NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 131

6 OCTOBER 1998

29 DECEMBER 1998

RALEIGH
2000

CITE THIS VOLUME
131 N.C. APP.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

SIDNEY S. EAGLES, JR.

Judges

K. EDWARD GREENE
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JOSEPH R. JOHN, SR.
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PATRICIA TIMMONS-GOODSON
CLARENCE E. HORTON, JR.
ROBERT C. HUNTER
ROBERT H. EDMUNDS, JR.

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GERALD ARNOLD

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JAMES M. BALEY, JR.
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FRANCIS E. DAIL

Clerk

JOHN H. CONNELL

---

*Deceased 19 January 2000.

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	WILLIAM Z. WOOD, JR.	Winston-Salem
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1. Appointed and sworn in 17 December 1999 to replace James D. Llewellyn who retired 1 August 1999.
2. Appointed and sworn in 3 March 2000 to replace Jerry Cash Martin who retired 1 January 2000.
3. Appointed and sworn in 28 January 2000.
4. Appointed and sworn in 24 March 2000 to replace John Mull Gardner who retired 29 February 2000.
5. Appointed and sworn in 31 May 2000.
6. Appointed and sworn in 14 February 2000.
7. Appointed to a new position and sworn in 16 April 1999.
8. Appointed and sworn in 29 November 1999.
9. Appointed and sworn in 1 January 2000.

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ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed Chief Judge effective 1 December 1999 to replace E. Burt Aycock, Jr. who retired 30 November 1999.
2. Appointed and sworn in 10 February 2000.
3. Appointed and sworn in 17 December 1999.
4. Appointed and sworn in 31 March 2000 to replace Paul L. Jones who was appointed and sworn in as Superior Court Judge 17 December 1999.
5. Appointed and sworn in 4 February 2000.
6. Appointed Chief Judge effective 1 April 2000.
7. Resigned as Chief Judge effective 31 March 2000.
8. Appointed and sworn in 25 April 2000 to replace Aaron Moses Massey who was sworn in as Superior Court Judge 25 April 2000.
9. Appointed and sworn in 1 May 2000.
10. Appointed Chief Judge effective 29 March 2000 to replace James W. Morgan who was appointed and sworn in as Superior Court Judge 24 January 2000.
11. Appointed and sworn in 25 February 2000 to replace James Thomas Bowen III who retired 31 December 1999.
12. Appointed and sworn in 25 April 2000.
13. Appointed and sworn in 7 December 1999.
14. Appointed and sworn in 1 May 2000 filling unexpired term in District 22 until December 2000.
15. Appointed and sworn in 19 May 2000.
16. Appointed and sworn in 11 May 2000.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
MICHAEL F. EASLEY

Deputy Attorney General for Administration
SUSAN W. RABON

Deputy Attorney General for Policy and Planning
HAMPTON DELLINGER, JR.

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CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
10(d)	Albrecht v. Dorsett, 502
26	Howell v. Morton, 626
28	Howell v. Morton, 626
34(a)	State v. Rollins, 601
34(b)	State v. Rollins, 601
35(a)	State v. Rollins, 601

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JERRY LEONARD POTTER, JR., Plaintiff v. CYNTHIA ELIZABETH POTTER, Defendant

No. COA97-398

(Filed 6 October 1998)

Child Support, Custody, and Visitation— custody jurisdiction—foreign court—significant connection

A trial court order in a child custody action denying defendant's motion to dismiss for lack of subject matter jurisdiction in North Carolina was reversed and subsequent custody orders were vacated where the parties disagreed at the hearing about the children's primary residence; defendant maintained that they lived in Tennessee during the week and were registered in the Tennessee school system; plaintiff asserted that the children spent their weekends in North Carolina as well as when they would "stay the night" during the week and on holidays; and the trial court stated at the hearing that, on the face of the affidavits, it would conclude that Tennessee would be the state with jurisdiction, but that the children had a significant connection with North Carolina and that it was not so unusual with the proximity of the state border to have "everything so jumbled up" that either state could hear the case. A trial court may assume significant connection jurisdiction under N.C.G.S. § 50A-3(a)(2) in an initial custody matter only upon proper determination by the court that the child in question has no home state as defined in 28

U.S.C. § 1738A (b)(4) at the time the custody action before the court was commenced. The court's comments here cannot fairly be characterized as definitively expressing the determination that the children had no home state.

Appeal by defendant from an order filed 6 September 1996 and a judgment filed 17 October 1996 by Judge William A. Leavell in Avery County District Court. Heard in the Court of Appeals 20 November 1997.

Joseph W. Seegers for plaintiff-appellee.

Legal Services of the Blue Ridge, Inc., by Karla P. Rusch, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's 6 September 1996 order denying her motion to dismiss as well as the court's subsequent 17 October 1996 "Judgment" awarding primary physical custody of the parties' two minor children to plaintiff. We reverse the trial court's 6 September 1996 ruling and consequently vacate its later "Judgment."

Relevant facts and procedural information include the following: Plaintiff and defendant were married 5 January 1993 in Tennessee. Two children, Jonathan Robert (Jonathan), born 11 June 1992, and Candice Michelle (Candice), born 30 September 1989, were legitimized by the marriage. During the marriage, plaintiff and defendant separated on several occasions for brief periods of time, finally doing so permanently during the summer of 1995. Jonathan and Candice were both born in Tennessee and lived in that state until the parties' separation.

On 25 July 1996, plaintiff filed the instant action seeking divorce and custody of Jonathan and Candice. Defendant's 19 August 1996 answer included a counterclaim and motion to dismiss for lack of subject matter jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) (1997) (Rule 12(b)(1)) (defendant's motion).

At the hearing on defendant's motion, the parties disagreed regarding the children's primary residence following the separation. Defendant maintained the children lived in Tennessee during the week and were registered in the Tennessee school system. According to her, the children spent weekends, from Friday evening to Sunday evening, at the home of plaintiff's parents in North Carolina.

Defendant asserted the children "lived with [her] all their life" except for "weekends and maybe . . . the 4th of July." She acknowledged Jonathan had received treatment in both Tennessee and North Carolina for "lazy eye," a chronic eye condition.

On the other hand, plaintiff asserted the children spent weekends in North Carolina, as well as "when we'd go pick them up and they'd stay the night" during the week and during holidays. Plaintiff approximated the children were with him in North Carolina "[s]omewhere near half" the time. Following one visit on 15 July 1996 during which Jonathan had a medical appointment in North Carolina, plaintiff's mother did not return the children to defendant in Tennessee.

At the hearing, the trial court expressed concern that it was not "in the best interest to just start all over again in Tennessee," and that "just looking at the Affidavits on their face, [it] would conclude that Tennessee would be the state that has jurisdiction." However, the court continued, "the children do have a significant connection to this state because of their repeated visitation two days per week," and that given the proximity of the state border, "it's not so unusual to have everything so jumbled up that really either state could hear this case."

Ruling from the bench and specifically citing N.C.G.S. § 50A-3(a)(2) (1989) of North Carolina's Uniform Child Custody Jurisdiction Act (UCCJA), the trial court denied defendant's motion on grounds the children and "one contesting [party]," *i.e.*, plaintiff, had a significant connection with this State. A written order denying defendant's motion was filed 6 September 1996, a temporary custody order in favor of plaintiff being filed the same date. Plaintiff's reply to defendant's counterclaim was filed 16 September 1996. Following a full hearing 25 September 1996, the trial court awarded primary physical custody to plaintiff. Defendant timely appealed to this Court.

In her initial assignment of error, defendant challenges the court's denial of her motion to dismiss for lack of subject matter jurisdiction. The UCCJA controls the issue of jurisdiction in child custody cases. *Tataragasi v. Tataragasi*, 124 N.C. App. 255, 266, 477 S.E.2d 239, 245 (1996), *disc. review denied*, 345 N.C. 760, 485 S.E.2d 309 (1997). The section contains four bases upon which North Carolina courts are afforded jurisdiction:

> (1) This State (i) is the home state of the child at the time of the 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 parent continues to live in this State; or
>
> (2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or
>
> (3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
>
> (4)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

N.C.G.S. § 50A-3(a). No preference is expressed in the statute between the home state alternative provided in G.S. § 50A-3(a)(1) and the significant connection basis in G.S. § 50A-3(a)(2).

Notwithstanding, jurisdiction in child custody matters is simultaneously governed by the federal Parental Kidnapping Prevention Act of 1980 (PKPA). 28 U.S.C. § 1738A (1998); *In re Bhatti*, 98 N.C. App. 493, 494, 391 S.E.2d 201, 202 (1990). The PKPA "establishes national policy in the area of custody jurisdiction," *Gasser v. Sperry*, 93 N.C. App. 72, 74, 376 S.E.2d 478, 480 (1989), and provides full faith and credit in every state for decrees entered in conformity therewith. 28 U.S.C. § 1738A.

The PKPA and the UCCJA "provide[] substantially the same jurisdictional prerequisites." *Beck v. Beck*, 123 N.C. App. 629, 632, 473 S.E.2d 789, 790 (1996). For example, both permit the state wherein a custody claim is filed to assume jurisdiction if that state is the home state of the affected child. 28 U.S.C. § 1738A(c)(2)(A); *Beck*, 123

N.C. App. at 632, 473 S.E.2d at 790. Moreover, in terms similar to G.S. § 50A-2(5), the PKPA defines "home state" as:

> the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months . . . . Periods of temporary absence of any of such persons are counted as part of the six-month or other period.

28 U.S.C. § 1738A (b)(4).

Unlike the UCCJA, however, the PKPA limits assumption of jurisdiction on the basis of significant connection in initial custody determinations to instances in which no state qualifies as the home state. 28 U.S.C. § 1738A (c)(2)(B); *Beck*, 123 N.C. App. at 632, 473 S.E.2d at 790. In the words of the PKPA,

> A child custody determination made by a court of a State is consistent with the provisions of this section *only* if—
>
> . . . .
>
> (2) one of the following conditions is met:
>
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
>
> (B)(i) *it appears that no other State would have jurisdiction under subparagraph (A)*, and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

28 U.S.C. § 1738A(c) (emphasis added).

An apparent conflict thus exists between this state's UCCJA, providing home state and significant connection bases for jurisdiction as equal alternatives, and the federally enacted PKPA, permitting the significant connection alternative only in the absence of a home state. This Court has previously held that to the extent any state custody

statute conflicts with provisions of the PKPA, the federal enactment controls. *Gasser*, 93 N.C. App. at 74-75, 376 S.E.2d at 480; *see also Thompson v. Thompson*, 484 U.S. 174, 181, 98 L. Ed. 2d 512, 521 (1988) (PKPA imposes uniform national standards for allocating and enforcing custody determinations). Accordingly, a trial court may assume significant connection jurisdiction under G.S. § 50A-3(a)(2) in an initial child custody matter only upon proper determination by the court that the child in question has no home state as defined in 28 U.S.C. § 1738A (b)(4) at the time the custody action pending before the trial court was commenced.

The foregoing holding is consistent with the strong home state preference expressed in our jurisprudence. For example, this Court has refused to recognize a foreign custody determination dependent upon significant connection jurisdiction when North Carolina was the home state. *See, e.g., Beck*, 123 N.C. App. 629, 473 S.E.2d 789 (trial court erred in refusing jurisdiction to modify custody decree where North Carolina was home state and Kentucky had assumed jurisdiction based upon significant connection); *Williams v. Williams*, 110 N.C. App. 406, 430 S.E.2d 277 (1993) (trial court erred in giving full faith and credit to Indiana order which failed to contain requisite findings of fact supporting either home state or significant connection jurisdiction); *Schrock v. Schrock*, 89 N.C. App. 308, 365 S.E.2d 657 (1988) (trial court properly refused to give full faith and credit to Michigan custody decree where North Carolina was home state); and *Davis v. Davis*, 53 N.C. App. 531, 542, 281 S.E.2d 411, 417 (1981) (trial court erred in enforcing California custody decree where California was not home state, no evidence was presented of significant connection with California, and home state "clearly" was North Carolina).

By the same token, this Court has also deferred to foreign jurisdictions which qualified as the child's home state. *See, e.g., In re Bhatti*, 98 N.C. App. 493, 391 S.E.2d 201 (trial court properly declined jurisdiction based on its conclusion Georgia was the home state) and *Holland v. Holland*, 56 N.C. App. 96, 286 S.E.2d 895 (1982) (trial court's assumption of jurisdiction under UCCJA significant connection basis reversed where Georgia was the home state; insufficient evidence of significant connection basis; PKPA not mentioned).

Moreover, earlier decisions indicating jurisdiction might be appropriate under either the home state or significant connection bases of the UCCJA are distinguishable in that these cases simply failed to consider the effect of the PKPA. *See, e.g., Pheasant v.*

McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990), *disc. review denied*, 328 N.C. 92, 402 S.E.2d 417 (1991) (trial court properly determined jurisdiction under home state prong of UCCJA or, in the alternative, the significant connection basis); *Brookshire v. Brookshire*, 89 N.C. App. 48, 365 S.E.2d 307 (1988) (jurisdiction properly based upon significant connection where no action pending in another state); *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985) (no error in denial of motion to dismiss for lack of subject matter jurisdiction where trial court assumed jurisdiction under either home state or significant connection alternate); *Hart v. Hart*, 74 N.C. App. 1, 327 S.E.2d 631 (1985) (jurisdiction proper under home state alternative of UCCJA, but also sufficient evidence under significant connection basis); and *Latch v. Latch*, 63 N.C. App. 498, 305 S.E.2d 564 (1983) (motion to dismiss for lack of subject matter jurisdiction properly denied where significant connection existed).

In addition, according primacy to the home state comports with the legislative impetus which prompted passage of both the state and federal acts. The UCCJA "represented a novel effort to resolve the confusion by promulgating coherent and uniform rules for determining custody jurisdiction." *Meade v. Meade*, 812 F.2d 1473, 1475 (4th Cir. 1987). However, the UCCJA proved to be an "imperfect remedy" when states adopted different versions and interpretations of the uniform requirements, *id.* at 1476, notably concerning the quantity of evidence deemed sufficient to satisfy jurisdictional bases such as that of significant connection. *See, e.g., Holland*, 56 N.C. App. at 100, 286 S.E.2d at 898 ("substantial evidence" must support court's determination of significant connection, and this must be "more than a scintilla" or simply "any competent evidence").

Indeed, at the time the UCCJA was promulgated, the significant connection alternate was intended to provide a "very limited basis" for jurisdiction. Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 Ark. L. Rev. 885, 898 (1993). However, it turned into a loophole resulting in the "furtherance of child snatching by the creation of haven states which might be willing to provide jurisdiction for absconding parents." *Id.*

Congress responded by adopting the PKPA in 1980. *Id.; see also* Andrea S. Charlow, *Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act*, 25 Fam. L. Q. 299, 300 (1991). Congress' underlying assumption in adopting the PKPA was

> that by requiring all states to accord full faith and credit to child custody orders that meet prescribed jurisdictional criteria, states naturally desiring recognition of their own orders would not accept jurisdiction without first meeting the requirements of the act.

Charlow, *supra*, at 300.

We also note that many states, either by statute or judicial decision, have rejected jurisdiction under the significant connection alternative if the child has a home state. *See, e.g.*, Tenn. Code Ann. § 36-6-203 (1997); Tex. Fam. Code Ann. § 152.003 (West 1997); *Williams v. Williams*, 609 N.E.2d 1111, 1113 (Ind. Ct. App. 1993) ("[i]t is only when the 'home state' test does not apply to the facts that the 'significant connection' test found in . . . [Indiana's version of the UCCJA] may be used to provide an alternative basis for subject matter jurisdiction"); *State ex rel. Griffin v. District Court of the Fifth District*, 831 P.2d 233, 240 (Wyo. 1992) ("[a] foreign state which is neither a decree state nor a home state may not assume jurisdiction in contravention to the UCCJA and PKPA preference for 'home state' jurisdiction"); *Shute v. Shute*, 607 A.2d 890, 893 (Vt. 1992) ("the PKPA preempts the Vermont statutes that conflict with the PKPA . . . . [B]est interest of the child is no longer controlling [in custody case] if the child has a home state").

Similarly, the current version of the UCCJA being promulgated by the Uniform Law Commissioners, entitled the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), tracks the language of the PKPA. The Act allows jurisdiction in an initial child custody determination on the basis of significant connection only if the child has no home state. The UCCJEA was adopted by Alaska and Oklahoma in 1998 and has been introduced in the legislatures of twelve additional states.

Having explored the intersection of state and federal law, the legislative motives behind the UCCJA and the PKPA, and the law of other jurisdictions, we turn now to application of our holding in the case *sub judice*. At the hearing on defendant's motion, the trial court was faced with evidence of connection by the children with both Tennessee and North Carolina, but observed that the parties' Affidavits as to Status of Minor Child indicated Tennessee would be the state with jurisdiction. However, the trial court noted it was not unusual, given the proximity of state borders, for circumstances to be "jumbled up." Ultimately, the trial court expressed its concern with

delay of a final custody determination and decided that "[i]t started here [North Carolina] so we might as well finish it here."

However understandable the trial court's sentiments, we conclude the foregoing does not comply with prerequisites of the UCCJA and the PKPA for assumption of jurisdiction in child custody matters. Based upon the extended analysis above, we hold the court erroneously concluded it might assume jurisdiction over an initial custody determination under the significant connection alternative set out in the UCCJA without first properly determining the children had no home state as defined in the PKPA at 28 U.S.C. § 1738A (b)(4).

First, it is undisputed that the trial court's formal order denying defendant's motion contains no such conclusion. In addition, the court's comments issued contemporaneously with its oral ruling cannot fairly be characterized as definitively expressing the determination that the children had no home state. Absent such a determination, the trial court's denial of defendant's motion upon its assumption of jurisdiction under G.S. § 50A-3(a)(2) constituted error and is reversed. It follows that the record thereby fails to reflect that the court had jurisdiction to enter its 6 September 1996 temporary custody order and its 17 October "Judgment" awarding permanent custody. Accordingly, those directives are vacated.

Prior to concluding, we emphasize that the action *sub judice* was one for initial determination of custody as opposed to a modification decree. At the filing of plaintiff's complaint, there was no pending or prior decree of custody in another jurisdiction. Further, we recognize that the UCCJA is a jurisdictional statute and the PKPA a full faith and credit statute. The objection might therefore be raised that we should concern ourselves only with the law of this state in the absence of a pending foreign action. We believe such a narrow resolution would be unsatisfactory.

For example, plaintiff filed his custody action only days after failing to cause the children to be returned to defendant, leaving defendant little time to initiate process in Tennessee. Child custody in no way should be determined with a "race to the courthouse" mentality if the best interests of the child are truly the goal.

Further, to allow custody decisions based upon significant connection jurisdiction without regard to the PKPA would essentially render such decrees meaningless in any state but our own. The Vermont Supreme Court considered such a circumstance in *Columb v. Columb*, 633 A.2d 689 (Vt. 1993).

In *Columb*, plaintiff father urged the court to allow jurisdiction under the equivalent significant connection basis set out in Vermont's UCCJA. *Id.* at 691. He conceded any resulting custody order would not be "entitled to full faith and credit" under the PKPA in other states, but argued the Vermont court should

> ignore this deficiency because other states are free to recognize [the Vermont] order even if they are not required to do so [under the PKPA].

Id. at 692.

The court responded as follows:

> The theoretical possibility that a home state would recognize a Vermont custody order issued without the full faith and credit protection of the PKPA is overwhelmed by the reality that courts have too often failed to respect other states' custody decrees even when issued in conformity with the UCCJA and PKPA. Further, a home state custody order issued in direct conflict with such a Vermont order would be entitled to full faith and credit in other states and, by virtue of the PKPA, in Vermont. Thus, if Vermont moves to assert jurisdiction when its order is not entitled to full faith and credit, the mother has every incentive to start a proceeding in Utah and refuse to comply with any Vermont order. To ignore these realities is likely to entangle this child in a web of proceedings satisfactory to no one.

Id. (citations omitted). We agree.

In sum, the trial court's order denying defendant's motion to dismiss for lack of subject matter jurisdiction is reversed, and its 6 September 1996 order of temporary custody and 17 October 1996 permanent custody "Judgment" are vacated. In view of the foregoing, we decline to consider defendant's remaining assignments of error.

Reversed in part and vacated in part.

Judges MARTIN, John C., and SMITH concur.

STATE OF NORTH CAROLINA v. LARRY EUGENE ALLRED

No. COA97-1377

(Filed 6 October 1998)

1. Criminal Law— motion in limine—opening statement—defendant restricted

The trial court neither erred nor abused its discretion in a prosecution for kidnapping and robbery by denying defendant's motion in limine to forecast evidence in his opening statement regarding the reputation of the house where the crime was committed as a crack house, or by granting the State's motion in limine to restrict defense counsel from making such a forecast in his opening statement. Counsel in opening statements may not refer to inadmissible evidence; out-of-court statements which form the reputation of a particular place are deemed hearsay and are inadmissible when their only purpose is to prove the contents of the statements. Moreover, the court permitted defense counsel to forecast that this was a disagreement over a drug transaction rather than a robbery or kidnapping and invited defense counsel to pose questions concerning the character of the house as such issues proved relevant in the context of the trial. N.C.G.S. § 8C-1, Rule 801(c).

2. Evidence— prior offense—modus operandi—admissible

The trial court did not err in a prosecution for robbery and kidnapping by admitting testimony regarding defendant's alleged participation in an earlier robbery. Many aspects of the two robberies are strikingly similar and the evidence was properly admitted under N.C.G.S. § 8C-1, Rule 404(b) to establish defendant's modus operandi. Furthermore, defendant failed to show that the evidence was more prejudicial than probative.

3. Robbery— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of robbery and attempted robbery where defendant entered a house, displayed a revolver, and ordered everyone to hand over their valuables, and three of those present had no valuables to surrender while two were induced to hand over money.

4. Kidnapping— second degree—restraint—insufficient

The trial court erred in a kidnapping and robbery prosecution by denying defendant's motion to dismiss the kidnapping charges for insufficient evidence as to Hampton and McBee where they were not moved or injured in any way and the restraint used against them was an inherent part of the robbery and did not expose them to any greater danger than that required to complete the robbery.

5. Kidnapping— second degree—restraint and removal—insufficient

The trial court erred in a robbery and kidnapping prosecution by denying defendant's motion to dismiss the kidnapping charges for insufficient evidence as to Alexander where defendant held him at gunpoint during the robbery, took him to his bedroom to get his "stash," and Alexander was made to sit on the bed while defendant searched for the stash, but at no time did defendant or his accomplice injure Alexander in any way. This restraint and removal were necessary to complete the armed robbery, as it was defendant's objective to obtain the money Alexander was believed to have kept hidden in his bedroom. Alexander's removal was a mere technical asportation and insufficient to support a conviction for a separate kidnapping offense.

6. Kidnapping— second degree—restraint and removal—sufficiency of evidence

The trial court did not err in a kidnapping and robbery prosecution by denying defendant's motion to dismiss the kidnapping charges as to Graves where defendant's accomplice entered Graves' bedroom, grabbed him by the collar, dragged him into the living room, and ordered him to sit on the couch. Nothing was taken from him and no attempt was made to rob him of anything. The removal was not an integral part of any robbery committed against him, but a separate course of conduct designed to prevent him from hindering the robbery of the other occupants.

Appeal by defendant from judgments entered 26 February 1997 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 25 August 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Victoria L. Voight, for the State.

Walter T. Johnson, Jr. for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Larry Eugene Allred appeals from the judgments entered upon his convictions of four counts of second-degree kidnapping, three counts of attempted robbery with a dangerous weapon, and two counts of robbery with a dangerous weapon. For the reasons set forth in the discussion below, we find no error in part and vacate in part.

The State presented evidence tending to show the following: On the night of 19 March 1996, April McBee, Angel Lyles, and Marilyn Lyles were guests in the home of Alfred Alexander, Wade Hampton, Alfred Graves, and Ray Doughty, which was located at 116 Avalon Road in Greensboro, North Carolina. Alexander, Hampton, Angel Lyles, and Marilyn Lyles were seated in the living room. McBee was in the kitchen, and Graves was asleep in his bedroom. At midnight, there was a knock at the front door. Angel Lyles answered the door, and two men, later identified as defendant and Steven Edwards, entered the living room and inquired about a female acquaintance. Alexander and his guests were explaining that they had not seen the woman, when defendant pulled out a revolver and Edwards removed a shotgun from beneath his coat. By this time, McBee had returned to the living room. The two men then ordered everyone present to hand over their money and jewelry. Hampton gave the robbers his wallet containing $20, and Alexander turned over the $200 he had in his pockets. McBee, Marilyn Lyles, and Angel Lyles told the defendant and Edwards that they had no money or jewelry to relinquish.

The commotion in the living room woke Graves, so he got up to see what was happening. Before he reached his bedroom door, Edwards kicked the door in, grabbed Graves by the collar, dragged him into the living room, and pushed him down on the couch. Neither defendant nor Edwards attempted to take anything from Graves. Once defendant and Edwards had subdued everyone in the living room, Edwards told defendant to take Alexander back into his bedroom to get his "stash." Edwards guarded the other occupants, while defendant escorted Alexander to the bedroom. There, defendant forced Alexander to sit on the bed, as he searched unsuccessfully for the hidden "stash." After several minutes, Edwards entered the bed-

room, nudged Alexander in the shoulder with the barrel of the shotgun, and told him to "give it up." Alexander stated that he had given them all of the money he had, so defendant and Edwards returned to the living room, leaving Alexander alone in his bedroom.

Upon returning to the living room, Edwards aimed his shotgun at the occupants and threatened to kill them. Defendant intervened by pushing the gun away and telling Edwards that it was not necessary to kill anyone. However, while they were fleeing, Edwards shot at the house, stating that he wanted to give the victims something by which to remember him. Alexander, having heard the threat and the shot, retrieved a revolver from under his pillow, ran to the front door, and fired at the perpetrators as they drove away.

After defendant and Edwards fled, one of the victims went to a neighbor's house to call the police. Officers Michael Fraterrigo and Jason Padgett of the Greensboro Police Department responded to the call and took the witnesses' statements. While at the scene, Officer Padgett received a call that an individual, later determined to be defendant, was being admitted to Moses Cone Hospital with multiple gunshot wounds. At the hospital, Officer Padgett conferred with Officer L.T. Marshall, who was present when Edwards and a man named James Brooks entered the emergency room with defendant, who had been shot three times. Officer Marshall testified that Edwards told him that he and defendant were traveling on English Street when someone fired several shots at their vehicle. According to Edwards, they stopped to pick up Brooks on their way to the emergency room.

Over defendant's objection, Kimberly Carter testified regarding a previous robbery allegedly committed by defendant. Carter stated that at approximately midnight on 9 March 1996, there was a knock at her door. Her two-year-old daughter answered the door before Carter was able to stop her. By the time Carter reached the door, two men had pushed their way inside her home. One of the men, whom she identified as defendant, grabbed her by the neck, pushed her into the wall, and yelled "Give me your stash." Defendant and his accomplice then spotted Carter's purse, took $80 from one of the inside pockets, and fled.

At the close of the State's evidence, defendant moved to dismiss all of the charges. The trial court denied the motion, and defendant proceeded with his defense. Pamela Haislip testified on defendant's behalf. She stated that she had introduced defendant to Alexander

and that soon thereafter, defendant began selling drugs for Alexander. Haislip further testified that shortly before the 19 March 1996 incident, she saw Alexander at a local store, and he advised her to tell defendant to bring him his money right away.

Defendant testified that on the evening of 19 March 1996, he asked Edwards for a ride to Alexander's house so that he could settle some "business." Defendant maintained that Edwards remained in the car while he spoke with Alexander. According to defendant, the conversation did not go well, and as he tried to leave the house, Alexander shot him three times for failing to pay for drugs that Alexander had given him to sell.

At the close of all the evidence, the trial court submitted the case to the jury, and the jury found defendant guilty of four counts of second-degree kidnapping, three counts of attempted armed robbery, and two counts of armed robbery. From the judgments entered on the jury's verdicts, defendant appeals.

We note initially that defendant's appeal is fraught with procedural violations, which subject the appeal to dismissal. First, in violation of Rule 12(a) of the North Carolina Rules of Appellate Procedure, the record on appeal was filed 35 days after it was settled. Under Rule 12(a), the record must be filed with the Clerk of this Court within 15 days after the record has been settled. N.C.R. App. P. 12(a). Consequently, the filing of the record in this case was considerably late.

Defendant's brief is also in violation of our Appellate Rules. Pursuant to Rule 28(b)(3), each party's brief must contain "[a] full and complete statement of the facts." N.C.R. App. P. 28(b)(3). The rule further provides that "[t]his should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be." *Id.* Defendant fails to observe this rule by submitting an incomplete and dubious statement of the facts which contains no references to the relevant transcript or record pages. Additionally, defendant violates Rule 28(b)(5) in that he fails to reference the pertinent assignments of error and the pages at which they appear in the record immediately following each argument presented. *See* N.C.R. App. P. 28(b)(5). Given the many rule violations, defendant's appeal is worthy of dismissal. Nonetheless, in the interests of justice, we elect to exercise our discretion under Rule 2

and suspend the above requirements. *See* N.C.R. App. P. 2. We caution, however, that we would not be so inclined, but for the fact that we find some merit to defendant's appeal. Hence, we proceed with our analysis of defendant's assignments of error.

[1] By his first assignment of error, defendant contends that the trial court committed reversible error in denying his motion in limine to forecast evidence in his opening statement regarding the reputation of 116 Avalon Road as a "crack house." In his brief, however, defendant argues that the trial court's error was in granting the State's motion in limine to restrict defense counsel from making such a forecast in his opening. It appears from the record that these motions were interwoven and that the trial court treated them as counterparts to a single motion. Therefore, we will consider this argument to be properly presented for our review. *See* N.C.R. App. P. 9, 10 (stating that scope of review on appeal limited to those issues presented by assignments of error in the record on appeal). Examining this argument on its merits, we discern no prejudicial error.

"In a criminal jury trial, '[e]ach party must be given the opportunity to make a brief opening statement.' " *State v. Mash*, 328 N.C. 61, 64, 399 S.E.2d 307, 310 (1991) (quoting N.C. [Gen. Stat.] § 15A-1221(a)(4)). The extent and scope of an opening statement are entrusted to the discretion of the trial judge. *State v. Fisher*, 336 N.C. 684, 445 S.E.2d 866 (1994). The purpose of an opening statement is to set forth a "general forecast" of the evidence. *State v. Freeman*, 93 N.C. App. 380, 389, 378 S.E.2d 545, 551 (1989) (citation omitted). Counsel for the parties may not, however, "(1) refer to inadmissible evidence, (2) 'exaggerate or overstate' the evidence, or (3) discuss evidence [they] expect[] the other party to introduce." *Id.* (citations omitted).

The State moved to exclude the evidence of the reputation of 116 Avalon Road pursuant to the general rule in North Carolina that "evidence concerning the reputation of a place or neighborhood will constitute hearsay and be inadmissible." *State v. Lee*, 51 N.C. App. 344, 349, 276 S.E.2d 501, 505 (1981). Defendant contends that this rule only applies where the evidence is offered against a criminal defendant. Admittedly, our research has revealed no cases where the State sought to exclude evidence of the reputation of a particular place. However, applying the well-settled principles governing hearsay evidence, we must conclude that the reputation of 116 Avalon Road was inadmissible, absent an exception.

Rule 801(c) of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c). Therefore, the out-of-court statements which form the reputation of a particular place—in this case, statements that 116 Avalon Road is a crack house—are deemed hearsay and, thereby, inadmissible when their only purpose is to prove the very contents of the statements. *See State v. Kerley*, 87 N.C. App. 240, 360 S.E.2d 464 (1987) (noting that statement made by one other than testifying witness is hearsay if offered to prove its truth and not encompassed by an exception). Accordingly, we conclude that the trial court properly restricted defense counsel from referring to the reputation of 116 Avalon Road in his opening statement.

Moreover, we note that while the trial court prevented defense counsel from mentioning in his opening that the house was reputed to be a drug location, it permitted defense counsel to foreshow that the incident occurring on 19 March 1996 was not a robbery or kidnapping, but a disagreement over a drug transaction. Furthermore, the trial court invited defense counsel to pose questions, subject to its evidentiary rulings, concerning the character of the house during examination of the witnesses, as such issues proved relevant to the context of the trial. In light of the foregoing, we discern neither error nor abuse of discretion in the trial court's decision, and this assignment of error is overruled.

[2] With his second assignment of error, defendant argues that the trial court erroneously admitted Kimberly Carter's testimony regarding defendant's alleged participation in the 9 March 1996 robbery of her home. Defendant contends that this evidence of prior crimes was inadmissible under Rule 404(b) of the North Carolina Rules of Evidence. We cannot agree.

Rule 404(b) of our Rules of Evidence is a general rule permitting the introduction of relevant evidence of other crimes, wrongs or acts committed by the defendant. *State v. Burr*, 341 N.C. 263, 289, 461 S.E.2d 602, 615 (1995). This rule is " '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.' " *Id.* (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). Thus, although the evidence of the defendant's other crimes may tend to show his inclination to commit them, the evidence is admissible under Rule

404(b), as long as it is also relevant for some other proper purpose. *Id.* Such other purposes include establishing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.R. Evid. 404(b).

The State argued that the evidence of defendant's alleged involvement in the 9 March 1996 robbery of Carter was admissible to prove defendant's *modus operandi*. The trial court admitted the evidence and instructed the jury that if it found the evidence to be believable, it could consider the evidence for the limited purpose of determining whether it established a common scheme or plan. In deciding if evidence of a prior crime is admissible for this purpose, the test is whether the incident in question is "sufficiently similar" to the event for which the defendant is presently on trial and "not too remote in time so as to be more probative than prejudicial under the balancing test of G.S. 8C-1, Rule 403." *State v. Schultz*, 88 N.C. App. 197, 202, 362 S.E.2d 853, 857 (1987). "Under Rule 404(b) a prior act or crime is 'similar' if there are 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.' " *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (quoting *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988)), *quoted in State v. Dickens*, 346 N.C. 26, 47-48, 484 S.E.2d 553, 565 (1997). Whether to exclude admissible evidence of prior crimes under Rule 403 is a matter left to the trial court's discretion. *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998).

Many aspects of the two robberies in this case are strikingly similar. Both incidents began with a knock at the door at approximately midnight. Additionally, both cases involved two perpetrators, and in each case, the victims were asked to give up their "stash." Equally noteworthy is that these robberies were committed within ten days of each other. In view of these similarities, we conclude that the evidence was properly admitted under Rule 404(b) to establish defendant's *modus operandi*. Furthermore, since defendant fails to show that this evidence was more prejudicial than probative, we hold that the trial court did not abuse its discretion in denying defendant's motion to exclude the evidence. Defendant's assignment of error, then, fails.

[3] Defendant next assigns error to the trial court's denial of his motion to dismiss all of the charges against him. We will address the robbery and kidnapping charges separately.

It is a well-settled rule that in considering a motion to dismiss criminal charges, the trial court must view all of the evidence, whether competent or incompetent, in the light most favorable to the State and must give the State every reasonable inference drawn from the evidence. *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). The question for the trial court is whether the State presented substantial evidence of each element of the offense charged and of the defendant's guilt. *State v. Pryor*, 59 N.C. App. 1, 5, 295 S.E.2d 610, 614 (1982). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* However, any contradictions or discrepancies in the evidence are for the jury to resolve, and these inconsistencies, by themselves, do not serve as grounds for dismissal. *State v. Hamlet*, 312 N.C. 162, 169, 321 S.E.2d 837, 842 (1984).

Under North Carolina General Statutes section 14-87, the essential elements of robbery with a dangerous weapon are: "(1) the unlawful taking or attempted taking of personal property from another, (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means, and (3) danger or threat to the life of the victim." *State v. Donnell*, 117 N.C. App. 184, 188, 450 S.E.2d 533, 536 (1994). The evidence in this case, viewed in the light most favorable to the State, showed that defendant, with his accomplice, entered 116 Avalon Road, displayed a revolver and ordered everyone present to hand over their valuables. These actions induced Hampton to hand over $20 and Alexander to turn over $200. McBee, Angel Lyles, and Marilyn Lyles had no valuables to surrender. The State having presented "substantial evidence" that defendant committed armed robbery of Hampton and Alexander and attempted armed robbery of McBee, Angel Lyles, and Marilyn Lyles, we hold that the trial court properly denied defendant's motion to dismiss the robbery charges.

[4] Defendant also challenges the sufficiency of the evidence presented to support his convictions of second-degree kidnapping. As previously stated, "[i]n ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *Dick*, 126 N.C. App. at 317, 485 S.E.2d at 91. A defendant is guilty of the offense of second-degree kidnapping if he (1) confines, restrains, or removes from one place to another (2) a person (3) without the person's consent, (4) for

the purpose of facilitating the commission of a felony. N.C. Gen. Stat. § 14-39(a)(2) (Cum. Supp. 1997). Our Supreme Court, however, has recognized that "certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim" and has held that restraint "which is an inherent, inevitable feature of [the] other felony" may not be used to convict a defendant of kidnapping. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). "The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the armed robbery itself.' " *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)), *quoted in State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998).

In the instant case, defendant was convicted of the second-degree kidnapping of Hampton, McBee, Alexander, and Graves. We will consider each of these victims in turn. With regard to the restraint of Hampton and McBee, the evidence shows only that defendant and his accomplice held them at gunpoint during the commission of the robbery. These victims were not moved, nor were they injured in any way. Under section 14-87(a), the restraint used against these victims was an inherent part of the armed robbery and did not expose them to any greater danger than that required to complete the robbery offense. Therefore, we hold that the restraint inflicted upon these victims was insufficient to support separate kidnapping convictions. The trial court erred in denying defendant's motion to dismiss, and we vacate defendant's convictions as to these kidnapping offenses.

[5] Regarding the restraint and removal of Alexander, the evidence shows that in addition to holding him at gunpoint during the commission of the robbery, defendant took Alexander back to his bedroom to get his "stash." While defendant searched for the stash, Alexander was made to sit on the bed, but at no time did defendant or his accomplice injure Alexander in any way. In light of our Supreme Court's decision in *Irwin*, 304 N.C. 93, 282 S.E.2d 439, we hold that this restraint and removal were necessary to complete the armed robbery, as it was defendant's objective to obtain the money Alexander was believed to have kept hidden in his bedroom.

In *Irwin*, the defendant forced the victim from her position near the fountain cash register to the back of the store where the pharmacy counter and safe were located. The Supreme Court reversed

defendant's kidnapping conviction, finding that the victim's removal to the rear of the store was an integral part of the armed robbery. *Id.* Applying this reasoning, we hold that "[Alexander's] removal was a mere technical asportation and insufficient to support a conviction for a separate kidnapping offense." *Id.* at 103, 282 S.E.2d at 446. The trial court, therefore, erred in denying defendant's motion to dismiss, and defendant's conviction of second-degree kidnapping with regard to Alexander is vacated.

[6] With regard to the restraint and removal of Graves, the evidence shows that defendant's accomplice entered his bedroom, grabbed him by the collar, dragged him into the living room, and ordered him to sit on the couch. Nothing was taken from Graves, and according to his testimony, no attempt was made to rob him of anything. Therefore, this removal was not an integral part of any robbery committed against him, but a separate course of conduct designed to prevent him from hindering defendant and his accomplice from perpetrating the robberies against the other occupants. *See State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985) (upholding denial of motion to dismiss kidnapping charge where defendant forced victims into dressing room to remove them from view of passersby who might impede commission of robbery). As previously stated, under section 14-39,

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of: . . . (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]

N.C.G.S. § 14-39(a)(2). Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss the kidnapping charge with respect to Graves, and defendant's conviction of this offense stands.

Defendant fails to cite any authority in support of his final assignment of error. Accordingly, it is deemed abandoned. N.C.R. App. P. 28(b)(5).

Based upon all of the foregoing, we find no error with regard to defendant's convictions of armed robbery, attempted armed robbery, and second-degree kidnapping of Alfred Graves. However, we vacate

defendant's convictions of second-degree kidnapping with respect to Wade Hampton, April McBee, and Alfred Alexander.

No error in part; vacated in part.

Judges GREENE and SMITH concur.

CITY OF MONROE, PLAINTIFF-APPELLEE v. W.F. HARRIS DEVELOPMENT, LLC, DEFENDANT-APPELLANT

No. COA97-1369

(Filed 6 October 1998)

1. **Appeal and Error— appealability—condemnation action—order resolving all issues except damages**

A trial court order in a condemnation action which resolved all issues but damages was immediately appealable.

2. **Eminent Domain— propriety of taking—public purpose established**

The trial court did not err in a condemnation action where defendant contended that the court erroneously concluded that the nature and extent of the property acquired was not a judicial question. Reading the challenged conclusion in context, it is clear that the trial court did not disregard allegations of arbitrary and capricious conduct by the City, but specifically made them the subject of it judicial inquiry in determining the propriety of the City's taking of this tract.

3. **Eminent Domain— size of taking—necessity to accomplish purpose**

The City of Monroe presented sufficient evidence to prove the necessity of a fee simple title and the trial court did not err by concluding that the taking was not an arbitrary and capricious act taken in bad faith where, although it was argued that the City had sufficient land to undertake the expansion of the airport without taking this tract, the city manager made it clear that property which lay outside the current master plan boundaries was necessary to the fulfillment of the City's ultimate goal. Based upon *City of Charlotte v. Cook*, 348 N.C. 205, the City was only required to

show that it needed a fee simple title in all of the tract in order to expand the airport.

4. Eminent Domain— airport taking—federal and state aviation approvals

The City's condemnation of a tract did not amount to an abuse of its condemnation power based on its failure to obtain property appraisals and approvals from federal and state aviation agencies. The City's failure to follow the guidelines was not so egregious an omission as to constitute a manifest abuse of discretion sufficient to overcome the presumption that the City initiated the proceeding in good faith and in accordance with the spirit of the law.

5. Eminent Domain— taking as abuse of discretion—intent to injure competitor—insufficient evidence

The trial court's order was not reversed in a condemnation action where defendant contended that the tract was taken to prevent development of a corporate center which would compete with the City's industrial park, but the court found that the allegations referred to actions of the City which were consistent with carrying out a public purpose in a lawful way or were not substantiated by the evidence.

Appeal by Defendant-Appellant from judgment entered 14 July 1997 by Judge William Z. Wood in Union County Superior Court. Heard in the Court of Appeals 20 August 1998.

Kilpatrick Stockton by Attorney Keith J. Merritt for defendant-appellant.

Underwood Kinsey Waren & Tucker by Attorney William E. Underwood Jr. for the plaintiff-appellee.

WYNN, Judge.

This appeal arises out of a condemnation action brought by the City of Monroe to take two tracts consisting of 14.87 acres of a 42.77 acre parcel of land owned by Harris Development Corporation ("Harris"). The property, initially purchased by William and Loretta Harris, was transferred to Harris in order to develop an industrial park. On 29 January 1997, Harris filed its Answer, Counterclaim, and Motion for Preliminary Injunction denying that the City of Monroe had the right to take the property, denying the amount of money

placed on the deposit was just compensation, and seeking preliminary and permanent injunctive relief to prevent title from being vested in the City of Monroe.

In response, the City of Monroe moved to dismiss the counterclaim and moved to amend their complaint to change the purpose of the taking of the property. Originally, both Tract 1 and Tract 2 were taken to expand the airport. The City of Monroe, however, subsequently determined that Tract 1 would be used as a public roadway for the airport's new terminal. The trial court granted the City of Monroe's motion to amend its complaint and no appeal was taken from this motion.

On 14 July 1997, the trial court entered an order as to all issues other than damages. Specifically, the court denied Harris Development's Motion for Preliminary and Permanent Injunctive relief, dismissed the Counterclaim filed by Harris Development, and ruled the City of Monroe had acquired fee simple title to the Harris property. Harris appeals the trial court's order.

[1] We first note that in *North Carolina State Highway Commission v. Nuckles*, 271 N.C. 1, 13, 155 S.E.2d 772, 783 (1967), our Supreme Court held that a highway condemnation proceeding which resolves all questions except damages is immediately appealable. Therefore, in the instant case, although the issue of damages has not been resolved, the trial court's order on all issues except damages is immediately appealable.

I.

[2] On appeal, Harris first argues that "the trial court erred in finding that the City of Monroe's right to acquire part of Tract 2 of the property was not a judicial question for the court . . .." Specifically, Harris challenges the trial court's conclusion of law #4 which states:

> The issues raised by defendant Harris concerning the right of the City to acquire the part of Tract 2 that was not shown to be acquired on the ALP Update address the nature and extent of the property required by the City for expansion of its Airport and is not a judicial question for this Court.

Although the propriety of a taking is generally not reviewable by the courts once a public purpose is established, our courts have consistently held that "[u]pon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of dis-

cretion by the condemnor, [the takings] issue . . . becomes a subject of judicial inquiry as a question of fact to be determined by the judge." *Greensboro-Highpoint Airport Authority v. Irvin*, 36 N.C. App. 662, 665, 245 S.E.2d 390, 392, *appeal dismissed*, 295 N.C. 548, 248 S.E.2d 726 (1978), *cert. denied*, 440 U.S. 912, 59 L. Ed. 2d 460 (1979) (citations omitted). Our courts have also held that in raising such allegations, the burden of proof is upon the condemnee to show that an abuse of discretion has indeed occurred as there is a presumption in this State that public officials discharge their duties in good faith and in accordance with the spirit and purpose of the law. *See Board of Education of Hickory v. Seagle*, 120 N.C. App. 566, 463 S.E.2d 277 (1995), *disc. review improvidently allowed*, 343 N.C. 509, 471 S.E.2d 63 (1996) (per curiam); *Painter v. Wake County Board of Education*, 288 N.C. 165, 217 S.E.2d 650 (1975).

In this case, the trial court, having first determined that "[t]he City ha[d] a valid purpose for acquiring . . . Tract 2 of the Harris Property, to wit: expansion of the Airport," then concluded as a matter of law that:

> 2. Neither the taking of Tract 1 for use as a public road nor the taking of Tract 2 for Airport expansion constitutes an arbitrary and capricious act undertaken in bad faith or a manifest abuse of discretion by the City.
>
> 3. Defendant Harris has not offered sufficient credible and substantial evidence to overcome the presumption that the officials of the City have discharged their duties in good faith and exercised their powers in the spirit and purpose of the law.

According to the trial court's order, it was only after reaching these conclusions that the court then concluded the issues raised by Harris concerning whether part of Tract 2 addressed "the nature and extent of the property," and therefore, they were not judicial questions for the court.

Reading the challenged conclusion in the context of conclusions #2 and 3, as well as the numerous findings of fact set forth by the court, it is clear the trial court did not disregard Harris' allegations of arbitrary and capricious conduct on the part of the City of Monroe, but that it specifically made them the subject of its judicial inquiry in determining the propriety of the City of Monroe's taking of Tract 2. Accordingly, Harris' first argument for reversal of the trial court's order is rejected.

II.

Next Harris contends, in a number of interrelated assignments of error, the court erred in concluding as a matter of law that the City of Monroe's taking of Tract 2 for the purpose of expanding its airport was not an arbitrary and capricious act undertaken in bad faith. According to Harris, the taking of Tract 2 was an abuse of the City of Monroe's discretion for three reasons: (1) the City took more of the property than was necessary for expansion of the Monroe Airport; (2) the City failed to comply with required federal grant and aviation procedures for the taking of property by eminent domain; and (3) the City's taking of Tract 2 was undertaken for the sole purpose of injuring the Harris Corporate Center. We address each of Harris' arguments in turn.

[3] In his first argument, Harris contends the City of Monroe's actions were "arbitrary, capricious, oppressive, excessive, and an abuse of discretion" because its condemnation of all of Tract 2 was not necessary to accomplish its public purpose. Specifically, Harris contends that the part of the property lying outside of the future expansion lines of the Monroe Airport is in excess of what the City of Monroe needs for its airport expansion; that the City of Monroe already had sufficient land to undertake the expansion of its airport without having to resort to the taking of Tract 2; and that an easement would have been sufficient to serve the public purpose. We disagree.

Under North Carolina law, "[c]ondemnation by right of eminent domain is not allowed, except so far as it is necessary for the proper construction and use of the improvement for which it is taken." *Spencer v. Wills*, 179 N.C. 175, 178, 102 S.E.2d 275, 277 (1920). In support of his argument that the City of Monroe took property in excess of what was necessary for its purpose, Harris cited the deposition testimony of Jerry Cox, the City Manager of Monroe. Harris specifically points to the following testimony:

> Q. So the line that is on the Airport Master Plan showing the future property line established the amount of land that is needed for airport expansion under the master plan?
>
> A. I will answer the question this way, under the immediate plan.
>
> Q. So if there is land that is outside the future property line as shown on the current master plan, then it isn't needed for current airport expansion, correct?

A. I will say that what's shown on the airport master plan that has been adopted is our best estimation, judgment as to what we need to accomplish the current master plan that has been approved.

Q. So if it lies outside the current master plan, you don't currently need that property?

A. As far as currently need, that's correct . . . .

Q. So, in other words, the city is taking by eminent domain property that lies outside the future expansion lines for Monroe Municipal Airport as shown on the Airport's Master plan?

A. On the current master plan, but again, in terms of future needs, as to being future expansion, that would be incorrect.

Q. But on the current master plan, it is outside the area that is being shown for future expansion?

A. On the current master plan that I'm looking at, that's correct.

Q. Which you've identified as the accurate current master plan?

A. As presented today, yes.

Contrary to Harris' assertion, we do not believe Mr. Cox's testimony establishes that the taking of all of Tract 2 was not necessary for the City of Monroe's future expansion of the airport. Although Mr. Cox admitted that part of Tract 2 fell outside the airport's property line, he made it clear that the land was not included within the expansion boundaries because it was not "what [the City] need[ed] to accomplish the *current* master plan that ha[d] been approved." (emphasis added). Indeed, he was rather adamant in noting the airport master plan was merely a plan by which the City of Monroe was to accomplish its most "immediate" needs, and in terms of the City's future needs and future plans for expanding the airport, the property which lay outside the master plan boundaries was necessary to the fulfillment of the City's ultimate goal.

Moreover, even if we were to read Mr. Cox's testimony as contemplated by defendant, we believe the following findings of fact made by the trial court sufficiently justify its conclusion that the City of Monroe was entitled to take all of Tract 2 in fee simple rather than by acquiring an easement:

5. The area of the Harris property that the City had denominated in this action as being acquired for Airport expansion, Tract 2 as

shown on the Official Map, which the City has filed herein pursuant to Section 40A-45 of the North Carolina General Statues, and described in the resolutions of the City's Council authorizing the condemnation, is larger than the area of the Harris Property shown to be acquired for Airport expansion on the ALP Update. The area of Tract 2 included in the condemnation action that is not shown as being acquired on the ALP Update is approximately 1,000 feet long and 150 feet wide located at the rear of the Harris Property as it is being planned for development and at its closest point is slightly less than 100 feet from the taxiway to the Airport's runway. The ALP Update shows that almost all of this area of Tract 2 of the Harris Property does lie within the Airport's building restriction line.

6. The City utilized a consultant to provide airport planning expertise in connection with the ALP Update. It is the opinion of this consultant that acquisition of both Tracts 1 and 2 of the Harris Property as shown on the Official Map is necessary for expansion of the Airport.

7. The Division of Aviation of the North Carolina Department of Transportation concurs with the decision of the City to acquire fee simple ownership of the area originally omitted from the ALP Update.

In anticipation of our reliance on these findings, Harris contends the opinion of the City of Monroe's consultant, Dain Riley, is not credible because "[n]o where in the affidavit does [he] explain why the City needs the land outside the future expansion boundaries of the Monroe Airport as shown on the airport master plan." Furthermore, Harris argues, Mr. Riley's opinion should have been disregarded by the trial court because his 1997 testimony was that additional land is needed "contradicts the very airport layout he created less than a year before the City began this condemnation proceeding." We find both of Harris' arguments unpersuasive.

First, although Mr. Riley did not couch his opinion in terms of the City of Monroe's needs "outside the future expansion boundaries of the Monroe Airport," his affidavit specifically states that his opinion applies to the City's "acquisition of Tracts 1 and 2 of the Harris Property" which, in our view, can only be read to mean all of Tract 2, including the land which lies outside the future expansion boundaries of the airport. Second, we are not convinced that the opinion Mr. Riley expressed in his 1997 affidavit necessarily "contradicts" the

1995 Monroe Airport Plan where, as here, the opinion of Mr. Riley was simply that he believed the City needed *more* land to expand the airport than he had initially envisioned almost two years ago. Furthermore, even if the opinion expressed in Mr. Riley's affidavit did contradict the 1995 airport plan, nothing in our law precludes him from giving such a contradictory opinion. The 1995 airport plan is not an affidavit; thus, it cannot be considered prior testimony by which we could judge the credibility of Mr. Riley's 1997 affidavit. Therefore, contrary to defendant's contention, we find Mr. Riley's opinion to be very credible.

Moreover, Harris relies on our holding in *City of Charlotte v. Cook*, 125 N.C. App. 205, 207, 479 S.E.2d 503, 506 (1997), in which we held that the City abused its discretion in condemning property in fee simple when an easement was sufficient to carry out the intended purpose. However, this reliance is misplaced as our holding in that case was reversed by the Supreme Court in *City of Charlotte v. Cook*, 348 N.C. 222, 498 S.E.2d 605 (1998). According to the Supreme Court, "[t]he City does not have to show that it would be impossible to construct a [pipeline] using a easement. If the City can show that it needs a fee simple title to construct and operate the [pipeline] under optimum conditions, this is proof of necessity." *Id.* at 226, 498 S.E.2d at 608. Based upon the Supreme Court's holding in *Cook*, we find the City of Monroe was only required to show that it needed a fee simple title in all of Tract 2 in order to expand the City of Monroe's Airport. We, therefore, conclude, upon our review of the ALP Update Map and the affidavits of the City's consultant and the Department of Aviation, that the City of Monroe presented sufficient evidence to prove the necessity of a fee simple title. Accordingly, we find no merit in the Harris' argument that the City already had sufficient land to undertake the expansion of its airport without having to resort to the taking of Tract 2.

[4] Defendant next argues that the City of Monroe's condemnation of Tract 2 amounted to an abuse of its condemnation power because it failed to obtain the two (2) property appraisals that the federal aviation department requires of a municipality before it can condemn property, and because it sought to take land outside of the airport expansion boundaries without first obtaining the approval of the North Carolina Division of Aviation.

While it is true, as defendant notes in its brief, that the guidelines of the Federal Aviation Administration ("FAA") and the Aviation

Division of the North Carolina Department of Transportation ("Aviation Division") are "important requirement[s] in that they assure that a property owner's land will only be taken with due process," we are not convinced that under the facts of this case, the City of Monroe's failure to follow the subject guidelines is so egregious an omission so as to constitute a manifest abuse of its discretion. The record indicates the City of Monroe obtained all but one of the appraisals required by the FAA and the Aviation Division which did approve—albeit "after the fact"—the City's plan to condemn all of Tract 2 for expansion of the airport. Under these circumstances, we cannot say that the procedural failures noted by Harris is sufficient evidence to overcome the presumption that the City of Monroe initiated this condemnation proceeding in good faith and in accordance with spirit of the law. Accordingly, Harris' second argument for a finding of abuse is rejected.

[5] Finally, we reach Harris' argument that the condemnation of Tract 2 was an abuse of the City of Monroe's discretion because it was undertaken solely to injure the Harris Corporate Center. That is, Harris contends that "the only logical explanation for taking [the] land [was] to prevent Harris Development from using it to develop the Harris Corporate Center, which competes for the same tenants as the industrial park being developed across the street by the City."

In addressing this argument, we find it significant that the trial court made the following finding:

> The evidence offered to support the allegations of defendant Harris that the City is acquiring Tracts 1 and 2 of the Harris Property pursuant to a "plan or scheme to lessen or destroy the value of the . . . (Harris Property) so that the City could purchase the property at less than its fair market value" or "eliminate competition for the City's Corporate Center" either refer to actions by the City that are consistent with carrying out a lawful, public purpose in a lawful way or are not substantiated by the evidence of the City's intent to do other than what it has a legal right to do.

Upon our review of the record, we believe the trial court was justified in making the aforementioned finding of fact. Accordingly, we have no cause to reverse the trial court's order on this ground.

For all the reasons discussed herein, the order of the trial court is affirmed with instructions to proceed to trial on the issue of damages.

Affirmed.

Judges TIMMONS-GOODSON and SMITH concur.

This opinion was authored and delivered to the Clerk of the North Carolina Court of Appeals by Judge Wynn prior to 1 October 1998.

IN THE MATTER OF THE LICENSE OF DARRYL BURKE CHEVROLET, INC., SAFETY EMISSION INSPECTION STATION, LICENSE NO. 20749 DARRYL BURKE CHEVROLET, INC., PETITIONER v. FREDERICK AIKENS, ACTING COMMISSIONER OF MOTOR VEHICLES, RESPONDENT

No. COA97-1528

(Filed 6 October 1998)

1. Administrative Law— whole record test—substantial evidence

The trial court did not err when reviewing an agency decision to suspend petitioner's Safety Equipment Inspection Station License in its application of the whole record standard of review. Even though the court ordered stricken certain findings and one conclusion by the Division of Motor Vehicles, the record is replete with substantial evidence to support the findings of fact which in turn fully justify the conclusion.

2. Motor Vehicles— safety inspection—missing catalytic converter—Type I violation

The trial court did not err in upholding an agency determination that failure to detect a missing catalytic converter during a motor vehicle safety inspection was a Type I violation under N.C.G.S. § 20-183.8B(a). A vehicle must pass both a visual inspection and an exhaust emissions analysis to pass an emissions inspection and the vehicle here was given an inspection sticker after only an exhaust analysis. Although petitioner contends that the the failure to perform a complete inspection was only a minor Type II violation because the truck met minimum allowed emissions levels, a Type I violation "directly affects the emission reduction benefits of the emissions inspection program" and common sense dictates that the vehicle would have had fewer

emissions with the device, thus having an effect on the emission reduction benefits of the program.

Judge GREENE dissenting.

Appeal by petitioner from judgment entered 4 September 1997 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 25 August 1998.

Clifton and Singer, L.L.P., by Benjamin F. Clifton, Jr., for petitioner-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General, Hal F. Askins, and Assistant Attorney General, Jeffrey R. Edwards, for respondent-appellee.

SMITH, Judge.

Petitioner, Darryl Burke Chevrolet, Inc. (Darryl Burke), appeals the trial court's summary judgment upholding a Safety Equipment Inspection Station License suspension order by the North Carolina Division of Motor Vehicles (the Division). Darryl Burke contends the Division issued the order based on a misinterpretation of N.C. Gen. Stat. § 20-183.8B (1995) (amended 1997) and N.C. Gen. Stat. § 20-183.8C (1995) (amended 1997). Petitioner argues that the trial court erred in (1) concluding the hearing officer's findings of fact and conclusions of law support the suspension order, and (2) upholding the Division's determination that petitioner's failure to detect a missing catalytic converter was a Type I violation rather than a Type II. For reasons set forth herein, we affirm.

Relevant facts and procedural information include the following: On 6 August 1996, Robert E. Jones (Jones), an undercover inspector with the Division, presented a Chevrolet truck to the service center of Darryl Burke for a safety and emissions inspection. Darryl Burke is licensed as a North Carolina Motor Vehicle Safety/Emission Equipment Inspection Station by the Division.

Prior to inspection, the Division altered the truck's emission system by replacing the catalytic converter with a piece of straight pipe. The truck was never raised for a visual inspection of the emissions system and Darryl Burke failed to detect the missing catalytic converter. Petitioner gave the truck a new inspection sticker and Jones paid the inspection fee.

On 20 September 1996, the Division determined that Darryl Burke committed a Type I violation under G.S. § 20-183.8B(a) and issued a suspension order. Petitioner's inspection license was suspended by the Division for a six-month period and a one-hundred dollar penalty was assessed. Darryl Burke requested a hearing before the Division which was held 15 October 1996. The Division upheld the license suspension and penalty in an order issued 24 October 1996.

Petitioner filed a petition for judicial review 1 November 1996. The trial court upheld the Division's suspension order by judgment entered 4 September 1997. Petitioner filed timely notice of appeal.

We note at the outset that Darryl Burke failed to include in its brief, assignments of error with references to the page numbers of the record on appeal as required by Rule 28(b)(5) of the Rules of Appellate Procedure. Such an omission and failure to follow the Appellate Rules subject an appeal to possible dismissal. *See Hines v. Arnold*, 103 N.C. App. 31, 404 S.E.2d 179 (1991). However, in our discretion and pursuant to Rule 2 of the Rules of Appellate Procedure, we consider Darryl Burke's arguments on the merits.

[1] Initially, we must determine the applicable standard of review. The trial court's standard for judicial review of an agency decision "depends upon the particular issues presented on appeal." *Amanini v. North Carolina Department of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). Appellate review of the trial court's decision is two-fold and "examines the trial court's order for error of law." *Id.* at 675, 443 S.E.2d at 118. The appellate court must "(1) determin[e] whether the trial court exercised the appropriate scope of review, and if appropriate, (2) decid[e] whether the court did so properly." *Id.* at 675, 443 S.E.2d at 118-19.

We first note the trial court properly applied the "whole record" standard of review to determine if the agency decision was supported by "substantial evidence." *Id.* at 674, 443 S.E.2d at 118. *See ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). Petitioner however, contends there was not sufficient findings of fact to support revocation of petitioner's license after the trial court, in effect, ordered stricken certain findings and one conclusion by the Division, upon determining they were "superfluous" and "did not affect petitioner's rights." Thus, we are required to determine if the remaining findings of fact are supported by substantial evidence in the entire record, and whether these findings justify the trial court's conclusion of law.

The trial court determined that substantial evidence existed to support the division's order, including the following findings of fact:

> 3. On 6 August 1996, a 1992 Chevrolet truck was presented for safety and emissions inspection at [petitioner's service department] by an undercover inspector for the [Division].
>
> 4. [F]rom the receipt and inspection certificate which was issued by [petitioner], the undercover inspector concluded [petitioner's employee had] conducted the inspection.
>
> 5. At the time of the "inspection" the vehicle . . . did not have as part of the emission control system a catalytic converter. The converter had been removed as part of the undercover investigation. . . .
>
> . . . .
>
> 11. The vehicle during the inspection process was never raised to perform a visual inspection.
>
> 12. After the "inspection," a 8/97 inspection certificate was placed on the vehicle.

The trial court affirmed the Division's conclusion that petitioner failed "to inspect or properly inspect a motor vehicle by failing to detect a missing catalytic converter." The trial court reviewed the entire record for relevant evidence that a reasonable mind might consider sufficient to support its conclusion. *State ex rel. Commissioner of Insurance v. North Carolina Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). We hold that the record is replete with substantial evidence to support the findings of fact which in turn fully justify the conclusion. We also note that the Division did not cross-appeal from that portion of the judgment disregarding some of the administrative findings.

[2] Petitioner next contends the trial court erred in upholding the Division's determination that a Type I violation included the failure to detect a missing catalytic converter. Petitioner argues the Division misinterpreted G.S. § 20-183.8B(a) in categorizing serious Type I violations. The pertinent language deems a serious violation to be one which "directly affects the emission reduction benefits of the emissions inspection program." G.S. § 20-183.8B(a).

An incorrect statutory interpretation by an agency constitutes an error of law. N.C. Gen. Stat. § 150B-51(b)(4) (1997). Therefore, "when

the issue on appeal is whether a state agency erred in interpreting a statutory term, 'an appellate court [trial court] may substitute its own judgment [for that of the agency] and employ a *de novo* review.' " *Amanini*, 114 N.C. App. at 678, 443 S.E.2d at 120 (citing *Chesapeake Microfilm, Inc. v. North Carolina Department of E.H.N.R.*, 111 N.C. App. 737, 744, 434 S.E.2d 218, 221 (1993), *aff'd*, 337 N.C. 797, 448 S.E.2d 514 (1994)). We find that the trial court properly applied a *de novo* standard of review to determine whether the Division's order was affected by error of law. The trial court held

> petitioner's action of placing an emissions inspection sticker on the vehicle without first performing a visual inspection in accordance with G.S. § 20-183.3(b) to determine whether the vehicle's catalytic converter was present, constituted a Type I violation under G.S. § 20-183.8C(a)(1) at the time of the events in question.

To pass an emissions inspection under G.S. § 20-183.3(b), "a vehicle must pass *both* a visual inspection *and* an exhaust emissions analysis."(emphasis added). Darryl Burke gave the truck an inspection sticker after performing only the exhaust analysis. Petitioner's failure to perform a complete inspection violated G.S. § 20-183.8C(a)(1), which states that

> [p]ut[ting] an emissions inspection sticker on a vehicle without performing an emissions inspection . . . or after performing an emissions inspection in which the vehicle did not pass the inspection [constitutes a Type I violation].

A Type I violation "directly affects the emission reduction benefits of the emissions inspection program." G.S. § 20-183.8B(a).

Darryl Burke concedes that a complete inspection was not performed, but argues the violation was a minor, Type II violation. A Type II violation involves no license suspension and "reflects negligence or carelessness in conducting an emissions inspection . . . but does not directly affect the emission reduction benefits of the emissions inspection program." G.S. § 20-183.8B(a). Petitioner claims its failure to perform a visual inspection was a minor oversight not impacting the emission reduction benefits program because the vehicle passed the emission analysis. We disagree.

The version of G.S. § 20-183.8C applicable to the case *sub judice*, did not categorize a missing catalytic converter as a Type I or Type II violation. However, the statute expressly authorized the Division to "designate other acts" as Type I or Type II violations. G.S.

§ 20-183.8C(d). This court held that such agency designations have the "force and effect of law." *Amanini*, 114 N.C. App. at 678, 443 S.E.2d at 120.

Through the Division's interpretation of G.S. § 20-183.8B and G.S. § 20-183.8C, it designated a missing catalytic converter as an "other act" that affects the emission reduction benefits serious enough to be a Type I violation. Agency rulings and interpretations are not controlling upon the courts, but "do constitute 'a body of experienced and informed judgment' which have been 'given considerable and in some cases decisive weight.' " *Schultz v. W.R. Hartin & Son, Inc.*, 428 F.2d 186, 191 (4th Cir. 1970) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 129 (1944)). In discussing deference given by states to their agencies, the United States Supreme Court noted that

> [t]he weight of [an agency's interpretation] . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140, 89 L. Ed. at 129. *See also Brooks, Commissioner of Labor of North Carolina v. McWhirter Grading Company, Inc.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981); *In re Appeal of North Carolina Savings & Loan League v. Credit Union Comm.*, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981).

In the case *sub judice*, based on the Division's reasoning, experience, and consistency with similar regulations, the trial court properly upheld the Division's Type I designation for a missing catalytic converter. The Division notes that without a catalytic converter, the truck meets only minimum allowable levels for carbon monoxide and hydrocarbon emissions. To support this reasoning, the Division considered regulations governing exhaust emission controls in North Carolina. Under N.C. Admin. Code tit. 19A, r. 3D.0542 (June 1998) (section effective October 1994), a catalytic converter is listed as an emissions control device. If this device is missing, the exhaust emission shall not be approved. N.C. Admin. Code tit. 19A, r. 3D.0541 (June 1998) (section effective October 1994).

Darryl Burke argues the truck met required standards, and therefore any impact on the emission reduction benefits was minor. However, meeting minimum levels will not prevent the truck from impacting the emissions reduction benefits program. A catalytic con-

verter is "[a] reaction chamber typically containing a finely divided platinum-iridium catalyst into which exhaust gases from an automobile engine are passed together with excess air so that the carbon monoxide and hydrocarbon pollutants are oxidized to carbon dioxide and water." The American Heritage Dictionary, 247 (2d ed. 1982).

Common sense would dictate that if the tested vehicle met minimum emission standards without the catalytic converter, it would have had even less emissions of carbon monoxide and hydrocarbons with the device. Thus, failure to observe that the catalytic converter was missing had an effect on the emission reduction benefits of the program.

We take judicial notice of the fact that the statutes governing petitioner's conduct were amended, with changes effective July 1, 1997. G.S. § 20-183.8C(b)(3) and (b)(4). Such amendments expressly categorized petitioner's conduct as a Type II violation. However, no issue or argument was presented to this Court as to the effect, if any, of the subsequent legislative changes on the instant case. We further assume no such argument was presented to the trial court, and thus we do not address any such issue. Therefore, the trial court correctly held that the Division properly interpreted G.S. § 20-183.8B and G.S. § 20-183.8C. We hold that the trial court properly applied the appropriate standards of review, and its order is not affected by error of law.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not agree that the placing of an emission inspection sticker on Robert E. Jones's truck, which did not have a catalytic converter, constitutes a Type I violation within the contemplation of N.C. Gen. Stat. § 20-183.8C(a)(1).

I agree with the majority that an emission inspection station or inspector, prior to placing an emission inspection sticker on a vehicle, is required to perform a visual inspection of the "emission control devices" and an analysis of the exhaust emissions of the vehicle. N.C.G.S. § 20-183.3(b) (Supp. 1997). I further agree that a catalytic

converter is an emission control device, 19A NCAC 3D.0542 (June 1998), and thus placing an emission inspection sticker on a vehicle that does not have a catalytic convertor is a violation of the statute.

I do not agree, however, that placing an emission inspection sticker on a vehicle that does not have a catalytic convertor constitutes a Type I violation, because a Type I violation occurs only when the violation "directly affects . . . emission reduction." N.C.G.S. § 20-183.8B(a) (Supp. 1997). There is no evidence in this case that the absence of the catalytic converter affected emission reduction. The majority posits that the presence of a catalytic converter necessarily benefits emission reduction. That is so, however, only if the catalytic converter is working properly. Because an inspector is not required to determine if the converter is working properly, only that it is in place, N.C.G.S. § 20-183.3(b), it does not follow that its absence affects emissions.

The failure to observe the absence of a catalytic converter does constitute a Type II violation as it reflects "negligence or carelessness in conducting" an emission inspection. N.C.G.S. § 20-183.8B(a). Furthermore, to the extent the statute in effect at the time of this violation is ambiguous, the legislature has clarified its meaning by specifically providing, by amendment, that the failure to discover the absence of a catalytic converter is a Type II violation. N.C.G.S. § 20-183.8C(b)(3)(a) (Supp. 1997); *see General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 524-25, 338 S.E.2d 114, 118 (1985) (ascertaining legislative intent from amendments).

I would therefore reverse the order of the trial court.

STATE OF NORTH CAROLINA v. KEVIN BRADLEY MARTIN

No. COA97-59

(Filed 6 October 1998)

1. Criminal Law— felony murder—self defense—evidence insufficient

The trial court did not err in a prosecution for felony murder by denying defendant's request for an instruction on self-defense as to the underlying felonies, assault and discharging a firearm into occupied property. In felony murder cases, self-defense is

available only to the extent that perfect self-defense applies to the relevant underlying felonies and the evidence here failed to support several elements of perfect self-defense.

2. Firearms and Other Weapons— discharging a firearm into occupied property—automobile—occupancy

The trial court did not err in a felony murder prosecution by denying defendant's motion to dismiss the underlying felony of discharging a firearm into occupied property where, viewing the evidence in the light most favorable to the State, there was substantial evidence to satisfy the element of occupancy. One victim testified that he heard gunshots when he was about halfway out of the car and that he was struck while his foot was still in the car, and other witnesses testified that the other victim remained in the vehicle after the shooting, viewed bullet holes in the automobile, and related that the second victim fell out of the car when the passenger door was opened.

Appeal by defendant from judgment entered 7 February 1996 by Judge Dexter Brooks in Cumberland County Superior Court. Heard in the Court of Appeals 22 October 1997.

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 Benjamin Sendor, for defendant-appellant.

JOHN, Judge.

Defendant appeals convictions of first-degree murder under the felony murder rule and assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, defendant contends the trial court erred by denying his request to instruct the jury on self-defense and by denying his motion to dismiss. We conclude the trial court did not err.

The State's evidence at trial tended to show the following: On the morning of 22 June 1993, defendant and Sean Burney (Burney) argued on the telephone regarding Burney's demand for payment of $150.00 to $200.00, representing estimated damage to Burney's truck several years earlier when he and defendant were throwing rocks at a passing train. A rock thrown by defendant had ricocheted off the train and dented the door of Burney's truck. Claiming the damage was acciden-

tal, defendant refused to pay. The 22 June 1993 conversation concluded with an agreement to meet "at the park in Eaglewood" to settle the dispute by fighting. Burney testified defendant said, "[y]ou better bring all your damn boys."

After the conversation with defendant, Burney and Brian Bell (Bell) left to pick up Randy Dalton (Dalton). Burney, Bell and Dalton drove to the home of Billy Strickland (Strickland), where they met Strickland, Pat O'Quinn (O'Quinn), and another friend. Strickland testified the group planned to go swimming and had no intentions of fighting defendant that day.

O'Quinn related that Burney and Dalton left Strickland's residence to go to the store between 11:30 a.m. and 12:00 p.m., and that they were gone approximately ten to fifteen minutes. In the meantime, two vehicles pulled onto the shoulder of the road in front of Strickland's house. One was a pickup truck driven by Sean Terry (Terry), with defendant and Tony Lugo (Lugo) as passengers in the truck bed. The other was an automobile operated by Jim Johnson (Johnson).

Johnson and Terry parked their vehicles at the road and approached O'Quinn and Bell who were standing on the porch of Strickland's home. Terry inquired about the problems between Burney and defendant, and O'Quinn warned that defendant should leave before Burney returned. About that time, Burney and Dalton returned, and Burney drove his vehicle into the driveway. Neither Burney nor Dalton was armed.

As Burney described it, he was stepping out of the automobile when he noticed it start to roll backward. Burney placed his right foot on the brake and reached back inside the vehicle so as to set the emergency brake. When he was "about halfway out of the car," he heard gunshots. While his "right foot was still in the car," he felt the impact of a bullet fired by defendant which knocked him to the ground. Burney was struck in the left side of his neck and the bullet exited his back below the shoulder blade. The automobile began to roll over Burney's feet, but he avoided it and ran into the house. As he fled, Burney observed defendant walking around with a rifle in his hand saying repeatedly, "What's up now?" Burney testified these constituted "fighting words."

Bell and O'Quinn both testified they observed defendant standing in the bed of the pickup truck shooting a .22 caliber rifle at Burney

and Dalton. O'Quinn stated he saw Dalton "slouch down into the V of the [open passenger side] door" and Burney "fall flat down on the concrete." O'Quinn testified that he heard several more shots, saw the windows on Burney's vehicle shatter, and then entered the house to place a 911 emergency call.

Terry, Johnson and Lugo attempted to assist Dalton after the shooting stopped. Dalton was sitting in the front passenger's seat of Burney's vehicle, his legs inside and his head resting on dashboard. Dalton had been shot in the upper left abdomen, and later died as the result of blood loss from a severed mesenteric artery. Burney recovered from his neck wound after hospitalization.

Law enforcement officers later located six spent shell casings outside the truck Terry had driven to Strickland's residence, and an additional casing in the truck bed. No firearms were discovered in or near Burney's automobile.

Hope Mills Police Chief John Hodges (Chief Hodges) was on duty the afternoon of the shooting. After hearing a radio alert, he stopped and questioned defendant near the crime scene. After defendant gave Chief Hodges a false name, Johnson identified defendant, and defendant was then transported to the police station. While there, defendant told Captain Tonzie K. Collins (Collins) the murder weapon was hidden behind a shed near the crime scene. Defendant led Chief Hodges and Collins to the site and a .22 caliber rifle was recovered. State Bureau of Investigation ballistics expert A.L. Langley testified all seven spent shell casings found at the scene of the shooting were fired from the retrieved rifle. Upon being returned to the station, defendant was left alone to prepare a written statement and he escaped. He was recaptured later that night with two friends approximately one mile from the South Carolina border.

Defendant testified on his own behalf as follows: On the morning of 22 June 1993, Burney telephoned defendant regarding the repair money, threatening to "take it out of [defendant's] ass" if it was not forthcoming. Burney vowed that "if he got his hands on me, he would kill me," which defendant understood to mean either kill or seriously injure defendant. Burney cursed repeatedly and threatened violence toward defendant's family during the conversation. Burney finally told defendant to meet him to fight it out, and said, "bring all your boys and all your weapons because we'll have ours." Defendant believed Burney because Burney had a reputation for violence and for carrying weapons.

Curtis Moody (Moody) overheard the foregoing conversation and began telephoning other friends to assist defendant in fighting Burney. Defendant's friend, Sean Marks, and Moody's friends, Terry, Lugo and Johnson arrived in response to Moody's calls and Terry brought a rifle.

Anticipating a fight with Burney, defendant and his five companions drove to Eaglewood Park. As they neared their destination, Terry handed a rifle through the window to the truck bed where defendant and Lugo were riding. Defendant explained that he was prepared to fight because he feared Burney or his friends might have a gun. Defendant observed Lugo take the weapon and wrap a bandana around it to catch ejected spent shell casings when the rifle was fired, and as Lugo explained, "to catch the shells from—falling around and, uh, possibly getting in trouble." However, defendant had no intention of either Lugo or himself firing the first shot.

When the group realized Burney was not at the park, defendant directed Terry, the vehicle driver, to take him home. However, Terry decided to stop at Strickland's house, notwithstanding defendant's protestation that it was not a good idea and his reiterated request to be taken home. Terry exited the truck and approached Burney's friends to talk things through and calm the situation.

At that point, Burney pulled into the driveway, "driving mighty fast." Dalton and Burney "jumped out of the car," Burney yelling to defendant, "[d]on't go nowhere[,] I have something for you." Burney's friends who had been standing on the porch, began approaching defendant. Lugo handed the rifle to defendant and he fired a warning shot into the air. When Burney reached back into his automobile after the car began to roll, he again turned toward defendant and said "something to the effect that, uh, 'He's armed, Randy. Get the gun.' " According to defendant, Dalton then

> turned to the passenger's side of the car, which the door was still open, kneeled down, reached under the seat of the car and came out with something in his hand. I'm not clear on what it was. He began to turn toward me, uh, with that object in his hand. At that point, I was, uh, very fearful for my life, and I started shooting in the direction of the car, never actually aiming the gun at Mr. Dalton.

After firing a total of seven shots, defendant realized he had injured Dalton. He "then got scared, jumped out of the truck and ran,"

dropping the rifle behind a shed. Approximately one and one-half hours later, Chief Hodges stopped defendant, who assumed a false name because he "was scared of being charged with something as serious as what had just took place." Defendant indicated during his testimony that he would not have shot at Dalton and Burney had he not feared for his own safety, and that he never intended to kill Dalton.

Defendant's friends, Moody and Terry, corroborated defendant's version of events. When asked about Burney's reputation for violence, Terry recounted incidents of Burney and a friend assaulting Terry, pointing guns at him and threatening to cut him. According to Terry, Burney exited his vehicle after entering Strickland's driveway, directed defendant not to go anywhere, and approached defendant looking "like he was wanting to hit [him]."

Lindsay Cobb, Heather McBride Cashwell and Amber Smith Stout (Stout), also called as witnesses for defendant, testified Burney had a reputation for starting fights and for violence. Stout further stated, "He gets into a lot of trouble. I've heard that he carries a gun, and sometimes a knife." On rebuttal, she testified Burney was "known to shoot up a couple houses."

Deputy Sheriff Ritchie J. Alfano of the Cumberland County Sheriff's Department testified Burney had a reputation as a troublemaker who "was known to be in quite a few fights." He described Burney as having a reputation for picking fights when his friends were around in order to impress them.

During his testimony, Burney denied having a reputation for violence, but admitted having pleaded guilty to assault with a deadly weapon involving a knife, and to breaking or entering and larceny.

Following the jury's guilty verdicts, defendant was sentenced to life imprisonment for first-degree murder, plus twenty years for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant entered timely notice of appeal.

[1] The essential issue on appeal is whether the trial court erred by denying defendant's request to instruct the jury on self-defense as to the felonies underlying his felony murder conviction, *i.e.*, assault with a deadly weapon and discharging a firearm into occupied property. We hold the court's refusal to do so was not error under the circumstances *sub judice*.

The trial court has broad discretion in presenting the issues to the jury, *State v. Flippin*, 280 N.C. 682, 687, 186 S.E.2d 917, 920 (1972). However, in determining whether to submit an instruction on self-defense, the court must consider the evidence in the light most favorable to the defendant. *State v. Blackmon*, 38 N.C. App. 620, 621-22, 248 S.E.2d 456, 457 (1978), *disc. review denied*, 296 N.C. 412, 251 S.E.2d 471 (1979).

Our Supreme Court has set forth the law of self-defense as follows:

> The right to act in self-defense rests upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time . . . . However, the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.

State v. Marsh, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977) (citations omitted).

North Carolina law recognizes both "perfect" and "imperfect" self-defense. *See, e.g., State v. Wilson*, 304 N.C. 689, 694-95, 285 S.E.2d 804, 807 (1982). Perfect self-defense excuses a murder charge completely, and is established by showing that, at the time of the killing:

> (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, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981).

Imperfect self-defense arises when the defendant reasonably believed it was necessary to kill the deceased in order to save himself from death or great bodily harm, but defendant, although without murderous intent, was the aggressor or used excessive force. *Wilson*, 304 N.C. at 695, 285 S.E.2d at 808. One who exercised the right of imperfect self-defense in killing an adversary remains "guilty of at least voluntary manslaughter." *Id.*

As defendant correctly recognizes, neither perfect nor imperfect self-defense is available to defend against first-degree murder under the felony murder theory. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). In felony murder cases, self-defense is available only to the extent that *perfect* self-defense applies to the relevant underlying felonies. *Id.* Imperfect self-defense is not available as a defense to felonies underlying a felony murder charge. *See id.* at 668-69, 462 S.E.2d at 499. We therefore consider whether defendant was entitled to an instruction on perfect self-defense as to the felonies underlying the felony murder charge.

The evidence is undisputed that defendant and his companions drove to Eaglewood park in search of Burney, prepared to fight and in possession of a rifle. The group thereafter continued to Strickland's residence where the fatal shooting occurred. Defendant argues he "sought to avoid [the] confrontation by twice telling Sean Terry not to stop at [Strickland's] house and to take [him] home." Viewing this latter evidence in the light most favorable to defendant, it is nonetheless ineffective to constitute a showing of withdrawal because it transpired prior to the actual confrontation with Burney and Dalton, and was not communicated to defendant's adversaries. *See Marsh*, 293 N.C. at 354, 237 S.E.2d at 747.

Soon after defendant and his friends arrived at Strickland's house, Burney and Dalton drove into the driveway, not completely blocking the vehicle in which defendant was located. According to defendant, he fired "a warning shot" as Burney and Dalton exited their automobile and began to approach defendant. Neither Burney nor Dalton were in possession of a weapon, deadly or otherwise.

Burney reached back into his automobile, again turned to defendant and said, "something to the effect that, 'uh, He's armed, Randy. Get the gun.' " Defendant stated Dalton then reached under "the seat of the car and came out with something in his hand," but that he was "not clear on what it was." Although defendant could not identify the object in Dalton's hand, he testified "[a]t that point, I was, uh, very fearful for my life, and I started shooting in the direction of the car," firing a total of seven shots. Pointedly, however, defendant insisted he was "never actually aiming the gun at Mr. Dalton," and that he never "at any time that day intend[ed] to kill Mr. Dalton."

Even viewing the foregoing in the light most favorable to defendant, we determine the trial court did not err by denying his motion for a jury instruction on self-defense. Defendant voluntarily, "aggressively and willingly," *Norris*, 303 N.C. at 530, 279 S.E.2d at 572-73, sought out a confrontation when he and his friends drove to the park and to Strickland's house looking for Burney. When Burney drove into Strickland's driveway, defendant neither communicated any desire to avoid confrontation nor attempted to leave the scene. The right of self-defense is available only to one who is "without fault," *Marsh*, 293 N.C. at 354, 237 S.E.2d at 747, and one who voluntarily enters into a fight "cannot invoke the doctrine of self-defense unless he first abandons the fight," *id.*, and notifies his adversary of his withdrawal, *id.* To the contrary, defendant brandished a rifle and fired it into the air. After hearing Burney say to Dalton "something to the effect that, uh, 'He's armed, Randy. Get the gun," defendant continued steadfast in the affray, firing six additional shots towards Burney's vehicle, *see Norris*, 303 N.C. at 530, 279 S.E.2d at 572-73 (defendant must not have used "excessive force"), killing Dalton and wounding Burney.

Finally, in order for defendant to have been entitled to an instruction on self-defense, it must have "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." *Id.* Taking defendant's own testimony in the light most favorable to him, he fired the rifle several times in the direction of Burney's vehicle, never aiming the weapon at Dalton or intending to kill him. This testimony belies defendant's insistence that he was entitled to a self-defense instruction. *See State v. Daniels*, 87 N.C. App. 287, 289-90, 360 S.E.2d 470, 471 (1987) ("defendant's own testimony tends to show she did not believe it was necessary to kill [decedent], since she did not intend to either stab or hurt him"). Because the evidence fails to support several elements of perfect self-defense, *see Norris*, 303 N.C. at 530, 279 S.E.2d at 572-73,

the trial court's failure to deliver the requested instruction thereon was not erroneous.

[2] Defendant also contends the trial court erred by denying his "motion to dismiss the underlying felony for felony murder of discharging a firearm into occupied property." Faced with a criminal defendant's motion to dismiss, the trial court must "consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference." *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992). The trial court must deny the motion if it determines there is substantial evidence to support each element of the offense charged and that defendant was the perpetrator. *Id.*

Focusing on the requirement of N.C.G.S. § 14-34.1 (1997) that the proscribed offense constitutes discharging a firearm into a vehicle "while it is occupied," defendant maintains the State failed to satisfy its burden of presenting evidence that Burney's vehicle was occupied at the time of the shooting. We do not agree.

Burney testified he heard gunshots when he was "about halfway out of the car," and that he was struck by a bullet while his "right foot was still in the car." Terry, the pickup truck driver, stated that after the shooting, he and others approached Burney's automobile to check on Dalton. Dalton remained seated in the passenger seat of the vehicle, with his "head . . . up at the dashboard" and his feet and legs still inside. Further, Terry viewed bullet holes in Burney's automobile, and related that when he and others opened the passenger side door, Dalton "fell out of the car." O'Quinn testified he observed defendant shooting at Burney and Dalton, and saw Dalton "slouch down into the V of the [open passenger side] door" of Burney's vehicle.

Viewing the evidence in the light most favorable to the State, we hold there was substantial evidence to satisfy the element of "occupancy" under G.S. § 14-34.1, and that the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. RONNIE EUGENE GRICE

No. COA97-1361

(Filed 6 October 1998)

1. **Criminal Law— sentencing—comment on defendant's lack of remorse—not an aggravating factor**

The trial court did not err by considering an improper aggravating factor when sentencing defendant for second-degree murder and assault with a deadly weapon inflicting serious injury arising from impaired driving. The court's statement concerning defendant's lack of remorse more closely resembles a comment on defendant's continued pattern of reckless behavior and lack of social duty than reliance on lack of remorse as an aggravating factor.

2. **Homicide— felony death by motor vehicle—not a lesser included offense of second-degree murder**

The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident resulting from defendant's impaired driving by instructing the jury on second-degree murder, involuntary manslaughter, and misdemeanor death by vehicle, but refusing to instruct on felony death by motor vehicle. Felony death by motor vehicle is not a lesser included offense of second-degree murder.

3. **Criminal Law— prior convictions—admitted to show malice—limiting instructions**

The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident which resulted from defendant's impaired driving by admitting DUI convictions from 1980. Prior driving while impaired convictions may be offered to show malice and the trial court correctly gave a limiting instruction.

4. **Homicide— second-degree murder—impaired driving and speeding—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a second-degree murder charge based on impaired driving where defendant contended that the court instructed the jury that it could convict if it found either that defendant was driving while impaired or speeding, that the alternative upon which the jury relied cannot be known, and that

the evidence of speed was insufficient. Five witnesses were able to form an opinion as to defendant's speed and there was sufficient evidence for the jury to determine whether defendant was exceeding the speed limit.

5. Homicide— second-degree murder—impaired driving and speeding—proximate cause—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a second-degree murder prosecution based on impaired driving and speeding where defendant contended that the evidence was insufficient to prove proximate cause. If defendant had evidence tending to rebut the State's prima facie case, he could have presented it to the jury.

Appeal by defendant from judgment entered 8 April 1997 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 27 August 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Wm. Dennis Worley, for the State.

Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charlesena Elliot Walker, for defendant appellant.

McGEE, Judge.

Defendant appeals his second-degree murder conviction in the death of Barbara Thompson, and his assault with a deadly weapon inflicting serious injury convictions in the injuries of her two daughters. All convictions arose from an automobile collision. The state's evidence tended to show that on 17 October 1995, Barbara Thompson and her daughters were stopped in their vehicle facing west on Holt Pond Road in Princeton, North Carolina, about to make a left-hand turn. A white car was behind the Thompsons' car, waiting for it to turn. Defendant was traveling west and attempted to pass both vehicles. The state's evidence showed that defendant was driving between sixty and sixty-five miles per hour. The posted speed limit was fifty-five miles per hour. Defendant collided with the driver's side of the Thompsons' vehicle, killing Barbara Thompson and injuring her two daughters. The two people in the car behind the Thompsons' car witnessed the accident. A sheriff's deputy driving in the opposite direction observed that defendant's truck was "doing all it could do" and the deputy heard the collision.

Defendant received minor injuries but a passenger in his vehicle was unconscious and was rushed to the hospital. Defendant told rescue personnel that he and his passenger had been drinking. A member of the Princeton Rescue Squad smelled alcohol on defendant and observed alcohol containers in the truck. Defendant was arrested for driving while impaired. Defendant had no driver's license and refused to take an Intoxilyzer test. A blood test revealed defendant had a blood alcohol concentration of 0.129 grams of alcohol per 100 milliliters of blood. Defendant had been convicted of driving while impaired on 14 July 1994 and was convicted of three driving under the influence offenses on 14 July 1980.

Defendant was convicted of the second-degree murder of Barbara Thompson and assault with a deadly weapon inflicting serious injury on Cynthia Thompson and Rebecca Thompson. Defendant was sentenced to 270 months minimum and 333 months maximum for second-degree murder and 58 months minimum and 79 months maximum for each of the assaults. All sentences were in excess of the presumptive sentences allowed under N.C. Gen. Stat. § 15A-1340.17 (1997).

Defendant raises four issues on appeal.

I.

[1] Defendant argues the trial court erred in sentencing by considering an improper aggravating factor. Defendant argues the trial court's consideration of defendant's lack of remorse at the time of the crime violated defendant's state constitutional due process rights and defendant's statutory rights under N.C. Gen. Stat. § 15A-1340 (1997). We disagree.

For each offense defendant was convicted of, the trial court found one aggravating factor: "The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which normally would be hazardous to the lives of more than one person." N.C. Gen. Stat. § 15A-1340.16(d)(8) (1997). Defendant, in arguing his position, relies upon a statement made by the trial court:

> Well, there were three convictions in 1973. I cannot consider the other ones and I am not considering them. But in 1994, a year before, approximately 18 months before this incident, he was before this Court or before some Court, convicted. He went through treatment back in—there were three convictions back in 1970. He went through it again in 1974. His disease is an insidious

> disease. It affects not only him; it affects his family and has caused death and destruction in another family. The thing that has impressed me most about this in a lot of ways, I sat here, just like this jury did, and heard—and saw the evidence. I saw the videotapes and saw at the scene and at the hospital. *And one thing that has been totally missing was remorse. Not one time was there inquiry made, is somebody hurt in that vehicle? Is somebody injured in that vehicle? A total lack of remorse which implies to me a lack of consciousness.* A total disregard for the laws of this State. In the *McBride* case, that has been cited frequently by the State and the Defendant, they define malice in these cases, an act which is inherently dangerous to human life and which is done so recklessly and wantonly to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. This time he was driving after his license were [sic] revoked. After he had just been convicted of—in a short period of time before, showed absolutely no remorse whatsoever. I am convinced that by not imposing a lengthy sentence that no one in this county would be safe, because I am convinced that with his attitude and his record and his conduct that he will be on that road again and some other family will be devastated. Stand up, sir.

(emphasis added).

This statement by the trial court does not support defendant's argument. In considering the above language, this statement more closely resembles a comment on defendant's continued pattern of reckless behavior and lack of social duty, than reliance on lack of remorse as an aggravating factor. Our Supreme Court has recognized that a pattern of conduct which causes serious danger to society may properly be considered as an aggravating factor. *State v. Hayes*, 323 N.C. 306, 372 S.E.2d 704 (1988).

Defendant also argues that our Supreme Court's decision in *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985), and our decision in *State v. Harrell*, 100 N.C. App. 450, 397 S.E.2d 84 (1990), *disc. review denied*, 328 N.C. 94, 402 S.E.2d 422 (1991) support his argument. In *Parker*, the Supreme Court remanded for resentencing because the trial court found as one of two nonstatutory aggravating factors that defendant showed a lack of remorse for his crimes. *Parker* at 253, 337 S.E.2d at 500. In the case at bar, however, defendant points *only* to the language of the trial court as proof of his argument. In *Harrell*, we

remanded defendant's conviction for resentencing because the trial court took into consideration when sentencing that the defendant had denied his guilt. *Harrell* at 451, 397 S.E.2d at 85. However, in the instant case the trial judge stated that "a total lack of remorse . . . implies to me a lack of consciousness." The trial court is drawing a parallel between defendant's lack of remorse and the element of malice necessary to support a second-degree murder conviction. Consistent with our Supreme Court's decision in *Hayes*, the trial court did not overstep its bounds in commenting on defendant's dangerous pattern of conduct.

For these reasons we find no error.

II.

[2] Defendant argues that the trial court erred in refusing to instruct the jury on felony death by vehicle. We disagree. The trial court instructed the jury on second-degree murder, involuntary manslaughter, and misdemeanor death by vehicle. These instructions were sufficient.

It is well settled that the elements of involuntary manslaughter and felony death by vehicle are the same. *State v. Williams*, 90 N.C. App. 614, 621, 369 S.E.2d 832, 836, *disc. review denied*, 323 N.C. 369, 373 S.E.2d 555 (1988). In *State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992), defendant was convicted of involuntary manslaughter and argued the trial court erred in refusing to submit felony death by vehicle to the jury as a possible verdict. We stated:

> In the present case, the trial court submitted three possible verdicts to the jury—second degree murder, involuntary manslaughter and misdemeanor death by vehicle. Since felony death by motor vehicle is not a lesser included offense of involuntary manslaughter, and since the trial court did submit involuntary manslaughter, the court did not err in not submitting felony death by motor vehicle as a possible verdict.

Byers at 380, 413 S.E.2d at 587. When the evidence supports the submission of a lesser included offense, it is error for the judge not to instruct on that offense. *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988). In the present case, defendant was charged with second-degree murder. Felony death by vehicle is not a lesser included offense of second-degree murder. *Williams* at 621, 369 S.E.2d at 836.

Therefore, we find no error.

III.

[3] Defendant argues the trial court erred in admitting his prior convictions that were more than ten years old. Defendant filed a motion *in limine* to exclude evidence regarding his three driving under the influence convictions on 14 July 1980. The trial court found that "[t]he probative value of [the convictions] substantially outweigh[ed] the danger of unfair prejudice," and that "[t]he evidence [was] relevant . . . to show malice." We agree.

Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733 (1993). What constitutes malice varies depending upon the facts of each case. *Id.* Our courts have specifically recognized three kinds of malice:

> One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

State v. Reynolds, 307 N.C. 184, 191, 297 S.E.2d 532 (1982) (citations omitted). It is the second type of malice that is applicable to this case.

Our Court has held that prior conduct such as prior convictions and prior bad acts will be admissible under Rule 404(b) of the North Carolina Rules of Evidence as evidence of malice to support a second-degree murder charge. *McBride* at 69, 425 S.E.2d at 734; *Byers* at 382, 413 S.E.2d at 589. When the state offers such evidence, not to show defendant's propensity to commit the crime, but to show the requisite mental state for a conviction of second-degree murder, admission of such evidence is not error. *Byers* at 382, 413 S.E.2d at 589; *McBride* at 69, 425 S.E.2d 734. Prior driving while impaired convictions may be offered to show malice. *McBride* at 69, 425 S.E.2d at 734.

The trial court further correctly gave the jury a limiting instruction concerning the purpose for which the contested evidence could be considered. Thus, we find no error.

IV.

[4] Defendant argues the trial court erred in denying his motion to dismiss for lack of sufficient evidence. We disagree.

In ruling upon a motion to dismiss, the trial court must consider the evidence in the light most favorable to the state; the state is entitled to every reasonable inference drawn from the facts. *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994); *State v. Stanley*, 310 N.C. 332, 339, 312 S.E.2d 393, 397 (1984).

Defendant argues the state did not prove that he was speeding, that he acted with malice, or that he proximately caused the victim's death. We have previously addressed defendant's argument concerning malice and determined that *McBride* governs this issue. We turn to defendant's argument concerning the sufficiency of the evidence pertaining to his speed.

The trial court instructed the jury that to find the defendant guilty of second-degree murder under the impaired driving statute, the state must prove:

> (1) defendant was driving a vehicle; (2) that while being operated by defendant, the vehicle was involved in a collision; (3) a person was killed in the collision; (4) defendant violated the following law or laws of this State governing the operation of motor vehicles: the law of this State makes it unlawful to drive while impaired and unlawful to exceed the posted speed limit; (5) defendant acted unlawfully and with malice; and (6) the death of the victim was proximately caused by the unlawful acts of the defendant done in a malicious manner.

N.C.P.I., Crim. 206.32.

As to requirement number four, defendant argues that the evidence was insufficient for the jury to have relied upon defendant's speed as a basis for his conviction. Since the court instructed the jury that it could convict defendant of second-degree murder if it found either that defendant was driving while impaired or speeding, defendant argues that the instruction was improper because it cannot be known which alternative the jury relied upon in convicting defendant.

Defendant relies upon *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990), which states that when a jury is given alternative theories upon which to base a verdict, and one of the theories is improper, a new trial is required. However, we believe the evidence presented was sufficient for the jury to weigh the credibility of the witnesses and determine whether defendant's speed was a factor.

N.C. Gen. Stat. § 8C-1 (1992), Rule 701 of the Rules of Evidence, allows for the admission of lay opinion if it is "(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." The posted speed limit was fifty-five miles per hour. W.T. Freeman, defendant's passenger, testified that defendant's truck was going "[p]robably say somewhere between 50, 55, 60," before impact. Freeman testified that "[w]e were driving along there talking. I won't paying the speed no mind." He also testified that he did not recall defendant applying the brakes before the collision with the victim's vehicle. Marcus Johnson did not actually witness the collision, but passed defendant's truck shortly before the collision occurred. Johnson testified the truck was "going pretty fast . . . [a]t least fifty, fifty-five."

Patrice Martin and her mother, Lorena Foye, were seated in a white car directly behind the victim's car when it was hit. They testified that defendant's truck was traveling sixty-five to seventy miles per hour. Martin testified she was turned around in the passenger's seat checking on one of her sons in the back seat when she saw defendant's truck. She testified that from the time she first saw defendant's truck until the collision, she never took her eyes off defendant's truck. Martin also testified that she did not observe any brake lights on defendant's truck, or hear defendant's tires squealing. Foye testified that as she was waiting for the victim's car to turn left, "I just saw this flash come past my window and as it passed the window, I saw it was a truck and I said, 'Oh my God. What is this man doing?' " Foye further stated:

> Once the truck hit the car, it was going so fast, that it hit the car and it bounced up and rolled over a couple of times and then the car came back down and the truck hit the car again, and that's when it knocked it into the ditch.

Foye testified that from the time she observed defendant's truck pass her until it hit the victim's car, she never took her eyes off it. She further testified that she never saw any brake lights on defendant's

truck, and never heard any tires screeching. Johnston County Sheriff's Deputy Mike Twigg was driving east on Holt Pond Road when he observed the victim's vehicle, parked in the roadway facing west with its turn signal on. Twigg observed defendant's truck as it passed him and as it approached the two vehicles. Twigg testified the truck was going "full throttle" and "doing all that it could." Twigg also testified that prior to the impact there were no brake lights illuminated on defendant's truck and no tires screeching.

The general rule for admission of opinion testimony on speed is that "a person of ordinary intelligence and experience is competent to state his opinion as to the speed of a vehicle when he has had a reasonable opportunity to observe the vehicle and judge its speed." *Insurance Co. v. Chantos*, 298 N.C. 246, 250, 258 S.E.2d 334, 336 (1979). The opportunity of a witness to judge the speed of a vehicle under the circumstances of the case generally goes to the weight of his or her testimony rather than to its admissibility. *Smith v. Stocks*, 54 N.C. App. 393, 283 S.E.2d 819 (1981); *Beaman v. Sheppard*, 35 N.C. App. 73, 239 S.E.2d 864, *disc. review denied*, 294 N.C. 441, 241 S.E.2d 843 (1978). Any person of ordinary intelligence who has had a reasonable opportunity to observe a moving automobile is competent to testify as to that automobile's rate of speed. *Gore v. Williams*, 58 N.C. App. 222, 293 S.E.2d 282 (1982).

In this case, five witnesses were able to form an opinion as to defendant's speed; four of these witnesses observed defendant's truck immediately prior to the collision. Foye, Martin and Twigg testified they did not see brake lights illuminate on defendant's truck, and did not hear defendant's tires squealing in an effort to slow down. We believe there was sufficient evidence for the jury to determine whether defendant was exceeding the speed limit.

[5] Defendant next argues that the evidence was insufficient to prove the element of proximate cause because the State's evidence did not establish that defendant's exceeding the speed limit or driving while impaired caused Mrs. Thompson's death. Defendant's argument is without merit. If defendant had evidence tending to rebut the State's prima facie case, he could have presented it to the jury. "[W]hen the plaintiff makes a prima facie case the defendant, for the first time, faces the possibility of an adverse jury verdict and must decide whether to introduce evidence in order to lessen that possibility." 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 32 (4th ed. 1993).

The trial court did not err in denying defendant's motion to dismiss for insufficient evidence. The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss "is the same whether the evidence is direct, circumstantial, or both." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). The evidence in this case, including all inferences of fact which may be reasonably deduced therefrom, considered in the light most favorable to the State, was sufficient to take the case to the jury.

No error.

Judges WYNN and HUNTER concur.

This opinion was concurred in by Judge Wynn prior to 1 October 1998.

STATE OF NORTH CAROLINA v. RICKY BRIGHT

No. COA97-963

(Filed 6 October 1998)

1. Evidence— credibility of child—inadmissible expert testimony—harmless error

A physician's testimony that he "believed that [a child kidnapping, rape and sexual offense victim] was a reliable informant" constituted expert testimony as to the child's credibility and was improperly admitted. However, this error was not prejudicial because the physical evidence alone overwhelmingly connected defendant to the crimes charged and supported defendant's convictions of those crimes. [Concurring in result opinion by Judge Greene in which Judge Mark D. Martin concurred.]

2. Appeal and Error— appealability—issue not raised at trial

A defendant in a prosecution for burglary, kidnapping, sexual offense, and rape involving a ten-year-old child waived the issue of release in an unsafe place by not raising it at trial.

3. Criminal Law— jurisdiction—submission to jury

Convictions for rape and sexual offense were vacated where defendant moved at trial to dismiss for lack of jurisdiction, the

trial court denied the motion, implicitly finding that sufficient evidence existed upon which the jury could conclude that the crimes occurred in North Carolina, but the court did not then instruct the jury as to the burden of proving jurisdiction and that it should return a special verdict indicating a lack of jurisdiction if it was not convinced beyond a reasonable doubt.

Judge GREENE concurring in the result.

Appeal by defendant from judgments entered 7 November 1996 by Judge Julius A. Rousseau, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 20 May 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Laura Crumpler, for the State.

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

TIMMONS-GOODSON, Judge.

Defendant was indicted on 12 February 1996 for one count of first-degree burglary, one count of first-degree kidnapping, three counts of first-degree sexual offense, and one count of first-degree rape. These charges were joined for trial, and the case was heard by a jury at the 4 November 1996 Criminal Session of Wilkes County Superior Court. The jury found defendant guilty on all counts, and the trial court sentenced defendant to six aggravated terms of imprisonment, to run consecutively. The pertinent facts follow.

The State's evidence tended to show that on 7 October 1995, ten-year old Queena Lynn Taylor and her family spent the night at a neighbor's trailer. The door to the trailer was unlocked, and a window was open in the living room where Queena and her younger brother were sleeping. Later that night, Queena awoke and found herself in the passenger seat of defendant's car. She was naked and her mouth was covered with duct tape. Defendant, whom Queena knew because he lived in a nearby trailer, ordered her to get in the back seat. Then, he took off his clothes and climbed into the back seat as well. Thereupon, defendant engaged in sexual intercourse with Queena and committed a number of other sexual acts against her, before allowing her to get dressed. Queena testified that while she put on her clothing, she noticed blood on her clothes and on the car seat.

After he and Queena got dressed, defendant drove for some distance on Interstate 81. During the drive, Queena spotted West Virginia signs, and at one point, defendant told her that they were near Charleston, West Virgina. Early the next morning, defendant dropped Queena off at Mountain View Elementary School, which Queena attended. The school was closed, however, and Queena had to find her way home.

When she reached her home, Queena told her mother, who had been searching for her, that defendant had abducted her and that he had touched her inappropriately. After contacting the police, Queena's mother took Queena to Wilkes Regional Medical Center, where she was examined by Dr. Marshall Odom. Dr. Odom's exam revealed that Queena had large contusions on both buttocks, an anal fissure, a laceration on the left side of her vagina, blood in her vagina, and a ruptured hymen. Dr. Odom could not conduct an internal exam because Queena was in a great deal of pain. Therefore, Dr. Odom called Dr. Thomas Frazer of the Wilkes County Child Medical Evaluation Program and asked him to perform an internal exam the following day.

Dr. Frazer examined Queena the following morning and, in addition to Dr. Odom's findings, found a cut at the back of her vagina "similar to the episiotomy that many women experience at childbirth." Dr. Frazer also found several cuts around her anus and an adult pubic hair inside her anal canal. Dr. Frazer questioned Queena about the source of these injuries, and she gave him a detailed account of her experience with defendant.

Detective Lieutenant Farrington of the Wilkes County Police Department attempted unsuccessfully to apprehend defendant at his trailer. Because of their inability to locate defendant, the Wilkes County police contacted the FBI. As part of the effort to secure his arrest, defendant was featured on "America's Most Wanted" and "Unsolved Mysteries." From tips received in response to these programs, defendant was ultimately captured in Nashville, Tennessee.

Following defendant's arrest, the FBI impounded his car and conducted forensic tests on its interior. These tests revealed human blood on the seat cushion and carpet fibers matching those found on Queena's clothing. In addition, a DNA analysis of a section of the crotch of Queena's undergarments disclosed semen with a DNA banding pattern that matched a sample of defendant's blood. The proba-

bility that the DNA found on Queena's undergarments belonged to someone other than defendant was approximately 1 in 2.1 billion.

At the close of the State's evidence, defendant moved to dismiss all of the charges against him. The trial court denied the motion, and defendant presented his defense. The jury deliberated and returned guilty verdicts on all of the offenses charged. Defendant appeals.

Defendant's first argument is that the trial court erred in permitting an expert witness to testify that the complainant, Queena, was a "reliable informant." Defendant contends that this constituted inadmissible expert opinion testimony regarding Queena's credibility. This argument is unpersuasive.

The law governing the scope of expert opinion testimony concerning the credibility of a witness is well established in this state. Under Rule 405(a) of the North Carolina Rules of Evidence, "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." N.C.R. Evid. 405(a). Accordingly, "expert testimony as to the credibility of a witness is not admissible." *State v. Wise*, 326 N.C. 421, 426, 390 S.E.2d 142, 145, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990), *denial of habeas corpus aff'd*, 976 F.2d 729 (4th Cir. 1992).

Defendant objects to the following testimony given by Child Medical Evaluation Physician, Dr. Thomas Frazer, about his interview and evaluation of the victim:

> Queena was interviewed by herself alone with only me in the conference room. She was an intelligent, bright child who is, is or was at that time in the fourth grade at Mountain View Elementary School, and was very able to describe what happened to her with careful detail and without making any inconsistencies, whatsoever. I *believed* that she was a *reliable informant.*

Defendant contends that the description "reliable informant" constituted impermissible opinion testimony regarding the victim's credibility as a witness. However, this statement was not a comment on Queena's credibility as a testifying witness, but was Dr. Frazer's professional observation that at the time of the interview, he "believed" he could rely on the information Queena gave him in forming an opinion as to the source of her injuries. Thus, the statement was proper and admissible.

This conclusion is consistent with our Supreme Court's decisions in *Wise*, 326 N.C. 421, 390 S.E.2d 142, and *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). In *Wise*, the trial court allowed an expert witness to use the word "genuine" in describing the emotions of the minor victim while she recounted the sexual assault against her. Our Supreme Court ruled that the testimony was admissible, since it was not an opinion on the victim's credibility, but "a description of the witness' observation of the victim's emotional state during the counseling session." 326 N.C. at 425, 390 S.E.2d at 145. The Court, therefore, held that the trial court committed no error in admitting the testimony.

The Court held similarly in *Kennedy*. When asked on direct examination about the victim's performance on certain personality and IQ tests, the expert, Dr. Dew, testified that the victim responded in an "honest fashion." Finding this testimony admissible, the Court stated the following reasoning:

> We do not consider the testimony of this witness that the victim answered the test questions in an "honest fashion" to be an expert opinion as to her character or credibility. It was merely a statement of opinion by a trained professional based upon personal knowledge and professional expertise that the test results were reliable because the victim seemed to respond to the questions in an honest fashion: her patient did not attempt to give false responses on a psychological test, thereby skewing the test results and rendering the results unreliable. By this answer Dr. Dew was not saying that she believed the victim to be truthful, but rather that she gave truthful answers to the test questions. The psychologist's testimony went not to the credibility of the victim but to the reliability of the test itself.

320 N.C. at 31, 357 S.E.2d at 366. Applying this reasoning, Dr. Frazer, by stating that Queena was a "reliable informant," "was not saying that [he] believed the victim to be truthful, but rather that she gave [reliable] answers to [his questions about the source of her injuries]." *Id.* Hence, defendant's argument fails.

[2] Next, defendant argues that the trial court erred in denying his motion to dismiss the first-degree kidnapping charge, on the ground that there was insufficient evidence that the victim was released in an unsafe place. Defendant, however, failed to raise this issue below; thus, he is deemed to have waived the issue on appeal. *State v. Patterson*, 103 N.C. App. 195, 405 S.E.2d 200 (1991).

[3] In his final argument, defendant contends that the trial court erred in entering judgment against him on the rape and sexual offense charges, because there was evidence that these offenses occurred in Virginia, rather than North Carolina. Defendant contends that since he challenged the jurisdiction of the trial court, the court was required to submit to the jury the question of whether the rape and sexual offenses were committed in North Carolina. Defendant's argument has merit.

"It is well settled law that an act must have occurred within the territorial boundaries of the state to be punishable as a crime in the state." *State v. Williams*, 74 N.C. App. 131, 132, 327 S.E.2d 300, 301 (1985) (citing *State v. Jones*, 227 N.C. 94, 40 S.E.2d 700 (1946)). The North Carolina courts have jurisdiction over a crime if any of the essential acts forming the offense occurred in this state. *State v. Vines*, 317 N.C. 242, 250-51, 345 S.E.2d 169, 174 (1986). When jurisdiction of a particular crime is challenged, the burden is on the State to prove beyond a reasonable doubt that the offense in question occurred in North Carolina. *State v. Rick*, 342 N.C. 91, 99, 463 S.E.2d 182, 186 (1995) (citing *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502-03 (1977)). If the trial court preliminarily determines that sufficient evidence exists from which a jury could find beyond a reasonable doubt that the crime was committed in North Carolina, the court is obligated to "instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the [crime] occurred in North Carolina, a verdict of not guilty should be returned." *Id.* at 101, 463 S.E.2d at 187 (citing *Batdorf*, 293 N.C. at 494, 238 S.E.2d at 503). "The trial court should also instruct the jury that if it is not so satisfied, it must return a special verdict indicating a lack of jurisdiction." *Id.* (citing *Batdorf*, 293 at 494, 238 S.E.2d at 503). Failure to charge the jury in this manner is reversible error and warrants a new trial. *See id.*

In the case *sub judice*, defendant moved at the close of the State's evidence to dismiss the rape and sexual assault charges against him on the ground that the court lacked jurisdiction. The trial court denied the motions, implicitly finding that sufficient evidence existed upon which the jury could conclude beyond a reasonable doubt that these crimes occurred in North Carolina. However, because jurisdiction had been challenged, the trial court was required to instruct the jury "as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the [rape and sexual assault crimes], or the essential elements of [these

crimes], occurred in North Carolina, it should return a special verdict so indicating." *Id.* at 101, 463 S.E.2d at 187. Since the trial court failed to instruct the jury appropriately, we vacate defendant's convictions of first-degree rape and three counts of first-degree sexual offense and remand for a new trial on these charges.

For the foregoing reasons, we discern no error as to defendant's first-degree burglary and first-degree kidnapping convictions. However, we vacate defendant's convictions of first-degree rape and first-degree sexual offense, and we remand this case to the superior court for a new trial on these charges.

No error in part, vacated and remanded in part.

Judge GREENE concurs in the result with a separate opinion.

Judge MARTIN, Mark D. concurs with Judge GREENE's separate opinion concurring in the result.

Judge GREENE concurring in the result.

[1] I disagree with the majority's conclusion that Dr. Frazer's testimony, in which he stated he "believed that [Queena] was a reliable informant," was "proper and admissible." This statement constituted expert testimony as to Queena's credibility, and as such, was inadmissible. *See State v. Wise*, 326 N.C. 421, 426, 390 S.E.2d 142, 145 ("[E]xpert testimony as to the credibility of a witness is not admissible."), *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990); *State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986) (holding that it was error to allow an expert to testify that she found the victim "believable"). I nonetheless concur in the majority's result, however, because even if the jury had found Queena to be less than credible (which, in any event, is unlikely given that Queena's detailed testimony was consistent with what she had told her family, police, and medical examiners following her abduction), the physical evidence in this case is overwhelming. *See* N.C.G.S. § 15A-1443(a) (1997) (stating that a non-constitutional error is not prejudicial unless there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached"); *cf. Aguallo*, 318 N.C. at 599-600, 350 S.E.2d at 82 (awarding defendant a new trial where there was a "reasonable possibility that a different result would have been reached by the jury" because the physical examination of the victim took place more than six months after the alleged

rape, and defendant's conviction therefore "hinged on the victim's testimony and . . . credibility").

In this case, the physical evidence alone overwhelmingly supports defendant's conviction. As noted in the majority's recitation of the facts, Dr. Odom's examination of Queena in the hours following her abduction revealed large contusions on Queena's buttocks, an anal fissure, a laceration of the left side of Queena's vagina, blood in her vagina, and a ruptured hymen. Dr. Frazer's examination of Queena the next day revealed, in addition to the above, a cut at the back of Queena's vagina and several cuts around her anus. Dr. Frazer also discovered an adult pubic hair inside Queena's anal canal, which was determined to be "microscopically consistent" with defendant's pubic hair. Forensic tests conducted on the interior of defendant's automobile revealed human blood on the seat cushion and carpet fibers matching those found on the clothing Queena had worn on the night of her abduction. A DNA analysis of a section of the crotch of the undergarments Queena had worn revealed semen with a DNA banding pattern that matched a sample of defendant's blood. Expert testimony revealed that the probability that the DNA found on Queena's undergarments belonged to anyone other than defendant was approximately 1 in 2.1 billion. Accordingly, although I believe that Dr. Frazer's testimony as to Queena's reliability was inadmissible, the overwhelming physical evidence in this case specifically connecting defendant to the heinous crimes committed against Queena leads me to conclude that there is no reasonable possibility that the jury would have reached a different outcome in the absence of Dr. Frazer's inadmissible statement.

As to the remaining issues raised by defendant on appeal, I fully concur in the majority opinion.

STATE v. MOORE

[131 N.C. App. 65 (1998)]

STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. ROBERTA JEAN MOORE, DEFENDANT-APPELLANT

No. COA97-1329

(Filed 6 October 1998)

1. Evidence— refreshing recollection—review of interview summary

The trial court did not err in a prosecution for attempted murder, conspiracy, solicitation to commit murder, and assault by allowing a witness to use an interview summary prepared by police officers to refresh his recollection. Although defendant contended that the summary was inadmissible hearsay because the witness did not write or sign the document and the officers who prepared it did not testify, a statement used to refresh a witness's recollection is not required to be signed by the witness or even be the witness's own prior statement. Here, the State asked several questions to which the witness could not recall the answer, the court allowed him to review the document, the witness answered that it refreshed his memory, and he was thereby enabled to testify more accurately.

2. Evidence— interview summaries—use by defendant—objection waived

There was no prejudicial error in a prosecution for attempted murder, conspiracy, solicitation to commit murder, and assault in the use of interview summaries of the co-defendants prepared by officers who did not testify. Any objection was waived by defense counsel's use of the statements.

3. Criminal Law— court's characterization of evidence—no prejudicial error

There was no prejudicial error in a prosecution for attempted murder, conspiracy, solicitation to commit murder, and assault in the court's characterization of police interview summaries as statements and evidence in front of the jury. Both defendants referred to the documents as statements, introduced them into evidence, and sent them to the jury room without objection, and both defendants were allowed to explain what the documents were and the circumstances under which they were created. Moreover, there was overwhelming evidence of guilt.

Appeal by defendant from judgments entered by the Honorable William Z. Wood, Jr., on 30 April 1997 in Forsyth County Superior Court. Heard in the Court of Appeals 24 August 1998.

Attorney General Michael F. Easley, by Associate Attorney General Julie Risher, for the State.

William L. Cofer for defendant appellant.

HORTON, Judge.

The cases of Roberta Jean Moore (defendant Moore) and her co-defendant Donna Jean Duggins (defendant Duggins) were consolidated for trial at the 21 April 1997 Criminal Session of Forsyth County Superior Court; each was convicted by a jury of the offenses of attempted first degree murder, conspiracy to commit murder, solicitation to commit murder, and assault with a deadly weapon with intent to kill inflicting serious injury. Each defendant was sentenced in the presumptive range to terms of a minimum of 314 months and a maximum of 396 months, and each then appealed to this Court. Both appeals involve identical assignments of error and issues.

In May of 1996, defendant Moore and defendant Duggins, who are sisters, worked at a family business, Crescent Inks. Dean Harold Duggins (victim) also worked at the business and was married to defendant Duggins. On the evening of 30 May 1996, the Kernersville Police Department was called to the Duggins' home by defendant Duggins. The victim and a family car were missing and the police found blood on the bathroom door, blood, hair, human body tissue, and pieces of skull on the bed, and blood throughout the house. There were no signs of forced entry. The next morning, the police discovered the victim's car and the unconscious victim nearby in a rural area. He had been assaulted in his bed with a hammer, dragged from his bed and into the car, driven to a rural area and left to die. The victim suffered serious head injuries which resulted in some brain damage; he has no memory of the assault.

At trial, Edward Morgan (Morgan) testified that on 28 May 1996, defendant Moore told him that defendant Duggins would pay him $1,000.00 to kill the victim. Morgan agreed to kill the victim. Defendant Moore picked him up at the bus station and took him back to her apartment. On the evening of the next day, Morgan and defendant Moore drove around looking for a place where they could dispose of the body. Defendant Moore told Morgan that a person

named Jason was going to kill the victim that night, but that if Jason did not kill him, Morgan would do it and they would need a place to take the body. They located a suitable place on a dirt road and discussed the details of the murder, including the use of a hammer to kill the victim.

According to Morgan, when he awoke the next morning, Moore had gone to work and had left a hammer by the bed. That evening defendant Duggins called defendant Moore and Morgan to tell them that the victim was asleep, and they went to the Duggins' home. Defendant Moore let Morgan out of her car near the Duggins' home, and defendant Duggins let Morgan into the home and told him where the victim was sleeping. Morgan repeatedly hit the victim in the head until he thought the victim was dead. Morgan and defendant Duggins then dragged the body of the victim out of the house and Morgan placed the body in the victim's car and drove it to the predetermined dirt road location where he dumped the victim and abandoned the car.

Casey Kirkman (Kirkman) testified that on 28 May 1996, he accompanied defendant Moore's daughter, Rebecca, to the bus station in Winston-Salem to buy a ticket for Morgan to travel from Spartanburg, South Carolina, to Winston-Salem. Kirkman also testified that defendant Moore told him that she and defendant Duggins had asked Morgan to "get" the victim.

Charles Hance (Hance) testified that he took Morgan, defendant Moore, and defendant Moore's children Rebecca and Allen, to South Carolina on 31 May 1996, and left Morgan there. Hance further testified that Rebecca told him that the defendants had planned the beating of the victim.

Police officers conducted separate interviews with several different people following the incident, including both defendants and David Helton (Helton). These interviews were not recorded but typed summaries were later prepared. During the trial the State was allowed to use the typed summaries, over the objections of defendants, on cross-examination of both defendants and Helton. The State did not, however, introduce the statements from the summaries as part of its case in chief. The police officers who had conducted the interviews with defendants and Helton did not testify at trial. Furthermore, the State did not contend that the police summaries were verbatim records of interviews with defendant Moore, defendant Duggins, or Helton.

At trial, Helton was called as a witness for defendant Duggins. After testifying about events on the evening and night of the attack on the victim, Helton was cross-examined by the State about several things he allegedly told the police after the incident occurred. At trial, Helton did not remember telling the police the particular facts which were attributed to him. The State then showed him a page from the summary of his interview with the police and asked him to read it. The defense objected. At the bench conference, the State referred to the document as "the statement [Helton] gave to the police," and stated that it was being used to refresh Helton's recollection. The trial court allowed Helton to read the entire page, and he acknowledged that the document refreshed his recollection.

Defendant Duggins testified as a witness on her own behalf. On direct examination, defendant Duggins stated that she loved her husband, the victim, and had nothing to do with the assault on him. On cross-examination by counsel for defendant Moore, defendant Duggins testified that she had reviewed the "statement," or the "report" of her interview with the police on 31 May 1996. The document was marked as defense exhibit "M4." The State's objection to its admission at that point was sustained. Counsel for defendant Moore referred to the interview between the police and defendant Duggins as a "statement" and continued to examine her about what she had told the police, particularly any omissions she had made in the interview with the police.

During defendant Duggins' cross-examination by the State, she was asked to "briefly look at [her] statement" to see if there was any reference in it as to whether she had been to a particular place on the day of the assault. There was no objection to the question or to the request that defendant Duggins read the document. Defendant Duggins was later asked by the State whether she told the police that defendant Moore "lies all the time." Defendant Duggins denied making the statement, stating that she did say her sister "tell[s] stories sometimes." The State then sought to show defendant Duggins the document which summarized the interview, and her counsel objected. The trial court excused the jury, discussed the matter with counsel, and ruled that the State could have her review the document to refresh her recollection. When the jury returned to the courtroom, the following occurred:

BY MR. ERIC SAUNDERS [Assistant District Attorney]:

Q. Ms. Duggins, let my [*sic*] hand you this piece of paper and ask you to look at it and tell me whether or not that refreshes your recollection about the interview that you had with the police on June the 7th.

(Pause in the proceedings.)

Q. Does that refresh your recollection, ma'am?

A. Some of the stuff in it is not true.

Q. And which part—which part in here would not be true, ma'am?

A. A couple—

Q. Tell the members of the jury which part of that statement you gave on June the 7th wasn't true.

MR. CLELAND: Well, objection, Your Honor.

MR. COFER: Objection.

THE COURT: Overruled.

Defendant Duggins then pointed out that, among other things, the document was inaccurate as to why she did not want guns in the house and that she did not tell the police defendant Moore lied "all the time," but instead had said that defendant Moore lied "sometimes." She stated that she had never signed any "statement" of what she said to the police, nor did she ever write down a "statement."

On recross-examination by the State, the following exchange occurred:

Q. Okay. I'm just asking you to read the statement, ma'am, and tell the members of the jury what is in that statement that is not true.

MR. CLELAND: Object to the characterization again of that document as a statement. It's a police officer's or some police officer's notes. It is not a statement.

MR. SAUNDERS: Judge, Mr. Cofer marked it and wanted her to look at it for some reason or another.

THE COURT: Okay. It's overruled. Go ahead.

(Pause in the proceedings.)

A. Yes.

Q. So except for those things that you mentioned, everything else in that statement is true?

A. Yes, sir.

Defendant Moore also testified in her own behalf. Her counsel questioned her extensively about her purported "statement," which was marked "M2." Defendant Moore confirmed that the summary of her interview with the police was "basically true." On cross-examination, the State again asked her about the "statement," and she again confirmed that nothing she said was misrepresented in the summary of her interview. There was no objection to either the question or answer. Thereafter, the State cross-examined her about the contents of the document. Except for one objection by defendant Duggins' counsel, which was overruled, there were no objections to a long series of questions based on the contents of the interview summary. On redirect examination, defendant Moore's counsel examined her in some detail about the contents of the interview summary. At the close of her evidence, defendant Moore introduced her interview summary "M2" into evidence.

After the jury retired to deliberate, the trial court allowed counsel for defendant Moore to reopen the evidence to introduce into evidence defendant Duggins' 31 May 1996 interview summary "M4." No objection was made by either the State or by defendant Duggins. The written summaries of the interviews with both defendant Duggins and defendant Moore (Exhibits "M2" and "M4") were then sent to the jury room without objection by counsel for the State or either defendant.

The issues are whether (I) the trial court erred in allowing the summaries to be used because they were inadmissible hearsay which violated the defendants' constitutional rights to confront and cross-examine those who prepared the summaries, and (II) the trial court committed reversible error by allowing the State to designate statements from the summaries as the defense witnesses' "prior statements" and as "evidence."

I

[1] Defendant Moore first argues that the typewritten summaries were inadmissible hearsay because the police officers who prepared the documents did not testify nor did defendants or Helton write or sign the summaries. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1992). A statement which is offered for any purpose other than to prove the truth of the matter asserted is admissible even if it was not made by the declarant while testifying at trial. *Hall v. Coplon*, 85 N.C. App. 505, 510, 355 S.E.2d 195, 198 (1987).

A statement used to refresh a witness's recollection is not required to be signed by the witness or even be the witness's own prior statement. *State v. Demery*, 113 N.C. App. 58, 67, 437 S.E.2d 704, 710 (1993). "If upon looking at *any* document [the witness] can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, *for it is not the memorandum that is the evidence but the recollection of the witness.*" *Id.* (quoting *State v. Smith*, 291 N.C. 505, 517, 231 S.E.2d 663, 671 (1977)). Prior statements may be used to impeach a witness where there is proof that on another occasion the witness has made statements inconsistent with his or her trial testimony. *Id.*

In this case, the State asked Helton several questions to which he could not recall the answer. Therefore, the trial court allowed him to review the document in question, and Helton answered that it did refresh his memory. He was thereby enabled to testify more accurately about the contested facts. This is a proper use of a writing to refresh a witness's recollection.

[2] The trial court also did not err in allowing the summary to be used to impeach the testimony of defendant Duggins. N.C. Gen. Stat. § 15A-1443(c) (1997) states that "[a] defendant is not prejudiced by . . . error resulting from his own conduct." *See also State v. Jennings*, 333 N.C. 579, 604, 430 S.E.2d 188, 200 (defendant cannot claim reversible error occurred when he introduces the evidence which he claims is prejudicial or makes no objection when the evidence is brought in), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993).

In this case, any objection to the use of the interview summary to refresh the recollection of or impeach the testimony of defendant Duggins was waived. Counsel for defendant Moore opened the door to the testimony when he asked defendant Duggins on cross-examination if she had an opportunity to read the "statement" she made on the early morning of 31 May 1996, or "the report that was made of

[her] statement." Defendant Moore's counsel referred to the document as a "statement" initially and continued to do so without any motion to strike or objection by defendant Duggins. The document was marked as defense exhibit "M4" by defendant Moore and eventually submitted to the jury. Furthermore, defendant Duggins' counsel examined her about the circumstances of her interview on 31 May 1996, asking her whether she wrote or signed any "statement" and how many police officers were asking her questions during the interview.

As to the use of the summary of defendant Moore's own interview with the police, any error which may have occurred was also waived because of defendant Moore's use of the statements herself. Her own counsel introduced the summary, showed her the summary during trial, and asked whether it was accurate; and she acknowledged that it was. Moreover, there were no objections to a long line of cross-examination about the summary. As a result, any errors in admission are not prejudicial.

II

[3] Defendant Moore also contends that it was reversible error for the trial court to characterize the documents as "statements," and "evidence" in front of the jury. We disagree. Although this may have been improper, any error committed was not prejudicial because both defendants referred to the documents as "statements" on occasion and introduced them into evidence and sent them to the jury room without objection. *See Jennings*, 333 N.C. at 604, 430 S.E.2d at 200. In addition, the jury could not have been misled about the nature of the documents, as both defendant Moore and defendant Duggins were allowed to explain what the documents were and under what circumstances they were created. Defendant Moore has shown no prejudicial error in the State's use of the summaries of the interviews with her, defendant Duggins, or Helton.

Finally we note that, even if it were error to allow in the summaries, there was overwhelming evidence of the guilt of defendant Moore; and any error which resulted was harmless beyond a reasonable doubt. *See State v. Autry*, 321 N.C. 392, 401, 364 S.E.2d 341, 347 (1988).

No error.

Chief Judge EAGLES and Judge MARTIN, Mark D., concur.

ELMER TRIVETTE AND NANCY TRIVETTE, AS CO-ADMINISTRATORS OF THE LATE RANDY JAMES TRIVETTE, AND NANCY TRIVETTE, INDIVIDUALLY, PLAINTIFFS V. NORTH CAROLINA BAPTIST HOSPITAL, INC., DEFENDANT

No. COA97-1557

(Filed 6 October 1998)

1. **Hospitals— emergency treatment—initial screening exam—disparate treatment—federal liability**

The trial court did not err by granting summary judgment for defendant in an action arising from the treatment of decedent at a hospital where plaintiffs contended that there was a genuine issue of material fact as to whether defendant-hospital failed to provide decedent with an appropriate screening examination in violation of the federal Emergency Medical Treatment and Active Labor Act. The key requirement under EMTALA's screening provision is uniform treatment among similarly situated patients regardless of their ability to pay; questions regarding proper diagnosis or treatment are best resolved under state negligence and medical malpractice theories.

2. **Hospitals— emergency treatment—stabilization before discharge—unperceived condition—federal liability**

The trial court did not err by granting summary judgment for defendant in an action arising from the treatment of decedent at a hospital where plaintiffs contended that there was a genuine issue of material fact as to whether defendant-hospital discharged the decedent before stabilizing him in violation of the federal Emergency Medical Treatment and Active Labor Act. A hospital must perceive the seriousness of the medical condition and fail to stabilize it to be liable under EMTALA and cannot be liable under EMTALA for failing to stabilize conditions it did not perceive even if it was negligent in not perceiving the condition. The defendant in this case met its EMTALA duties because it determined prior to discharging decedent that the seizure which it perceived to be decedent's emergency medical condition no longer seriously jeopardized his health.

Judge GREENE dissenting.

Appeal by plaintiffs Elmer and Nancy Trivette from summary judgment entered 7 October 1997 by Judge Sanford L. Steelman in Forsyth County Superior Court. Heard in the Court of Appeals 22 September 1998.

Moore and Brown, by B. Ervin Brown, II, for the plaintiff-appellants.

Kilpatrick Stockton, by J. Robert Elster, Richard S. Gottlieb, for the defendant-appellee.

WYNN, Judge.

Plaintiffs' decedent, Randy Trivette, a severely disabled adult, lived under the total care of his parents all of his life. On May 2, 1996, Randy was taken by ambulance to defendant North Carolina Baptist Hospital because of continuous vomiting, choking, limpness, pallor, and a decrease in mental status. Randy was unconscious at the time he was admitted.

Upon arrival at the emergency room, Randy was given a screening examination which included a battery of tests and chest x-rays. The medical screening and accompanying tests showed, *inter alia*, that his white blood cell count was elevated, his iron levels were low and his eyes were fully dilated. Based on these results, Randy was diagnosed as having a possible seizure, and therefore was admitted to the hospital.

The following morning, Randy's primary care physician determined that Randy's condition had stabilized, and discharged him. Within twelve hours of Randy's discharge, he was taken by ambulance to Forsyth Memorial Hospital where he was diagnosed with gastrointestinal bleeding and a cerebral hemorrhage. Randy stayed at Forsyth hospital for twenty-one days before being discharged. He died approximately four months later.

On July 6, 1997, plaintiffs filed suit against North Carolina Baptist Hospital (hereafter "hospital") alleging violations of the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 13955dd (1994) (hereafter "EMTALA"). Specifically, plaintiffs contend that defendant hospital violated EMTALA by: (1) failing to provide Randy with an appropriate medical screening, and (2) by discharging him before stabilizing his medical condition. Defendant hospital answered plaintiffs' complaint, and thereafter motioned for summary judgment. The trial court granted defendant's summary judgment motion by explicitly relying on the Fourth Circuit's holding in *Vickers v. Nash County General Hosp., Inc.*, 78 F.3d 139 (4th Cir. 1996). We affirm.

I.

Summary judgment is appropriate "if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law." *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). Summary judgment is proper where it appears that even if the plaintiff's facts as alleged are true, the law does not provide for recovery. *Lowder v. Lowder*, 68 N.C. App. 505, 506, 315 S.E.2d 520, 521, *disc. rev. denied* 311 N.C. 759, 321 S.E.2d 138 (1984).

In 1986, Congress enacted EMTALA to address the growing problem of "patient dumping"—the practice of refusing to provide emergency medical treatment to patients unable to pay, or transferring such patients before their emergency conditions are stabilized. *Vickers v. Nash General Hosp. Inc.*, 78 F.3d 139, 142 (4th Cir. 1996). To prevent patient dumping, EMTALA imposes upon hospitals two principal obligations: (1) when an individual seeks treatment in an emergency room, the hospital must provide for an appropriate medical screening examination, and (2) if the screening examination reveals an "emergency medical condition," the hospital must stabilize that condition before transferring or discharging the patient. 42 U.S.C. §§ 1395dd(a), 1395dd(b)(1) (1993). EMTALA imposes these *limited* duties upon hospitals with emergency rooms because EMTALA was primarily, if not solely, enacted to deal with the problem of patients being turned away from emergency rooms for non-medical reasons. *Bryan v. Rectors & Visitors of the Univ. of Virginia*, 95 F.3d 349, 351 (4th Cir. 1996). Moreover, these duties are "limited" in a very critical sense: "EMTALA is not a substitute for state law malpractice actions, and was not intended to guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence." *Power v. Arlington Hosp. Assn.*, 42 F.3d 851, 856 (4th Cir. 1994) (emphasis added).

In the case *sub judice*, plaintiffs argue that the trial court improperly granted defendant's summary judgment motion. Specifically, plaintiffs argue that there are genuine issues of material fact with respect to its two claims; first, that defendant hospital failed to provide Randy with an "appropriate" screening examination in violation of § 1395dd(a), and second that defendant hospital discharged Randy before stabilizing his condition in violation of § 1395dd(b)(1).

A.

[1] Under EMTALA's Medical screening requirement, 42 U.S.C. § 1395dd(a), when an individual comes to a hospital emergency room for treatment, the hospital must "provide for an *appropriate* medical screening examination." EMTALA, however, fails to define the phrase "appropriate medical screening examination" beyond stating that its purpose is to identify "emergency medical condition[s]." *Power*, 42 F.3d at 856. Nonetheless, numerous courts have consistently interpreted this phrase to only require a hospital to develop a screening examination designed to identify emergency medical conditions, and to apply that screening examination uniformly to all patients with similar complaints. *Id. Brooks v. Maryland Gen. Hosp., Inc.*, 996 F.2d 708, 710-11 (4th Cir. 1993); *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 879 (4th Cir. 1992). That is, the key requirement under EMTALA's screening provision is uniform treatment among similarly situated patients regardless of their ability to pay. Given the narrow duties imposed under EMTALA's screening requirement, this provision does not guarantee that the screening examination will result in a correct diagnosis or adequate care.[1] *Baber*, 977 F.2d at 879. Indeed, "questions regarding whether a physician or other hospital personnel failed properly to diagnose or treat a patient's condition are best resolved under existing and developing state negligence and medical malpractice theories of recovery." *Vickers*, 78 F.3d at 142 (*citing Baber*, 977 F.2d at 880).

Appellants contend that Randy was not provided with an "appropriate screening examination" because certain tests recommended by Randy's emergency room doctor were never given. Appellants contend that because the hospital failed to conduct the recommended tests and procedures, the hospital, in essence, "failed to treat" Randy. We find appellants' argument without merit.

As previously stated, a hospital satisfies EMTALA's screening requirement if it uniformly applies a standard medical screening examination. *Brooks*, 996 F.2d at 713. EMTALA, moreover, recognizes a distinction between an initial screening examination and the adequacy and correctness of subsequent treatment. *Vickers*, 78 F.3d at

1. There is still some debate whether a hospital's screening standard can be so low as to constitute a "failure to treat," and hence constitute an EMTALA violation. *Baber*, 977 F.2d at 879 n.7. Although plaintiffs have raised the "failure to treat" issue, we need not address it because we believe that the defendant hospital, by giving Randy a battery of tests and admitting him to the hospital, had an adequate screening procedure which certainly could not equate to a "failure to treat."

143. That is, EMTALA is applicable only to the extent that it requires a hospital emergency room to provide all similarly situated patients with uniform *initial* screening procedures. Once EMTALA's screening requirements are met, the patient's subsequent diagnosis and medical care become the hospital's legal responsibility. *Bryan*, 95 F.3d at 351. Thus, the legal adequacy of that diagnosis and subsequent care is governed by state malpractice law, not EMTALA. *Id.*

In *Vickers*, for example, plaintiff alleged that the defendant hospital violated EMTALA's screening requirement using the following syllogism: decedent arrived at the emergency room with a severe laceration of the head; patients with severe head injuries normally undergo certain tests for intra cranial injury; because decedent did not receive those tests, he received disparate treatment. *Vickers*, 78 F.3d at 143. The Court, however, in ruling against plaintiff noted that the defendant hospital did in fact meet EMTALA's screening requirement because the attending physician repaired the laceration and took some x-rays. *Id.* Although the Court conceded that further tests may have saved the decedent's life, it held that these questions related to improper diagnosis and testing, and thus were the exclusive province of state negligence and malpractice law. *Id.*

Similarly, in *Gerber v. Northwest Hosp. Center, Inc.*, 943 F. Supp. 571 (D. Md. 1996), plaintiff filed suit claiming that the defendant hospital violated EMTALA's screening requirement by not addressing her psychiatric symptoms. Specifically, plaintiff complained that the attending physician should have recognized she was seriously depressed because she repeatedly mentioned that she wanted to kill herself and would rather die than always be ill. *Id.* at 574. The court, after noting that the doctor performed a battery of tests, held for the defendant hospital. *Id.* at 574-75. In so ruling, the court stated that although it was arguable that the physician should have performed more or different tests to reach a different or more comprehensive diagnosis, the physician nonetheless met EMTALA's mandate that he treat all similarly situated patients uniformly during their initial screening examination. *Id.*

Similar to the cases mentioned, appellants in the case *sub judice* contend that the attending physician should have conducted further testing to determine the nature of Randy's ailments. The appellant correctly points out that in this case, unlike in the cases mentioned, the physician actually recommended further testing that was never performed. Nonetheless, "the correctness of the treatment that follows the [initial] screening" is an issue exclusively in the province of

state negligence and malpractice law. Relevant to the case *sub judice* is the fact that the attending physician performed a battery of tests and admitted the patient to remain in the hospital overnight. These actions constitute an "appropriate screening examination" for EMTALA purposes.

Additionally, we note that plaintiff failed to produce any evidence of disparate treatment by defendant hospital toward Randy during this initial screening examination. Indeed, defendant hospital performed what it perceived to be all the necessary tests, and as a consequence of the results of those tests, admitted Randy to the hospital for treatment. These actions do not demonstrate conduct which offends EMTALA's primary goal of preventing patients from being turned away from hospital emergency rooms for non-economic reasons. Therefore, we affirm the trial court's granting of summary judgment on the § 1395dd(a) issue.

B.

[2] According to EMTALA's stabilization requirement, when a hospital determines that an individual has an "emergency medical condition," the hospital must "stabilize" that condition before transferring or discharging the individual. 42 U.S.C. § 1395dd(b)(1) (1994). A condition is deemed an "emergency medical condition" when it "manifests itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in (i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395dd(e). EMTALA's stabilization requirements, however, apply only if the hospital *actually* determines that the patient suffers from an emergency medical condition. *Baber*, 977 F.2d at 883 (emphasis added). Indeed, to be liable under EMTALA's stabilization requirement, "a hospital must actually perceive the seriousness of the medical condition and nevertheless fail to stabilize it." *Vickers*, 78 F.3d at 145. Accordingly, a hospital cannot be liable under EMTALA for failing to stabilize conditions it did not perceive, even if the hospital was negligent in not perceiving.

In the case *sub judice*, plaintiffs allege that defendant hospital violated EMTALA's stabilization requirement by discharging Randy even though he was in exactly the same condition as when he arrived. Plaintiffs argue there is a genuine issue of material fact as to whether Randy's condition was "stabilized" prior to his discharge. In making

this argument, plaintiffs note that there is no record that Randy stopped vomiting, that his blood count improved, or that he even regained consciousness. Although this information is relevant to a medical malpractice or negligence claim, it is of little import to the case *sub judice*.

Defendant hospital, in determining to discharge Randy, concluded that Randy had most likely suffered from a seizure and that his condition had stabilized. There is no evidence that defendant hospital perceived or actually knew of Randy's gastrointestinal bleeding or cerebral hemorrhage. Because the defendant hospital did not perceive or know of this condition, it did not have a duty under EMTALA to stabilize it. Rather, defendant hospital had a duty to stabilize what it perceived to be Randy's emergency medical condition—the seizure. Therefore, when the defendant hospital determined prior to discharging Randy that the seizure no longer seriously jeopardized his health, the defendant hospital met its EMTALA duties. Accordingly, we affirm the trial court's decision to grant summary judgment on this issue.

In conclusion, we find there is no genuine issue as to any material fact, and therefore affirm the trial court's decision to grant summary judgment in this matter.

Affirm.

Judge WALKER concurs.

Judge GREENE dissents in a separate opinion.

This opinion was authored and delivered to the Clerk of the North Carolina Court of Appeals by Judge Wynn prior to 1 October 1998.

Judge GREENE dissenting.

In this case, there is uncontradicted evidence that Randy did not receive certain tests recommended by the emergency room doctor. This evidence presents a genuine issue of fact as to whether Randy was provided an "appropriate screening examination," as required by the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (Supp. 1998). I, therefore, would reverse summary judgment for the defendant hospital and remand.

RILEY BROOKS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PLAINTIFF V. SOUTHERN NATIONAL CORPORATION, SUCCESSOR IN INTEREST TO BB&T FINANCIAL CORPORATION, BRANCH BANKING AND TRUST COMPANY, JOHN A. ALLISON IV, ROBERT ROACH, MARK G. COLLINS AND REBECCA S. PRICE, DEFENDANTS

No. COA97-1193

(Filed 6 October 1998)

1. Administrative Law— failure to exhaust remedies—effectiveness of remedy

The trial court did not err by dismissing claims including fraud arising from the acquisition of a savings bank for failure to exhaust administrative remedies where plaintiff argued that the administrative remedy was not effective because the regulations regarding notice of the acquisition are constitutionally infirm. The publication and actual mailed notice required by N.C.G.S. § 54C-33(d) and the administrative code satisfy the due process standards set out in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, and, despite having actual notice, plaintiff never availed himself of any of the available administrative remedies during the two-year period prior to filing the complaint.

2. Administrative Law— failure to exhaust administrative remedies—similar cases—adverse rulings

The trial court did not err by dismissing claims arising from the acquisition of a savings bank for failure to exhaust administrative remedies where plaintiff argued that the Savings Institution Division of the N.C. Department of Commerce had approved every conversion/merger submitted to it and would have ruled against his position. However, the agency had the authority to hear plaintiff's challenges to the conversion/merger and plaintiff cites no case holding that an administrative remedy is inadequate or futile merely because an agency might rule against a litigant. Prior approval of other conversion/mergers did not necessarily mean that SID would have approved the merger in this case without regard to plaintiff's argument.

3. Administrative Law— exclusivity of remedy—common law claims

The administrative remedy was exclusive as to claims arising from administrative approval of a bank conversion and acquisition, but the trial court properly denied defendant's motion to dis-

miss common law claims which could not have been raised administratively. Plaintiff may pursue those claims in superior court.

Appeal by plaintiff from order, granting in part and denying in part defendants' motion to dismiss, entered 24 June 1997 by Judge Thomas W. Ross in Rockingham County Superior Court. Heard in the Court of Appeals 17 August 1998.

On 30 September 1993, BB&T Financial Corporation (BB&T) acquired Mutual Savings Bank of Rockingham County, SSB (Mutual Savings Bank). Plaintiff Riley Brooks was at that time a depositor in Mutual Savings Bank. Branch Banking & Trust Company (Branch Banking) is a North Carolina chartered commercial bank, wholly owned by BB&T. Southern National Corporation (Southern National), a bank holding company, merged with BB&T.

Brooks filed this action on 29 September 1995 on behalf of a class consisting of all those persons who were depositors in, or borrowers from, Mutual Savings Bank prior to its acquisition by BB&T, excluding defendants and any unnamed officers and directors of Mutual Savings Bank. At all relevant times, defendant John A. Allison, IV (Allison), was the President and Chief Executive Officer (CEO) of BB&T. Defendants Robert Roach (Roach), Mark G. Collins (Collins), and Rebecca S. Price (Price) were at all relevant times officers of Mutual Savings Bank.

Plaintiff alleged that as part of its strategy to acquire healthy savings and loan institutions, BB&T met with the officers and directors of Mutual Savings Bank and conspired to obtain the assets of Mutual Savings Bank at a bargain price in exchange for personal benefits and economic gains by the officers of Mutual Savings Bank. Plaintiff further alleged that: as part of the acquisition process, Mutual Savings Bank became a state savings bank chartered under North Carolina law in 1992; in 1993, the officers and directors of Mutual Savings Bank submitted a plan for conversion/merger to the Savings Institution Division (SID) and recommended approval of the plan by the depositors and borrowers; the ownership equity of Mutual Savings Bank was more than $13 million in 1993, but the recommended sale price was only $7 million; and on 30 September 1993, BB&T acquired Mutual Savings Bank on terms detrimental to plaintiff and other members of his class.

The class action instituted by plaintiff sought compensatory and punitive damages from defendants for the following claims: (1) breach of fiduciary duty/constructive fraud; (2) common law fraud; (3) aiding & abetting; (4) negligent misrepresentation; (5) unfair and deceptive trade practices; (6) civil conspiracy; (7) Chapter 54B and 54C violations; (8) unjust enrichment/constructive trust; and (9) punitive damages. Defendants moved to dismiss the action in its entirety pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and (6) (1990), on grounds that plaintiff had not exhausted the available administrative and judicial remedies, and further, that each claim in the complaint fails to state a claim upon which relief might be granted.

On 24 June 1997, the trial court granted the motion in part, dismissing plaintiff's fifth, seventh, and eighth claims for relief. The trial court also dismissed the first cause of action, insofar as it was based on a breach of fiduciary duty arising by reason of an alleged violation of any duty imposed by any North Carolina statute or any regulations of the Administrator. The trial court's order certified the case for immediate appeal.

Smith, Follin & James, L.L.P., by Norman B. Smith, J. David James, and Margaret Rowlett; and Baker & Boyan, P.L.L.C., by Walter W. Baker, Jr., for plaintiff appellant.

Arnold & Porter, by Alexander E. Bennett; and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips, for defendant appellees.

HORTON, Judge.

Defendants originally complained that this matter was not properly before us for decision since none of plaintiff's claims have been finally determined, but withdrew their objection prior to oral argument in light of the decision of our Supreme Court in *DKH Corp. v. Rankin-Patterson Oil Co., Inc.*, 348 N.C. 583, 500 S.E.2d 666 (1998).

Plaintiff does not contend he actually exhausted any available administrative remedies. He alleges in his complaint that the merger/conversion plan for Mutual Savings Bank was approved by SID, and that N.C. Gen. Stat. § 150B-38 (1995), *et seq.*, "provid[ed] for the possible review of the appropriateness and legality of the . . . actions of the SID in approving the . . . merger/conversion." Plaintiff argues, however, that: (I) no adequate administrative remedy was available to him under either Chapter 150B (1995), the statutes estab-

lishing SID, or SID's own regulations; (II) it would have been futile to pursue available administrative remedies because SID always approved every conversion/merger request; and (III) he was not required to exhaust administrative remedies because the provisions of N.C. Gen. Stat. §§ 54B (1992) or 54C (1991) do not provide an exclusive remedy.

I

[1] It is well settled that a plaintiff must exhaust the administrative process, where that process is "exclusive" and "effective," or risk having his claim barred. *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). "[A]s a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Id.* at 721-22, 260 S.E.2d at 615. However, plaintiff argues, among other things, that the administrative remedy in this case is not effective because the regulations with regards to notice are constitutionally infirm.

Decisions of SID are reviewable under the express provisions of the North Carolina Administrative Procedures Act. N.C. Gen. Stat. § 150B-38(a)(2) (1995) provides that the provisions of Article 3A apply to "the Savings Institutions Division of the Department of Commerce . . . ." Article 3A then sets out requirements of notice and an opportunity to be heard, and requires that each affected agency adopt rules consistent with the statutory provisions for the conducting of hearings. SID has done so. *See* N.C. Admin. Code, tit. 4, 16G.0400, *et seq.* The Administrative Code sets out an initial informal administrative process (N.C. Admin. Code, tit. 4, 16G.0405(a) and 16A.0402), followed by an administrative hearing if the matter cannot be resolved informally (N.C. Gen. Stat. § 150B-38), and finally, for judicial review in the Wake County Superior Court pursuant to N.C. Gen. Stat. § 150B-43 (1995).

Defendant contends plaintiff's argument concerning notice fails at the outset because plaintiff does not have a property interest which entitles him to due process protections. Several decisions of our Fourth Circuit hold that "ownership interests in the mutual association do not rise to the level of a protected property interest." *York v. Federal Home Loan Bank Board*, 624 F.2d 495, 500 (4th Cir.), *cert. denied*, 449 U.S. 1043, 66 L. Ed. 2d 504 (1980); *see also Society for Savings v. Bowers*, 349 U.S. 143, 99 L. Ed. 950 (1955). We will assume, however, for the purposes of argument that plaintiff has standing to

question whether the notice provisions set out in SID's regulations pass constitutional muster.

There were three separate levels of notice in this matter. First, after Mutual Savings Bank adopted a Plan of Conversion and entered into an Agreement and Plan of Reorganization with BB&T on 26 February 1993, there was a public announcement of those events. In addition, copies of the Plan of Conversion were made available to all interested parties at the offices of Mutual Savings Bank. Further, pursuant to SID's regulations, a notice was published in *The Reidsville Review* on 18 March 1993, and in the *Eden Daily News* on 19 March 1993. The notice informed members of Mutual Savings Bank of their right to file objections to the proposed conversion or written comments with SID within 10 days after publication.

Second, after the conversion application was filed with the Administrator and deemed to be substantially complete, Mutual Savings Bank published a notice to that effect in the *Eden Daily News* on 26 July 1993. The notice, which was also posted in Mutual Savings Bank's offices, advised members that: (A) written comments on the application, including objections and supporting materials, would be considered by the Administrator if filed with him in 10 business days; (B) failure to make such comments or objections might preclude administrative or judicial remedies; and (C) the proposed conversion plan and any written comments thereon would be available for inspection in the office of the Administrator. This notice complied fully with the requirements of N.C. Admin. Code, tit. 4, 16G.0405(a).

Third, on 11 August 1993, each member of Mutual Savings Bank was mailed a Prospectus/Proxy Statement, which advised members that the Administrator had made a preliminary approval of the proposed conversion/merger, and advised the members that the Administrator was required to find, prior to final approval, that the transaction was fair to members and that no person would receive an inequitable gain as a result of the transaction.

Plaintiff does not deny that he received a copy of the required mailing. He did not communicate with the Administrator, file any comments, or make any objection to the proposed conversion plan. The plan was approved by vote of the members of Mutual Savings Bank and finally approved by the Administrator on 29 October 1993. Nor did plaintiff submit any petition for a contested case to the superior court within 30 days of the final approval by the Administrator.

We hold that the publication and actual mailed notice which were required by both Chapter 54C (N.C. Gen. Stat. § 54C-33(d)) and the Administrative Code (N.C. Admin. Code, tit. 4, 16G.0510 and 16G.0511) satisfy due process standards set out by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489-90, 99 L. Ed. 2d 565, 572 (1988) (notice by mail required to known holders of protected property interest). Despite having actual notice of the anticipated conversion of Mutual Savings Bank, plaintiff never availed himself of any of the available administrative remedies during the two-year period prior to filing the complaint in the instant case.

II.

[2] Nor may plaintiff excuse himself for failing to exhaust his administrative remedies by arguing that SID would have ruled against his position. Plaintiff does not cite any authority in support of that argument, but does cite several cases in which the administrative remedy was found to be inadequate because the agency in question did not have the power to grant the relief sought.

In *Stocks v. Thompson*, 1 N.C. App. 201, 207, 161 S.E.2d 149, 154-55 (1968), an administrative remedy was inadequate because the agency did not have the power to hear objections to the entire tax list, but individual taxpayers were required to exhaust their "clearly defined and entirely adequate" remedies. In *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 108 N.C. App. 357, 365, 424 S.E.2d 420, 423 (1993), plaintiffs were not required to exhaust administrative remedies where the agency did not have the authority to rule on plaintiff's constitutional challenge.

However, in the instant case, the agency had the authority to hear plaintiff's challenges to the approval of the conversion/merger of Mutual Savings Bank. Plaintiff cites no case holding that an administrative remedy is inadequate or futile merely because an agency might rule against a litigant. Plaintiff argues, however, that prior to the Mutual Savings Bank conversion/merger, SID had approved every conversion/merger submitted to it. We cannot determine from the record or briefs whether any of those transactions were approved in the face of proper objections by affected parties. Merely because SID might have previously approved other conversion/mergers does not necessarily mean that SID would have approved the merger in this case without regard to plaintiff's arguments and objections. Plaintiff's argument is clearly speculative and is thus overruled.

III.

[3] Plaintiff next argues the administrative remedy provided in N.C. Gen. Stat. § 150B is not an "exclusive" remedy. In support of that position, he cites N.C. Gen. Stat. § 54C-78(d) (1991 and Cum. Supp. 1997), which states: "Nothing in this section shall prevent anyone damaged by a director, officer or employee of a State savings bank from bringing a separate cause of action in a court of competent jurisdiction." We disagree with plaintiff's position. As we pointed out above, N.C. Gen. Stat. § 150B-38(a) specifically provides that the provisions of Article 3A of the Administrative Procedures Act apply to SID.

> As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process.

Presnell v. Pell, 298 N.C. 715, 721-22, 260 S.E.2d 611, 615 (1979) (citations omitted).

Insofar as plaintiff's claims in the instant case are grounded in the approval of the conversion/merger by the Administrator, plaintiff had an effective administrative remedy and the right to seek judicial review of the Administrator's decision. Plaintiff waived that remedy through his inaction, and the trial court properly dismissed those claims which could have been raised in the administrative review process. As to those claims, the administrative remedy was exclusive. However, as to certain common law claims which could not have been effectively raised before the Administrator, such as the alleged fraudulent misrepresentations in the prospectus/proxy statement, the trial court properly denied defendants' motion to dismiss. As plaintiff states in his brief, administrative review would have been a "useless and futile act because the facts, circumstances and legal theories which are a basis of this action were not required to be, nor were they

considered by the SID when it approved the merger/conversion . . . ." Plaintiff may now pursue those claims in superior court.

In summary, we conclude the administrative remedies available to plaintiff were adequate, exclusive, and complied with due process considerations. Plaintiff took no action to protect his rights and allowed almost two full years to pass before instituting this action. We note that during that time, the conversion/merger transaction was completed and the parties began to act in reliance on its completion. The trial judge correctly analyzed plaintiff's multiple claims for relief, and dismissed those which had, by their very nature, been part and parcel of the Administrator's decision.

Since we find the claims in question were properly dismissed because of plaintiff's failure to exhaust his administrative remedies, we need not reach the other assignments of error relating to whether the dismissed claims stated a cause of action.

Affirmed.

Chief Judge EAGLES and Judge MARTIN, Mark D., concur.

ROBERT C. FELMET, EMPLOYEE-CLAIMANT v. DUKE POWER COMPANY, INC., EMPLOYER-DEFENDANT, SELF-INSURED

No. COA97-1393

(Filed 6 October 1998)

1. **Workers' Compensation— timely payment—compromise settlement—appealable**

Defendant in a worker's compensation action was not subject to the 10% penalty in N.C.G.S. § 97-18(g) for paying a compromise settlement within 27 days of receipt of the Commission order approving the settlement. Although plaintiff contended that compromise settlements are not appealable, so that employers are liable for the penalty after 24 days, and a statement in *Brookover v. Borden, Inc.*, 100 N.C. App. 754, ostensibly holds that approved compromise settlements are unappealable, the Court of Appeals has never followed such an approach and the Court of Appeals and Supreme Court have consistently heard and decided appeals involving compromise settlements. Fundamental fair-

ness requires a holding that defendant rightfully assumed that it was entitled to appeal its compromise settlement and was accordingly entitled to tender payment within thirty-nine days of the compromise settlement's approval.

2. Workers' Compensation— timely payment—compromise settlement—not a waiver of appeal

A compromise settlement did not amount to a waiver of the right to appeal in an action in which plaintiff sought the 10% penalty under N.C.G.S. § 97-18(g) for payment of a worker's compensation settlement more than ten days after waiving the right to appeal. The fact that cases involving compromise settlements have been heard at the appellate level demonstrates that execution of a compromise settlement does not waive a party's right to appeal; additionally, plaintiff's argument would lead to absurd results which the legislature did not intend.

Appeal by claimant-appellant Robert C. Felmet from an order entered 15 August 1997 by Commissioner Coy M. Vance of the Full Industrial Commission. Heard in the Court of Appeals 20 August 1998.

Seth M. Bernanke, for claimant-appellant Robert C. Felmet.

Morris York Williams Surles & Brearley, by Jennifer Brearly, for defendant-appellee Duke Power Company, Inc.

WYNN, Judge.

Robert Felmet filed three separate workers' compensation claims relating to accidents which occurred while under Duke Power's employ. The claims were scheduled to be heard before Deputy Commissioner Berger when the parties reached an Agreement for Compromise and Settlement and Release ("compromise settlement"). The parties executed the compromise settlement on 3 February 1997, and forwarded it to Deputy Commissioner Berger for approval.

Deputy Commissioner Berger ordered the approval of the Compromise Settlement Agreement on 10 February 1997, and transmitted his order to Duke Power's counsel via facsimile the next day. On 10 March 1997, twenty-seven days after Duke Power's receipt of Deputy Berger's Order, claimant's counsel received payment satisfying the Order's terms.

Following receipt of the settlement amount, claimant moved to compel payment of a 10% penalty, contending Duke Power's payment

was untimely under the time of payment provision of N.C. Gen. Stat. § 97-18 (1997). Specifically, claimant contended he was entitled to receive a 10% penalty payment because: (1) the compromise settlement was unappealable, and therefore given the fifteen day appeal provision of N.C. Gen. Stat. § 97-85 (1997) did not apply, payment was due within twenty-four days; and in the alternative, (2) the compromise settlement constituted a notice of waiver of right to appeal, and therefore initiated the provision of N.C. Gen. Stat. § 97-18(e) (1997) requiring payment within ten days of said notice. On 9 April 1997, Deputy Commissioner Berger denied claimant's motion. Thereafter, the Full Commission, by Order of Commissioner Vance, affirmed Deputy Commissioner Berger's Order. On appeal, claimant assigns as error the Full Commission's denial of his Motion to Compel.

I.

Chapter 97 of the *General Statutes of North Carolina* articulates this State's comprehensive workers' compensation scheme under the short title of the Workers' Compensation Act. *See generally* N.C. Gen. Stat. § 97 (1997). In developing the Workers' Compensation Act, the legislature included numerous sections relating to the timing of workers' compensation payments. *See e.g.*, N.C. Gen. Stat. §§ 97-18, 24, 85 (1997). These sections, by ensuring that a plaintiff receives timely recovery, further one of the Act's primary objects—"to grant certain and speedy relief to injured employees . . . ." *See Cabe v. Parker-Graham-Sexton, Inc.*, 202 N.C. 176, 186, 162 S.E. 223, 229 (1932). That is, by requiring employers and insurers to pay benefits within a stated time limit, these sections "provid[e] swift and sure compensation to injured workers without the necessity of protracted litigation." *See Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982).

At issue in the case *sub judice* are N.C. Gen. Stat. §§ 97-17, 97-18, 97-85 which apply to the timing of appeals and payments. Under N.C. Gen. Stat. § 97-85 (1997), a party must appeal a workers' compensation award to the Full Commission within fifteen days from the date when notice of the award was given. N.C. Gen. Stat. § 97-18(e) (1997) provides that the first installment of compensation "shall become due 10 days from the day following expiration of the time of appeal from the award . . . or the day after notice waiving the right of appeal has been received by the Commission." Lastly, N.C. Gen. Stat. § 97-18(g) (1997) imposes a 10% penalty upon any party that fails to pay benefits within fourteen days after they become due.

Under the preceding payment schedule, employers can avoid being subject to the 10% penalty by tendering settlement payments within thirty-nine days after notice of the award is provided, with liability attaching on the fortieth day. That is, to calculate the date upon which the 10% penalty applies, a person must first consider the fifteen day appeal time provided under N.C. Gen. Stat. § 97-85, then add ten days as provided under N.C. Gen. Stat. § 97-18(e), and finally add fourteen days as provided under N.C. Gen. Stat. § 97-18(g).

Although the payment schedule set forth in sections 97-18 and 97-85 appears to provide an unambiguous schedule regarding payments, there is some question regarding the application of this schedule to compromise settlements. Specifically, two questions must be answered: (1) whether a compromise settlement constitutes an unappealable order, thereby bypassing the fifteen day "stay" set forth in N.C. Gen. Stat. § 97-85, and accordingly making employers liable for the 10% penalty after twenty-four days, as opposed to thirty-nine days; and (2) whether the signing or approval of a compromise settlement constitutes a waiver of the right to appeal and thereby activates the requirement in N.C. Gen. Stat. § 97-18(e) that the first payment "shall become due" within ten days of said waiver.

A.

[1] Under N.C. Gen. Stat. § 97-17 (1997), an employee may settle a workers' compensation claim with his employer so long as the amount of compensation and the time and manner of payment are in accordance with the Workers' Compensation Act. For these settlements to be binding, however, a memorandum of the agreement must be filed with and approved by the Commission. N.C. Gen. Stat. § 97-17 (1997); *Glenn v. MacDonald*, 109 N.C. App. 45, 47, 425 S.E.2d 727, 729 (1993). In approving a compromise settlement, the Commission is acting in a judicial capacity, and therefore, once the Commission approves a compromise settlement, it becomes an award enforceable by court decree. *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 221 S.E.2d 355 (1976).

Claimant, in arguing that compromise settlements are not appealable, cites our decisions in *Glenn v. MacDonald*, 109 N.C. App. 45, 47, 425 S.E.2d 727, 729 (1993) and *Brookover v. Borden, Inc.*, 100 N.C. App. 754, 756, 398 S.E.2d 604, 606 (1990), *disc. rev. denied*, 328 N.C. 270, 400 S.E.2d 450 (1991). In *Glenn*, this Court stated "where there is no finding that the [settlement] agreement itself was obtained by fraud, misrepresentation, mutual mistake or undue influence, the

Full Commission may not set aside the agreement, once approved." *Glenn*, 109 N.C. at 49, 425 S.E.2d at 730 (emphasis added). This statement, however, only demonstrates that the *Full Commission* cannot set aside a compromise settlement except under limited circumstances. This statement in no way implies that a compromise settlement cannot be appealed to this Court.

As for claimant's reliance on *Brookover*, we note this Court did state that an approved compromise settlement is "as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal." *Brookover*, 100 N.C. App. at 756, 398 S.E.2d at 606 (1990). Although this statement ostensibly holds that approved compromise settlements are unappealable, this Court has never followed such an approach. Indeed, both this Court and the Supreme Court of North Carolina have consistently heard and decided appeals involving compromise settlements. *See e.g.*, *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 444 S.E.2d 191 (1994); *Caudill v. Chatham Manufacturing Co.*, 258 N.C. 99, 128 S.E.2d 128, 133 (1962); *Wall v. N.C. Dept. of Human Resources: Division of Youth Services*, 99 N.C. App. 330, 393 S.E.2d 109 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). In the case *sub judice*, we can only assume that Duke Power, when entering into this compromise settlement, relied upon our prior decisions allowing compromise settlement appeals. Duke Power was in no position to rectify the apparent conflict between our words and actions with respect to compromise settlement appeals. Therefore, fundamental fairness requires us to hold Duke Power rightfully assumed that it was entitled to appeal its compromise settlement, and accordingly be entitled to tender payment within thirty-nine days of the compromise settlement's approval.

In sum, we hold that to calculate the date a compromise settlement award becomes due under the Workers' Compensation Act, a party must: (1) allow the fifteen day appeal time set forth in N.C. Gen. Stat. § 97-85; (2) then add ten days pursuant to N.C. Gen. Stat. § 97-18(e); and (3) finally, add fourteen days as required under N.C. Gen. Stat. § 97-18(g). Thus, a paying party liable under a compromise settlement has thirty-nine days from the date the compromise settlement is approved to tender payment, with liability for non-payment attaching on the fortieth day.

In the case sub judice, Duke Power complied with the Commission's order twenty-seven days after the settlement was exe-

cuted. Because Duke Power had thirty-nine days to tender payment, it is not subject to the 10% penalty in N.C. Gen. Stat. § 97-18(g).

B.

[2] Claimant also contends on appeal that Duke Power is subject to the 10% penalty in N.C. Gen. Stat. § 97-18(g) because Duke Power waived its right to appeal by submitting the compromise settlement to the Industrial Commission for approval. According to claimant, Duke Power, by waiving its right to appeal, is subject to the 10% penalty in N.C. Gen. Stat. § 97-18(g) because § 97-18(e) provides that an award becomes due ten days after notice "waiving the right to appeal . . . ." We disagree.

As stated previously, this Court has heard appeals concerning compromise settlements numerous times in the past. *See e.g.*, *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 444 S.E.2d 191 (1994); *Caudill v. Chatham Manufacturing Co.*, 258 N.C. 99, 128 S.E.2d 128, 133 (1962); *Wall v. N.C. Dept. of Human Resources: Division of Youth Services*, 99 N.C. App. 330, 393 S.E.2d 109 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). Indeed, the fact these cases were heard at the appellate level demonstrates that mere execution of a compromise settlement does not waive a party's right to appeal.

Additionally, we cannot accept appellant's argument because it would lead to absurd results. Specifically, N.C. Gen. Stat. § 97-18(e) provides that an award "shall become due 10 days from . . . the day after notice waiving the right of appeal by all parties has been *received* by the Commission." (emphasis added). Therefore, if this court considers a compromise settlement as a waiver of the right to appeal, then an award becomes due ten days after the Commission *receives* the compromise settlement. Accordingly, if the Commission takes 9 days to approve the compromise settlement, then the employer only has two days before the award becomes due. Indeed, in the case *sub judice*, the Commission approved the compromise settlement seven days after receiving it. Therefore, under the appellant's theory, the award was due only four days after the Commission's approval. Surely the legislature did not intend such a result.

In conclusion, both case law and statutory construction guide us to conclude that a compromise settlement does not constitute a waiver of the right to appeal. Accordingly, because the compromise

settlement did not amount to a waiver of the right to appeal, N.C. Gen. Stat. § 97-18(e) was not automatically triggered. Therefore, with respect to this argument only, Duke Power was entitled to take the full thirty-nine days to comply with the Commission's order.

Affirmed.

Judges McGEE and SMITH concur.

This opinion was authored and delivered to the Clerk of the North Carolina Court of Appeals by Judge Wynn prior to 1 October 1998.

DANA L. GARREN, EMPLOYEE, PLAINTIFF-APPELLEE v. P.H. GLATFELTER CO., SELF-INSURED EMPLOYER, (ALEXIS RISK MANAGEMENT SERVICES, INC. SERVICING AGENT), DEFENDANT-APPELLANT

No. COA97-1461

(Filed 6 October 1998)

1. Workers' Compensation— occupational disease—rotator cuff injury

The Industrial Commission correctly determined that plaintiff had carried her burden in establishing the existence of an occupational disease where plaintiff's work involved loading bobbins on a machine and later removing the bobbins and stacking them on a pallet and she alleged a rotator cuff injury. The Commission's fact finding will not be disturbed on appeal if supported by any competent evidence and the evidence here tended show that plaintiff's occupation required repetitive activity involving her shoulders.

2. Workers' Compensation— employment as significant contributing factor—evidence sufficient to support finding

A worker's compensation plaintiff met her burden of showing that her employment caused or was a significant contributing factor to her torn rotator cuff, and the record reflects at least competent evidence to support the Commission's conclusion on this point, where one of plaintiff's doctors acknowledged the difficulty in pinpointing the exact cause of plaintiff's condition

because she also cleaned houses, but made clear that both activities could have contributed to her condition, at the very least.

3. Workers' Compensation— videotape of job—not an accurate reflection of conditions

The Industrial Commission did not err by "ignoring" a videotape offered by defendant in deciding that plaintiff's work significantly contributed to her torn rotator cuff where defendant contended that the videotape accurately reflected plaintiff's job, but the man used as a model in the video is much larger and certainly much stronger than plaintiff and one of plaintiff's doctors testified that he would not base his answers on the tape because the video was planned, did not show the patient, did not show the material that patient was using at the time of the injury, and did not document the forces or weights involved.

4. Workers' Compensation— cause of condition—non-work related factors

The Industrial Commission did not err by finding that plaintiff's torn rotator cuff is work related where defendant contended that she injured her shoulder cleaning houses. Plaintiff told both of her doctors that her shoulder problems began in early 1991 and she only began cleaning houses in about August of 1993. N.C.G.S. § 97-53(13) does not require that the conditions of employment be the exclusive cause of the occupational disease and a medical expert's overall opinion is not rendered incompetent merely because that expert recognizes other possible causes of plaintiff's condition.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 28 August 1997. Heard in the Court of Appeals 27 August 1998.

David Gantt for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Jack S. Holmes and John H. Ruocchio, for defendant-appellant.

McGEE, Judge.

Defendant P.H. Glatfelter Co. appeals from opinion and award of the North Carolina Industrial Commission awarding plaintiff compensation of $466.00 per week from 5 April 1994 until plaintiff returns to work or until further order of the Commission. The award arose

from plaintiff establishing she suffers from an occupational disease, specifically a rotator cuff tear. Defendant was ordered to pay plaintiff's medical bills as they relate to her occupational disease and to provide vocational rehabilitation.

Plaintiff was employed by defendant for seventeen years and worked as a reclaim operator from 13 January 1992 until 5 April 1994, her last day of work. From April 1993 to April 1994, plaintiff also worked part-time as a relief supervisor. The Commission's findings of fact stated that as a reclaim operator, plaintiff ran two machines at once. She lifted defective bobbins of cigarette paper onto the reclaim machine, threaded the paper through the machine and attached it to an end spool. She ran the bobbin through the machine onto another core, creating a new bobbin free of defects. Plaintiff then removed the bobbin and stacked it on a pallet, sometimes up to fifty-five bobbins high. Plaintiff ran seventy to eighty bobbins, weighing six to twenty pounds, during an eight hour shift. When the cores of the bobbins were damaged, plaintiff frequently beat them into place with her hands.

Plaintiff's supervisor, Carolyn Owenby, testified that in the spring of 1994 plaintiff complained of a "rotary cuff" injury. At that time, however, Owenby testified plaintiff did not seek assistance from her employer regarding her injury. Rather, plaintiff stated she believed she had injured her shoulder cleaning houses. Plaintiff, working with an assistant, supplemented her income with defendant by cleaning ten to twelve houses per week for eight months, ending in April 1994.

Plaintiff testified she first felt pain in her shoulder in 1991, three years before going to the doctor. Plaintiff went to her family doctor, Dr. James Keeley, "before March" of 1994, and received a cortisone shot in her arm. The cortisone shot did not help, and plaintiff went to an orthopaedic surgeon, Dr. Angus W. Graham, III, on 17 March 1994. Dr. Graham diagnosed plaintiff with a rotator cuff tear and performed three surgeries on plaintiff over a six-month period. The surgeries were unsuccessful. Plaintiff consulted Dr. James S. Thompson on 31 January 1995, and Dr. Thompson performed a fourth surgery, which was more successful. Dr. Thompson recommended plaintiff undergo physical therapy before returning to work.

I.

[1] Defendant first argues the Commission erred in concluding that plaintiff's rotator cuff tear was the result of an occupational disease, and that plaintiff was disabled as a result. We disagree.

An occupational disease is defined as:

> Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53(13) (1991). In *Perry v. Burlington Industries, Inc.*, 80 N.C. App. 650, 343 S.E.2d 215 (1986), our Court stated:

> A disease is an occupational disease compensable under N.C. Gen. Stat. 97-53(13) if claimant's employment exposed him "to a greater risk of contracting this disease than members of the public generally . . ." and such exposure "significantly contributed to, or was a significant causal factor in, the disease's development."

Perry at 654, 343 S.E.2d at 218 (quoting *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983)). Three elements are required to prove a compensable occupational disease:

> (1) the disease must be characteristic of a trade or occupation, (2) the disease [must not be] an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of causation, *i.e.*, proof of a causal connection between the disease and the employment.

Perry at 654, 343 S.E.2d at 218 (citation omitted). There is sufficient evidence in this case to support the Commission's finding that plaintiff has in fact developed an occupational disease while in the course and scope of her employment.

The standard by which we review decisions by the Industrial Commission was stated in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986): "The Commission's fact findings will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding." *Peoples* at 432, 342 S.E.2d at 803 (quoting *Jones v. Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965)).

The evidence tends to show that plaintiff's occupation required repetitive activity involving her shoulders. Plaintiff lifted bobbins weighing from six to twenty pounds. Plaintiff, who is five feet and one inch tall, also stacked bobbins on top of each other, which involved

overhead lifting. Plaintiff testified that some days the overhead lifting that was required lasted "all day long." Plaintiff also had to frequently beat the bobbins into place because the cores were damaged.

Both of plaintiff's medical experts testified in their depositions that the activities of plaintiff's job could have caused her occupational disease. In response to the question of whether plaintiff's job was a significant contributing or causal factor to plaintiff's condition, Dr. Graham stated, "I would say that the answer could be yes; that either it could be contributing and it could be causal." Dr. Graham stated that using the upper extremities in a repetitive fashion involving "excessive stress," or "jerking or pulling," could "certainly have been an aggravating activity." He stated that based upon an individual's level of fitness and body strength, this repetitive, excessive stress "could actually be a causal factor." Dr. Thompson also stated in his deposition: "[S]pecifically, the activities that could aggravate acromioclavicular joint problems, impingement or rotator cuff disease would be placing and removing the bobbins from the spindle, tightening the nut and especially loosening the nut from the spindle, lifting the bobbins and stacking the bobbins." Both doctors also testified that due to her occupation, plaintiff had a greater increased exposure to rotator cuff injury than members of the general public.

Based upon the medical testimony, the Commission correctly determined that plaintiff had carried her burden in establishing the existence of an occupational disease.

II.

[2] Defendant next contends that plaintiff's employment did not significantly contribute to or cause her shoulder condition. We disagree.

In his deposition, Dr. Graham was asked whether he had an opinion to a reasonable degree of medical certainty whether plaintiff's work as a reclaim operator was a "significant contributing or causal factor" of her condition. Dr. Graham stated "the answer could be yes," based in part on the fact that plaintiff's condition was "chronic in development, meaning slow in onset." Dr. Graham acknowledged the difficulty in pin-pointing the exact cause of plaintiff's condition, as plaintiff also cleaned houses six days a week. However, Dr. Graham made clear that, at the very least, both activities could have contributed to the condition of plaintiff's shoulder. In his deposition, the following exchange took place between plaintiff's counsel and Dr. Graham:

Q: And do you have an opinion, satisfactory to yourself and to a reasonable degree of medical certainty, as to whether or not [plaintiff's] acts and work as you saw on the video over the 16, 17 years placed her at a greater risk to getting a rotator cuff problem that you treated her for than the general public as a whole that didn't work at a place like [defendant's], doing the kind of work you saw on the video?

Mr. Holmes: Objection.

A: I think by virtue of the fact that she's using her upper extremities, the answer is probable—is "yes."

. . .

Q: Do you have an opinion . . . as to whether or not the work that [plaintiff] did at [defendant's] aggravated or accelerated the problems she had that you treated her for concerning her rotator cuff?

A: It could have aggravated it, and it could have accelerated it.

In accordance with N.C. Gen. Stat. § 97-53(13) and *Perry,* we agree with the Commission that plaintiff has met her burden in showing her employment with defendant caused or was a significant contributing factor to her ailment. In following our standard of review for cases from the Industrial Commission, we also find the record reflects at least "competent evidence" to support the Commission's conclusion on this point.

III.

[3] Defendant next argues that a videotape it offered into evidence accurately reflected plaintiff's job as a reclaim operator, and the Commission erred by "ignoring" the videotape in making its decision. The videotape tended to show plaintiff's job as a light-duty position, involving no overhead lifting. Defendant, therefore, contends plaintiff's job with defendant could not be the source of her rotator cuff tear. The videotape was stipulated into evidence; both plaintiff and her supervisor, Carolyn Owenby, testified the videotape accurately depicted the reclaim operator position. To the extent the videotape accurately reflected the position of a reclaim operator, we agree with defendant's assessment. We disagree, however, that the videotape accurately portrayed the position in relation to plaintiff. Thus, we do not agree with defendant's assertion that the videotape proves that plaintiff's position as a reclaim operator could not have been a significant causal factor of plaintiff's rotator cuff tear.

The videotape showed the reclaim operator position as a light duty position, not involving repetitive or strenuous tasks using the shoulder. The videotape depicted a man placing and removing bobbins from a spindle, tightening the nut that secures the bobbins, loosening the nut from the spindle, and lifting and stacking the bobbins. However, the man used as a model in the video is much larger and certainly much stronger than plaintiff. Plaintiff is five feet and one inch tall, weighs approximately 114 pounds and, as noted by Dr. Thompson, has "thin arms." The man in the video was not forced to beat the cores of the bobbins, nor place bobbins on a pallet that required overhead lifting, both of which plaintiff testified she often did. Dr. Thompson stated that he would not base any of his answers as to whether plaintiff had sustained a shoulder injury at work on the videotape:

> Because there are no forces measured on the tape, the weight of the bobbins is not documented, the force required to remove the bobbins from the spindles is not documented, the force required to place the spindle on the—or place a bobbin on the spindle is not documented, the videotape is done by a man who's much larger than [plaintiff], the videotape is planned.
>
> It's not the patient on the videotape. It's not the bobbins that [plaintiff] was using at the time.

For these reasons, we find no error by the Commission as to this argument.

IV.

[4] Defendant contends the medical evidence presented establishes that plaintiff's condition is not work related. Specifically, defendant argues plaintiff injured her shoulder cleaning houses, which plaintiff did approximately six evenings per week for eight months ending in April 1994.

Plaintiff testified she told both Dr. Graham and Dr. Thompson that her shoulder problems began in early 1991. Plaintiff only began cleaning houses in approximately August of 1993. We have previously held that N.C. Gen. Stat. § 97-53(13) does not require the conditions of employment to be the exclusive cause of the occupational disease in order for it to be compensable. *Humphries v. Cone Mills Corp.*, 52 N.C. App. 612, 279 S.E.2d 56, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 832 (1981); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d

359 (1983). Assuming *arguendo* that plaintiff's job cleaning houses aggravated or otherwise affected plaintiff's shoulder, plaintiff's claim would nevertheless be compensable. Merely because a medical expert recognizes other possible causes of the plaintiff's condition, the expert's overall medical opinion is not rendered incompetent. *Price v. Broyhill Furniture*, 90 N.C. App. 224, 368 S.E.2d 1 (1988); *see also Perry*, 80 N.C. App. 650, 343 S.E.2d 215 (1986) (holding physician's testimony on cross-examination that employee's cigarette smoking was probably more significant contributing factor than his occupation did not invalidate conclusion that employee had compensable occupational disease). Further, our Supreme Court has recognized that the Commission is the fact-finding body in workers' compensation cases, and the scope of appellate review of questions of fact is limited. *Peoples* at 432, 342 S.E.2d at 803 (citing *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976)). "The authority to find facts necessary for an award is vested exclusively in the Commission." *Id.* (citing *Moore v. Electric Co.*, 259 N.C. 735, 131 S.E.2d 356 (1963)).

For the above reasons, we hold the Commission correctly concluded that plaintiff's employment with defendant significantly contributed to, or was a significant causal factor in plaintiff's occupational disease.

Affirmed.

Judges WYNN and HUNTER concur.

This opinion was concurred in by Judge Wynn prior to 1 October 1998.

BIGGER v. VISTA SALES AND MARKETING

[131 N.C. App. 101 (1998)]

LEIGH BIGGER AND WILLIAM J. BIGGER, PLAINTIFFS v. VISTA SALES AND MARKETING, INC., LOUISE ALDERSON, STATE FARM GENERAL INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, BOBBY R. BEBBER, NEW YORK LIFE INSURANCE ANNUITY CORPORATION AND KENNETH P. LOVELACE, DEFENDANTS

No. COA97-1604

(Filed 6 October 1998)

1. Insurance— agent—failure to advise purchase of workers' compensation coverage—liability to employee

The trial court did not err by granting a 12(b)(6) dismissal for defendants in an action by an injured employee alleging that an insurance agent had a duty to recommend to the company the purchase of workers' compensation insurance. Vista Sales, the employer of plaintiff Leigh Bigger, never asked the agent to procure workers' compensation insurance and the evidence of a 28 year relationship with the president of Vista was insufficient to find that the agent impliedly undertook to advise plaintiffs.

2. Insurance— agent—failure to advise purchase of workers' compensation coverage—standing of employee to sue

Plaintiffs lacked standing to bring an action alleging that plaintiff Leigh Bigger was harmed by an insurance agent's negligent failure to advise Ms. Bigger's employer that workers' compensation insurance was required by law. Even assuming that the agent had a duty to advise the employer, this in no way establishes an action for third parties. Moreover, there is no merit in the contention that plaintiffs have standing because Ms. Bigger, as an employee, would have been an intended third-party beneficiary of the workers' compensation insurance; any benefit that Ms. Bigger could have derived from defendants' advice is at best speculative.

3. Emotional Distress— allegations—insufficient

The trial court did not err by granting defendants' Rule 12(b)(6) motion to dismiss a claim for the negligent infliction of emotional distress by the husband of an injured employee arising from the failure of the employer to obtain workers' compensation insurance and the failure of the insurance agent to advise that workers' compensation insurance was required by law. The family relationship between plaintiff and the injured party is insufficient, standing alone, to establish the element of foreseeability.

Plaintiffs here merely alleged that William Bigger was Leigh Bigger's husband and did not allege any knowledge by defendants that William Bigger was susceptible to emotional distress.

Appeal by plaintiffs from an order entered on 7 March 1996 by Judge Dennis Winner in Buncombe County Superior Court. Heard in the Court of Appeals 17 September 1998.

Morris York Williams Surles & Brearly by Attorney Thomas E. Williams for plaintiff-appellants.

Attorney John C. Clinger for defendant-appellees Bebber and State Farm Companies.

WYNN, Judge.

Leigh Bigger was in Defendant Vista Sales and Marketing's ("Vista Sales") employ at the time of her injury which arose out of and in the course of her employment. Thereafter, she presented a claim against Vista Sales before the Industrial Commission. On 2 April 1997, the Full Commission affirmed the Deputy Commissioner's Opinion and Award ordering Vista Sales to compensate Bigger for all her medical expenses and temporary total disability.

Vista Sales, in violation of North Carolina law, did not carry a policy providing workers' compensation insurance, nor did it qualify as a self-insured employer at the time of the accident. Therefore, Bigger was unable to collect the amount of the aforementioned compensation. William Bigger, as a result, incurred the medical expenses and other expenses associated with providing and caring for his wife. Consequently, the Biggers filed a complaint in superior court on 26 October 1995 against Vista Sales, Louise Alderson, State Farm General Insurance Company, State Farm Fire and Casualty, Bobby R. Bebber, New York Life Insurance Company, New York Life Insurance Annuity Corporation, and Kenneth Lovelace.

The trial court dismissed the Biggers' claims against Bebber and the State Farm Defendants on 7 March 1996. Additionally, summary judgment was entered in favor of New York Life Insurance Company, New York Life Insurance Annuity Corporation, and Kenneth Lovelace on 2 January 1997. On 30 September 1997, the Biggers took a voluntary dismissal without prejudice as to the other defendants.

On appeal, the Biggers contend the trial court erred in granting the defendant's 12(b)(6) motion. Specifically, the Biggers argue three

reasons why the complaint states a claim upon which relief can be granted: (1) Bebber, an insurance agent of State Farm, negligently failed to recommend that Vista Sales purchase workers' compensation insurance; (2) the Biggers had standing to bring suit; and (3) William Bigger had a cause of action against the defendants for negligent infliction of emotional distress.

"Under Rule 12(b)(6), a claim should be dismissed where it appears that plaintiff is not entitled to relief under any set of facts which could be proven." *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 299, 435 S.E.2d. 537, 541 (1993) (citing *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 401 S.E.2d 133 (1991)). Therefore, "[t]he question for the [appellate] 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 can be granted under some legal theory, whether properly labeled or not." *Id.* at 300, 435 S.E.2d. at 541, (citing *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987)).

Contrary to plaintiffs' assertions, the complaint when treated as true, does not state any sufficient claim upon which relief can be granted. Accordingly, the trial court was correct in granting the defendants' 12(b)(6) motion to dismiss.

I.

[1] The Biggers first argue the dismissal was incorrect because Bebber, as an insurance agent, had a duty to recommend that Vista Sales purchase workers' compensation insurance, or in the alternative, to inform Vista Sales that this insurance was required by law. Further, they contend this duty was imputed to the State Farm Defendants under a theory of respondeat superior. We disagree.

In the present case, Bebber procured a State Farm general commercial liability insurance policy for Vista Sales after discussing its insurance needs. This policy was subsequently renewed. Vista Sales, however, never asked Bebber to procure workers' compensation insurance. Accordingly, we must determine whether Bebber had a duty to advise Vista Sales to purchase workers' compensation even though no such request for coverage was made.

As correctly noted in the Biggers' brief, North Carolina has recognized a cause of action against an insurance agent for negligent advice. *See R. Angell Homes, Inc. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 303 S.E.2d 573 (1983); *See also Bradley Freight Lines, Inc., v. Pope, Flynn & Co., Inc.*, 42 N.C. App. 285, 256 S.E.2d 522

(1979). Bebber, however, could not have given negligent advice regarding workers' compensation insurance given that Vista Sales never inquired about such coverage.

The Biggers compared the present case to *Fli-Back Co., Inc. v. Philadelphia Manufacturers Mut. Ins. Co.*, 502 F.2d 214 (4th Cir. 1974) in which the Fourth Circuit Court of Appeals held that as a result of the insurer's conduct, it could not deny coverage for its failure to advise the insured that the coverage did not extend to the insured's West Building. In *Fli-Back*, Philadelphia Manufacturers Mutual (PMM) began insuring the plaintiff in 1955. At that time, PMM notified Fli-Back that it could provide low-cost mutual coverage for all of Fli-Back's manufacturing complex except the West Building. For the West Building, PMM offered to secure coverage from the affiliated insurance company, Affiliated FM. In 1960, Fli-Back purchased business interruption insurance from PMM. PMM, however, did not inform Fli-Back that the policy excluded the West Building and did not offer to secure business interruption insurance coverage for the West Building from Affiliated FM, even though Affiliated FM was in the business of writing such coverage.

The *Fli-Back* court found the aforementioned evidence raised a strong inference that PMM accepted a continuing obligation to advise Fli-Back of its insurance needs. In the case sub judice, unlike *Fli-Back*, Bebber and Vista Sales never discussed the issue of workers' compensation coverage. We find this difference to be of manifest importance, and therefore, we do not find *Fli-Back* to be controlling in the present case.

The Biggers contend the defendants were liable for their failure to advise Vista Sales regarding workers' compensation insurance because Bebber impliedly undertook to advise the insured. Other jurisdictions have held that an implied undertaking to advise may be shown if: (1) the agent received consideration beyond the mere payment of the premium; (2) the insured made a clear request for advice; or (3) there is a course of dealings over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on. *See Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471, 377 S.E.2d 343, 347 (1988) (holding that defendants were under no duty to advise insured of the employee exclusion in his policy or to advise insured that he needed worker's compensation insurance); *Mullins v. Commonwealth Life Ins.*, 839 S.W.2d 245, 248 (Ky. 1992) (holding

that an insurer and agent had no duty to advise as to the availability of optional coverage).

Paragraph 25 of the Biggers' Complaint, as amended, states that:

> 25. For a period of approximately 28 years prior to October 30, 1992, Bebber acted as an insurance agent for Alderson, provided her with insurance policies, and generally handled her insurance needs. Following the incorporation of Vista Sales, and prior to the October 30, 1992, Alderson, while acting as the President, Director and/or controlling shareholder of Vista Sales, discussed with Bebber the nature of the business conducted with Vista Sales.

The Biggers failed to provide any evidence regarding the extent of the course of dealings between Bebber and Vista Sales, and merely alleged the existence of a 28 year relationship between Bebber and Alderson. We do not find the allegation that Bebber acted on behalf of Alderson for 28 years to be sufficient evidence to establish a course of dealings between Bebber and Vista Sales, which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on. *Id.* Without any additional evidence, we do not find that Bebber impliedly undertook to advise the Biggers.

Moreover, "it is . . . well established that an insurance agent is not obligated to assume the duty of procuring a policy of insurance for a customer." *Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 561, 393 S.E.2d 306, 307 (1990) (holding that evidence was insufficient to show that agent was liable for failure to procure or maintain insurance on a house after construction). Rather, "an insurance agent has a duty to procure additional insurance for a policyholder at the request of the policyholder." *Phillips v. State Farm, Mut. Auto., Ins. Co.*, 129 N.C. App. 111, 497 S.E.2d 325, 327 (1998) (citation omitted). "[This] duty does not, however, obligate the insurer or its agent to procure a policy for the insured which had not been requested." *Id.* (citation omitted). To hold Bebber responsible for insurance coverage beyond that requested by Vista Sales would inappropriately place the burden on the insurance agent and insurance company to procure liability insurance for the employer. Consequently, we can not hold that Bebber's failure to advise Vista Sales regarding workers' compensation coverage was negligent.

Furthermore, we find no merit in the Biggers' contention that even if the defendants were not neglient for the failure to recommend

that Vista Sales procure workers' compensation, they were still negligent for failing to advise Vista Sales that workers' compensation coverage was required by law. Therefore, plaintiffs' first argument is rejected.

II.

[2] Next, the Biggers argue they have standing to bring this action because Leigh Bigger was harmed by Bebber's negligent failure to advise Vista Sales that workers' compensation insurance was required by law. We disagree.

In this regard, the Biggers compare the present case to *Johnson v. Smith*, 58 N.C.App. 390, 293 S.E.2d 644 (1982) in which this Court reversed the dismissal of plaintiff's action against the defendant insurance agent for negligently failing to procure insurance against a designated risk. Even if we assume that Bebber had a duty to advise Vista Sales about the need to purchase workers' compensation insurance, this in no way establishes an action for third parties such as the plaintiffs. Accordingly, we can not agree with the Biggers' assertion that the failure to procure insurance is similar to the failure to advise. Thus, we do not find the *Johnson* case to be applicable.

Moreover, we find no merit in the Biggers' contention that they have standing because Leigh Bigger, as an employee of Vista Sales, would have been an intended third-party beneficiary of the workers' compensation insurance. Although "[t]he third party beneficiary doctrine is well established in our law," in the instant case, any benefit that Bigger could have derived from the defendants' advice to Vista Sales regarding workers' compensation insurance is at best speculative. *Lammonds v. Aleo Mfg. Co.*, 243 N.C. 749, 752, 92 S.E.2d 143, 145 (1956). Further, there is no guarantee that Vista Sales would have followed defendants' advice and actually purchased workers' compensation insurance. That is, we do not recognize an action for a third party claiming to be a beneficiary of a nonexisting contract. Accordingly, we reject the Biggers' second argument.

III.

[3] Lastly, the Biggers argue that William Bigger may maintain this action because he has a claim for negligent infliction of emotional distress. "To state a claim for negligent infliction of emotional distress under North Carolina law, the plaintiff need only allege that '(1) the defendant negligently engaged in conduct, (2) it was reasonably fore-

seeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause severe emotional distress.' " *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (quoting *Johnson v. Ruark, Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d. 85, 97 (1990)).

Here, the Biggers argue that defendants' conduct caused William Bigger to suffer severe emotional distress because he was required to incur great expense for Leigh Bigger's medical care and treatment as a result of her compensable work injury. In addition, the Biggers allege this expense placed great financial strain and hardship upon William Bigger, and consequently, he was required to seek professional psychiatric and psychological care and treatment for severe emotional stress.

"[T]he family relationship between plaintiff and the injured party for whom plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability." *Anderson v. Baccus*, 335 N.C. 526, 533, 439 S.E.2d 136, 140 (1994). In their complaint, the Biggers merely alleged that William Bigger was Leigh Bigger's husband. Further, they did not allege any knowledge on the part of the defendants that William Bigger was susceptible to emotional distress. Thus, even if defendants' actions had been negligent, given the fact that his emotional distress was too remote to be reasonably foreseeable, William Bigger could not have maintained an action based on negligent infliction of emotional distress. We therefore reject plaintiffs' third argument.

For the reasons stated above, we find that the Biggers' complaint did not state a claim upon which relief could be granted and the trial court was correct in granting the 12(b)(6) motion to dismiss.

Affirmed.

Judges McGEE and HUNTER concur.

This opinion was authored and delivered to the Clerk of the North Carolina Court of Appeals by Judge Wynn prior to 1 October 1998.

IN RE 1990 RED CHEROKEE JEEP

[131 N.C. App. 108 (1998)]

IN RE 1990 RED CHEROKEE JEEP, VIN 1J4FJ38L4LL146261

No. COA97-964

(Filed 6 October 1998)

1. Motor Vehicles— forfeiture—standing

The Town of Waynesville had no standing to petition for an order of forfeiture of a vehicle under N.C.G.S. § 14-86.1 where the vehicle was used to transport a stolen safe. By the statue's terms, a forfeiture is a criminal proceeding and the authority to prosecute criminal actions rests exclusively with the district attorneys; moreover, other statutory provisions indicate a plain legislative intent that only district attorneys are to prosecute forfeiture proceedings under N.C.G.S. § 14-86.1.

2. Motor Vehicles-seizure— search warrant—standing to request

The trial court erred by denying for lack of standing petitioner's motion to seize a motor vehicle used to transport a stolen safe. Under the facts of this case, the vehicle may be seized under N.C.G.S. § 14-86.1 only pursuant to a search warrant. Although only justices, judges, clerks and magistrates may issue search warrants and only law enforcement officers may execute them, any person or entity may apply for a search warrant.

Appeal by petitioner, the Town of Waynesville, from order entered 2 May 1997 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 18 May 1998.

Brown, Queen & Patten, PA, by Frank G. Queen, and Brown, Ward & Haynes, PA, by Michael Bonfoey, for petitioner-appellant the Town of Waynesville.

No counsel contra.

LEWIS, Judge.

This case involves an effort by the Town of Waynesville ("the Town") to have a Jeep seized and forfeited to the Town for use by the Waynesville Police Department. The superior court judge denied the "Motion for Seizure Order and Forfeiture" filed by the Town on the ground that petitioner lacked standing to bring the motion. We af-

firm the ruling in part, reverse it in part, and remand the case to the superior court.

The Jeep at issue was allegedly used by Aimee Nicole Morgan to transport a stolen safe from a restaurant to another location in order to force it open and steal its contents. On 24 January 1996, Morgan pled guilty to aiding and abetting a felonious larceny.

On 2 February 1996, the Town of Waynesville filed a "Motion for Seizure Order and Forfeiture" pursuant to N.C. Gen. Stat. § 14-86.1 (1993). The motion was filed under the docket number of the criminal case in which judgment was rendered against Ms. Morgan. It states that Ms. Morgan owned the Jeep on the date of the offense (12 June 1995), that she currently owns the Jeep, and that she "keeps and maintains the property at or near 101 Eagle Gap Road, Waynesville." The motion goes on to say that because the Jeep was used to convey stolen property worth more than $2,000, it is subject to seizure and forfeiture under G.S. 14-86.1.

The superior court denied petitioner's motion in full. The court held that petitioner had no standing to request an order of forfeiture under G.S. 14-86.1. The trial judge's view was that only the district attorney could petition for an order of forfeiture. The trial judge made no written conclusions about the request for an order authorizing seizure.

[1] This appeal presents us with two distinct questions: (1) Who may petition for an order for seizure under G.S. 14-86.1?; and (2) Who may petition for an order of forfeiture under G.S. 14-86.1? We address the forfeiture question first.

The controlling statute in this case, G.S. 14-86.1, is found in Chapter 14 of the General Statutes, "Criminal Law," Article 16, "Larceny." The statute provides in relevant part,

> All conveyances, including vehicles, watercraft or aircraft, used to unlawfully conceal, convey or transport property in violation of G.S. 14-71, 14-71.1, or 20-106, or used by any person in the commission of armed or common-law robbery, or used by any person in the commission of any larceny when the value of the property taken is more than two thousand dollars ($2,000) shall be subject to forfeiture as provided herein, except that:
>
> . . . .

> (6) **The trial judge in the criminal proceeding which may subject the conveyance to forfeiture** may order the seized conveyance returned to the owner if he finds forfeiture inappropriate. . . .

N.C. Gen. Stat. § 14-86.1(a) (1993) (emphasis added). Subsection (b) provides,

> Any conveyance subject to forfeiture under this section may be seized by any law-enforcement officer upon process issued by any district or superior court having original jurisdiction over the offense except that seizure without such process may be made when:
>
> (1) The seizure is incident to an arrest or subject to a search under a search warrant; or
>
> (2) The property subject to seizure has been the subject of a prior judgment in favor of the State **in a criminal injunction or forfeiture proceeding under this section**.

N.C. Gen. Stat. § 14-86.1(b) (emphasis added). By the statute's own terms, then, a forfeiture proceeding under G.S. 14-86.1 is a criminal proceeding.

The authority to prosecute criminal actions in the courts of North Carolina rests exclusively with the district attorneys of the State. N.C. Const. art. IV, § 18; N.C. Gen. Stat. § 7A-61 (1995); *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991); *State v. Sturgill*, 121 N.C. App. 629, 637-38, 469 S.E.2d 557, 562 (1996). The Town had no authority, therefore, to petition the Criminal Division of the Haywood County Superior Court for an order of forfeiture under G.S. 14-86.1.

Our conclusion that district attorneys alone may prosecute forfeiture proceedings under G.S. 14-86.1 is bolstered by other statutory provisions. Subsection (e) of G.S. 14-86.1 states in part,

> All conveyances subject to forfeiture under the provisions of this section shall be forfeited pursuant to the procedures for forfeiture of conveyances used to conceal, convey, or transport intoxicating beverages found in G.S. 18B-504.

Section 18B-504 provides for the forfeiture of property, including vehicles, used to commit violations of the alcoholic beverage control laws of Chapter 18B ("ABC laws"). N.C. Gen. Stat. § 18B-504 (1995). When the owner or possessor of a conveyance subject to forfeiture is

found guilty of violating an ABC law, the presiding judge in the criminal proceeding must decide whether to order forfeiture of the property. N.C. Gen. Stat. § 18B-504(e)(1) (1995). The designation of the judge who presides at the criminal trial as the person who is to decide the forfeiture issue clearly indicates that the district attorney is to represent the State at the forfeiture hearing. Similarly, section 18B-504 expressly authorizes the district attorney to seek the forfeiture of property if the owner is unknown, or if the owner is known and has been charged with a crime but is unavailable for trial. *See* N.C. Gen. Stat. § 18B-504(i). These provisions, incorporated by reference into G.S. 14-86.1, indicate a plain legislative intent that only district attorneys are to prosecute forfeiture proceedings under G.S. 14-86.1.

Having decided that the Town had no standing to petition for an order for forfeiture under G.S. 14-86.1, we now examine whether it had standing to seek an order authorizing seizure of the Jeep.

[2] We make two preliminary observations. First, contrary to what is implied in petitioner's brief, the procedures for seizing a conveyance under G.S. 14-86.1 are not found in General Statutes section 18B-504; section 18B-504 contains only the procedures for forfeiture of conveyances under G.S. 14-86.1. *See* N.C. Gen. Stat. § 14-86.1(e). Second, we note that only "law-enforcement officers" are authorized to seize conveyances under G.S. 14-86.1. N.C. Gen. Stat. § 14-86.1(b). The Town of Waynesville is not a "law-enforcement officer" and thus has no authority to seize Ms. Morgan's Jeep under G.S. 14-86.1.

The question before us, however, is not whether the Town has authority to seize Ms. Morgan's Jeep, but whether it has standing to petition the superior court for an order authorizing seizure of the Jeep by law-enforcement officers. Subsection (b) of G.S. 14-86.1 lists the circumstances under which the seizure of a conveyance is permitted:

> Any conveyance subject to forfeiture under this section may be seized by any law-enforcement officer upon process issued by any district or superior court having original jurisdiction over the offense except that seizure without such process may be made when:
>
> (1) The seizure is incident to an arrest or subject to a search under a search warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this section.

Subsection (b)(2) is inapplicable to this case because no such judgment has been rendered. Similarly, the Town's proposed seizure of Ms. Morgan's Jeep would not be "incident to arrest"; Ms. Morgan has already been arrested and convicted of the larceny in which she allegedly used the Jeep. Furthermore, the provision authorizing seizure upon the issuance of "process" by a district or superior court does not seem to apply here. *See* N.C. Gen. Stat. §§ 15A-301 through 15A-305 (discussing the four common forms of criminal process: citation, criminal summons, warrant for arrest, and order for arrest).

Accordingly, in this case, Ms. Morgan's Jeep may be seized under G.S. 14-86.1 only pursuant to a search under a search warrant. *See* N.C. Gen. Stat. § 14-86.1(b)(1); *see also* N.C. Gen. Stat. § 15A-242 (1997) (providing that an item is subject to seizure pursuant to a search warrant if there is probable cause to believe that it has been used to commit a crime). We thus read the Town's "Motion for Seizure Order" as an application for an order authorizing a search for the purpose of seizing the Jeep. Although the location of the Jeep is already known, in order to seize it, a search warrant must be obtained. *See* N.C. Gen. Stat. § 15A-241 (defining search warrant in relevant part as "a court order and process directing a law-enforcement officer to search designated premises . . . for the purpose of seizing designated items").

It bears mentioning that, where G.S. 14-86.1(b) authorizes the seizure of conveyances "upon process issued by any district or superior court," we do not believe the word "process" includes search warrants. If the legislature intended the word "process" to include search warrants, there would have been no reason to provide in subsection 14-86.1(b)(1) that law-enforcement officers may seize conveyances "without such process" when the seizure is "subject to a search under a search warrant."

The issue before this Court, then, is whether the Town of Waynesville has standing to apply for a search warrant authorizing seizure of the Jeep. We find nothing in Article 11 of the Criminal Procedure Act, "Search Warrants," that would prohibit the Town from applying for a search warrant. The Criminal Procedure Act provides that only Justices, judges, clerks, and magistrates may issue search warrants, *see* N.C. Gen. Stat. § 15A-243 (1997), and that only law-

enforcement officers may execute them, *see* N.C. Gen. Stat. § 15A-247 (1997), but it does not limit those persons or entities who may apply for search warrants. Any person or entity—including, as here, a town—may apply for a search warrant.

On the narrow question of whether the Town of Waynesville has standing to apply for a search warrant, we hold that it does. We do not decide whether the Town's application for a search warrant has satisfied the procedural requirements of N.C. Gen. Stat. § 15A-244 (1997). Nor do we decide whether the Town has shown an adequate basis for issuance of the warrant, *see* N.C. Gen. Stat. § 15A-245 (1997). Our holding today is limited to recognizing the Town's standing to apply for the search warrant. We reiterate and emphasize that the Town has no authority whatsoever to execute the search warrant for Ms. Morgan's Jeep. *See* N.C. Gen. Stat. §§ 14-86.1 and 15A-247.

In summary, we conclude that the trial court correctly denied petitioner's motion for forfeiture under 14-86.1. The trial court erred, however, when it denied petitioner's "Motion for Seizure Order" on the basis that petitioner lacked standing to seek it. We remand the case to the trial court for disposition of petitioner's "Motion for Seizure Order."

Affirmed in part, reversed in part, and remanded.

Judges MARTIN, John C. and SMITH concur.

STATE OF NORTH CAROLINA v. JOHN KEITH HAAS, JR., DEFENDANT

No. COA97-1492

(Filed 6 October 1998)

1. Bail and Pretrial Release— right to communicate with counsel and friends—defendant sufficiently informed—no prejudice

The statutory and constitutional rights of an impaired driving defendant were not impaired where defendant contended that the magistrate failed to inform him of his right to communicate with counsel and friends but there was considerable evidence supporting the superior court's implicit finding that he was properly

apprized of his right to communicate with counsel and friends and, regardless of whether defendant was technically informed of this "right," he was informed of his unlimited access to the telephone and visitors and utilized these communications tools.

2. **Bail and Pretrial Release— statutory factors—incomplete inquiry by magistrate—no prejudice**

A driving while impaired defendant did not suffer prejudice from any failure by a magistrate to consider the requisite factors set forth in N.C.G.S. § 15A-534(c) in determining pretrial release conditions. Bond was set at $500; assuming that all of the conditions were inquired into and every factor found in defendant's favor, such findings do not mandate any departure from the $500 bond. The magistrate was justified in setting that bond simply because defendant did not reside in the county.

3. **Bail and Pretrial Release— impaired driver—requested release to friend—not sober, responsible adult**

The trial court did not err by upholding a magistrate's alleged denial of an impaired driving defendant's alleged request for release into his friend's custody where it is unclear whether defendant actually requested pretrial release and there is substantial record evidence demonstrating that the friend did not meet N.C.G.S. § 15A-534.2(c)'s definition of a sober, responsible adult.

Appeal by defendant John Keith Haas, Jr. from judgment entered 25 August 1997 by Judge Dennis J. Winner in Watauga County Superior Court. Heard in the Court of Appeals 22 September 1998.

Michael F. Easley, Attorney General, by Assistant Attorney General Gregory Horne, for the State.

Wilson, Palmer & Lackey, P.A., by William C. Palmer, for defendant-appellant.

WYNN, Judge.

On 25 July 1995, defendant John Haas was arrested for impaired driving and was brought before Watauga County Magistrate Walter Greene. Magistrate Greene informed Haas of the pending charges, and proceeded to ask Haas questions to determine Haas' pretrial release conditions. Magistrate Green inquired as to where Haas lived,

how long he lived there, his employment, and where his family resided. Magistrate Greene, however, failed to inquire into Haas's character, mental condition, and prior criminal history including failures to appear. After considering Haas' responses, Magistrate Greene conditioned Haas' pretrial release upon his obtaining a $500 secured bond. Thereafter, Magistrate Greene informed Haas a telephone was at his disposal to contact friends, family, bondsmen or an attorney to secure his pretrial release. Moreover, Magistrate Greene informed Haas of the three ways he could post bond.

Subsequent to the initial hearing, Haas was taken to Wataugua County Jail and placed in a holding cell. While in jail, Haas was permitted to make an unlimited number of phone calls, and did in fact call his parents to help him post bond. Additionally, Haas had unlimited access to visitors, and was visited by his friend Mr. Allen Chappell; the man with whom Haas was driving when he was arrested.

On 20 September 1995, Haas was found guilty of impaired driving in Wataugua County District Court. Upon his conviction, Haas filed an appeal to the Superior Court. Additionally, Haas filed a Motion to Dismiss alleging denial of his rights to confrontation and counsel. On August 25, the case was called for trial and Judge Winner heard and denied Haas' motion. The matter proceeded to a jury trial where Haas was found guilty. Haas thereafter filed this appeal.

I.

[1] On appeal, Haas argues that his statutory and constitutional rights to communicate with, and have access to, counsel and friends were violated. Specifically, Haas argues he suffered prejudice by Magistrate Green's: (1) failure to inform him of his right to communicate with counsel and friends; (2) failure to consider the requisite factors when determining his pretrial release conditions; and (3) denial of his request for pretrial release to a sober, responsible adult.

According to N.C. Gen. Stat. § 15A-511(b) (1996), a magistrate must inform a defendant of his right to communicate with counsel and friends. Haas argues that Judge Winner failed to find facts necessary to support his ruling that Haas was in fact informed of these rights. Before addressing this matter, we note the trial court's findings of fact are presumed to be correct and are binding on appeal. *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990). Moreover, dismissal of a charge is a drastic remedy and will only be granted if

the defendant makes a sufficient showing of a substantial statutory violation and of prejudice arising therefrom. *Id.; State v. Gilbert*, 85 N.C. App. 594, 595, 355 S.E.2d 261, 263 (1987). Thus, before a motion to dismiss will be granted, it must appear that the statutory or constitutional violation caused irreparable prejudice to the preparation of defendant's case. *State v. Knoll*, 322 N.C. 535, 545-46, 369 S.E.2d 558, 564-65 (1988).

In the case *sub judice*, there is considerable evidence supporting Judge Winner's finding that Haas was properly apprized of his right to communicate with counsel and friends. First, Magistrate Greene testified that he informed Haas that "a telephone would be made available to him and he could contact friends, family, bondsmen, attorney, anyone he would like to call to try and help him with his pretrial release." Indeed, Haas himself not only testified that he was informed by both Magistrate Greene and the jailer that he had unlimited access to a telephone, but also signed a form certifying he was given the opportunity to contact certain individuals.

Second, the jailer testified Haas was never denied access to friends or family. Haas, in fact, called his father collect and tried to place another phone call. Additionally, Haas was visited in jail by his friend Allen Chappell.

The aforementioned evidence clearly supports Judge Winner's finding that Haas was apprized of his right to communicate with counsel and friends. Haas nonetheless argues that even if there is ample evidence on the record to support this finding, Judge Winner failed to find as fact that he was properly apprized. Judge Winner, however, specifically stated in his findings that "the court did not find error in the magistrate's procedure." This finding implicitly holds that Magistrate Greene followed N.C. Gen. Stat. § 15A-511(b)'s mandate that a magistrate inform Haas of his right to communicate with counsel and friends.

Lastly, assuming *arguendo* that Magistrate Greene failed to properly apprize Haas of his right to communicate with counsel or friends, Haas' appeal with respect to this issue still fails for lack of prejudice. As previously stated, a motion to dismiss will only be granted when the statutory or constitutional violation caused irreparable prejudice to the development of Haas' case. *Gilbert*, 85 N.C. App. at 596, 355 S.E.2d at 263. In the case *sub judice*, regardless of whether Haas was technically informed of his "right," Haas nonetheless was informed of

his unlimited access to the telephone and visitors. Moreover, Haas utilized these communication tools, and thus cannot rightfully contend that he was prejudiced by Magistrate Greene's alleged failure to communicate this right. Therefore, we find Haas' claim in this respect without merit.

[2] Haas also argues as error Magistrate Green's alleged failure to consider the requisite factors when determining the conditions of his pretrial release. Under N.C. Gen. Stat. § 15A-534(c), in determining which conditions of release to impose, a judicial officer must:

> [o]n the basis of available information, take into account the nature of the circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

Haas contends that because Magistrate Greene failed to consider his character, mental condition and prior history, Magistrate Greene thereby failed to proceed in accordance with N.C. Gen. Stat. § 15A-534(c). We disagree.

In *State v. Eliason*, *supra*, the defendant was arrested for driving while impaired and assigned as error the magistrate's decision to set bond at $300 without considering his character, mental condition, financial resources, length of residence in the community or family ties. The court, in rejecting defendant's argument, stated that it could not "discern any substantial statutory violation which would warrant dismissal of the charges against the defendant *based on a failure to inquire into every individual factor*." *Id.* at 316, 395 S.E.2d at 704 (emphasis added). Moreover, the Court emphasized the defendant's failure to prove how further inquiry would have required the magistrate to proceed differently. *Id.* Accordingly, the Court found that any statutory or constitutional violation alleged would not warrant dismissal of the charges against him.

In the case *sub judice*, Magistrate Greene set bond at $500 based partly upon Haas' residence outside the county. Assuming Magistrate Greene inquired into every factor set forth in N.C. Gen.

Stat. § 15A-534(c) and found them all in Haas' favor, such findings do not mandate any departure from the $500 bond. Indeed, Magistrate Green was justified in setting bond at that level simply because Haas did not reside in the county. Therefore, Haas cannot demonstrate he was prejudiced from Magistrate Greene's failure to inquire into every individual factor set forth in the statute. Thus, we affirm the trial court's ruling on this matter.

[3] Lastly, we address Haas' argument that the trial court erred by upholding Magistrate Greene's denial of his alleged request for pretrial release into his friend Allen Chappell's custody. Specifically, Haas argues that Magistrate Green was required to release him into the hands of a sober, responsible adult, and Magistrate Greene's failure to do so constituted reversible error by denying him access to evidence during a crucial evidence gathering period.

Under N.C. Gen. Stat. § 15A-534.2(c), an impaired driver "has the right to pretrial release under N.C. Gen. Stat. § 15A-534 when the judicial officer determines that . . . (2) a sober, responsible adult is willing and able to assume responsibility for the defendant." Haas contends that Magistrate Greene violated his right to pretrial release by denying his request for release into Allen Chappell's custody.

Initially, we note that it is unclear whether Haas actually requested pretrial release. Although Haas testified that he requested pretrial release, Magistrate Greene could only state that he "[did] not recall him asking me that." Judge Winner, however, stated in his findings of fact that Haas "never requested that he be allowed to go without bond with Chappell."

Assuming *arguendo* that Haas did request pretrial release, we must still determine whether Magistrate Greene's alleged denial constituted reversible error. As stated, under N.C. Gen. Stat. § 15A-534.2(c) an impaired driver has the right to pretrial release only when the judicial officer determines that a sober, responsible adult is willing and able to assume responsibility for the impaired individual. Although Judge Winner explicitly refused to determine whether Allen Chappell was sober, we find substantial evidence in the Record on Appeal demonstrating that Allen Chappell was not a sober, responsible adult as articulated in the statute.

Officer Randy Rasnake, for example, had the longest and most direct contact with Allen Chappell, and he informed both Magistrate Greene and Judge Winner that at approximately 1:16 a.m. "Mr. Patrick

Allen Chappell was *extremely intoxicated by alcohol.*" (emphasis added). Defendant attempted to refute this statement through the testimony of both himself and the jailer. The jailer, however, merely stated that it is "normal procedure" to allow only sober visitors. The jailer never stated Allen Chappell was sober when he visited defendant. Moreover, Allen Chappell visited defendant at 2:39 a.m., a mere hour and twenty minutes after Officer Rasnake's unequivocal observation that Allen Chappell was extremely intoxicated. Common sense dictates that Allen Chappell could not have adequately sobered into a responsible adult in that short interval of time. Additionally, as for defendant's own testimony that Allen Chappell was "stone cold sober," a trial court may find that self-serving statements such as this one lack credibility, and therefore are incompetent. *State v. Jones*, 339 N.C. 114, 160, 451 S.E.2d 826, 855 (1994), *reconsideration denied*, 339 N.C. 618, 453 S.E.2d 188 (1995), *cert. denied*, *Jones v. North Carolina*, 515 U.S. 1169, 115 S.Ct. 2634, 132 L. Ed. 2d 873, *reh'g denied*, 515 U.S. 1183, 116 S.Ct. 32, 132 L. Ed. 2d 913 (1995) (holding trial court did not err by failing to consider defendant's self-serving statements).

In conclusion, given the fact that the Record on Appeal contains ample evidence demonstrating Allen Chappell's failure to meet N.C. Gen. Stat. § 15A-534.2(c)(2)'s definition of a sober, responsible adult, we hold regardless of whether the defendant requested pretrial release into Allen Chappell's custody, Magistrate Greene had no duty to grant defendant's request. Therefore, defendant's contention he was unlawfully denied pretrial release into the custody of a sober, responsible adult is without merit.

Affirmed.

Judges GREENE and WALKER concur.

This opinion was authored and delivered to the Clerk of the North Carolina Court of Appeals by Judge Wynn prior to 1 October 1998.

WILLIAM R. BROWN, II, PLAINTIFF v. WEAVER-ROGERS ASSOCIATES, INC.; DOUGLAS W. JONES AND WIFE, DEBORAH G. JONES; GARY D. HELTON AND WIFE, NANCY BAUER HELTON; HUI-MING SUN AND WIFE, MEEI-ING SUN; PAUL V. PICKERING AND WIFE, ALLISON D. PICKERING; DONALD A. FARRELL AND WIFE, CECILIA M. FARRELL; GLORIA J. KOCH; JOHN SNIDER WILKINS AND WIFE, PATRICIA M. WILKINS; MAHMOUD R. HUSEIN AND WIFE, IBTISAM HUSEIN; HAL WADE INGRAM AND WIFE, CAROL STRANGE INGRAM; BRUCE ALLEN HUFFMAN AND WIFE, KATHRYN ELLEN HUFFMAN; TERRELL R. BROOKS; ROBERT JOSEPH METCALF AND WIFE, JEAN C. METCALF; GILBERT K. LYTTLE AND WIFE, TERRY C. STERLING; ALI GHODDOUSSI AND WIFE, AZAR GHODDOUSSI; HERBERT E. FOREMAN AND WIFE, MARGARET V. FOREMAN; PAUL DAVID HAWKINS AND WIFE, DANIELLE D. HAWKINS, DEFENDANTS

No. COA97-1413

(Filed 6 October 1998)

Easements— appurtenant—dominant estate not located—extrinsic evidence

The trial court erred by concluding that a deed of easement was ineffectual and void because it contained no description of a dominant estate where the stipulated facts contained extrinsic evidence which clearly pointed to the dominant estate. Extrinsic evidence may be considered in locating the dominant estate when the deed of easement clearly describes the easement itself and the servient estate.

Appeal by plaintiff and defendants Ghoddoussi from judgment and order entered by Judge Narley L. Cashwell in Wake County Superior Court on 27 May 1997. Heard in the Court of Appeals 26 August 1998.

Michael W. Strickland & Associates, P.A., by Nelson G. Harris, for plaintiff-appellant and defendant-appellants Ghoddoussi.

Burns, Day & Presnell, P.A., by Lacy M. Presnell, III, and Susan F. Vick; Higgins, Frankstone, Graves & Morris, by Thomas D. Higgins, Jr., for defendant-appellees Sun.

W. Hugh Thompson for defendant-appellees Jones.

Boxley, Bolton & Garber, by Ronald H. Garber, for defendant-appellees Pickering.

MARTIN, John C., Judge.

Plaintiff brought this action seeking a declaration of his rights under a purported deed of easement. Plaintiff alleged that he has the right, pursuant to the deed of easement, to open a public thoroughfare across lots, located in Stone Creek Subdivision (Stone Creek), which are owned by some of the defendants. Answers filed on behalf of various defendants included affirmative defenses alleging termination, abandonment, and withdrawal of the easement, as well as champerty and maintenance.

The parties agreed that the trial court should determine the issue of the validity of the deed of easement, before proceeding with a trial upon the issues raised by the affirmative defenses. The matter was submitted upon stipulated facts and documents which, as pertinent to the issues raised by this appeal, show that Quinton J. Kelly and his wife, Willie H. Kelly, executed the original deed of easement to Joe S. Jones, Jr., on 13 March 1970. The Kellys owned land which was eventually subdivided into lots within Stone Creek; Jones owned an adjacent tract which was also subdivided into lots. Pursuant to the language of the deed of easement, the Kellys granted:

> unto Joe S. Jones, Jr., his heirs and assigns, the right, privilege and easement, now and hereafter to construct, improve, inspect, maintain and repair a roadway, which shall be a public thoroughfare, upon and across . . .

a forty (40) foot strip of land which is specifically described by metes and bounds in the deed of easement as follows:

> Beginning at a point in the center line of SR 1844, a corner with Lowery, and running thence South 3 degrees 00' 2191.71 feet to a stake on the east side of Still Creek; running thence North 89 degrees 15' West 40 feet to a point; running thence North 3 degrees 00' East 2191.71 feet to a point in the center line of SR 1844; and running thence with said center line of said road South 80 degrees East 40 feet to the point of Beginning, and being a forty-foot strip along the easternmost line of the tract of land conveyed by Minton Lowery to Quinton J. Kelly and wife, Willie H. Kelly, by deed recorded in Book 1810, page 423, as corrected by Deed of Correction in Book 1857, Page 629, all in Wake County Registry.

The easement appears upon the plat of Stone Creek subdivision, recorded in Book of Maps 1972, Page 425, Wake County Registry and

upon the plat of the Property of Joe S. Jones, Jr., recorded in Book of Maps 1986, Page 524, Wake County Registry. The easement, shown as a "40' Access Easement" on the Stone Creek plat, crosses the eastern portions of nine lots located within Stone Creek; it is adjacent to an additional twenty foot strip shown on the Jones plat so as to provide a sixty foot right of way adjacent to the western boundaries of Lots 1-10 of the Jones subdivision.

Plaintiff is a successor in title to Joe S. Jones, Jr., having purchased lot 1 in the Jones subdivision on 16 August 1994. Defendants are the record owners of lots in the Stone Creek subdivision which are affected by the purported easement, as well as the record owners of lots 2-10 of the Jones subdivision.

The trial court found the facts to be as stipulated and concluded that because the deed of easement did not contain a description of a dominant estate, it was "ineffectual and void." The trial court entered a final judgment declaring the deed of easement to be of no force and effect and "a burden on no land." Plaintiff and defendants Ghoddoussi gave notice of appeal.

Appellants contend the trial court erred in concluding that the deed of easement is ineffectual and void, because it contains no description of a dominant estate. While it is true that deeds of easement must reasonably identify the easement, the servient and the dominant tenements, we hold that extrinsic evidence may be considered in locating the dominant estate when the deed of easement clearly describes the easement itself and the servient estate. In this case, the stipulated facts contained extrinsic evidence which clearly point to the property in the Jones Subdivision as the dominant estate; thus, the trial court erred in nullifying the deed of easement for its failure to locate the dominant estate.

Deeds of easement are construed according to the rules for construction of contracts so as to ascertain the intention of the parties as gathered from the entire instrument at the time it was made. *Higdon v. Davis*, 315 N.C. 208, 337 S.E.2d 543 (1985). When "there is any doubt entertained as to the real intention," the court should construe the deed of easement with "reason and common sense" and adopt the interpretation which produces the usual and just result. *Hine v. Blumenthal*, 239 N.C. 537, 547, 80 S.E.2d 458, 466 (1954); *Hundley v. Michael*, 105 N.C. App. 432, 435, 413 S.E.2d 296, 298 (1992).

An easement appurtenant is a right to use the land of another, i.e., the servient estate, granted to one who also holds title to the land benefitted by the easement, i.e., the dominant estate. Webster, *Real Estate Law in North Carolina* §§ 15-3, 15-4 (1994). The easement attaches to the dominant estate and passes with the transfer of the dominant estate as "an appurtenance thereof." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). It cannot exist apart from the dominant estate. *Id.* If an easement is created without a dominant estate, it is known as an "easement in gross" and is a purely personal license granted to use the land of another; it is not appurtenant to any land and usually ends with the death of the grantee. *Waters v. North Carolina Phosphate Corp.*, 310 N.C. 438, 443, 312 S.E.2d 428, 433 (1984); *Shingleton, supra; Gibbs v. Wright*, 17 N.C. App. 495, 195 S.E.2d 40 (1973). Once an easement appurtenant is properly created, it runs with the land and is not personal to the landowner. *Yount v. Lowe*, 288 N.C. 90, 215 S.E.2d 563 (1975); *Wiggins v. Short*, 122 N.C. App. 322, 469 S.E.2d 571 (1996); *Gibbs, supra.*

> 'Whether an easement in a given case is appurtenant or in gross depends mainly on the nature of the right and the intention of the parties creating it. If the easement is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the parties as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant and not an easement in gross. Easements in gross are not favored by the courts, however, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate. If doubt exists as to its real nature, an easement is presumed to be appurtenant, and not in gross.'

Gibbs, at 497-98, 195 S.E.2d at 42-43 (quoting 25 Am.Jur.2d, Easements and Licenses, § 13).

A reasonable interpretation of the deed of easement in this case shows the original parties intended an easement appurtenant rather than an easement in gross. Initially, we observe that the grant extended to Jones, "his heirs and assigns." The parties' use of these words indicates an intent that the grant was not personal to Jones, but would extend beyond the life of Jones and would run with the land. In addition, "[w]hile the grant does not use the word 'appurtenant,' neither does it use the term 'in gross.' More significantly, it

does not qualify the grantee's rights by the use of such terms as 'personally' or 'in person.' " *Gibbs* at 498, 195 S.E.2d at 43.

Moreover, when an easement is granted for a public use, rather than a personal use, an easement appurtenant is intended. *Waters*, at 443, 312 S.E.2d at 433 ("It is an easement in gross for the benefit of Carolina Power and Light Company, its successors and assigns, and not the general public."). Nothing in this grant of easement indicates the easement is limited to the personal use of Jones. In fact, the purpose of the easement as stated in the deed is for a "public thoroughfare" rather than personal use. Given the express scope and location of the easement found in the deed, "[i]t is more reasonable to presume that the parties intended the right to be appurtenant to the land conveyed, for which purpose it had obvious value, than to presume they intended it to be personal to the grantee apart from her status as owner of the land conveyed, for which purpose it had no apparent value." *Gibbs* at 498, 195 S.E.2d at 43. Thus, we hold the clear intent of the deed of easement was to create an easement appurtenant.

When granting an easement appurtenant, "[t]he instrument must identify with reasonable certainty the easement created and the dominant and servient tenements." *Oliver v. Ernul*, 277 N.C. 591, 597, 178 S.E.2d 393, 396 (1971); *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E.2d 541 (1953). Relying on this language, defendants contend a deed of easement is null and void when it fails to specifically describe the dominant tract. We disagree.

Where there is sufficient reference in the deed itself to extrinsic evidence resolving an ambiguity, the latent ambiguity may be resolved by parol evidence. *Allen v. Duvall*, 311 N.C. 245, 316 S.E.2d 267 (1984) (Use of roads created by grant of easements by plaintiffs' predecessors in title, acquiesced in by defendants' predecessors in title of the servient estate, sufficiently located roads on the ground, so as to remove latent ambiguity in grant instrument.); *Thompson v. Umberger*, 221 N.C. 178, 19 S.E.2d 484 (1942); *Carson v. Ray*, 52 N.C. 609 (1860) (extrinsic proof may be insufficient to remove a patent ambiguity, where "the subject-matter of the grant or devise is so uncertain that there is nothing described to which any proof can apply").

In particular, where the deed of easement clearly describes the location of the easement and the servient estate, this Court has held the lack of a clear description of the dominant estate to be a latent, rather than a patent, ambiguity. *Cochran v. Keller*, 84 N.C. App. 205,

352 S.E.2d 458 (1987); *appeal after remand*, 89 N.C. App. 469, 366 S.E.2d 602 (1988), *disc. review denied*, 322 N.C. 605, 370 S.E.2d 244 (1988). "A latent ambiguity 'will not be held to be void for uncertainty but parol evidence will be admitted to fit the description to the thing intended.' " *Id.* at 212, 352 S.E.2d at 463. In *Cochran*, the deed of easement was "sufficiently certain to permit location of the easement itself and the servient tract;" but an ambiguity existed as to whether the parties intended to benefit all of the lands then owned by the grantee or just one parcel. Rather than nullify the easement as void for vagueness, the Court held that parol evidence was admissible upon the issue of which property the parties intended to benefit by the easement. *Id.* at 211-12, 352 S.E.2d at 462-63.

In the present case, the deed of easement did not expressly refer to the Jones land as the dominant estate. However, the location of the easement itself and the servient estate were clear on the face of the deed. There was abundant extrinsic evidence, including the location of the grantee's property in relation to the easement as described by the deed, as well as the subsequently recorded maps of the respective properties, indicating the intent of the parties to create an easement appurtenant to the Jones land. Under such circumstances, the trial court should have considered the extrinsic evidence to resolve the latent ambiguity as to the identity of the dominant tract, and it erred in its conclusion that the deed of easement was void because it contained no description of the dominant estate. Accordingly, the judgment declaring the deed of easement to be of no force and effect is reversed and this case is remanded to the trial court for further proceedings to resolve the issues raised by defendants' affirmative defenses.

Reversed and remanded.

Judges LEWIS and WALKER concur.

DKH CORPORATION, A NORTH CAROLINA CORPORATION, PLAINTIFF V. RANKIN-PATTERSON OIL COMPANY, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA96-1330

(Filed 6 October 1998)

1. Unfair Trade Practices— anti-trust—exclusive purchase requirement

The trial court erred by granting summary judgment for defendant in an anti-trust action arising from a sale and lease agreement between the parties involving a convenience store which included the exclusive purchase of gasoline from defendant. The evidence concerning plaintiff's obligation to pay for the gasoline and plaintiff's assumption of risk is convoluted, there are evidentiary gaps, and the circumstances in which plaintiff is absolutely obligated to purchase defendant's gasoline are unclear.

2. Agency— evidence of control—insufficient

A principal-agent relationship devolves from one person's consent to another that he shall act on the other's behalf and be subject to his control; when an entity cannot exert control or dominance over another's performance of a designated task, that entity cannot be characterized as a principal. In this case, remanded on other grounds, the facts available on appeal lead to the conclusion that defendant did not have sufficient control of plaintiff to constitute a principal-agency decision, and the trial court is advised not to rest its determination on agency principals.

Appeal by plaintiff from partial summary judgment entered 4 October 1996 and amended 7 October 1996 by Judge Dennis J. Winner in Buncombe County Superior Court. Appeal initially *dismissed* as interlocutory in 126 N.C. App. 634, 487 S.E.2d 588 (1997), *reversed and remanded* for decision on the merits, 348 N.C. 583, —— S.E.2d —— (1998). Reconvened in the North Carolina Court of Appeals by Order of Chief Judge Sidney S. Eagles dated 29 July 1998.

Kelly & Rowe, P.A., by E. Glenn Kelly, James Gary Rowe, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, by Stephen J. Grabenstein, for defendant-appellee.

WYNN, Judge.

On June 1, 1990, plaintiff DKH Corporation ("DKH") purchased from defendant Rankin-Patterson Oil Company, Inc. real and personal property for the operation of a mini-mart service station. DKH's purchase, in pertinent part, included land, a convenience store, and tanks and pumps used for dispensing gasoline.

Thereafter, on July 1, 1990, DKH and Rankin-Patterson entered into a LEASE AGREEMENT ("lease") which defined the terms and conditions under which DKH was to operate the mini-mart. Despite the time lag between the initial purchase and the lease, both parties stipulate the two agreements were part of the same transaction. The lease provided for an initial term of fifteen years and required Rankin-Patterson to pay monthly rent in the amount of $450.

Under the lease terms, DKH was responsible for all insurance and taxes related to the property. Rankin-Patterson, on the other hand, agreed to "maintain and keep in working order all of the pumps." Rankin-Patterson also agreed to obtain DKH's written consent prior to assigning, subletting or modifying the property. Lastly, and of integral importance to the case *sub judice*, the lease contained a "Gasoline Agreement" which provides:

> [l]essor will sell gasoline at retail to the consuming public on behalf of the lessee. Lessee will furnish all gasoline to be sold. The lessor will be responsible for payment of all gasoline sold at retail to Lessee. Lessee will price all gasoline to Lessor by using its costs (which includes all taxes and freight) and splitting the margin from its distributor cost to retail by 50%. Payment of gasoline sales by Lessor to Lessee will be verified by meter readings of the retail pumps and paid to Lessee on Monday and Thursday of each week.

In addition to the requirements set forth in the lease, Rankin-Patterson insisted that DKH purchase all its gasoline from Rankin-Patterson. Indeed, Rankin-Patterson would not provide DKH with gasoline if DKH purchased gasoline, diesel fuel or kerosene from any of Rankin-Patterson's competitors. Moreover, DKH was required to pay Rankin-Patterson for the gasoline whether or not DKH received payment from the retail customer. Therefore, DKH assumed the risk of loss accompanying the sale of retail gasoline including such risks as: (1) a customer driving away from the pump without paying, (2) a customer giving DKH a check that bounces, or (3) a customer using an invalid credit card.

From July 1, 1990, until the date this action was commenced, DKH has purchased gasoline from Rankin-Patterson only. Moreover, DKH has fully complied with Rankin-Patterson's orders. DKH, however, now contends the lease and its accompanying arrangements are invalid as a matter of law. Accordingly, DKH filed suit in Buncombe County Superior Court contending, *inter alia*, the lease and accompanying arrangements violate North Carolina's "antitrust" statute found at N.C. Gen. Stat. § 75 (1995). Specifically, DKH contends the lease and accompanying arrangement violate N.C. Gen. Stat. § 75-5(b)(2) (1994) in that they require DKH to purchase gasoline upon the condition that DKH not deal in the goods of any of Rankin-Patterson's competitors or rivals.

Judge Winner, after receiving summary judgment motions from both parties, dismissed DKH's N.C. Gen. Stat. § 75-5(b)(2) claim on the ground that § 75-5(b)(2) was inapplicable as a matter of law. Specifically, Judge Winner found the arrangement between the parties constituted a consignment/agency agreement, and therefore was not a "sale" of goods as required under N.C. Gen. Stat. § 75-5(b)(2). DKH appeals this ruling.

I.

[1] Summary judgment is properly rendered when the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mutual Life Ins.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). When motioning for summary judgment, the movant has the burden of establishing the lack of any triable issue of material fact *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). Moreover, in antitrust actions, this Court will sparingly grant summary judgments in cases where the issues are complex and where intent and motive play an important role. *Stearns v. Genrad, Inc.*, 564 F.Supp. 1309, 1312 (M.D. N.C. 1983), *aff'd*, 752 F.2d 942 (4th Cir. 1984).

In 1913, the General Assembly enacted chapter 75 of the *North Carolina General Statutes* to codify common law rules concerning unlawful restraints of trade and unfair trade practices. William B. Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C. Law Rev. 199, 200 (1972). Chapter 75, entitled "Monopolies, Trusts and Consumer Protection," was modeled after the Sherman Act and many of Chapter 75's provisions closely resemble it. *Id.* at 206. In 1969, the General

Assembly expanded North Carolina antitrust law by adding N.C. Gen. Stat. § 75-1.1 which copied the Federal Trade Commission Act. *Id.* at 207. Contemporaneously, the General Assembly added N.C. Gen. Stat. § 75-5 which resembles the Clayton Act in that both address specific practices primarily involving non-ancillary restraints of trade such as price fixing, territorial arrangements and exclusive dealing. *Id.*

Given the aforementioned genesis of North Carolina's antitrust law, this Court will consider both North Carolina case law and federal law in its analysis. Indeed, it is clear that federal decisions, though not binding on this Court, do provide guidance in determining the scope and meaning of chapter 75. *Marshall v. Miller*, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981) ("federal decisions interpreting the FTC Act may be used as guidance in determining the scope and meaning of § 75-1.1"); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973) ("the body of law applying the Sherman Act, although not binding upon this Court in applying G.S. § 75-1, is nonetheless instructive in determining the full reach of that statute.").

Under N.C. Gen. Stat. § 75-5(b)(2):

> it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to . . . (2) sell any goods in this State upon conditions that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales.

It is well established that gasoline is a "good" for N.C. Gen. Stat. § 75-5(b)(2) purposes. *Arey v. Lemons*, 232 N.C. 531, 61 S.E.2d 596 (1950); *Roanoke Properties V. Spruill Oil Co.*, Inc., 110 N.C. App. 443, 429 S.E.2d 752 (1993). Therefore, a defendant who *sells* gasoline conditioned upon the purchaser agreeing not to deal in the goods of a competitor is liable under N.C. Gen. Stat. § 75-5(b)(2) (emphasis added). Judge Winners, in partly granting Rankin-Patterson's summary judgment motion, determined the arrangement in the instant case constituted a consignment or agency agreement, as opposed to a sale, and therefore held N.C. Gen. Stat. § 75-5(b)(2) inapplicable.

Many courts have considered the issue of whether a particular gasoline transaction is a consignment or sale. *Miller v. Bristow, Inc.*, 739 F.Supp. 1044 (Dist. S.C. 1990); *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806, *reh'g denied*, 592 F.2d 1190 (5th Cir. 1979), *cert. denied*, 444 U.S. 836, 100 S. Ct. 70, 62 L. Ed. 46 (1979); *Call Carl v. B.P. Oil Corp.*, 554 F.2d 623, 626-28 (4th Cir. 1977), *cert. denied*, 434 U.S. 923,

928, 98 S.Ct. 400, 54 *L.Ed.2d 280 (1977)*. When making this determination, these courts have considered several factors including: (1) whether there is an absolute obligation to pay for the goods, (2) whether the purchaser takes title to the goods, (3) whether the purchaser immediately pays for the goods, (4) whether the purchaser sets the resale price, (5) whether the purchaser bears the risk of loss, (6) whether the purchaser insures the goods, (7) whether the purchaser repairs and maintains the goods, and (8) whether the purchaser pays taxes on the goods. *See generally* 1 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 2.02[1][c][I][A]; *Miller v. W.H. Bristow, Inc.*, 739 F.Supp. 1044 (Dist. S.C. 1990); *Call Carl v. B.P. Oil Corp.*, 554 F.2d 623 (4th Cir. 1977), *cert. denied*, 434 U.S. 923, 98 S.Ct. 400, 54 L.Ed.2d 280 (1977). Therefore, evidence relating to these factors is necessary to reach a conclusion in this matter.

According to the Supreme Court of North Carolina, "the hallmark of consignment is the absence of an absolute obligation on the part of the consignee to pay for the goods." *American Clipper Corp. v. Howerton*, 311 N.C. 151, 316 S.E.2d 186 (1984). Implicit in a purchaser's "absolute obligation" to pay for goods is an assumption that the purchaser assumes the risk that the goods will either not sell or be destroyed before sale. This implicit assumption corresponds with numerous opinions holding that a purchaser's assuming the risk of loss demonstrates the transaction was a sale as opposed to a consignment. *Miller*, 739 F.Supp. at 1053; *Hardwick* 589 F.2d at 809.

In the case *sub judice*, the evidence concerning both DKH's obligation to pay and assumption of risk is convoluted. First, the depositions contain vague, conflicting statements with respect to both issues. Moreover, there are evidentiary gaps such as which party assumes the risk of loss from fire or other natural catastrophes. Lastly, it is unclear under what circumstances DKH is in fact "absolutely obligated" to purchase Rankin-Patterson's gasoline once that gasoline is delivered. Because these factual issues go to the "hallmark" of this antitrust case, and because this Court sparingly grants summary judgment in complex antitrust cases, we reverse the trial court's decision and remand this matter for further consideration. This Court believes that further factual inquiry is warranted given the factual niceties involved in making a consignment/sale distinction. Specifically, we believe more evidence relating to the aforementioned factors is necessary to make a proper determination as to the relationship of the parties in this matter.

[2] In remanding this case, we advise the trial court not to rest its determination on agency principles. A principal-agent relationship devolves from one person's consent to another that he shall act on the other's behalf and be subject to his control. *Outer Banks Contractors, Inc. v. Daniels & Daniels Const., Inc.*, 111 N.C. App. 725, 730, 433 S.E.2d 759 (1993). As this Court has previously stated, "the element of 'control' is the primary indicator of an agency relationship." *Peace River Elec. Co-op, Inc. v. Ward Transformer Co., Inc.*, 116 N.C. App. 493, 504, 449 S.E.2d 202 (1994), *rev. denied*, 339 N.C. 739, 454 S.E.2d 665 (1995). Therefore, when an entity cannot exert control or dominance over another's performance of a designated task, that entity cannot be characterized as a principal. *Id.* Although the issue of control is generally in the jury's province, when the facts lead to only one conclusion, the question becomes one of law for the trial court. *Smock for Smock v. Brantley*, 76 N.C. App. 73, 75, 331 S.E.2d 714, 716 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E.2d 30 (1986).

In the case *sub judice*, the facts, as currently available, lead to but one conclusion—Rankin-Patterson does not have the requisite control over DKH. Given the evidence available to this Court, once the gasoline was transferred into DKH's tanks, DKH had absolute dominion and control over it. DKH alone determined the gasoline's retail price, took the risk of the customer not paying, determined the hours of the business' operation, and made all decisions concerning the sale of the product. Such unfettered control over the sale of gasoline demonstrates that Rankin-Patterson did not have sufficient control of DKH to constitute a principal-agency relationship. Therefore, in remanding this matter, we advise the trial court to make its determination based on the consignment/sale distinction, as opposed to one based on agency.

Vacated and Remanded with instructions.

Judges GREENE and TIMMONS-GOODSON concur.

This opinion was authored and delivered to the Clerk of the North Carolina Court of Appeals by Judge Wynn prior to 1 October 1998.

BRANCH BANKING & TRUST COMPANY, A NORTH CAROLINA CORPORATION, PLAINTIFF V. GLENWOOD TUCKER AND WIFE, SHARLETTE A. TUCKER, DEFENDANTS

No. COA97-1121

(Filed 6 October 1998)

1. Judgments— Rule 60 relief—no abuse of discretion

The trial court did not err by setting aside a summary judgment and entries of default where defendants Tucker executed promissory notes to plaintiff Branch Banking & Trust secured by deeds of trust on their real estate and by certain equipment and personal property; the Tuckers defaulted and plaintiff instituted foreclosure and an action on the notes; plaintiff purchased the real property at the foreclosure sale and assigned its bid; plaintiff agreed in the assignment that it would not seek further recovery and filed a voluntary dismissal with prejudice; plaintiff subsequently instituted a second civil action seeking the deficiency on the notes; defaults were entered against the Tuckers; plaintiff's attorney also filed a motion for summary judgment, which was granted; the Tuckers moved for relief under N.C.G.S. § 1A-1, Rule 60(b); and that motion was granted, with the summary judgment and the entries of default set aside and plaintiff's complaint dismissed with prejudice. The trial court found that plaintiff was attempting to collect on the same promissory notes involved in the earlier action, which had been voluntarily dismissed with prejudice, and set aside the summary judgment in the exercise of its discretion. Plaintiff does not make any contention that the judge abused his discretion and no abuse of discretion was shown on the facts.

2. Judgments— Rule 60 motion for relief—timeliness

It could not be said that the trial court erred by concluding that defendant's motion for relief was filed within a reasonable time where plaintiff began a foreclosure against defendant's property on 23 April 1992 and an action on promissory notes secured in part by equipment and personal property on 7 May 1992; plaintiff bought the real property at the foreclosure sale on 12 January 1993, assigning its bid and then taking a voluntary dismissal with prejudice of the civil action on 23 February 1993; plaintiff instituted a second civil action on the notes on 26 March 1993; defaults were entered against defendants on 21 May 1993 and 8 July 1993; plaintiff also filed a motion for summary judgment and a notice that a hearing would be held on 26 July 1993; a certificate

of service by mail was signed by plaintiff's attorney but defendants deny receipt of the documents; a hearing was held on 26 July 1993 with neither defendant present; summary judgment was granted on 10 October 1994; and plaintiffs moved for relief on 14 September 1995. There is nothing in the record to indicate any notice to defendants that summary judgment had been entered, and defendants filed their motion for relief in less time than plaintiff consumed in preparing the order and having it signed and filed.

3. Judgments— Rule 60 relief—complaint dismissed with prejudice

The trial court erred by dismissing a complaint with prejudice where defendants Tucker executed promissory notes to plaintiff Branch Banking & Trust secured by deeds of trust on their real estate and by certain equipment and personal property; the Tuckers defaulted and plaintiff instituted foreclosure and an action on the notes; plaintiff purchased the real property at the foreclosure sale and assigned its bid; plaintiff agreed in the assignment that it would not seek further recovery and filed a voluntary dismissal with prejudice of its civil action; plaintiff subsequently instituted a second civil action seeking the deficiency on the notes; defaults and a summary judgment were entered against the Tuckers; and the Tuckers moved for relief under Rule 60(b). While the trial court understandably concluded that plaintiff is seeking to relitagate matters finally disposed of by the voluntary dismissal with prejudice, plaintiffs are entitled to make their argument that the dismissal was only intended to dismiss its claim for foreclosure.

Appeal by plaintiff from order entered 31 January 1997 by the Honorable Knox V. Jenkins in Johnston County Superior Court, setting aside summary judgment entered on 10 October 1994 by the Honorable Henry V. Barnette, Jr., and dismissing plaintiff's complaint. Heard in the Court of Appeals 17 August 1998.

W. Robert Denning, III, for plaintiff appellant.

Emery D. Ashley for defendant appellees.

HORTON, Judge.

On 29 April 1988 and 23 April 1991, defendants Glenwood Tucker, and wife, Sharlette A. Tucker (the Tuckers), executed certain promis-

sory notes to plaintiff Branch Banking & Trust Company for loaned money and executed deeds of trust on their real estate to secure those notes. The Tuckers also pledged certain equipment and personal property as security for the notes. The Tuckers defaulted in payment of the notes and plaintiff instituted a special proceeding on 23 April 1992 to foreclose the deeds of trust. On 7 May 1992, plaintiff filed a civil action to recover money from the promissory notes, possession of the pledged equipment and personal property by claim and delivery, and attorneys' fees.

On 12 January 1993, plaintiff became the last and highest bidder at the foreclosure sale of the Tuckers' real property. Plaintiff's bid was $210,001.00. On 22 January 1993, plaintiff assigned its bid to Shelton R. Adams and Suzette J. Stroud by a document entitled "Assignment of Bid and Agreement" (Assignment). The Assignment was prepared by plaintiff's attorney and was signed by plaintiff. In the Assignment, plaintiff agreed that it would not seek any further recovery from defendants and it would dismiss its pending civil action against them with prejudice. The terms of the sale were then complied with, final reports were filed, and the special proceeding was closed on 22 February 1993. On 23 February 1993, as agreed, plaintiff filed a voluntary dismissal with prejudice in its civil action against the Tuckers.

On 26 March 1993, plaintiff instituted a second civil action against the Tuckers, seeking to recover the deficient balance due on the promissory notes. Each defendant was served with a summons and unverified complaint in the action, and each defendant moved for an extension of time within which to file an answer. Defendant Sharlette A. Tucker's *pro se* motion for extension of time was granted, and the time for answering was extended through 18 June 1993. No order granting defendant Glenwood Tucker's motion for extension of time appears in the record.

On 20 May 1993, plaintiff's attorney executed and filed an affidavit with the trial court stating that defendant Glenwood Tucker was served with summons and complaint, the time to answer had expired, and Glenwood Tucker was "indebted to the plaintiff in the amount of $203,783.23 with interest thereon from date[.]" An assistant clerk entered default against Glenwood Tucker on 21 May 1993.

Sharlette A. Tucker never filed an answer, and her default was entered on 8 July 1993. Plaintiff's attorney signed and filed an affidavit against Sharlette A. Tucker on 8 July 1993, alleging that she was

indebted to plaintiff in the "amount of $203,783.23 with interest thereon from date." On 8 July 1993, plaintiff's attorney also filed a motion for summary judgment and a notice that the motion would be heard at the term of Johnston County Superior Court beginning on Monday, 26 July 1993, at 10:00 a.m. The certificate of service on the notice of hearing and the motion for summary judgment was signed by plaintiff's attorney and stated that copies of the notice and motion were mailed to each defendant at "Route 4 Box 171A, Benson, NC 27504." Defendants deny receipt of the documents.

The Honorable Henry V. Barnette, Jr., presided over the 26 July 1993 Session of Johnston County Superior Court. Judge Barnette is and was then a Resident Superior Court Judge of Wake County. Apparently there were some proceedings in the case before Judge Barnette at the July 1993 Session. Neither defendant was present. More than a year later, on 10 October 1994, Judge Barnette granted summary judgment and ordered that "plaintiff have and recover of the defendants the sum of $203,783.23 with interest thereon as allowed by law; together with the costs of this action, and attorneys' fees as allowed by the laws of the State of North Carolina."

Other than the brief affidavits filed by plaintiff's attorney to secure entries of default against defendants, it does not appear that other affidavits or testimony in support of the motion for summary judgment were presented to Judge Barnette. Additionally, there is no explanation given for the delay in signing the motion for summary judgment. Further, there is nothing in the record to show that the motion for summary judgment was ever served on either defendant.

On 14 September 1995, the Tuckers moved, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (1990), for relief from summary judgment. The matter was heard by the Honorable Knox V. Jenkins at the 6 January 1997 Session of Johnston County Superior Court. Judge Jenkins entered an order setting aside summary judgment under the provisions of N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) and (6).

Judge Jenkins also ordered that the entries of default be set aside and that plaintiff's complaint be dismissed with prejudice. Plaintiff then moved pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60 (1990) that the trial court alter or amend its judgment insofar as it provided for a dismissal of plaintiff's complaint. Judge Jenkins denied the motion to alter or amend on 11 February 1997, and plaintiff appealed both from that denial and from the order setting aside summary judgment.

On appeal, plaintiff argues Judge Jenkins erred in concluding that summary judgment was void, defendants did not act within a reasonable time in seeking relief from summary judgment, and plaintiff's complaint should be dismissed.

Before we address the merits of this case, we note that appellate review is confined to those exceptions which pertain to the argument presented. *Crockett v. First Fed. Sav. & Loan Assoc. of Charlotte*, 289 N.C. 620, 631, 224 S.E.2d 580, 588 (1976). 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). In the instant case, plaintiff notes seven assignments of error in the record on appeal but does not set any of them out in its brief in support of any question therein presented. Notwithstanding the errors, in deference to the litigants and for reasons of judicial economy, we nevertheless address the general thrust of plaintiff's argument pursuant to N.C.R. App. P. 2.

[1] Plaintiff first contends Judge Jenkins erred in finding that summary judgment was "void" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) and in setting aside the judgment. We note that Judge Jenkins also set aside summary judgment in his discretion pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 60(b)(6), which provides that:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

Judge Jenkins found that plaintiff was attempting to collect from defendants on the same promissory notes involved in the earlier action against defendants, which was voluntarily dismissed with prejudice. In its discretion, the trial court then set aside summary judgment.

"Rule 60(b) has been described as '. . . a grand reservoir of equitable power to do justice in a particular case. . . .' " *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976) (citation omitted). Relief afforded under N.C. Gen. Stat. § 1A-1, Rule 60(b) "is within the discretion of the trial court, and such a decision will be disturbed only for an abuse of discretion." *Harrington v. Harrington*, 38 N.C. App. 610, 612, 248 S.E.2d 460, 461 (1978). Plaintiff does not set out any argument, or make any contention, that Judge Jenkins abused his discretion in setting aside the order for summary judgment. Thus, no abuse of discretion has been shown on the facts of this case.

[2] Second, it does not appear from the record that defendants did not act within a reasonable time in moving for relief from summary judgment. For reasons which do not appear from the record, plaintiff did not present the order for summary judgment to Judge Barnette for more than a year after a hearing on its motion for summary judgment. Summary judgment was filed on 10 October 1994 and defendants filed their motion for relief from the order on 14 September 1995, less than a year later. There is nothing in the record to indicate any notice to defendants that summary judgment had been entered. Defendants filed their motion for relief from summary judgment in less time than plaintiff consumed in preparing the order, having it signed, and filed. Certainly we cannot say that the trial court erred in concluding that defendants' motion for relief was filed within a reasonable time.

[3] Finally, while it appears the trial court acted within its discretion in setting aside the entries of default against defendants, it appears the trial court erred in dismissing plaintiff's complaint with prejudice. The trial court understandably concluded that plaintiff is seeking to relitigate matters finally disposed of by the voluntary dismissal with prejudice entered by plaintiff in its first civil action against these defendants. While defendants are entitled to the opportunity to plead the disposition of the prior civil action in bar of the instant claim against them, plaintiff contends the dismissal with prejudice was only intended to dismiss its claim for foreclosure and not any claim for deficiency arising from the foreclosure sale. Whether that argument will ultimately prevail we cannot say, but plaintiff is entitled to make it. We further note that neither responsive pleadings nor a motion for summary judgment were filed by defendants in the trial court.

In conclusion, the actions of the trial court in setting aside summary judgment and the entries of default are affirmed, but its action in dismissing plaintiff's complaint with prejudice is reversed. This

matter is remanded to the trial court with directions to enter an order setting a time within which defendants may file an answer or otherwise defend the complaint.

Affirmed in part, reversed in part, and remanded.

Chief Judge EAGLES and Judge MARTIN, Mark D., concur.

KAREN SMITH, PLAINTIFF v. PRINCIPAL MUTUAL LIFE INSURANCE COMPANY, DEFENDANT AND ELOIS H. WOOD, ADDITIONAL PARTY DEFENDANT

No. COA97-1513

(Filed 6 October 1998)

Insurance— life insurance—change of beneficiary—form not received before death of insured

The trial court did not err in a declaratory judgment action to determine the beneficiary of a life insurance policy by concluding that a change of beneficiary form had to be received by the insurer before the insured's death. While the policy does not give explicit directions as to whether or not changes of beneficiary must be made during the lifetime of the insured, the North Carolina rule is that the rights of the beneficiary vest at the death of the insured; accordingly, any change of beneficiary must at least be communicated to the insurance company during the lifetime of the insured. Moreover, because no change of beneficiary form was received by the insurer prior to the death of the insured, the interpleader and substantial compliance rules have no effect.

Appeal by additional party defendant from order entered 19 September 1997 by Judge Jerry Cash Martin in Guilford County Superior Court. Heard in the Court of Appeals 24 August 1998.

Daniel Lee Smith was the policyowner and insured under a life insurance policy for $65,000 issued by defendant Principal Mutual Life Insurance Company ("Principal"). Plaintiff, Karen Annette Smith, was decedent's wife and the sole beneficiary named in the policy. On 21 May 1995, Daniel Lee Smith died in a drowning accident. At the time of his death, decedent and plaintiff were separated but not divorced.

On or about 30 May 1995, Elois H. Wood, the additional party defendant and decedent's mother, submitted to Principal a change of beneficiary form purportedly executed by the decedent prior to his death. The form, dated 25 March 1995, changed the policy's beneficiary from plaintiff to Wood.

Plaintiff brought this declaratory judgment action against Principal on 14 March 1997 asking that the court declare plaintiff the policy beneficiary. On 14 April 1997 Principal answered and counterclaimed, asking that Wood be allowed to intervene and that Principal be allowed to deposit the policy proceeds into the Office of the Clerk of Superior Court and be dismissed from this action. The plaintiff moved for summary judgment on 10 June 1997. Additional party defendant Wood moved to intervene on 13 June 1997. On 6 August 1997 the trial court allowed the intervention of Wood and dismissal of Principal upon payment of the proceeds into the Office of the Clerk of Superior Court. On 29 August 1997 Principal was dismissed from the action upon receipt of the life insurance proceeds by the Clerk of Superior Court. On 19 September 1997, the trial court granted summary judgment in favor of plaintiff and awarded her the life insurance proceeds. Additional party defendant Woods appeals.

Floyd and Jacobs, L.L.P., by Constance Floyd Jacobs and Robert V. Shaver, Jr., for plaintiff-appellee.

Douglas, Ravenel, Hardy & Crihfield, L.L.P., by Robert D. Douglas, III, for additional party defendant-appellant.

EAGLES, Chief Judge.

We first consider whether the trial court erred in its conclusion of law that for the change of beneficiary to be effective, the form had to be received by Principal before the insured's death. Defendant Wood contends that to be effective the form only needed to be executed by the insured prior to his death and that all the evidence before the Court shows that decedent did execute the change of beneficiary form before his death. Defendant Wood additionally contends that by filing an interpleader action and depositing the policy's proceeds, Principal "waived any requirement that the change of beneficiary designation be received prior to the decedent's death." See *Sudan Temple v. Umphlett*, 246 N.C. 555, 560, 99 S.E.2d 791, 794 (1957). Finally, defendant contends that the filing of the Change of Beneficiary Form following the death of the insured was simply a

ministerial act, and that under the doctrine of substantial compliance, "affirmative acts demonstrating an intent to change beneficiaries which are not in strict compliance with policy formalities nevertheless may guide the court in distributing insurance proceeds." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 383, 348 S.E.2d 794, 798 (1986) (citing *Teague v. Insurance Co.*, 200 N.C. 450, 157 S.E.2d 421 (1931)).

Plaintiff argues that the properly executed form must be submitted to the insurer and approved during the insured's lifetime to be effective. Execution alone is not sufficient. Here, the change of beneficiary form was not received by Principal during the decedent's lifetime and it was never approved by Principal. Additionally, plaintiff contends that defendant Wood's reliance on the interpleader rule announced in the *Sudan Temple* decision is "misplaced" because the interpleader rule is inapplicable on these facts. Specifically, plaintiff argues that *Dortch* expressly held that "the interpleader rule was not designed to defeat vested rights." *Id.* at 383, 348 S.E.2d at 798. Plaintiff contends that the interpleader rule is inapplicable because the rights of the plaintiff vested at the death of the insured and the change of beneficiary form was not received by Principal until after the insured's death. *Id.* Finally, plaintiff argues that *Dortch* similarly rejects defendant's substantial compliance argument because substantial compliance can only be applied to those changes attempted during the insured's lifetime, before the original beneficiary's interest vests. *Id.* Accordingly, plaintiff asserts that the trial court properly granted summary judgment in her favor.

After careful consideration of the record, briefs and contentions of the parties, we affirm. The trial court's conclusion of law states that "[t]he unambiguous language of the life insurance policy requires that beneficiary changes be made during the life of the insured . . . ." While the policy does not give explicit directions as to whether or not changes of beneficiary must be made during the lifetime of the insured, the North Carolina rule of law is that the rights of the beneficiary vest at the death of the insured. *Dortch*, 318 N.C. at 382, 348 S.E.2d at 797. Accordingly, any change of beneficiary must at least be communicated to the insurance company during the lifetime of the insured, the silence of the policy language on this subject notwithstanding. "Because no change of beneficiary was attempted . . . during [decedent's] lifetime," we hold that plaintiff "remained the designated beneficiary when he died and [plaintiff] acquired vested rights to policy benefits at that time." *Id.* Defendant Wood's submis-

sion of the change of beneficiary form after decedent's death "necessarily failed as against a prior vested right." *Id.*

Additionally, we agree with plaintiff that Principal did not waive any requirement that the change of beneficiary be received during the lifetime of the insured. In analyzing the interpleader rule, our Supreme Court noted that in *Sudan Temple* it had "pointedly remarked that an insurance company's waiver of formalities 'does not impair any *vested* right which the original beneficiary had. It is but a recognition that the insurer had, *in the lifetime of the insured*, consented to a change in its contract between them.' " *Dortch*, 318 N.C. at 383, 348 S.E.2d at 798 (quoting *Sudan Temple*, 246 N.C. at 560, 99 S.E.2d at 794-95) (alteration in original). Principal never consented to a change in beneficiary *during the lifetime of the insured* because it did not receive the request until after his death. Similarly, defendant's substantial compliance argument also fails. "Like the interpleader rule . . . substantial compliance can be successfully applied only to those changes attempted during the lifetime of the insured, before the interest of the designated beneficiary vests." *Dortch*, 318 N.C. at 383, 348 S.E.2d at 798. No change of beneficiary form was received by Principal prior to the death of the insured. Accordingly, plaintiff's interest "under the policy ripened upon the death" of the insured and the interpleader and substantial compliance rules have no effect. *Id.* The assignment of error is overruled.

Because of our disposition of this issue, the remaining issues on appeal are moot.

Affirmed.

Judges MARTIN, Mark D., and HORTON concur.

DOROTHY JOHNSON AND PAULA SMITH, PLAINTIFF-APPELLANTS V. FIRST UNION CORPORATION AND/OR FIRST UNION MORTGAGE CORPORATION; KAY L. BAILEY; CIGNA PROPERTY & CASUALTY INSURANCE COMPANY AND/OR ESIS, INC.; ROBIN DEFFENBAUGH; INTERNATIONAL REHABILITATION ASSOCIATES, INC. (INTRACORP); AND PAT EDWARDS, R.N., DEFENDANT-APPELLEES

No. COA97-211

(Filed 6 October 1998)

Workers' Compensation— collateral attack—claims including fraud

The trial court did not err by dismissing pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) a civil action including allegations of fraud and bad faith refusal to pay a claim which arose from a workers' compensation claim involving an inaccurate videotape and an altered Industrial Commission form. The Workers' Compensation Act is a comprehensive regulatory scheme and collateral attacks are inappropriate.

Appeal by plaintiffs from order entered 18 September 1996 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard originally in the Court of Appeals 9 October 1997, *Johnson v. First Union Corp.*, 128 N.C. App. 450, 496 S.E.2d 1 (1998). Heard in the Court of Appeals 27 August 1998, pursuant to a petition for rehearing.

Charles R. Hassell, Jr., for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for defendant-appellees First Union Corporation, First Union Mortgage Corporation and Kay L. Bailey.

Yates, McLamb, & Weyher, L.L.P., by Derek M. Crump and Travis K. Morton, and Poyner & Spruill, L.L.P., by Beth R. Fleishman and Robin Tatum Morris, for defendant-appellees CIGNA Property & Casualty Insurance Company and/or Esis, Inc., and Robin Deffenbaugh.

Maupin, Taylor & Ellis, P.A., by Elizabeth D. Scott and Joanne J. Lambert, for defendant-appellees and petitioners International Rehabilitation Associates, Inc., (Intracorp) and Pat Edwards, R.N.

McGEE, Judge.

This case arises from an action stemming from alleged on-the-job injuries suffered by plaintiffs. In 1992 and 1993, plaintiffs separately filed claims with the North Carolina Industrial Commission seeking workers' compensation benefits for repetitive motion disorders they allegedly suffered in the course of their employment as customer service representatives for First Union Corporation and/or First Union Mortgage Corporation. Both plaintiffs initially were diagnosed with job-related repetitive motion disorders, and both subsequently had their claims rejected, apparently based at least in part on a videotape prepared by defendants to illustrate the nature of plaintiffs' jobs. Plaintiffs contend that the videotape did not accurately portray the physical requirements of their jobs, and they assert that defendants made the videotape with the intention of deceiving plaintiffs' physician. Plaintiffs further contend that, based on the allegedly inaccurate videotape, their physician withdrew diagnoses that plaintiffs' disorders were job-related.

Plaintiff Smith also alleges that defendants made material alterations in a workers' compensation Form 21 that she had previously signed. Plaintiff Smith asserts that defendants deliberately concealed the alteration from her and her attorney. Plaintiff Smith says the Industrial Commission subsequently notified her that defendants had submitted her Form 21 with "material alterations" that suggested fraud. The Industrial Commission allegedly also told plaintiff Smith that the Form 21 agreement might be voided or set aside and that she might be entitled to full restoration of compensation.

Plaintiffs filed suit in Superior Court, alleging fraud, bad faith refusal to pay or settle a valid claim, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy. The trial court dismissed the complaint pursuant to N.C.R. Civ. P. 12(b)(6), saying the complaint failed to state a claim for which relief could be granted. Plaintiffs appeal, arguing that the trial court's order is contrary to the law of this jurisdiction as to the torts of fraud, bad faith, intentional infliction of emotional distress and other claims. Defendants cross-appeal, saying that the trial court was correct in dismissing the appeal, but asserting that the dismissal should have been based on lack of subject matter jurisdiction pursuant to N.C.R. Civ. P. 12(b)(1). Defendants contend that The North Carolina Workers' Compensation Act (N.C. Gen. Stat. § 97-1 through 97-200) gives the North Carolina Industrial Commission exclusive jurisdiction over workers' compensation claims and all

related matters, including issues such as those raised in the case at bar. We agree.

Through the Workers' Compensation Act, North Carolina has set up a comprehensive system to provide for employees who suffer work-related illness or injury. "The purpose of the Act, however, is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers." *Barnhardt v. Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966), *overruled on other grounds*, *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986).

> The purpose of the act is to provide compensation for an employee in this State who has suffered an injury by accident which arose out of and in the course of his employment, the compensation to be paid by the employer, in accordance with the provisions of the act, without regard to whether the accident and resulting injury was caused by the negligence of the employer, as theretofore defined by the law of this State. The right of the employee to compensation, and the liability of the employer therefor, are founded upon mutual concessions, as provided in the act, *by which each surrenders rights and waives remedies which he theretofore had under the law of this State.* The act establishes a sound public policy, and is just to both employer and employee. As administered by the North Carolina Industrial Commission, in accordance with its provisions, the act has proven satisfactory to the public and to both employers and employees in this State with respect to matters covered by its provisions.

Lee v. American Enka Corp., 212 N.C. 455, 461-62, 193 S.E. 809, 812 (1937) (citations omitted) (emphasis added); *see also* N.C.G.S. § 97-10.1 (1991).

Other case law has shown that the Industrial Commission is authorized to deal with matters such as fraud:

> If plaintiff desires to attack [an] agreement for fraud, misrepresentation, undue influence, or mutual mistake, and has evidence to support such attack, he may make application in due time for a further hearing for that purpose. In such event, the Industrial Commission shall hear the evidence offered by the parties, find the facts with respect thereto, and upon such findings determine whether the agreement was erroneously executed due to fraud,

misrepresentation, undue influence or mutual mistake. If such error is found, the Commission may set aside the agreement, G.S. 97-17, and determine whether a further award is justified and, if so, the amount thereof.

Pruitt v. Publishing Co., 289 N.C. 254, 260, 221 S.E.2d 355, 359 (1976).

In a recent case, our Supreme Court cited the "comprehensive regulatory scheme" set out for insurance-related matters in Chapter 58 of the North Carolina General Statutes. *N.C. Steel, Inc. v. National Council on Compensation Ins.*, 347 N.C. 627, 632, 496 S.E.2d 369, 372 (1998). In *N.C. Steel*, the Court rejected a civil action challenging an increase in workers' compensation insurance premiums, saying, "We do not believe that, with this comprehensive regulatory scheme, the General Assembly intended that the rates could be collaterally attacked." *Id.* Likewise, the Workers' Compensation Act is a comprehensive regulatory scheme, and collateral attacks are inappropriate.

Plaintiffs in this case assert that their injuries are work-related. The Workers' Compensation Act gives jurisdiction for such cases to the North Carolina Industrial Commission. Plaintiffs must pursue their remedies through the Commission.

We affirm the trial court's dismissal of plaintiffs' complaint.

Affirmed.

Judges MARTIN, John C. and SMITH concur.

TOMMY CARTER AND TRACY CARTER, ADMINISTRATOR OF THE ESTATE OF PHYLLIS CARTER, PLAINTIFFS V. ANTHONY G. HUCKS-FOLLISS; PINEHURST SURGICAL CLINIC, P.A.; AND MOORE REGIONAL HOSPITAL, INC., DEFENDANTS

No. COA97-1530

(Filed 6 October 1998)

Hospitals— credentialing—negligence

The trial court erred by granting summary judgment for defendant-hospital in a claim for permanent injuries sustained as a consequence of surgery where it was alleged that defendant

was negligent in re-credentialing the surgeon. Hospitals owe a duty of care to their patients to ascertain that a physician is qualified to perform surgery and, in determining whether a hospital accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) has breached its duty of care in ascertaining the qualifications of the physician, it is appropriate to consider whether the hospital has complied with JCAHO standards. Those standards require that board certification be considered; here, there is evidence that defendant was aware of the surgeon's lack of certification and evidence that defendant did not consider the lack of certification. There are also genuine issues of fact on proximate cause.

Appeal by plaintiffs from order filed 26 June 1997 by Judge William C. Gore, Jr. in Hoke County Superior Court. Heard in the Court of Appeals 25 August 1998.

The McLeod Law Firm, P.A., by Joe McLeod and William W. Aycock, Jr., for plaintiffs appellants.

Smith Helms Mulliss & Moore, L.L.P., by Samuel O. Southern, Matthew W. Sawchak, and Christine Nero Coughlin, for defendants appellees.

GREENE, Judge.

Tommy and Tracy Carter (collectively, Plaintiffs) appeal from the granting of Moore Regional Hospital's (Defendant) motion for summary judgment entered 26 June 1997.

On 20 August 1993, Dr. Anthony Hucks-Folliss (Dr. Hucks-Folliss) performed neck surgery on plaintiff Tommy Carter at Defendant. Dr. Hucks-Folliss is a neurosurgeon on the medical staff of Defendant. He first was granted surgical privileges by Defendant in 1975, and has been reviewed every two years hence to renew those privileges. Though he has been on Defendant's staff for over twenty years, Dr. Hucks-Folliss never has been certified by the American Board of Neurological Surgery. Presently, Dr. Hucks-Folliss is ineligible for board certification because he has taken and failed the certification examination on three different occasions.

The credentialing and re-credentialing of physicians at Defendant is designed to comply with standards promulgated by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

In 1992, the time when Dr. Hucks-Folliss was last re-credentialed by Defendant prior to the neck surgery performed on Tommy Carter, the JCAHO provided that board certification "is an excellent benchmark and is [to be] considered when delineating clinical privileges."

On the application filed by Dr. Hucks-Folliss, seeking to renew his surgical privileges with Defendant, he specifically stated, in response to a question on the application, that he was not board certified. Dr. James Barnes (Dr. Barnes), one of Plaintiffs' experts, presented an affidavit wherein he states that Defendant "does not appear [to have] ever considered the fact that Dr. Hucks-Folliss was not board certified, or that he had failed board exams three times," when renewing Dr. Hucks-Folliss's surgical privileges. Jean Hill (Ms. Hill), the manager of Medical Staff Services for Defendant, stated in her deposition that board certification was not an issue in the re-credentialing of active staff physicians. There is no dispute that Dr. Hucks-Folliss was on active staff in 1992. Additionally, this record does not reveal any further inquiry by Defendant into Dr. Hucks-Folliss's board certification status (beyond the question on the application).

In the complaint, it is alleged that Defendant was negligent: (1) in granting clinical privileges to Dr. Hucks-Folliss; (2) in failing to ascertain whether Dr. Hucks-Folliss was qualified to perform neurological surgery; and (3) in failing to enforce the standards of the JCAHO. It is further alleged that as a proximate result of Defendant's negligence, Tommy Carter agreed to allow Dr. Hucks-Folliss to perform surgery on him in Defendant. As a consequence of that surgery, Tommy Carter sustained "serious, permanent and painful injuries to his person including quadraparesis, scarring and other disfigurement."

The issue is whether a genuine issue of fact is presented on this record as to the negligence of Defendant in re-credentialing Dr. Hucks-Folliss.

Hospitals owe a duty of care to its patients to ascertain that a physician is qualified to perform surgery before granting that physician the privilege of conducting surgery in that hospital. *Blanton v. Moses H. Cone Hosp.*, 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987). In determining whether a hospital, accredited by the JCAHO, has breached its duty of care in ascertaining the qualifications of the physician to practice in the hospital, it is appropriate to consider whether the hospital has complied with standards promulgated by the JCAHO. Failure to comply with these standards "is some evidence of negligence." *Id.*

In this case, Defendant has agreed to be bound by the standards promulgated by JCAHO and those standards provided in part that board certification was a factor to be "considered" when determining hospital privileges. Defendant argues that the evidence reveals unequivocally that it "considered," in re-credentialing Dr. Hucks-Folliss, the fact that he was not board certified. It points to the application submitted by Dr. Hucks-Folliss, specifically stating that he was not board certified, to support this argument. We disagree. Although this evidence does reveal that Defendant was aware of Dr. Hucks-Folliss's lack of certification, it does not follow that his lack of certification was considered as a factor in the re-credentialing decision. In any event, there is evidence from Dr. Barnes and Ms. Hill that supports a finding that Defendant did not consider Dr. Hucks-Folliss's lack of certification, or his failure to pass the certification test on three occasions, in assessing his qualifications to practice medicine in the hospital. This evidence presents a genuine issue of material fact and thus precludes the issuance of a summary judgment. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985).

We also reject the alternative argument of Defendant that summary judgment is proper because there is no evidence that any breach of duty (in failing to consider Dr. Hucks-Folliss's lack of board certification prior to re-credentialing) by it was a proximate cause of the injuries sustained by Tommy Carter. Genuine issues of material fact are raised on this point as well. *See Green v. Tile Co.*, 263 N.C. 503, 505, 139 S.E.2d 538, 540 (1965) (defining proximate cause).

Reversed and remanded.

Judges TIMMONS-GOODSON and SMITH concur.

DAVID WALTER HANCOCK AND WIFE, PATRICIA D. HANCOCK, PETITIONER-APPELLEES v. ROBERT M. TENERY AND WIFE, WILLO'DEANE TENERY; SAMUEL RYAN TENERY AND WIFE, DEBRA C. TENERY; CARRIE RENEE TENERY RATLEDGE AND HUSBAND, JOHN BRADLEY RATLEDGE, DEFENDANT-APPELLANTS

No. COA97-1465

(Filed 6 October 1998)

Highways and Streets— cartway proceeding—appeal—exceptions to commissioners' report

The trial court correctly dismissed defendant's appeal from an order of the clerk of superior court which confirmed a commissioners' report in a cartway proceeding where the court concluded that no exceptions were filed to the report. The filing of exceptions to the commissioners' report is a prerequisite to the filing of the appeal.

Appeal by defendant-appellants from judgment entered 16 July 1997 by Judge Catherine C. Eagles in Davie County Superior Court. Heard in the Court of Appeals 27 August 1998.

Daniel Law Firm P.A., by Stephen T. Daniel and James W. Kilbourne, Jr., for defendant-appellants.

Hall and Vogler, Attorneys at Law, by E. Edward Vogler, Jr. and Beverly S. Murphy, for petitioner-appellees.

SMITH, Judge.

Petitioners David and Patricia Hancock (the Hancocks) initiated this action on 31 January 1997 by filing a special proceeding pursuant to N.C. Gen. Stat. § 136-68, *et seq.* In their petition, the Hancocks sought to establish a statutory cartway across the property of their adjoining landowners. Defendants Robert Tenery and his wife, Willo'Deane Tenery; Samuel Ryan Tenery and his wife, Debra Couch Tenery; and, Carrie Renee Tenery Ratledge and her husband, John Bradley Ratledge (collectively referred to as defendants) answered the petition, denying all allegations and moving to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Following a hearing, the Clerk of Davie County Superior Court entered an order in which he found the Hancocks were entitled to a cartway across the land of defendants, and appointed a panel of three commissioners to "view the premises described in the Petition, hear proof and allegations of the parties . . ., ascertain and determine the

compensation which ought justly be made by the [c]ommissioners to the owner of the property, and lay out a cartway with the assistance of any and all professional surveyors necessary."

Thereafter, the commissioners filed a report on 25 February 1997 in which they established a cartway across defendants' land and ordered the Hancocks to pay defendants the sum of $10,000.00 as a result of this taking. None of the defendants filed exceptions to this report, and the clerk confirmed the report on 18 March 1997. Both parties appealed from this order, but the Hancocks dismissed their appeal on 1 July 1997. Following a hearing, the trial court entered an order on 16 July 1997 in which it dismissed defendants' appeal for their "failure to file exceptions to the [c]ommissioner's [r]eport . . . ."

N.C. Gen. Stat. §136-68 provides:

> The establishment, alteration, or discontinuance of any cartway . . . for the benefit of any person, firm, association, or corporation, over the lands of another, shall be determined by a special proceeding instituted before the clerk of the superior court in the county where the property affected is situated. Such special proceeding shall be commenced by a petition filed with said clerk and the service of a copy thereof on the person or persons whose property will be affected thereby. From any final order or judgment in said special proceeding, any interested party may appeal to the superior court for a jury trial de novo on all issues including the right to relief, the location of a cartway, . . . and the assessment of damages. *The procedure established under Chapter 40A, entitled "Eminent Domain," shall be followed in the conduct of such special proceeding insofar as the same is applicable and in harmony with the provisions of this section.*

N.C. Gen. Stat. § 136-68 (Cum. Supp. 1997) (emphasis added). Chapter 40A of the North Carolina General Statutes sets forth the "exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors." N.C. Gen. Stat. § 40A-1 (1984). In accordance therewith, N.C. Gen. Stat. § 40A-25 states that if the clerk of superior court does not find sufficient cause to deny the petition for the establishment of a cartway, he "shall make an order for the appointment of three commissioners and shall fix the time and place for the first meeting of the commissioners." N.C. Gen. Stat. § 40A-25 (1984). Further, N.C. Gen. Stat. § 40A-26 states that "[a]fter the testimony is closed in each case, . . . a majority of the commissioners being present and acting, shall ascertain and determine the

compensation which ought justly to be made by the condemnor to the owners of the property appraised by them." N.C. Gen. Stat. § 40A-26 (1984). Finally, N.C. Gen. Stat. § 40A-28(c) provides that "[a]ny party to the proceedings may file exceptions to the clerk's final determination on any exceptions to the report . . . within 10 days of the clerk's final determination." N.C. Gen. Stat. § 40A-28(c) (1984).

However, it is important to note that "[t]he filing of exceptions to the [c]ommissioners' [r]eport is a prerequisite to the filing of an appeal." *Carolina Power & Light Co. v. Crowder*, 89 N.C. App. 578, 580, 366 S.E.2d 499, 500 (1988) (citation omitted). Also, "[a]n exception to [an order dismissing an appeal] presents nothing for review except whether or not the court's conclusions of law are supported by the findings of fact." *Id.*

In this case, the trial court made the following findings:

> 6. [T]he commissioner's report in this matter was filed on February 25, 1997; that the commissioner's report was served on all parties to this action; that no exceptions to said report [were] ever filed by [defendants].
>
> 7. [T]he Clerk's Final Order was filed on March 18, 1997; that [defendants] gave Notice of Appeal to said Order on April 2, 1997 more than 10 days after the Clerk's Final Order was filed and served on the parties.

The trial court then concluded that the defendants' appeal was not timely made, and the "failure to file exceptions to the [c]ommissioner's [r]eport requires this Court to dismiss [defendants'] appeal." After a careful review, we find the trial court's order of 16 July 1997 dismissing defendants' appeal for failure to file exceptions to be fully supported by the record, and therefore affirm the dismissal.

Affirmed.

Judges WYNN and McGEE concur.

This opinion was concurred in by Judge Wynn prior to 1 October 1998.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 OCTOBER 1998

BENEFIT SERVICES v. BENEFIT MGMT. SERVICES No. 97-1406	Mecklenburg (94CVS7761)	Reversed and Remanded in part, Affirmed in part
BROWN v. RENAISSANCE MEDIA, INC. No. 97-1451	Mecklenburg (96CVD12143)	Affirmed
BRYANT v. BRYANT No. 98-43	Johnston (89CVD1179)	Vacated and Remanded
CATHEY v. AGRIMAX, INC. No. 97-1338	Guilford (96CVS5380)	Affirmed
DAVIS v. SHELBY LIFE INS. CO. No. 97-1405	Guilford (96CVS7478)	Affirmed
DODDER v. YATES CONSTR. CO. No. 97-1452	Forsyth (94CVS6219)	Affirmed in part; Reversed in part; costs taxed to appellants
EVERETT v. SARA LEE CORP. No. 97-1600	Ind. Comm. (373242)	Affirmed
FALLS v. NOAH No. 97-1397	Forsyth (96CVS3237)	Affirmed
FOX v. FOX No. 98-411	Wake (97CVD11892)	Affirmed
HAISLIP v. COLONY TIRE CORP. No. 97-1090	Ind. Comm. (449075)	Affirmed in part, Reversed in part
HARLOW v. VOYAGER COMMUNICATIONS V No. 96-1340-2	Mecklenburg (95CVS4990)	Affirmed
HILL v. BRADY No. 97-1212	Carteret (97CVS239)	Affirmed

HILL v. BURNS AEROSPACE CORP. No. 97-1488	Forsyth (97CVS1094)	Affirmed in part and Reversed as to the dismissal against Burns
HOFF v. CONSOLIDATED DIESEL CO. No. 98-435	Ind. Comm. (470335)	Affirmed
HOLLINS v. MORGANITE, INC. No. 97-1450	Ind. Comm. (473930)	Affirmed
HOOTS v. LOKEY No. 97-1453	Forsyth (96CVS1596)	Affirmed
IN RE BLANKENSHIP No. 97-1468	Ashe (97J48)	Affirmed
IN RE ROBINSON No. 98-394	Pitt (97J21)	Affirmed
JPS ELASTOMERICS CORP. v. STILES No. 97-1220	Gaston (95CVS758)	No error in part, Reversed in part, and Remanded
JACKSON v. CUMBERLAND GROUP HOMES, INC. No. 97-1349	Ind. Comm. (480490)	Affirmed
JACKSON v. WAL-MART STORES, INC. No. 97-1522	Harnett (96CVS01299)	Affirmed
LINVILLE v. LINVILLE No. 97-1345	Wake (94CVD2300)	Affirmed
LONG v. WAL-MART STORES, INC. No. 97-1546	Cumberland (96CVS2688)	Reversed and Remanded
McKEEL v. JAMES FINCH CHEVROLET No. 98-357	Ind. Comm. (138640)	Affirmed
MORETZ v. MORETZ No. 98-44	Avery (95CVD508)	Reversed in part and Remanded
MURRAY v. RUSS No. 98-21	Union (94CVD1025)	Affirmed in part Vacated and Remanded in part

OPENSHAW v. BUXTON CHIROPRACTIC CLINIC No. 97-1404	Ind. Comm. (076960)	Affirmed
POWELL v. CIRCLE S DINER No. 97-1455	Ind. Comm. (546406)	Affirmed
ROYAL PONTIAC GMC v. AIKENS No. 97-1529	Wake (96CVSW11609)	Affirmed
SEAGLE v. KENT-COFFEY MFG. CO. No. 97-1094	Ind. Comm. (028828)	Affirmed in part, Reversed in part and Remanded
SMITH v. CITY OF REIDSVILLE No. 97-777	Rockingham (96CVS889)	Affirmed
STATE v. BARRETT No. 97-1428	Mecklenburg (94CRS68890)	No Error
STATE v. CHATHAM No. 97-913	Rockingham (92CRS4938)	No Error
STATE v. DICKENS No. 97-834	Edgecombe (95CRS11625) (95CRS11626) (95CRS11627) (95CRS11628)	No Error
STATE v. DUGGINS No. 97-1278	Forsyth (96CRS25753) (96CRS36724) (96CRS36727) (96CRS36735)	No Error
STATE v. EDWARDS No. 97-1315	Guilford (96CRS35446) (96CRS35447) (96CRS35448) (96CRS35449) (96CRS36869) (96CRS36870) (96CRS36872) (96CRS36873) (96CRS36874) (96CRS36875) (96CRS36877)	No error in part; Vacated in part
STATE v. JACKSON No. 97-1188	Cumberland (94CRS50890)	No Error
STATE v. MITCHELL No. 97-605	Hertford (95CRS2899)	No Error

STATE v. MURPHY No. 97-1089	Pender (92CRS3310) (92CRS3311) (92CRS3312) (92CRS3313)	No Error
STATE v. OWENS No. 98-223	Onslow (97CRS2141)	No Error
STATE v. PHILLIPS No. 97-1359	Graham (95CRS536) (95CRS537)	No Error
STATE v. PULLIAM No. 98-331	Buncombe (96CRS63958) (96CRS63959)	No error in part, Reversed in part
STATE v. TURNAGE No. 98-385	Craven (93CRS666)	Affirmed
STATE v. WILLIAMSON No. 97-1178	Mecklenburg (95CRS38776) (95CRS38777)	No prejudicial error
STATE v. WRIGHT No. 97-1459	Graham (94CRS434) (96CRS540) (96CRS541)	No error in part, Vacate in part
STATE ex rel. UTILITIES COMM'N v. CHARLOTTE VAN & STORAGE CO. No. 97-1383	Utilities Commission (T-4096)	Affirmed
STEPHENSON v. PITT COUNTY MEM'L HOSP. No. 97-1419	Ind. Comm. (455256)	Affirmed
STEVENSON v. GUILFORD COUNTY BD. OF EDUC. No. 97-1486	Guilford (96CVS10667)	Affirmed
TISE v. YATES CONSTR. CO. No. 97-1429	Forsyth (94CVS4289)	Reversed
TUCKER v. RAND No. 98-344	Wayne (93CVS662)	Affirmed
WADDELL v. ITHACA INDUS., INC. No. 97-1062	Ind. Comm. (420107)	Affirmed
WILSON v. DONAYRE No. 97-491	Columbus (94CVS00627)	Affirmed

STATE OF NORTH CAROLINA v. SHELLY WASHINGTON

No. COA97-838

(Filed 20 October 1998)

1. **Witnesses— competency—rape victim with cerebral palsy—speech not clear**

The trial court did not abuse its discretion in a prosecution for second-degree rape and second-degree sexual offense against a mentally retarded victim by granting the State's motion to have her declared incompetent to testify. An expert in the psychology of mentally retarded individuals who is a consultant to the organization providing health care services to the victim testified that he was familiar with the victim's history, that he had had six or seven sessions with her over the past year, and that her cerebral palsy impaired her ability to speak and made it difficult to understand much of what she said. The only other witness at the competency hearing was the victim herself, and the judge stated that he had had a difficult time understanding what the victim was actually saying.

2. **Constitutional Law— Confrontation Clause—admission of hearsay testimony**

Although a criminal defendant has the constitutional right to confront and cross-examine witnesses against him, the right to cross-examine is not absolute. The admission of hearsay within a firmly rooted exception generally does not violate the right of confrontation but hearsay which does not fall within a firmly rooted exception violates the Confrontation Clause unless the State establishes the reliability of the hearsay and its necessity.

3. **Constitutional Law— State—confrontation clause—admission of hearsay testimony**

A criminal defendant's right of confrontation under the North Carolina Constitution will be interpreted by applying the reasoning of the United States Supreme Court in *White v. Illinois*, 502 U.S. 346, and *United States v. Inadi*, 475 U.S. 387. Specifically, where hearsay proffered by the prosecution comes within a firmly rooted exception of the hearsay rule, the Confrontation Clause of the North Carolina Constitution is not violated, even though no particularized showing is made as to the necessity for using such hearsay or as to its reliability or trustworthiness.

4. Evidence— hearsay—excited utterances

The trial court did not err in a prosecution for second-degree rape and second-degree sexual offense against a mentally retarded victim by holding that the victim's statements to her sister and mother on the evening of the rape were excited utterances where the victim's statements explained that she had been raped by the mother's boyfriend less than thirty minutes before and both witnesses testified that the victim was visibly shaken when she made the statements.

5. Evidence— hearsay—residual exception—no findings—not prejudicial

There was no prejudicial error in a second-degree rape and sexual offense prosecution where the court admitted statements by an officer and investigator who took statements from the victim under the residual exception to the hearsay rule without making findings of fact supporting the conclusion that the officers' statements were trustworthy. The officers' testimony was almost entirely repetitive of other testimony which was properly admitted.

6. Evidence— hearsay—medical treatment exception

The trial court did not err in a prosecution for second-degree rape and sexual offense by admitting statements the victim made to a nurse who examined her at a hospital. The statements were clearly made for the purposes of medical diagnosis or treatment.

7. Constitutional Law— right of confrontation—hearsay testimony

Statements made by a second-degree rape and sexual offense victim to her mother, sister, and a nurse fell within firmly rooted exceptions to the hearsay rule and their admission did not violate defendant's Sixth Amendment right to cross-examine the declarant. However, statements which were erroneously admitted under the residual exception because the court did not make the necessary, particularized findings that the statements possessed circumstantial guarantees of trustworthiness violated defendant's Sixth Amendment right of confrontation.

8. Evidence— expert opinion—psychologist—mentally retarded victim—likely reaction to sexual advance

The trial court did not abuse its discretion in a prosecution for second-degree murder and sexual offense against a mentally

retarded defendant by allowing a psychologist to answer the State's hypothetical question concerning the victim's likely reaction to a sexual advance. The court correctly allowed the witness to express an opinion based on his knowledge of psychology, his many years of experience with mentally retarded persons, his knowledge of the victim's psychological evaluations, and his personal interactions with the victim.

9. Rape; Sexual Offenses— retarded victim—acts by force—evidence sufficient

In a prosecution for second-degree rape and sexual offense against a mentally retarded victim, the trial court correctly denied defendant's motion to dismiss where counts of rape by vaginal intercourse by force and against the victim's will and having vaginal intercourse with a victim who was mentally retarded were based on one act, and counts of second-degree sexual offense by force and with a mentally defective victim were also based on one act. There was substantial evidence that defendant engaged in both vaginal intercourse and a sexual act with the victim, that the victim was mentally retarded, that defendant knew of her retardation, and that her mental retardation rendered her substantially incapable of resisting.

10. Criminal Law— instructions—request not in writing

The trial court did not err in a prosecution for second-degree rape and second-degree sexual offense by denying defendant's request that the jury be instructed to disregard the fact that the offenses occurred while he was on furlough from prison where the request for the instruction was not in writing.

11. Criminal Law— jury charge—use of victim—no plain error

There was no plain error in a prosecution for second-degree rape and second-degree sexual offense against a mentally retarded victim in the court's use of "victim" in its charge to the jury.

Appeal by defendant from judgments entered 1 August 1996 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 19 March 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Jane Ammons Gilchrist, for the State.

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

LEWIS, Judge.

Defendant appeals from his convictions of second-degree rape in violation of N.C. Gen. Stat. § 14-27.3 (1993) and second-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.5 (1993). The State's evidence tended to show that on the evening of 25 December 1994, A.W. was raped by defendant at the residence of A.W.'s mother, Ethel, and sister, Luttrell. Defendant was Ethel's boyfriend. The facts of the case will be described in greater detail in the discussion below.

I. Determination That A.W. Was Incompetent to Testify

[1] Before trial, the State moved to have A.W. declared incompetent to testify. After a hearing, the trial court found that A.W. was not competent to testify because she was "incapable of expressing [herself] concerning the matter as to be understood, either directly or through interpretation by one who can understand [her]." N.C.R. Evid. 601(b). Defendant argues that it was error to grant the motion.

The determination of whether a witness is competent to testify rests within the sound discretion of the trial judge, who has the opportunity to observe the witness first-hand. *State v. Fields*, 315 N.C. 191, 204, 337 S.E.2d 518, 526 (1985). "Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal." *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987).

At the competency hearing, the court received testimony from Dr. Monty Grubb, an expert in the psychology of mentally retarded individuals. Dr. Grubb is a consultant to an organization that provides health care services to A.W. He testified that his job involves reviewing A.W.'s psychological evaluations and providing psychological therapy, that he has been working in this position for a year, and that he is reasonably familiar with A.W.'s medical history. Dr. Grubb stated that over the past year, he had spoken with A.W. at six or seven sessions for ten to thirty minutes per session. He further stated that he has brief contact with A.W. weekly "where we may not exchange words but we see each other."

Dr. Grubb indicated that although A.W. "understands most of simple conversation," she cannot speak in a manner that is easily understood. He testified that A.W.'s cerebral palsy impairs her ability to speak and makes it "very difficult to understand much of what she says."

The only other witness to testify at the competency hearing was A.W. herself. Based on his observation of A.W., the trial judge stated that "the court had a very difficult time understanding what [A.W.] was actually saying in response to the questions."

Based on the evidence presented at the competency hearing, we cannot say that the trial court abused its discretion in ruling that A.W. was incapable of effectively communicating at trial and was therefore incompetent to testify.

II. Hearsay Statements Challenged by Defendant

[2] Defendant next argues that the trial court erred by allowing several witnesses to testify regarding statements made by A.W. about the alleged rape. Defendant argues that because hearsay statements by A.W. were admitted into evidence at trial, and because defendant had no opportunity to cross-examine A.W., his right of confrontation under the Sixth Amendment was violated.

A criminal defendant has the "right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. *See also* N.C. Const. art. I, § 23 (similar). The right of confrontation guaranteed by the Sixth Amendment includes the right to cross-examine adverse witnesses. *Douglas v. Alabama*, 380 U.S. 415, 418, 13 L. Ed. 2d 934, 937 (1965). A person is a "witness against" a criminal defendant not only when she testifies at trial, but also when statements of hers that are adverse to the defendant are admitted as hearsay. *See White v. Illinois*, 502 U.S. 346, 352-53, 116 L. Ed. 2d 848, 856-57 (1992).

A defendant's right to cross-examine the witnesses against him is not absolute. For example, the admission of hearsay that "come[s] within a firmly rooted exception to the hearsay rule" generally does not violate the defendant's right of confrontation even if the defendant has no opportunity to cross-examine the declarant. *Id.* at 356, 116 L. Ed. 2d at 859. This is because statements that fall within firmly rooted hearsay exceptions are deemed "so trustworthy that adversarial testing can be expected to add little to [their] reliability." *Id.* at 357, 116 L. Ed. 2d at 860.

Furthermore, some hearsay that does not fall within a firmly rooted hearsay exception may be admitted without violating the Confrontation Clause. Such hearsay must be marked by "particularized guarantees of trustworthiness." *See Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980). Whether such hearsay must also be "necessary" to the prosecution's case is debatable. *See id.* at 65, 65

L. Ed. 2d at 607 (stating that "the Sixth Amendment establishes a rule of necessity" such that ordinarily, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant"); *Idaho v. Wright*, 497 U.S. 805, 815-16, 111 L. Ed. 2d 638, 652 (1990) (expressly declining to address whether demonstrating a child declarant's unavailability is required to admit the child's statements under the residual hearsay exception); *White*, 502 U.S. at 354-55, 116 L. Ed. 2d at 858-59 (suggesting that a showing of declarant's unavailability is not required even if hearsay does not fall within a firmly rooted hearsay exception). Nevertheless, our state Supreme Court has interpreted the relevant United States Supreme Court opinions as holding that where hearsay does not fall within a firmly rooted exception to the hearsay rule, its admission violates the Confrontation Clause unless the State establishes not only the reliability of the hearsay, but also its necessity. *State v. Jackson*, 503 S.E.2d 101, 106 (N.C. 1998).

[3] In *Jackson*, our state Supreme Court also held that it would interpret a criminal defendant's right of confrontation under the North Carolina Constitution by applying the same reasoning of the United States Supreme Court in *White v. Illinois*, *supra*, and in *United States v. Inadi*, 475 U.S. 387, 89 L. Ed. 2d 390 (1986). Specifically, the *Jackson* Court held that "where hearsay proffered by the prosecution comes within a firmly rooted exception to the hearsay rule, the Confrontation Clause of the North Carolina Constitution is not violated, even though no particularized showing is made as to the necessity for using such hearsay or as to its reliability or trustworthiness." *Jackson*, 503 S.E.2d at 107. With these principles in mind, we turn to the statements by A.W. that were admitted as hearsay over defendant's objection.

A. Statements to Luttrell and Ethel

[4] A.W.'s sister, Luttrell, testified that on the evening of the alleged rape, she left her mother's house to visit a next-door neighbor, locking the door and leaving A.W. behind. Fifteen to twenty minutes later, A.W. arrived at the neighbor's house. At first, Luttrell could not understand what A.W. was trying to tell her because A.W. was upset and crying. Then A.W. said, "My mama friend, right. Shelton raped me." Luttrell told her to stop lying, but A.W. said, "No. He stuck his d--- in me." According to Luttrell, when Luttrell brought A.W. back to her mother's house, A.W. told her that Shelton had "kissed her in the mouth" and had given her perfume and fifteen dollars and told her

not to tell her sister or mother that he had given her those items. Luttrell stated that A.W. was upset and crying when she said these things.

Luttrell telephoned their mother, Ethel, and told Ethel what A.W. had said. Ethel testified that when she arrived home about five minutes later, A.W. was shaking and crying and "[h]ad a scared look on her face." Ethel testified that A.W. told her what had happened. The account that A.W. gave Ethel was almost exactly what she had told Luttrell. According to Ethel, A.W. was upset and crying and "shaking like a leaf" when she was describing what had occurred.

The trial court held, and we agree, that A.W.'s statements to Ethel and Luttrell were excited utterances, admissible as exceptions to the general rule prohibiting hearsay testimony. *See* N.C.R. Evid. 803(2). A statement is an excited utterance if it is the result of an "occurrence or event sufficiently startling to render inoperative the normal reflective processes of the observer," and, more specifically, it is "a spontaneous reaction to the occurrence or event and not the result of reflective thought." 2 Kenneth S. Broun et al., *McCormick on Evidence* § 272 (John William Strong ed., 4th ed. 1992); *see State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). In this case, A.W.'s statements to Luttrell and Ethel explained that she had been raped by Ethel's boyfriend less than thirty minutes before. Both Luttrell and Ethel testified that A.W. was visibly shaken when she made the statements. This testimony, collectively, was sufficient to support the court's ruling.

B. Statements to Officer Fey and Investigator Vincent

[5] Shortly after she arrived home, Ethel dialed 911 and told the operator her daughter had been raped. Officer Fey of the Wilmington Police Department was dispatched at 10:30 p.m. When he arrived about five minutes later, Officer Fey took a statement from A.W. using Ethel as an interpreter. Shortly after 11:00 p.m., Investigator Sharon Vincent of the Wilmington Police Department interviewed A.W. The statements A.W. made to Officer Fey and Investigator Vincent were essentially the same as those she made to Luttrell and Ethel.

Over defendant's objection, the court admitted A.W.'s statements to Officer Fey and Investigator Vincent. The court concluded that these statements fell within the residual exceptions to the hearsay rule, N.C.R. Evid. 803(24) and 804(b)(5), which allow the admission of hearsay not falling within well-established hearsay exceptions but

"having equivalent circumstantial guarantees of trustworthiness." In ruling these statements admissible, the trial court concluded only that the statements were "trustworthy," and the court made no findings of fact supporting that conclusion.

The trial court failed to make the necessary "findings of fact and conclusions of law that the statement[s] possess[] 'equivalent circumstantial guarantee[s] of trustworthiness.' " *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986) (quoting *Smith*, 315 N.C. at 93, 337 S.E.2d at 845). For this reason, it was error to admit the statements of A.W. to Officer Fey and Investigator Vincent.

C. Statements to Nurse Madeiros

[6] Ethel took A.W. to the emergency room at New Hanover Regional Medical Center and requested that A.W. be examined for possible rape injuries. Nurse Bernadine Madeiros met with A.W. at the hospital. Nurse Madeiros described her role in examining A.W. and other potential rape victims as follows:

> It is actually a combined effort with Rape Crisis. We make sure the patient is okay. That she is not injured. We get as much detail as we can about the situation so that we can make sure that something didn't occur that we need to call a physician immediately. We get a reasonable detail of the situation so I know that she isn't bleeding or hysterical or anything immediately.

Nurse Madeiros stated that A.W. described her encounter with "Shelton" and what Shelton had done. A.W.'s description was consistent with her statements to Luttrell and Ethel. In addition, Nurse Madeiros testified that A.W. told her Shelton had penetrated her vagina with his finger. She also testified that A.W. identified her assailant as a black male whom she knew.

Although A.W.'s statements to Nurse Madeiros were hearsay, they were clearly made for purposes of medical diagnosis or treatment and the trial court correctly admitted them under Rule of Evidence 803(4).

D. Confrontation Clause Analysis

[7] Because A.W.'s statements to Luttrell, Ethel, and Nurse Madeiros fell within firmly rooted exceptions to the hearsay rule, their admission did not violate defendant's Sixth Amendment right to cross-examine the declarant. *See White*, 502 U.S. at 356, 116 L. Ed. 2d at 859. In contrast, A.W.'s statements to Officer Fey and Investigator Vincent

were not found to fall within a firmly rooted hearsay exception. The court stated in conclusory fashion that these statements were "trustworthy," but it failed to make the necessary, particularized findings that the statements possessed circumstantial guarantees of trustworthiness. *See Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608; *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989). The record before us does not affirmatively demonstrate that such "circumstantial guarantees of trustworthiness" exist. It was therefore error to admit these statements under the residual hearsay exceptions. This error violated defendant's Sixth Amendment right of confrontation.

[5] Nevertheless, the trial court's error could not have prejudiced defendant. The testimony of Officer Fey and Investigator Vincent regarding A.W.'s description of the rape was almost entirely repetitive of the testimony of Ethel, Luttrell, and Nurse Madeiros, all of which was properly admitted. For this reason, the admission of the testimony of Officer Fey and Investigator Vincent, though error, was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (1997).

III. Trial Testimony of Dr. Grubb

[8] At trial, Dr. Monty Grubb testified for the State as an expert witness in the field of psychology, specifically in the field of working with, counseling, and treating mentally retarded people. Dr. Grubb has undergraduate, masters, and doctoral degrees in psychology. He is a member of the American Psychological Society and a member of the American Association on Mental Retardation. He has worked in the field of mental retardation as a psychologist since 1976 and has a total of fourteen years of experience working directly with mentally retarded persons. For the past six years before trial, Dr. Grubb worked as a consultant to several organizations in North Carolina that provide group homes for people with mental retardation.

Dr. Grubb testified that over the year he had known A.W., he met with her about once a month for counseling sessions lasting twenty to thirty minutes. He probably "made eye contact" with A.W. at least once a week. Dr. Grubb testified that A.W. was mentally retarded. Based on his experiences and on his review of psychological evaluations performed on A.W., Dr. Grubb testified that A.W. functions around the level of an eight-year-old, both mentally and emotionally. He testified that A.W.'s ability to make informed decisions about "anything complicated" is significantly decreased by her mental retarda-

tion. In Dr. Grubb's words, "[S]he can't evaluate a lot of different things and put it together and make a decision in her own best interest most of the time. Weighing all the consequences and all the information is something that she is not very capable of doing."

Dr. Grubb was asked if he had an opinion about how A.W. would react to a sexual advance made by an adult with whom she was only vaguely familiar. He answered, over defendant's objection, that in his opinion A.W. would "respond similarly to an individual who corresponds to her intellectual and adaptive behavior age. She would respond very similar [sic] to an eight-year-old." Dr. Grubb stated that A.W. might be somewhat intimidated and that she might freeze up. According to Dr. Grubb, A.W. might consider the person making the advance "as someone that she is supposed to show respect for because he was a normal functioning adult."

Dr. Grubb went on to testify that in his experience, A.W. is more relaxed around adults with whom she is familiar and that she is more tense around strangers. On redirect, Dr. Grubb reiterated that if sexual advances were made to A.W. by a person with whom she was not substantially familiar, she might "freeze," because her "initial reaction could be so emotionally laden, not realizing what was happening, . . . given the emotional nature of the situation." Dr. Grubb also read into evidence, without objection, part of a psychological evaluation indicating that A.W. might easily be taken advantage of by a stranger.

Defendant argues that it was error to allow Dr. Grubb to give an opinion about how A.W. would have reacted to a sexual advance. Expert testimony is admissible if it "can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." *State v. Evangelista*, 319 N.C. 152, 163, 353 S.E.2d 375, 383 (1987); *see* N.C.R. Evid. 702. The trial court is given wide discretion in applying this rule and will be reversed only for an abuse of discretion. *Id.* at 164, 353 S.E.2d at 384.

We cannot say that the trial court abused its discretion in allowing Dr. Grubb to answer the State's hypothetical question. Based on his knowledge of psychology, his many years of experience with mentally retarded persons, his knowledge of A.W.'s psychological evaluations, and his personal interactions with A.W., the trial court correctly allowed him to express an opinion regarding how A.W. would likely have reacted to a sexual advance.

IV. Motion to Dismiss

[9] Defendant was charged in separate indictments with two counts of second-degree rape. The first count alleged that defendant had vaginal intercourse with A.W. by force and against her will, in violation of G.S. 14-27.3(a)(1). The second count alleged that, in violation of G.S. 14-27.3(a)(2), defendant had vaginal intercourse with A.W., that A.W. was mentally defective, and that A.W.'s mental defect was known or should have been known to defendant.

Similarly, defendant was charged in separate indictments with two counts of second-degree sexual offense: engaging in a sexual act by force and against the will of the victim, G.S. 14-27.5(a)(1), and engaging in a sexual act with a victim who was mentally defective, G.S. 14-27.5(a)(2). The record clearly indicates that the two counts of second-degree rape were based on the same act of vaginal intercourse, and the two counts of second-degree sexual offense were based on the same sexual act.

The jury was instructed on all four counts. Defendant was convicted on all four counts. The trial court arrested judgment on the counts alleging violations of G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1).

The only issue raised by defendant with respect to the submission of the four counts to the jury is whether the trial court erred by denying his motion to dismiss all charges. A motion to dismiss on the ground of insufficient evidence should be denied if there is substantial evidence of each element of the offense charged and that defendant was the perpetrator. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). In deciding the motion, a court must consider the evidence in the light most favorable to the State. *Id.*

General Statutes section 14-27.3, which defines the crime of second-degree rape, reads in relevant part:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally defective . . . and the person performing the act knows or should reasonably know the other person is mentally defective . . . .

General Statutes section 14-27.5, which defines the crime of second-degree sexual offense, reads in relevant part:

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally defective . . . and the person performing the act knows or should reasonably know the other person is mentally defective . . . .

See also N.C. Gen. Stat. § 14-27.1(4) (defining "sexual act"). The crimes of second-degree rape and second-degree sexual offense thus differ only with respect to the conduct prohibited.

A person is "mentally defective" if she "suffers from mental retardation . . . which temporarily or permanently renders [her] substantially incapable of appraising the nature of . . . her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act." N.C. Gen. Stat. § 14-27.1(1) (1993). Our Supreme Court has indicated that one who is "mentally defective" under the sex offense laws is "statutorily deemed incapable of consenting" to intercourse or other sexual acts. *State v. Holden*, 338 N.C. 394, 406, 450 S.E.2d 878, 884 (1994). It has further indicated that force is "inherent to having sexual intercourse with a person who is deemed by law to be unable to consent." *Id.*

Accordingly, if there is substantial evidence that a person has engaged in prohibited sexual conduct in violation of G.S. 14-27.3 or 14-27.5, and that the victim was mentally defective, and that the person performing the act knew or reasonably should have known that the victim was mentally defective, then *ipso facto*, there is substantial evidence that the person has engaged in such conduct "by force and against the will" of the victim.

In this case, there was substantial evidence that defendant engaged in both vaginal intercourse and a "sexual act" with A.W. There was also substantial evidence that A.W. was mentally retarded, and that defendant knew of A.W.'s retardation. Finally, there was substantial evidence that A.W.'s mental retardation rendered her substantially incapable of "resisting the act of vaginal intercourse or a sexual act." *See State v. Oliver*, 85 N.C. App. 1, 20, 354 S.E.2d 527, 538, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64, *supersedeas denied*, 320 N.C. 174, 358 S.E.2d 65 (1987). The trial court correctly denied defendant's motion to dismiss.

V. Jury Instructions

[10] The trial court admitted evidence that at the time defendant committed the sexual offenses against A.W., he was on furlough from prison, where he was serving a sentence for armed robbery. Defendant orally requested that the trial court instruct the jury not to consider this fact in its deliberations, but that motion was denied. Because defendant failed to submit his request for instructions in writing in compliance with General Statutes section 15A-1231(a) (1997), the trial court's denial of defendant's motion was not error. *See State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997), *cert. denied*, 118 S. Ct. 704, 139 L. Ed. 2d 647 (1998).

[11] Finally, defendant argues that the trial court committed plain error by referring to A.W. as a "victim" in its charge to the jury. On the evidence presented, we cannot say that this is one of those rare cases in which the defendant probably would have acquitted had the trial court omitted the word "victim" from its charge to the jury. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

No error.

Judges MARTIN, John C. and MARTIN, Mark D., concur.

NORMAN OWEN TRUCKING, INC. PLAINTIFF v. J. A. MORKOSKI AND ALLEN RESEARCH ASSOCIATES, INC., DEFENDANTS

No. COA97-561

(Filed 20 October 1998)

1. Fraud— fraudulent conveyance—salary paid to corporation president—insufficient cash on hand for creditors—voluntariness

The trial court erred by failing to grant defendant-Morkoski's JNOV motion on the issue of fraudulent conveyance in an action arising from defendant-Research issuing checks to Morkoski, its president, as a salary draw even though Research could not pay for trucking services provided by plaintiff. A fraudulent conveyance must be voluntary, or not for value, and plaintiff presented no evidence as to the value, or lack thereof, of the services rendered by Morkoski in return for the sums advanced.

2. Fraud— fraudulent conveyance—salary paid to corporation president—insufficient cash on hand for creditors—intent

The trial court erred by failing to grant defendant-Morkoski's JNOV motion on the issue of fraudulent conveyance in an action arising from defendant-Research issuing checks to Morkoski, its president, as a salary draw even though Research could not pay for trucking services provided by plaintiff. An intent to defraud creditors must be shown and, while plaintiff contends that intent is shown by the lack of adequate funds to pay all creditors and the circumstance that Morkoski, as a director and president of Research, prepared, signed and cashed the checks, the evidence was that the enterprise had favorable prospects and was engaged in the normal course of business, although experiencing cash flow difficulty. The Court of Appeals would not establish a rule that a corporation, even closely held, may not make regular salary payments if faced with debt in excess of cash on hand. Moreover, the total paid to Morkoski amounted to his maximum salary in only two of the seven months at issue and plaintiff offered no evidence as to the timing of services rendered by Morkoski in relation to the dates of the checks.

3. Unfair Trade Practices— salary paid to corporation president—insufficient cash to pay creditors—not deceptive or oppressive

The trial court erred by failing to grant defendant-Morkoski's JNOV motion on the issue of unfair trade practices in an action arising from defendant-Research issuing checks to Morkoski, its president, as a salary draw even though Research could not pay for trucking services provided by plaintiff. It cannot be said that Morkoski's actions may properly be characterized as the deceptive or oppressive conduct required by the statute.

4. Unjust Enrichment— payment of salary to corporation president—insufficient cash to pay creditors

The trial court erred by failing to grant defendant-Morkoski's JNOV motion on the issue of unjust enrichment in an action arising from defendant-Research issuing checks to Morkoski, its president, as a salary draw even though Research could not pay for trucking services provided by plaintiff. There was no evidence of a direct receipt by Morkoski of any benefit in consequence of plaintiff's performance of its contract with defendant

Research, nor any evidence that Morkoski consciously accepted that benefit.

Appeal by defendants from judgment filed 14 October 1996 and order filed 11 December 1996 by Judge Robert S. Cilley in Henderson County District Court. Heard in the Court of Appeals 4 December 1997.

E.K. Morley, for plaintiff-appellee.

Prince, Youngblood & Massagee, by Sharon B. Alexander, for defendant-appellant.

JOHN, Judge.

Defendant J.A. Morkoski (Morkoski) appeals the trial court's judgment awarding damages to plaintiff Norman Owen Trucking, Inc., on the latter's claims of fraudulent conveyance, unfair and deceptive trade practices and unjust enrichment. Morkoski contends the trial court erred by denying his motions for directed verdict and judgment notwithstanding the verdict (JNOV) as to each claim, and further assigns as error the trial court's determination that his conduct violated N.C.G.S. § 75-1.1 (1994). For the reasons set forth below, we reverse the trial court and remand this case with direction that JNOV be entered in favor of Morkoski.

Plaintiff filed suit 23 March 1993 against Morkoski and Allen Research Associates, Inc. (Research), alleging (1) certain checks issued to Morkoski by Research constituted fraudulent conveyances, (2) Morkoski and Research engaged in unfair or deceptive acts or practices in violation of G.S. § 75-1.1 and (3) "Morkoski has been personally unjustly enriched."

At jury trial commenced 10 October 1996, the evidence tended to show the following: In 1991, Morkoski and several other individuals began a new enterprise through Research, an existing corporation. Morkoski was a director, shareholder and president of Research. The new undertaking involved shredding scrap tires and utilizing the resulting rubber chips in manufacturing mats installed to protect nylon landfill liners. Morkoski and one other person supervised hourly workers and production of the mats, and Morkoski was to receive $3500.00 per month for his services.

Jack Webb (Webb), vice-president of finance for Research, testified that by 1992 the group "had expectations of a very good busi-

ness." However, despite approaching several potential lenders, Research "simply could not borrow the money to buy the shredding equipment necessary to grind up the tires," and therefore entered into a contract with a South Carolina company which had the required machinery.

Between 30 March 1992 and 13 May 1992, Research hired plaintiff to haul tires to the South Carolina location, and conceded "plaintiff provided $4,250.00 worth of trucking services" to Research. Norman Owen (Owen), president and owner of plaintiff, set the figure at $5,250.00, less a 6 May 1992 payment of $1,250.00. An invoice dated 25 May 1992 indicated plaintiff had sent billing statements to Research on 15 April 1992 and 1 May 1992.

During the period between 10 January and 1 July 1992, Research issued seventeen checks (the checks) payable to Morkoski and designated as being for salary "draw." The checks totaled $15,250 as follows: January—$2950.00, February—$600.00, March—$3500.00, April—$0.00, May—$5500.00, June—$2300.00, and July—$400.00. Morkoski, who personally signed the checks, acknowledged he had no written contract with Research and that the checks were not expressly authorized in advance by the Board of Directors of Research. According to Webb, the checks represented payments towards Morkoski's monthly salary of $3500.00, which amount had been agreed upon by the Board of Directors of Research.

As part of discovery, Morkoski and Research responded affirmatively to the following requests of plaintiff for admissions:

> 17. That at the time that the $4,500.00 payment was made to the individual defendant, the corporate defendant did not have funds adequate to pay all of its creditors.
>
> 18. That at the time that the $11,100.00 payment was made to the individual defendant, the corporate defendant did not have funds adequate to pay all of its creditors.
>
> 19. That at no time subsequent to making the $4,500.00 payment to the individual defendant has the corporate defendant had funds adequate to pay all of its creditors.

By consent judgment entered 10 April 1992, Research was held liable to an equipment supplier in the amount of $76,542.83 plus court costs and interest, although Webb testified the judgment was subse-

quently satisfied. As of 30 June 1992, the "Statement of Income and Retained Earnings" of Research reflected a loss of $278,154.00.

The arrangement with the South Carolina facility became unworkable for several reasons and, lacking the ability to grind accumulated tires, the enterprise ultimately failed. No evidence was introduced tending to show the actual date thereof.

Plaintiff relied at trial upon the testimony of Owens and the admissions received during discovery. At the close of the evidence, the trial court denied the motion of Morkoski and Research for directed verdict. The jury found for plaintiff on all issues, awarding $5,871.33 in damages. The trial court subsequently concluded the conduct of "both defendants" violated G.S. § 75-1.1 and trebled the damages awarded by the jury. From this judgment awarding plaintiff $17,613.99, counsel fees and costs, as well the trial court's order denying defendant's subsequent JNOV motion, Morkoski filed timely notice of appeal.

Morkoski first argues the trial court erred by denying his motions for directed verdict and JNOV. As the effect of a JNOV motion is simply that judgment be entered in accordance with an earlier directed verdict motion, the same standard is applied in reviewing both motions, *Smith v. Childs*, 112 N.C. App. 672, 682, 437 S.E.2d 500, 507 (1993), and we speak only to the trial court's later ruling.

In deciding a JNOV motion, the trial court must determine whether the evidence in the light most favorable to the non-moving party is sufficient to take the case to the jury. *Freese v. Smith*, 110 N.C. App. 28, 33, 428 S.E.2d 841, 845 (1993). The motion should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim. *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C. App. 237, 242, 446 S.E.2d 100, 103 (1994).

I. Fraudulent Conveyances

[1] At the outset, we observe that the case *sub judice* involves the transfer of funds as opposed to the transfer of real property more typically seen in fraudulent conveyance cases. In any event, plaintiff and Morkoski each cite *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914) as the leading North Carolina case on the subject.

Aman summarizes the applicable fraudulent conveyance principles as follows:

(1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.

(2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.

(3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.

(4) If the conveyance is upon a valuable consideration *and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee* and of which intent he had no notice, it is valid.

(5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee* or of which he he [sic] has notice, it is void.

Id. at 227, 81 S.E. at 164 (emphasis in original); *see also* N.C.G.S. § 39-23.4 (Conveyances with intent to defraud creditors void), and § 39-23.5 (Voluntary conveyance evidence of fraud as to existing creditors) (1997).

Plaintiff contends the checks were void under each of the five principles enunciated in *Aman*. Morkoski responds that plaintiff failed to present the requisite scintilla of evidence that the checks were voluntary as defined in *Aman* and further failed to show fraudulent intent existed with Morkoski's knowledge. We agree.

In view of the admission that Research lacked adequate funds to satisfy "all of its creditors" at the time the checks were issued, we do not consider the first principle of the *Aman* analysis, but rather proceed to the second and third. To sustain a claim under these princi-

ples, transfer of the property in question must have been voluntary. *Kirkhart v. Saieed,* 107 N.C. App. 293, 295, 419 S.E.2d 580, 581 (1992). This Court has described a conveyance as voluntary

> when it is not for value, *i.e.*, when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud.

Nytco Leasing v. Southeastern Motels, 40 N.C. App. 120, 128, 252 S.E.2d 826, 832 (1979).

In the instant case, the evidence was uncontradicted that the "agreed pay" of Morkoski was $3500.00 per month, and that the checks represented payments towards that amount. The record further reflects that during the first six months of 1992, Morkoski was "either at the office or involved in Allen Research activities traveling, essentially five days a week."

Plaintiff presented no evidence as to the value, or lack thereof, of the services rendered by Morkoski in return for the sums advanced by Research. Neither the admissions received in discovery nor the testimony of Owen addressed whether Research had paid a "reasonably fair price" for Morkoski's services. *See id.* In the absence of a scintilla of evidence tending to show the payments represented by the checks were voluntary or "not for value," *see id.*, the conveyances thereby effected cannot be subject to characterization as void under principles (2) and (3) of *Aman. See Aman,* 165 N.C. at 227, 81 S.E. at 164.

[2] Principles (4) and (5) of *Aman* mandate evidence of intent to defraud creditors. *Kirkhart*, 107 N.C. App. at 296, 419 S.E.2d at 581. At a minimum, "actual intent to defraud creditors" on the part of the grantor must be shown. *Aman*, 165 N.C. at 227, 81 S.E. at 164. Morkoski argues plaintiff "offered absolutely no evidence" tending to show such intent.

Plaintiff in essence responds that the combination of the discovery admission that Research lacked adequate funds to pay all creditors at the time of issuance of the checks to Morkoski with the circumstance that Morkoski, as a director and president of Research, prepared, signed and cashed the checks, sufficiently demonstrated intent to defraud. However, a careful review of the record, even viewed in the light most favorable to plaintiff, *see Freese*, 110 N.C. App. at 33, 428 S.E.2d at 845, reveals plaintiff's contention to be unavailing.

First, while Morkoski admitted Research did not have sufficient funds on hand to pay all creditors at the time of issuance of the checks, this not uncommon business occurrence is far different and clearly distinguishable from the insolvency and dissolution of companies in the cases cited by plaintiff. *See Bassett v. Cooperage Co.*, 188 N.C. 511, 512, 125 S.E. 14, 14 (1924) (sale of entire property of insolvent company "with a view of going out of business amounted practically to a dissolution"); *Underwood v. Stafford*, 270 N.C. 700, 704, 155 S.E.2d 211, 214 (1967) ("insolvent and inactive" corporation); *McIver v. Hardware Co.*, 144 N.C. 478, 482-83, 57 S.E. 169, 171 (1907) (sale of "practically the entire property" of insolvent company); and *Graham v. Carr*, 130 N.C. 271, 272, 41 S.E. 379, 380 (1902) (corporation insolvent and its operations "shut down").

The uncontradicted evidence in the case *sub judice* was to the effect that all individuals connected with the enterprise anticipated great success in the relevant 1992 time period, that the company was being paid to pick up used tires and was selling its product, and that commission sales in the amount of $598,950.00 were expected from a single project in addition to a sale of product which would have grossed over $400,000.00. In short, the evidence was that the enterprise had favorable prospects and was engaged in the normal course of business, although experiencing cash flow difficulty.

The instant case is akin to that of *Whitley v. Carolina Clinic, Inc.*, 118 N.C. App. 523, 455 S.E.2d 896, *disc. review denied*, 340 N.C. 363, 458 S.E.2d 197 (1995), in which plaintiffs sought to set aside corporate deferred compensation payments to the defendant's owners and directors in excess of $1,400,000.00, allegedly advanced at a time when the defendant corporation was insolvent. *Id.* at 525, 455 S.E.2d at 898. Plaintiffs "base[d] their claim on the fact that the [defendant's] audited balance sheets [for the relevant time period] reflect[ed] liabilities in excess of assets and negative stockholders' equity." *Id.* at 526, 455 S.E.2d at 899. In affirming summary judgment on plaintiffs' breach of fiduciary duty claim (analogous to the instant fraudulent conveyance claim) in favor of the owners and directors, this Court observed that more than "balance sheet insolvency," *id.* at 527, 455 S.E.2d at 899, is required, explaining in the words of a leading treatise that

> "a corporation is not insolvent, as a general rule, merely because it is embarrassed and cannot pay its debts as they become due, or because its assets, if sold, would not bring enough to pay all

> its liabilities, if it is still prosecuting its business in good faith, with a reasonable prospect and expectation of continuing to do so."

Id. at 527-28, 455 S.E.2d at 900 (quoting 15A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 7472 at 273-74 (perm. ed. rev. vol. 1990). Accordingly, "the transaction at issue must occur under circumstances amounting to a "winding-up" or dissolution of the corporation." *Id.* at 528, 455 S.E.2d at 900.

Second, the evidence was uncontradicted, both through the testimony of Webb and designation of the checks as being for "draw," that the payments to Morkoski were in the nature of a draw against agreed salary. We are not prepared to establish a rule that a corporation, even closely held, may not make regular salary payments if faced with debt in excess of cash on hand. Further, actual fraudulent intent is negated by the circumstance that the total paid to Morkoski amounted to $3,500.00 or more in only two of the seven months at issue, and that payments in three of the remaining months equaled $600.00, $0.00, and $400.00 respectively. If the intent was to defraud, the full amount would appear to have been taken each month notwithstanding outstanding debt to creditors.

Finally, plaintiff offered no evidence as to the timing of services rendered by Morkoski in relation to the dates of the checks.

In sum, plaintiff's evidence was insufficient on the "voluntary" element set out in principles (2) and (3) and the "intent to defraud" element under principles (4) and (5) enunciated in *Aman, see Aman,* 165 N.C. at 227, 81 S.E. at 164, and the trial court erred in failing to grant Morkoski's JNOV motion on the issue of fraudulent conveyance. *See Ace Chemical Corp.*, 115 N.C. App. at 242, 446 S.E.2d at 103.

II. Unfair and Deceptive Trade Practices

[3] We next consider Morkoski's assignments of error directed at the trial court's denial of his directed verdict and JNOV motions on the issue of unfair and deceptive trade practices, and at its conclusion as a matter of law that Morkoski's conduct constituted a violation of G.S. § 75-1.1.

Chapter 75 of the North Carolina General Statues prohibits unfair acts which undermine ethical standards and good faith between persons engaged in business dealings. *Pleasant Valley Promenade v.*

Lechmere, Inc., 120 N.C. App. 650, 657, 464 S.E.2d 47, 54 (1995). To prevail on a claim of unfair and deceptive trade practice, a plaintiff must show

> (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 his business.

Spartan Leasing v. Pollard, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). Whether a commercial act or practice violates G.S. § 75-1.1 is a question of law. *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 691, 370 S.E.2d 267, 271 (1988). Moreover, whether an action is unfair or deceptive is dependent upon "the facts of each case and its impact on the marketplace." *Id.*

Simple breach of contract or failure to pay a debt do not qualify as unfair or deceptive acts, but rather must be characterized by some type of egregious or aggravating circumstances before the statute applies. *Ace Chemical Corp.*, 115 N.C. App. at 247, 446 S.E.2d at 106. Suffice it to state that after careful review of the record and consideration of the impact of the conduct of Morkoski upon the marketplace, we cannot say his actions may properly be characterized as the deceptive or oppressive conduct required by the statute. *See Budd Tire Corp.*, 90 N.C. App. at 691, 370 S.E.2d at 271 (in action to collect debt owed under contract by setting aside sale of debtor's assets, transaction "is merely deemed fraudulent to provide[] . . . an equitable remedy," and evidence reflected "none of the kind of deceptive or oppressive conduct . . . which would classify [debtor's] actions as an unfair and deceptive trade practice"). Plaintiff thus failed to offer a scintilla of evidence supporting an essential element of its Chapter 75 claim, *see Ace Chemical Corp.*, 115 N.C. App. at 242, 446 S.E.2d at 103, and the trial court erred by denying Morkoski's JNOV motion on the issue of unfair and deceptive trade practices and by concluding as a matter of law that his actions violated G.S. § 75-1.1.

III. Unjust Enrichment

[4] Finally, we consider Morkoski's challenge to the trial court's submission of plaintiff's unjust enrichment claim to the jury. Unjust enrichment "is described as a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556, *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). If there is a contract between the parties, the contract governs the claim and the law will not imply a contract. *Id.*

In order to withstand Morkoski's directed verdict and JNOV motions, plaintiff was required to present evidence that a benefit was conferred upon Morkoski, that he "consciously accepted" that benefit, and that the benefit was not gratuitous. *Britt v. Britt*, 320 N.C. 573, 577, 359 S.E.2d 467, 469 (1987), *overruled on other grounds*, 323 N.C. 559, 374 S.E.2d 385 (1988). Further,

> where there is a contract between two persons for the furnishing of goods or services to a third, the latter is not liable on an implied contract simply because he has received such services or goods.

Bryson v. Hutton, 41 N.C. App. 575, 577, 255 S.E.2d 258, 259 (1979).

Simply put, plaintiff's evidence failed the test of *Jackson* and *Bryson*. The uncontradicted evidence in the record, presented by the testimony of Owen, was that plaintiff entered into a contract with Research to provide trucking services for the benefit of Research, and that Research admitted plaintiff provided to it "$4,250.00 worth of trucking services." However, no evidence showed the direct receipt by Morkoski of any benefit in consequence of plaintiff's performance of its contract with Research, nor showed that Morkoski "consciously accepted," *Britt*, 320 N.C. at 577, 359 S.E.2d at 469, any such benefit. *See Effler v. Pyles*, 94 N.C. App. 349, 353, 380 S.E.2d 149, 152 (1989) (summary judgment against plaintiff proper on issue of unjust enrichment where she failed to meet burden of showing "she conferred a benefit directly on" defendant wife). Accordingly, lacking a scintilla of evidence as to an essential element of plaintiff's claim, *see Ace Chemical Corp.*, 115 N.C. App. at 242, 446 S.E.2d at 103, the trial court erred by denying Morkoski's JNOV motion on the issue of unjust enrichment.

Based on the foregoing, the judgment of the trial court is reversed and the case remanded for entry of JNOV in favor of defendant Morkoski.

Reversed and remanded.

Judges MARTIN, John C. and SMITH concur.

CATHY JACKSON, GUARDIAN AD LITEM FOR TIMOTHY RANDALL JACKSON, MINOR, PLAINTIFF-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES DIVISION OF MENTAL HEALTH, DEVELOPMENTAL DISABILITIES, AND SUBSTANCE ABUSE SERVICES, AND ORANGE PERSON CHATHAM MENTAL HEALTH DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE AUTHORITY, DEFENDANT-APPELLEES

No. COA97-1169

(Filed 20 October 1998)

1. **Administrative Law— failure to exhaust administrative remedies—appeal procedures not published**

The trial court did not err by dismissing plaintiff's complaint for failure to exhaust administrative remedies where plaintiff sought monetary damages, a declaratory judgment, and injunctive relief arising from defendant's failure to approve and fund the readmission of her son to a hospital for treatment of bipolar and attention deficit disorders. Although plaintiff contended that defendants did not provide her with information about administrative remedies and that defendants violated her son's due process rights by failing to publish or promulgate appeal procedures as required by the Administrative Procedure Act, the Act itself provides adequate remedies in the absence of administrative rules. Plaintiff here has not sought any form of administrative relief but is instead attempting to avoid the Act entirely and seek immediate relief in the courts.

2. **Administrative Law— failure to exhaust administrative remedies—adequacy of remedies**

The trial court did not err by dismissing plaintiff's complaint for failure to exhaust administrative remedies where plaintiff sought monetary damages, a declaratory judgment, and injunctive relief arising from defendant's failure to approve and fund the readmission of her son to a hospital for treatment of bipolar and attention deficit disorders. Although plaintiff contended that the remedies available at the administrative level were inadequate to resolve her claims because she had requested injunctive relief which could only be ordered by the court, it is neither impractical nor inappropriate to require a contested administrative hearing to determine initially whether plaintiff's son is being improperly denied necessary care. Plaintiff should not be permitted to bypass administrative procedures merely by pleading a request for injunctive relief.

3. Administrative Law— failure to exhaust administrative remedies—monetary damages

The trial court did not err by dismissing plaintiff's complaint for failure to exhaust administrative remedies where plaintiff sought monetary damages, a declaratory judgment, and injunctive relief arising from defendant's failure to approve and fund the readmission of her son to a hospital for treatment of bipolar and attention deficit disorders. Although plaintiff contended that administrative remedies were inadequate because her son could not be financially compensated for damages through administrative procedures, plaintiff's primary claim is for the provision of mental health care to which she claims her son is entitled under Federal and State Medicaid programs. That is an issue which should properly be determined in the first instance through administrative procedures without premature intervention by the courts; the insertion of a prayer for monetary damages does not render administrative relief inadequate.

4. Administrative Law— failure to exhaust administrative remedies—consideration of evidence

The trial court did not err when dismissing a complaint for failure to exhaust administrative remedies where plaintiff sought monetary damages, a declaratory judgment, and injunctive relief arising from defendant's failure to approve and fund the readmission of her son to a hospital for treatment of bipolar and attention deficit disorders and contended that defendant-OPC was improperly allowed to place contested facts before the court concerning whether plaintiff had given and abandoned notice of appeal to OPC's appeals panel. The court made no finding with respect to the "contested facts," and there is no indication that the trial judge considered anything other than the allegations of the complaint and the parties' legal arguments with respect thereto.

Appeal by plaintiff from order entered 22 April 1997 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 30 April 1998.

Legal Services of North Carolina, Mental Health Unit, by Susan M. Epstein and Lewis Pitts; and National Health Law Program, by Jane Perkins, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert T. Hargett, and Assistant Attorney General

Bruce S. Ambrose, for North Carolina Department of Human Resources Division of Mental Health, Developmental Disabilities, and Substance Abuse Services.

Brown & Bunch, by M. LeAnn Nease and Scott D. Zimmerman, for defendant-appellee, Orange-Person-Chatham Mental Health, Developmental Disabilities and Substance Abuse Authority.

MARTIN, John C., Judge.

In this action, plaintiff, who is the duly appointed guardian *ad litem* for her minor son, Timothy Randall Jackson (Randy), seeks monetary damages as well as injunctive and declaratory relief. In her amended complaint, plaintiff alleged that Randy, who resides with her in Orange County, North Carolina, suffers from bipolar and attention deficit disorders, which have caused him to exhibit severe aggression and impulsivity since he was four years old. Randy has been placed on a number of psychotropic drugs to control his behavior. Randy is a Medicaid eligible child enrolled in the North Carolina Alternatives Mental Health Managed Care Program (Carolina Alternatives). Defendant North Carolina Department of Human Resources Division of Mental Health, Developmental Disabilities, and Substance Abuse Services (DMH) is the single state agency designated by G.S. § 108A-54 to administer the State's Medicaid Assistance Program through which Medicaid is provided, including Carolina Alternatives. Defendant Orange-Person-Chatham Mental Health, Developmental Disabilities and Substance Abuse Authority (OPC) is an area authority which implements the managed care plan in its geographical area in accordance with the provisions of Chapter 122C of the General Statutes.

In January 1996, Randy was admitted to the Child Neuropsychiatry Unit at the University of North Carolina Hospital for treatment and remained there, except for a brief discharge, until 17 February 1996. By the end of February, Randy's behavioral problems were escalating and, on 1 March 1996, his treating physician, Dr. Thomas Gualtieri, an approved care provider, recommended that Randy be readmitted to the hospital for adjustment of his medication and stabilization. Approval from OPC was required for Randy's readmission to the hospital; OPC refused to approve and fund his readmission. Plaintiff alleged that, despite her repeated requests, OPC never provided her with written information concerning Randy's appeal rights, and did not provide her with written notice of the denial of care until 15 March 1996. Plaintiff alleged that as a result of the denial of care,

Randy's condition worsened and he "developed medication side effects that required discontinuation of the medication, worsening his aggression and impulsivity, and increasing his insomnia and destructiveness." As a result, Randy "could not safely attend school, play with others, or leave the confines of his home."

On 26 March 1996, plaintiff filed her original complaint in this action in which she sought injunctive relief requiring OPC to approve payment for Randy's hospitalization. On 28 March 1996, OPC gave approval for Randy's immediate admission to the hospital. Plaintiff alleged that she received, on 4 April 1996, a document entitled "Carolina Alternatives Appeals and Grievances Procedure."

On 18 October 1996 plaintiff applied for the appointment of a guardian *ad litem* for Randy and moved to amend the complaint to add DMH as a defendant. On 15 November 1996 the trial court appointed plaintiff as guardian *ad litem* and allowed the motion to amend. In her amended complaint, plaintiff alleged that Randy was damaged by defendants' denial of the medical care to which he was entitled, that he was damaged by their denial of his due process rights, and that the "Carolina Alternatives Appeals and Grievances Procedure" is unconstitutional. She sought compensatory damages for defendants' alleged denial of medical care and denial of due process, injunctive relief to prevent future care and due process denials by defendants, and a declaratory judgment that defendants' appeals process is unconstitutional.

Defendants answered and moved to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(1). The trial judge granted the motions of both defendants, dismissing the complaint without prejudice for plaintiff's failure to exhaust administrative remedies. Plaintiff gave notice of appeal from the dismissal of her claims for injunctive relief and damages, but specifically did not give notice of appeal from that portion of the order dismissing her claim for declaratory relief.

By multiple assignments of error, plaintiff contends the trial court erred when it dismissed her complaint pursuant to G.S. § 1A-1, Rule 12(b)(1) on the grounds that it lacked subject matter jurisdiction because plaintiff had failed to exhaust her administrative remedies. As a general rule, it is the policy of this State that disputes between its administrative agencies and its citizens be resolved pursuant to the provision of the Administrative Procedure Act, G.S. § 150B-22, and that judicial review of an administrative decision may

be had only after all administrative remedies have been resolved. N.C. Gen. Stat. § 150B-43.

> [F]ive requirements must generally be satisfied before a party may ask a court to rule on an adverse administrative determination: (1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute.

Huang v. N.C. State University, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992). "Whether one has standing to obtain judicial review of an administrative decision is a question of subject matter jurisdiction." *Carter v. N.C. State Bd. of Registration for Professional Engineers & Land Surveyors*, 86 N.C. App. 308, 313, 357 S.E.2d 705, 708 (1987).

I.

[1] By her first assignment of error, plaintiff contends the trial court's dismissal of her complaint for failure to exhaust administrative remedies was error, because defendants did not provide plaintiff with information with respect to administrative remedies during the period in which Randy was being denied care, and because defendants violated Randy's due process rights by their failure to publish or promulgate appeal procedures as required by the North Carolina Administrative Procedure Act, G.S. § 150B-1 *et seq.* (NCAPA). Plaintiff contends that the only applicable rule is found in the codification of the Carolina Alternatives Program at 10 Admin. Code tit. 26M, r. .0305, and that it is insufficient to satisfy Randy's due process rights. The aforementioned rule provides only that enrollees have a right to appeal decisions of the OPC, but does not explain the appropriate appellate procedures: "Enrollees and sub-contractors shall have the right to appeal decisions of an Area Authority as required by 42 CFR *et seq.*" 10 N.C. Admin. Code tit. 26M, r. .0305. Plaintiff argues, therefore, that the trial judge erred by ruling that she was required to exhaust remedies that she was unable to find, because they were not properly promulgated and published. We hold, however, that in the absence of administrative rules promulgated by the OPC, the NCAPA itself provides adequate remedies for Randy's grievance which must be exhausted before the complaint is justiciable.

The NCAPA was drafted to " 'establish a uniform system of administrative rule making and adjudicatory procedures for agencies.' " *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994), *reh'g denied*, 338 N.C. 314, 451 S.E.2d 634 (1994) (quoting N.C. Gen. Stat. § 150B-1(a) (1991)). Administrative decisions of State agencies are subject to review only under the provisions of the NCAPA, unless the agency is specifically exempted from its provisions by NCAPA itself or some other statute. *Id.* "[T]he General Assembly has shown itself to be quite capable of specifically and expressly naming the particular agencies to be exempt from the provisions of the Act and has clearly specified the extent of each exemption." *Id.* at 587, 447 S.E.2d 779 (quoting *Vass v. Bd. of Trustees of Teachers' and State Employees' Comprehensive Major Medical Plan*, 324 N.C. 402, 379 S.E.2d 26 (1989)). G.S. § 122C-131 *et seq.*, establishes a statewide system to provide treatment for individuals suffering from mental health disorders, developmental disabilities and substance abuse. The statutory scheme does not exclude either defendant from the administrative procedures codified in the NCAPA. N.C. Gen. Stat. § 150B-1(c); N.C. Gen. Stat. § 122C-131 *et seq.* Therefore, the provisions of the NCAPA apply to defendants OPC and DMH as entities established to administer Carolina Alternatives under contract with the State of North Carolina.

Plaintiff's argument relies erroneously upon G.S. § 150B-18, which states that "[a] rule is not valid unless it is adopted in substantial compliance with this Article." N.C. Gen. Stat. § 150B-18 (1991). The necessary procedures for substantial compliance are outlined in G.S. § 150B-21.2 (1995). While it is true that the NCAPA requires that an agency follow the specified procedures to validate any rules it decides to promulgate, the Act does not require agencies to promulgate appellate procedures as plaintiff contends. The NCAPA anticipates that agencies will not always promulgate administrative remedies, and accordingly provides that, unless specifically exempt from the NCAPA, "the (agency's) decisions are subject to administrative review under the Act." *Vass*, 324 N.C. at 407, 379 S.E.2d at 29.

The administrative remedies of the NCAPA provide an aggrieved party with the right to initiate a hearing to resolve disputes involving the party's rights, duties, or privileges. N.C. Gen. Stat. § 150B-22 (1991); *Empire Power Co.*, 337 N.C. at 587, 447 S.E.2d at 779. When a dispute arises between a private citizen and a state agency which cannot be informally resolved, the procedure for resolution of the dis-

pute is governed by the NCAPA. N.C. Gen. Stat. § 150B-1 *et seq.; North Buncombe Assn. of Concerned Citizens, Inc. v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462, *disc. review denied*, 327 N.C. 484, 397 S.E.2d 215 (1990). A "person aggrieved" is statutorily defined as a "person or group of persons of common interest directly or indirectly affected substantially in his or its person, property or employment, by an administrative decision." N.C. Gen. Stat. § 150B-2(6); *Empire Power Co.*, 337 N.C. at 587, 447 S.E.2d at 779. There is no question that Randy became an aggrieved person when he was denied medical care by the OPC, and he was thus entitled to an administrative hearing pursuant to the NCAPA as the appropriate appellate procedure from such denial.

Plaintiff relies upon *Orange County SHAPE v. North Carolina Dept. of Transportation*, 46 N.C. App. 350, 265 S.E.2d 890, *disc. review denied*, 301 N.C. 94 (1980) to argue that defendants' failure to publish administrative remedies alleviates the necessity for exhaustion of remedies. In *SHAPE*, the plaintiffs were not required to exhaust administrative remedies because the agency had not published them as required by the NCAPA; the court stated that "it would contravene the most rudimentary principles of due process for this Court to deny the appellants a right of judicial review because they had not exhausted an administrative remedy . . . which is effectively hidden in the catacombs of state bureaucracy." *Id.* at 377, 265 S.E.2d at 908. *SHAPE* is distinguishable from the present case because, in *SHAPE*, the plaintiffs were seeking judicial review of a decision by the North Carolina Board of Transportation after they had already begun to follow the administrative procedures outlined in the Board of Transportation's enabling statute; the statute under which the OPC was created does not include appellate procedures for plaintiff to follow, obscure or otherwise. Plaintiff, in this case, has not sought any form of administrative relief but is instead attempting to avoid the NCAPA entirely and seek immediate relief in the courts. " 'To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness and purpose of the administrative agencies." *Church v. Madison County Bd. of Ed.*, 31 N.C. App. 641, 646-47, 230 S.E.2d 769, 772 (1976), *disc. review denied*, 292 N.C. 264, 233 S.E.2d 391 (1977) (quoting *Elmore v. Lanier*, 270 N.C. 674, 155 S.E.2d 114 (1967)). Accordingly, we reject plaintiff's arguments that she is excused from the requirement that she exhaust administrative remedies before seeking judicial review of defendants' actions, or that Randy's due process rights were violated because the

defendants did not promulgate and publish procedures for administrative review of their decision with respect to the provision of treatment. We hold that appropriate remedies were available and discoverable under the NCAPA. Plaintiff's first assignment of error is overruled.

II.

[2] Plaintiff asserts the trial court erred in dismissing her complaint for her failure to exhaust administrative remedies because the remedies available at the administrative level were inadequate to resolve her claims. When the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts. *Church*, 31 N.C. App. at 647, 230 S.E.2d at 772. On the other hand, if the remedy established by the NCAPA is inadequate, exhaustion is not required. *Huang v. N.C. State University*, *supra*. The burden of showing inadequacy is on the party claiming inadequacy, who must include such allegations in the complaint. *Id.* "The remedy is considered inadequate unless it is 'calculated to give relief more or less commensurate with the claim,' " *Id.* at 715, 421 S.E.2d at 815 (quoting L. Jaffe, Judicial Control of Administrative Action, at 426 (1965)).

Plaintiff acknowledges that she had the burden of pleading futility or inadequacy of the administrative remedy, but argues that she did so properly. Her complaint includes the following allegations:

> 17. Exhaustion of any purported administrative appeals was, and is, futile, pointless, and inadequate because they cannot provide the remedies sought and because they facially violate due process of law guaranteed by the state constitution and law.
>
> 26. The Appeals Process is futile because it fails to consider the circumstances and abilities of the enrollees who are required to use the process, and provides unnecessary and unrealistic hurdles for an enrollee seeking review, in violation of state law.
>
> 27. The Appeals Process fails to provide a pre-denial evidentiary hearing for enrollees seeking urgent care, and the expedited review process is futile because the process cannot provide the immediate need for relief from an erroneous decision. An enrollee denied emergency care must wait five days for a decision, without care paid while the reconsideration is pending, in violation of state law.

28. The Appeals Process fails to inform the enrollee of his right to appeal directly to the single State Agency (DMH) from the decision of the Area Authority and receive a de novo evidentiary hearing at the State Agency level, in violation of state law.

29. Unless restrained by court order the defendants will continue to corrupt the medical judgment of the treating physician and deprive Randy Jackson of medically necessary care and due process of law.

Though the complaint has specifically alleged the inadequacy and futility of administrative review, *see Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 424 S.E.2d 420, *affirmed*, 335 N.C. 158, 436 S.E.2d 821 (1993), the allegations do not end our inquiry, especially in view of plaintiff's decision not to pursue her claim for a declaratory judgment. The complaint must be carefully scrutinized " 'to ensure that the claim for relief [is] not inserted for the sole purpose of avoiding the exhaustion rule.' " *Huang* at 715, 421 S.E.2d at 816, (quoting *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir. 1974)). Thus, we must consider whether the available administrative remedies were indeed inadequate to resolve her claims.

Plaintiff argues dismissal was improper because she requested injunctive relief which could only be ordered by the court. "A pleading that alleges inadequacy of administrative remedy states a claim upon which equitable relief may be granted if the circumstances warrant it." *Lloyd v. Babb*, 296 N.C. 416, 426-27, 251 S.E.2d 843, 851 (1979). In *Lloyd*, the Court determined that plaintiff's claim for equitable relief could properly go forward because the available administrative remedy would have required the plaintiffs to individually challenge the voting rights of between 6,000 and 10,000 persons, and, therefore, would not provide an effective remedy. *Lloyd*, *supra*. In the present case, plaintiff alleged that "(u)nless restrained by court order the defendants will continue to corrupt the medical judgment of the treating physician and deprive Randy of medically necessary care and due process of law." The circumstances alleged by plaintiff lack the impracticalities present in *Lloyd*; it is neither impractical nor inappropriate to require a contested administrative hearing to determine initially whether Randy is being improperly denied necessary care and the availability of such a hearing is an adequate remedy. Plaintiff should not be permitted to bypass administrative procedures by merely pleading a request for injunctive relief.

[3] Plaintiff also argues available administrative remedies are inadequate because she alleged Randy had been damaged as a result of defendants' intentional denial of urgent medical care and their denial of his right to due process, and he cannot be financially compensated for such damages through administrative procedures. Though plaintiff's argument might, at first glance, appear to have merit, we reject it. In arguing the inadequacy of administrative relief for the alleged violation of Randy's constitutional right to due process in her fourth assignment of error, plaintiff relies on the decision of our Supreme Court in *Corum v. University of North Carolina through Bd. of Governors*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, *Durham v. Corum*, 506 U.S. 985, 121 L.Ed.2d 431 (1992), in which our Supreme Court recognized a direct claim for relief against the State for an alleged violation of a party's constitutional right where no other adequate remedy existed. There are critical distinctions between this case and *Corum*, however. In *Corum*, the plaintiff had utilized his administrative remedies. Moreover, the defendant University of North Carolina is specifically exempted from the provisions of the NCAPA. Thus, the exhaustion of administrative remedies was not an issue in *Corum*. The *Corum* Court recognized that its facts were unique and warned:

> When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong (citations omitted).

Id. at 784, 418 S.E.2d at 291.

The purpose of a contested case under the NCAPA is to determine a person's rights, duties or privileges where a dispute with a state agency over such matters cannot otherwise be resolved. N.C. Gen. Stat. § 150B-23. Notwithstanding the relief for which plaintiff prays in this case, we must focus on the allegations of her complaint; plaintiff's primary claim is for the provision of mental health care to which she asserts Randy is entitled under Federal and State Medicaid programs. That is an issue which should properly be deter-

mined in the first instance by the agencies statutorily charged with administering the public system for the delivery of such care, through administrative procedures and without premature intervention by the courts. The procedures available through the NCAPA are calculated to require, if plaintiff is correct, the provision of such care and, thus, "to give relief more or less commensurate" with her claim. We do not believe plaintiff's insertion of a prayer for monetary damages in this case renders administrative relief inadequate so as to relieve her from the requirement that she exhaust available administrative remedies before resorting to the courts.

III.

[4] Finally, we consider plaintiff's contention that OPC "improperly placed contested facts before the trial court during oral and written argument . . ." which should not have been considered by the trial court in ruling upon the motion to dismiss. The alleged "contested facts" concerned whether plaintiff had given, and later abandoned, notice of appeal to OPC's appeals panel. According to plaintiff's argument, "a plaintiff who takes an appeal from an administrative decision, and then fails to complete it, arguably may be deemed not to have exhausted their administrative remedy prior to seeking judicial review." Thus, she asserts, she was prejudiced if the trial court considered OPC's improper argument in reaching its decision to dismiss her complaint.

Defendants respond that even if the court had considered the material, OPC presented it only in support of its argument that the complaint should be dismissed with prejudice. Since the dismissal was without prejudice, defendants argue there was no prejudice to plaintiff.

The trial court made no finding with respect to the "contested facts" to which plaintiff objects and, from our review of the record and the trial court's order dismissing this action, we discern no indication that the able trial judge considered anything other than the allegations of the complaint and the parties' legal arguments with respect thereto in reaching his decision to dismiss plaintiff's complaint without prejudice. Thus we overrule plaintiff's sixth assignment of error.

For the foregoing reasons, the order of dismissal is affirmed.

Affirmed.

Judges WYNN and WALKER concur.

(Judge WYNN concurred in this opinion prior to 1 October 1998.)

STATE OF NORTH CAROLINA v. JAMES NORMAN BURMEISTER, II

No. COA97-1510

(Filed 20 October 1998)

1. Venue— motion for change—properly denied

The trial court did not abuse its discretion by denying a first-degree murder defendant's motion for a change of venue where the court found that potential jurors in other counties had been exposed to media coverage and that defendant's own survey showed that the majority of potential jurors in Cumberland County had not formed an opinion, and the selected jurors each stated that they had not formed prior opinions concerning defendant's guilt and could decide the case based solely on the evidence introduced at trial.

2. Criminal Law— prosecutor's opening arguments—references to Adolph Hitler

The trial court did not abuse its discretion in a first-degree murder prosecution by not sustaining defendant's objections to references by the prosecutor to Adolph Hitler in his opening argument where overwhelming evidence was presented of defendant's preoccupation with Nazi Germany.

3. Evidence— motive and intent—defendant's prejudice relevant

The trial court did not err in a first-degree murder prosecution by admitting evidence relating to defendant's prejudice against homosexuals and Jewish people where evidence of defendant's prejudices was relevant to show his motive and intent when he killed the two black victims.

4. Evidence— motive and intent—prior conduct—acting out skinhead song

There was no plain error in a first-degree murder prosecution in the admission of evidence that defendant acted out the lyrics of a skinhead song in a bar fight by kicking a man in the face as he lay on the ground. Evidence of defendant's skinhead beliefs and mindset are relevant to his motive and intent in killing two black victims.

5. Evidence— accomplice's statement to witnesses—fear of incrimination—admissible

There was no error in a first-degree murder prosecution in the admission of testimony from several witnesses that an accomplice had been asked about a spider web tattoo and had replied that he did not want to incriminate himself. The significance of the tattoo had already been introduced through other testimony; defendant and the accomplice had been tried separately, so that the Bruton rule had no bearing; and the failure to answer did not amount to an admission or confession of a crime or illegal act.

6. Witnesses— instructions—credibility—accomplice—alcohol abuser

Any error was harmless in a first-degree murder prosecution where defendant requested that the court instruct the jury that the testimony of an alcohol abuser must be examined with greater care than ordinary witnesses and that the jury should never convict upon the unsupported testimony of such a witness unless it believed the testimony beyond a reasonable doubt, and the court instructed the jury to consider the opportunity of the witnesses to see, hear, know and remember the facts or occurrences about which the witness testified, that it should examine every part of the testimony of an accomplice witness with the greatest care and caution, and that it should specifically examine the testimony of this witness with great care and caution. The court is not required to frame instructions with any greater particularity than is necessary to enable the jury to properly understand and apply the law to the evidence.

7. Homicide— conspiracy—evidence sufficient

The trial court correctly denied defendant's motion to dismiss a conspiracy to murder charge where the evidence, viewed in the light most favorable to the State, was sufficient to submit

the charge to the jury on the theory that defendant and others conspired to kill a black person so that defendant could get his spider web tattoo.

Appeal by defendant from judgments entered 6 March 1997 by Judge Coy E. Brewer, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 23 September 1998.

Defendant James Norman Burmeister, II, was tried in Cumberland County Superior Court on two counts of first degree murder, and one count of conspiracy to commit murder. The State offered evidence tending to show that on the afternoon of 6 December 1995, defendant Burmeister and his friends Randy Meadows (Meadows) and Malcolm Wright (Wright) were drinking beer at defendant's trailer and discussing their hatred of black people. Wright had a spider web tattoo on his elbow, and bragged that the tattoo was used by skinheads to represent that the person with the tattoo had killed a black person. Defendant, who was a neo-Nazi skinhead, became excited by the talk about the tattoo because he wanted to gain recognition and respect among the other skinheads. When the three men left the trailer to go to dinner that same evening, defendant took his pistol, telling Wright and Meadows that he might earn his tattoo that night.

Further evidence for the State tended to show that the men had dinner and stopped at a nightclub in Fayetteville. Thereafter, the men decided to "fu-k with some n---rs," so defendant instructed Meadows to cruise side streets looking for black people. The three men spotted a black couple walking and decided to circle the block. Meadows stopped the car because defendant and Wright were getting out. Defendant and Wright left their flight jackets, their jewelry, and wallets in the car to prevent identification. Defendant instructed Meadows to wait for them for 15 minutes, but to return to the barracks if they were not back within that time.

The State's evidence tended to show that as defendant left the car, he said to Meadows: "You never know. Maybe I'll earn my spider web tonight." Minutes later, Meadows heard three gunshots, followed by three additional gunshots. Meadows waited and did not see his companions, but he saw blue lights and police cars.

The officers arrived on the scene about 12:15 a.m. on 7 December 1995. The first officer to arrive on the scene found two victims in the road with fatal gunshot wounds to their heads.

Meadows parked the car and walked towards the blue lights and police cars. Meadows first told the officers that he lived in the neighborhood, and later told the officers that he had gotten lost after driving down side streets to avoid the police because he was driving after drinking. The officers did not believe Meadows' story, so they questioned Meadows further and he took the officers to the car where they found two flight jackets with German military insignia. Thereafter Meadows confessed, implicating defendant and Wright, and directed the officers to the trailer where defendant lived. Defendant and Wright were arrested a few hours later at 104 Laurel Street.

A taxi driver testified for the State that he picked up defendant and Wright in the early morning of 7 December 1995 and took them to 104 Laurel Street in Cooper's Ranch Mobile Home Park. The two men had no money to pay for the taxi fare. Instead, they wrote their names, social security numbers, and military units down on a piece of paper and gave it to the taxi driver, telling him they would be in to pay him later.

Another State witness testified that defendant and Wright came to her home about 3:30 a.m. on 7 December 1995 to get a key to the 104 Laurel Street address, because defendant was locked out. She further testified that defendant was renting a room in the trailer at 104 Laurel Street.

The State presented evidence showing that defendant was a member of a skinhead organization and was an avowed racist. In addition, Meadows testified that defendant told him in jail that he had killed the two people.

Defendant was convicted on both counts of first degree murder and for conspiracy to commit murder. However, the jury was unable to agree on a sentence for the charges of first degree murder. Thus, the trial court entered consecutive life sentences on the two murder counts. The trial court then entered a sentence of 196 months to 245 months on the conspiracy count to run at the expiration of the life sentences. Defendant appeals.

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

James R. Parish for defendant appellant.

HORTON, Judge.

Defendant assigns error to: (I) the trial court's failure to change venue; (II) the trial court's failure to sustain his objection to the district attorney's references to Adolph Hitler in his opening statement to the jury; (III) the trial court's admission of evidence relating to: (A) defendant's expressed prejudice against homosexual and Jewish persons, (B) defendant's action in kicking a person in the face and bragging about it, and (C) witnesses asking codefendant Wright about his spider web tattoo; (IV) the trial court's failure to properly instruct the jury on the credibility of witnesses; and (V) the trial court's failure to dismiss the charge of conspiracy to commit murder at the close of all evidence.

I. Change of Venue

[1] Defendant claims the trial court erred when it denied defendant's motion to change venue. Defendant introduced numerous newspaper and magazine articles, a telephone survey created to gauge the impact of pretrial publicity in Cumberland County, and the testimony of two witnesses.

"The determination of whether a defendant has carried his burden of showing that pretrial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion." *State v. Knight*, 340 N.C. 531, 553, 459 S.E.2d 481, 495 (1995). The test for determining whether pretrial publicity requires a change of venue is whether it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information, rather than the evidence presented at trial. *Id.*

Although there had been extensive pretrial publicity to potential jurors from Cumberland County, the trial court found that potential jurors in other counties had also been exposed to the media coverage of the murders. The trial court also found that defendant's own survey showed the majority of potential jurors surveyed from Cumberland County had not formed an opinion.

In addition, the trial court decided to use the jury *voir dire* selection process to make certain the jury selected had not formed an opinion that would preclude them from making a decision based on the evidence presented in the case. Our Supreme Court has held that

> the potential jurors' responses to questions on *voir dire* are the best evidence of whether pretrial publicity was prejudicial or

> inflammatory. If each juror states unequivocally that he or she can set aside pretrial information about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, the trial court does not err in refusing to grant a change of venue.

Knight, 340 N.C. at 554-55, 459 S.E.2d at 495-96 (citations omitted).

The record on appeal indicates that the selected jurors each stated they had not formed prior opinions concerning defendant's guilt and that they could decide the case based solely on the evidence introduced at trial. Thus, the trial court did not abuse its discretion and this assignment of error is overruled.

II. Opening Statement

[2] Defendant next argues the trial court erred by failing to sustain defendant's objection to the district attorney's references to Adolph Hitler in the State's opening statement to the jury as follows:

> You will hear as you sit here a story of evil, an evil that has its roots in an evil that is closely allied with the events that transpired in the 1930s and 1940s in the world. Events engineered—
>
> * * * *
>
> . . . by Adolph Hitler and his gang of henchmen—
>
> * * * *
>
> —causing the death of millions of people—
>
> * * * *
>
> —an evil brought back to life here in Fayetteville by this defendant and a group that called themselves "skinheads." Pure, unmitigated evil. An evil that struck down two completely unsuspecting people. Two people that had no idea of what was coming and what was gonna happen to 'em. Not because they offended anybody, not because they angered someone.

As our Supreme Court has already stated, "arguments of counsel are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts." *State v. Taylor*, 289 N.C. 223, 226, 221 S.E.2d 359, 362 (1976). The proper function of an opening statement is to inform the trial court and the jury of the nature of the case and the evidence counsel plans

to offer in support of his case. *State v. Jaynes*, 342 N.C. 249, 282, 464 S.E.2d 448, 468 (1995). The trial court's discretion will not be reviewed unless counsel's remarks are extreme and are clearly calculated to prejudice the jury in its deliberations. *Taylor*, 289 N.C. at 227, 221 S.E.2d at 362.

In the instant case, the prosecutor's opening remarks related to the nature of the case and the evidence the State planned to offer in support of it. The prosecutor told the jury that the State's evidence would show the racial killings were committed by a neo-Nazi skinhead who was motivated by the same type of racial hatred as that preached by German Nazis in the 1930s and 1940s.

The evidence presented showed defendant was enchanted with Nazi Germany. In fact, defendant displayed Nazi military flags and posters in his room, listened to and sang neo-Nazi songs, wore Nazi German patches on his jacket, and wore an Iron Cross around his neck. Furthermore, neo-Nazi literature seized in defendant's room espoused the philosophy of white supremacy and racial hatred, urging preparation for the upcoming racial holy war. In light of the overwhelming evidence presented concerning defendant's preoccupation with Nazi Germany, the trial court did not err in overruling defendant's objections.

III. Admission of Evidence

(A) Expressed Prejudices

[3] Defendant claims the trial court erred in admitting evidence relating to defendant's expressed prejudice against homosexuals and Jewish people. N.C. Gen. Stat. § 8C-1, Rule 404(b) (1992) provides that, although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith, such evidence is admissible for other purposes, such as proof of motive and intent.

Our Supreme Court has 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. *State v. Stager*, 329 N.C. 278, 302, 406 S.E.2d 876, 890 (1991). The relevant test under Rule 404(b) is whether there was "substantial evidence tending to support a reasonable finding *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.

In the instant case, the evidence of defendant's prejudices was relevant to show defendant's motive and intent when he killed the two black victims. The evidence showed that defendant was advancing his skinhead beliefs. Thus, this evidence was admissible to show motive and intent, and not merely to show defendant's propensity to commit murder. Therefore, this assignment of error is overruled.

(B) Prior violent behavior

[4] In addition, defendant claims the trial court erred in admitting evidence that defendant kicked a person in the face and bragged about it. The State introduced evidence of a bar fight that defendant was involved in before the murders, in which he acted out the lyrics of one of his skinhead songs by kicking a man in the mouth with defendant's Doc Marten shoes as the man lay on the ground. Defendant claims this evidence was impermissible character evidence used only to show his propensity for violence.

Defendant concedes that he has waived this argument by failing to object when the evidence was introduced at trial. However, he urges this Court to review this evidence under the plain error rule. Defendant must show that he would not have been convicted if the error had not been made or that a miscarriage of justice would result if the error is not corrected. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983).

In the instant case, defendant has not met his burden. As previously mentioned, evidence of defendant's skinhead beliefs and mindset are relevant under Rule 404(b) to prove defendant's motive and intent when he killed the two black victims. Thus, this assignment of error is overruled.

(C) Spider web tattoo

[5] Defendant argues the trial court erred in allowing the State to introduce several witnesses quoting Wright. Wright stated, in response to questions as to why he had a spider web tattoo, that he did not want to tell because he did not want to incriminate himself. Defendant cites *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), and contends Wright's statements were inadmissible as a codefendant's confession of guilt which incriminated and prejudiced him. Again, defendant concedes that he failed to object to this testi-

mony at trial, but he claims that this Court should consider the evidence under the plain error rule.

First, evidence about the significance of the spider web tattoo had already been introduced in Meadows' testimony. In addition, the *Bruton* rule has no bearing on whether Wright's statement was admissible since Wright and defendant were tried separately instead of jointly. Furthermore, Wright's failure to answer when asked about his spider web tattoo did not amount to an admission or confession of the commission of a crime or illegal act. Therefore, the admission of this evidence was not prejudicial error.

(IV) Jury Instruction

[6] Next, defendant claims the trial court erred when it failed to properly instruct the jury on the credibility of witnesses. Defendant requested a special jury instruction that the testimony of Meadows as an alcohol abuser "must always be examined and weighed by the jury with greater care than the testimony of ordinary witnesses[,]" and further, that the jury "should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt."

The court 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). In the instant case, the trial court instructed the jury to consider "the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified[.]"

Furthermore, the trial court instructed that the jury "should examine every part of the testimony of an accomplice witness with the greatest care and caution[]" and that the jury specifically should examine Meadows' testimony "with great care and caution in deciding whether or not to believe him[]" because Meadows "was testifying under an agreement with the prosecutor for a charge reduction in exchange for his testimony." Thus, any potential error in failing to give defendant's specific instruction on credibility was harmless. *See State v. Eakins*, 292 N.C. 445, 449-50, 233 S.E.2d 387, 390 (1977).

(V) Motion to Dismiss

[7] Finally, defendant argues the trial court erred by failing to dismiss the charge of conspiracy to commit murder at the close of all

evidence. Defendant contends the evidence showed no more than a mutual understanding or implied agreement by Meadows, Wright, and defendant to assault unsuspecting blacks. Defendant further claims the evidence raised no more than a mere suspicion that the object of their agreement was to kill the victims.

A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act or to do a lawful act by unlawful means. *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 830 (1991). Direct proof of conspiracy is rarely obtainable, and a conspiracy generally is established by a number of indefinite acts, which taken collectively point to the existence of a conspiracy. *State v. Smith*, 237 N.C. 1, 17, 74 S.E.2d 291, 302 (1953).

Viewing the evidence in the light most favorable to the State, the evidence was sufficient to submit the conspiracy charge to the jury on the theory that Wright, Meadows, and defendant conspired to kill a black person so that defendant could get his spider web tattoo. Thus, the trial court correctly denied defendant's motion to dismiss the conspiracy charge.

For the foregoing reasons, the decision of the trial court was free from prejudicial error.

No error.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. HAMILTON JUNIOR COZART

No. COA97-1248

(Filed 20 October 1998)

1. Homicide— attempted first-degree murder—elements—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss an attempted first-degree murder charge for insufficient evidence. A person commits the crime of attempted first-degree murder if he specifically intends to kill another person unlawfully; does an overt act calculated to carry out that intent that

goes beyond mere preparation; acts with malice, premeditation, and deliberation; and falls short. There was sufficient evidence in this case of each element and that defendant was the perpetrator.

2. Homicide— attempted second-degree murder as lesser included offense—instruction refused—evidence of premeditation not contradicted

The trial court did not err in an attempted first-degree murder prosecution by not instructing the jury on attempted second-degree murder. A person commits the crime of attempted second-degree murder when he specifically intends to kill another person unlawfully; does an overt act calculated to carry out that intent that goes beyond mere preparation; acts with malice; and falls short. The only elements that distinguish attempted first-degree murder from attempted second-degree murder are premeditation and deliberation; here, there was no evidence to contradict the State's evidence of premeditation and deliberation.

3. Homicide— attempted first-degree murder—assault with a deadly weapon not a lesser included offense

The trial court did not err in a prosecution for attempted first-degree murder by not giving an instruction on assault with a deadly weapon with intent to kill. Although defendant contends that assault with a deadly weapon with intent to kill is a lesser included offense of attempted first-degree murder, use of a deadly weapon is an element not required for attempted first-degree murder.

4. Witnesses— cross-examination—scope limited—no prejudice

There was no prejudicial error in a prosecution for attempted first-degree murder in the court's limiting the scope of cross-examination of a State's witness who testified that she was not present at the time of the shooting and whom defendant wished to impeach with an affidavit stating that she was present. There was no reason for the limitations placed on defendant's use of the purported affidavit; however, defendant was able to impeach the witness's trial testimony by asking her about a prior statement to an investigating officer and, moreover, this witness's testimony added very little to the State's case.

5. Evidence— hearsay—affidavit contradicting testimony

The trial court did not err by refusing to admit as substantive evidence the purported affidavit of a witness containing a statement which contradicted her trial testimony. The statement was inadmissible hearsay as substantive evidence.

6. Witnesses— cross-examination—questions not allowed— no offer of proof

The trial court did not err in a prosecution for attempted first-degree murder by preventing defendant on cross-examination of several witnesses from asking certain questions about recent fights between defendant, defendant's family, and the State's witnesses. Defendant made no offer of proof regarding the responses.

Appeal by defendant from judgments entered 1 May 1997 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 19 August 1998.

Attorney General Michael F. Easley, by Associate Attorney General Teresa L. Harris, for the State.

Paul Pooley for defendant.

LEWIS, Judge.

Defendant was convicted of discharging a firearm into occupied property and attempted first-degree murder. We find no error.

The State's evidence, including the testimony of six eyewitnesses, tended to show the following. On 27 March 1996, around 5:15 p.m., Deshawn Holley was involved in an altercation with defendant. Holley left and traveled to the home of his cousin, Gennive Walden, at 511 Benton Street in Benson, where several relatives were visiting. Holley stayed outside on the porch.

About ten minutes after Holley arrived, a green Bronco driven by Terence Green pulled up outside the Walden home. Defendant, Albert Coleman, and Jeremy Stallings got out of the Bronco. When Holley saw them, he grabbed a stick from someone who was also standing on the porch. Holley pointed the stick at defendant and the others and told defendant if he came any closer, Holley would hit him in the head. Defendant then snapped his fingers, said, "This is for you, punk m----- f-----," and told Coleman to "get the guns." Coleman went to the

Bronco and took out several guns. He handed them to Stallings and defendant. Defendant then said, "Shoot," and the three began firing at the porch from about twenty-five yards away. Holley and his relatives ran inside. About eight rounds were fired, at least one of which shattered a window and entered the house. Some of the bullets passed over the heads of those on the porch, but no one was hit.

[1] On appeal, defendant first argues that the trial court should have granted his motion to dismiss the attempted first-degree murder charge for lack of sufficient evidence. A motion to dismiss on the ground of insufficient evidence should be denied if there is substantial evidence of each element of the crime, and that defendant was the perpetrator. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). Substantial evidence is such relevant evidence as a reasonable mind might find sufficient to support a conclusion. *Id.*

First-degree murder is the unlawful killing of a human being with malice and with a specific intent to kill, committed after premeditation and deliberation. N.C. Gen. Stat. § 14-17 (1993); *State v. Mitchell*, 288 N.C. 360, 365, 218 S.E.2d 332, 336 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836. In the context of attempted first-degree murder, circumstances that may tend to prove premeditation and deliberation include: (1) lack of provocation by the intended victim or victims; (2) conduct and statements of the defendant both before and after the attempted killing; (3) threats made against the intended victim or victims by the defendant; and (4) ill will or previous difficulty between the defendant and the intended victim or victims. *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980).

A person "attempts" to commit a crime when he intends to commit the crime; he performs an overt act calculated to carry out that intent, going beyond mere preparation; and he falls short of committing the crime. *State v. Collins*, 334 N.C. 54, 60, 431 S.E.2d 188, 192 (1993). Thus: A person commits the crime of attempted first-degree

murder if he specifically intends to kill another person unlawfully; he does an overt act calculated to carry out that intent, going beyond mere preparation; he acts with malice, premeditation, and deliberation; and he falls short of committing the murder.

In this case, there was sufficient evidence of each element of attempted first-degree murder and that defendant was the perpetrator. Defendant's intent to kill Holley with malice can be inferred from his shooting at the porch from twenty-five yards away and from his ordering others to shoot at the porch from this range, particularly after telling defendant, "This is for you, punk m---- f-----." Defendant's premeditation and deliberation can be inferred from the fact that defendant assaulted Holley in his car just minutes before the shooting; that defendant sought out Holley; that guns were on board the Bronco when it arrived at the scene of the shooting; and that defendant snapped his fingers and ordered his companions to get the guns and open fire. Finally, it goes without saying that defendant's firing a gun at Holley is an overt act, going beyond mere preparation, in furtherance of his intent to kill Holley. Defendant's motion to dismiss the attempted first-degree murder charge was correctly denied.

[2] Next, defendant argues that the trial court should have instructed the jury on the lesser-included offense of attempted second-degree murder.

Second-degree murder is the unlawful killing of another person with malice, but without premeditation and deliberation. N.C. Gen. Stat. § 14-17 (1993); *State v. Geddie*, 345 N.C. 73, 94, 478 S.E.2d 146, 156 (1996). A person commits the crime of attempted second-degree murder when he specifically intends to kill another person unlawfully; he does an overt act calculated to carry out that intent, going beyond mere preparation; he acts with malice; and he falls short of committing the murder.

A defendant is not entitled to an instruction on second-degree murder in addition to an instruction on first-degree murder "[i]f the [State's] evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense." *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). The same analysis applies to determining whether a defendant is entitled to an instruc-

tion on attempted second-degree murder where the jury is instructed on attempted first-degree murder. The only elements that distinguish attempted first-degree murder from attempted second-degree murder are premeditation and deliberation.

In this case, there was no evidence to contradict the State's evidence of premeditation and deliberation. No instruction on attempted second-degree murder was warranted.

[3] Defendant also argues that he was entitled to an instruction on assault with a deadly weapon with intent to kill in violation of N.C. Gen. Stat. § 14-32(c) (1993). Defendant claims that assault with a deadly weapon with intent to kill is a lesser-included offense within the crime of attempted first-degree murder. We disagree. Assault with a deadly weapon with intent to kill requires proof of an element not required for attempted first-degree murder: the use of a deadly weapon. It is not a lesser-included offense of attempted first-degree murder. *See State v. Westbrooks*, 345 N.C. 43, 55, 478 S.E.2d 483, 491 (1996).

[4] In his next assignment of error, defendant claims that the trial court improperly limited the scope of his cross-examination of State witness Gennive Walden. At trial, Walden testified, among other things, that she was not present at the time of the shooting but arrived there about thirty minutes later. Defendant wanted to impeach Walden with a document purporting to be an affidavit executed by Walden some ten months before trial. The purported affidavit includes a statement that Walden was present at the time of the shooting.

At a hearing held outside the presence of the jury, Walden testified that someone else had typed up the paper, that she did not recall having read or having been read the final statement before signing it, and that the paper she signed did not include a statement that she was present when shots were fired. The trial court indicated that it would restrict the use of the affidavit in cross-examination. The reason the trial court restricted use of the affidavit is unclear. It appears the trial judge believed that Gennive Walden was not, in fact, present at the scene of the shooting, and that limiting the use of the purported affidavit during cross-examination would prevent perjured testimony from reaching the jury.

When the jury returned and Gennive Walden was cross-examined, Walden admitted signing the purported affidavit. The trial court sus-

tained objections to the reading of any part of the purported affidavit, including the statement that Walden was present at the scene of the shooting. When defendant offered the affidavit into evidence, apparently for impeachment purposes, the trial court refused to allow the jury to see the statement but allowed defendant to argue to the jury that Walden admitted signing a statement that she was present at the time of the shooting.

A witness is ordinarily subject to impeachment on cross-examination through the use of prior inconsistent statements. N.C.R. Evid. 607, 611(b), 613; *State v. McKeithan*, 293 N.C. 722, 730, 239 S.E.2d 254, 259 (1977). We find no reason for limitations placed on defendant's use of the purported affidavit for impeachment purposes.

Nevertheless, we believe that the trial court's error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443 (1997). Defendant was able to impeach Gennive Walden's trial testimony that she was not present at the time of the shooting by asking her about a prior inconsistent statement she made to an investigating officer. More important, because Walden's testimony added very little, if anything, to the State's case, a more extensive assault on her credibility would not have helped the defense.

[5] Defendant next argues that the trial court erred in refusing to admit Gennive Walden's purported affidavit as substantive evidence. It is not clear from the record whether defendant actually attempted to introduce Walden's affidavit as substantive evidence. Assuming that such a tender was made, the trial court correctly refused to admit it in evidence. As substantive evidence, Ms. Walden's prior statement was inadmissible hearsay. N.C.R. Evid. 801, 802. It fell within no established exception to the hearsay rule and was not inherently trustworthy. *See* N.C.R. Evid. 803.

[6] Finally, defendant argues that the trial court erred by preventing defendant, in his cross-examination of several witnesses, from asking certain questions about recent fights between defendant, defendant's family, and the State's witnesses. Defendant made no offer of proof regarding what the witnesses' responses would have been. We thus conclude that the exclusion of such evidence was not error. *See State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985).

No error.

Judges MARTIN, John C. and WALKER concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. JOE C. ROWE AND WIFE, SHARON B. ROWE; HOWARD L. PRUITT, JR., AND WIFE, GEORGIA PRUITT; ROBERT W. ADAMS, TRUSTEE; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY AND HUSBAND, KENNETH H. ABERNETHY; MARTHA BOWMAN CAUDILL AND HUSBAND, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC. (FORMERLY APPALACHIAN POSTER ADVERTISING COMPANY, INC.), LESSEE; AND FLORENCE BOWMAN BOLICK, DEFENDANTS

No. COA97-1470

(Filed 20 October 1998)

1. Appeal and Error— appealability—interlocutory orders—condemnation action

Preliminary issues in a condemnation action were not properly before the Court of Appeals where the trial court fully considered these questions before trial and its orders, though interlocutory, affected a substantial right and should have been immediately appealed under *Highway Commission v. Nuckles*, 271 N.C. 1.

2. Eminent Domain— evidence—comparable sale

The trial court did not abuse its discretion in a condemnation action by allowing as evidence of a comparable sale defendants' conveyance of another tract approximately four months before the taking. Although defendants argue that the sale included an option and that the sale price was indeterminate, the property was sold within four months of the taking, was physically adjacent to defendant's property and was sufficiently comparable to be introduced. Defendants were allowed to offer evidence about the option and argue its effect; dissimilarities go to the weight of the evidence rather than its admissibility. Moreover, DOT used the comparable sale to impeach a defendant's testimony; the extent of cross-examination is in the discretion of the trial court and defendants have shown no abuse.

3. Eminent Domain— evidence—remainder tract—cost of opening streets and raising grade

The trial court did not err in a condemnation action when it sustained objections to defendants' attempt to offer evidence of the costs of opening unopened streets on the remainder tract and of raising the grade of one tract to the level of the projected road. Defendants were speculating about the future construction of streets and the effects on their remainder property.

4. Eminent Domain— evidence—location of unopened streets excluded

There was no prejudicial error in a condemnation action in the court's refusal to allow defendants to introduce a map showing the location of unopened streets. Although defendants wished to demonstrate to the jury the lack of unity of the remaining tracts, that issue had been determined by the court as a preliminary question of law. Moreover, there was a wealth of other evidence about the location of the unopened streets.

5. Eminent Domain— evidence—cross-examination—sale of adjacent tract

The trial court abused its discretion in a condemnation by sustaining an objection when defendants attempted to cross-examine a State's witness regarding the sale of an adjacent tract where the witness had given a valuation of defendants' property. While there were some differences in the size of the tracts, size is merely one factor, and defendants were introducing the appraisal rather than the comparable sale and were offering the evidence to impeach an important DOT witness, rather than for substantive purposes. In light of the failure of the jury to award any compensation to defendants, excluding the evidence was not harmless.

Appeal by defendants from judgment entered by Judge J. Marlene Hyatt on 17 June 1997 in Catawba County Superior Court and orders entered by Judge James L. Baker, Jr., on 8 May 1997 and 16 May 1997 in Catawba County Superior Court. Heard in the Court of Appeals 27 August 1998.

Attorney General Michael F. Easley, by Assistant Attorney General J. Bruce McKinney, for plaintiff appellee.

Lewis & Daggett, PA, by Michael J. Lewis; and Bell, Davis & Pitt, PA, by Stephen M. Russell, for defendant appellants.

HORTON, Judge.

Joe C. Rowe, *et al.* (collectively, defendants) appeal from a jury verdict and judgment denying them any compensation for 11.411 acres of their land in Catawba County which the Department of Transportation (DOT) condemned on 26 June 1995 for a connector road. Prior to the taking, defendants Joe C. Rowe and wife, Sharon B.

Rowe (the Rowes), and defendants Howard L. Pruitt, Jr., and wife, Georgia M. Pruitt (the Pruitts), owned 18.123 acres in Catawba County, which they purchased in December 1986. DOT determined that the benefits to defendants' remaining 6.712 acres of property outweighed any loss to defendants due to the taking, and, therefore, did not make a deposit to defendants of the amount estimated to be just compensation at the time it filed its condemnation action.

Defendants filed an answer alleging that the "special or general benefits" provision of N.C. Gen. Stat. § 136-112(1) (1993), the condemnation statute, is unconstitutional both on its face and as applied to these defendant landowners. Prior to trial, a hearing was held pursuant to the provisions of N.C. Gen. Stat. § 136-108 (1993) to determine issues other than the amount of damages. Evidence was introduced which tended to show that, after the taking, defendants were left with four small remainder tracts of land known as tracts A, B, C, and D, which totaled 6.712 acres and that prior to the taking, defendants' remainder tracts A and B were physically connected to the area taken by DOT for its right of way with tract A being attached to the easternmost portion of the area taken, and tract B being attached to the westernmost portion of the area taken. Tract B was separated from remainder tracts C and D by a deeded 70-foot street. Tracts C and D were separated from each other by a deeded 60-foot street. None of the deeded streets separating tracts B, C, and D were actually in existence on the ground on the date of taking.

In its order dated 8 May 1997, the trial court determined that defendants' remaining four small tracts, which were not condemned by DOT, had "physical unity" and therefore were affected by the taking. The trial court also rejected defendants' claim that the condemnation statute, N.C. Gen. Stat. § 136-112(1) was unconstitutional in an order dated 16 May 1997. At trial, the jury found that defendants were not entitled to any compensation for the taking by DOT because of the increase in value of the remaining tracts which was offset against any loss suffered by the taking.

On appeal, defendants contend that (I) the trial court erred in including each of the four small tracts in the area affected by the taking and thereby treating all of defendants' property as a "unified tract"; (II) N.C. Gen. Stat. § 136-112(1), which allows a deduction from just compensation for "special or general benefits" resulting from a taking is unconstitutional both on its face and as applied to these defendants; (III) the trial court erred by allowing evidence of an

allegedly comparable sale; (IV) the trial court erred by excluding evidence on the question of the defendants' damages; (V) the trial court erred by not allowing them to introduce a map of the tracts; and (VI) the trial court erred by not allowing them to cross-examine Richard Marlowe about a comparable piece of property.

I and II

[1] We initially note that the purpose of the procedure set forth in section 136-108 is to narrow the issues so that the jury must only decide the amount of damages. In *Highway Commission v. Nuckles*, Justice (later Chief Justice) Sharp explained that

> [o]ne of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the State Highway Commission is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors. G.S. 1-227. . . .
>
> Obviously, it would be an exercise in futility, completely thwarting the purpose of G.S. 136-108, to have the jury assess damages to tracts 1, 2, 3, and 4 if plaintiff were condemning only tracts A and B, and the verdict would be set aside on appeal for errors committed by the judge in determining the "issues other than damages."

271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967).

In this case, the trial court fully considered the preliminary questions raised by defendants about the unity of all of the tracts and about the constitutionality of the "special or general benefits" provision of N.C. Gen. Stat. § 136-112 as applied to these defendants. Indeed, written orders finding against defendants were entered. Defendants did note an exception to the ruling concerning the unity of the tracts; they did not, however, enter notice of appeal from the orders until 7 July 1997. Although the preliminary orders were clearly interlocutory, they affected a substantial right of the defendants; and the *Nuckles* case requires them to immediately appeal the orders which dealt with the unity and constitutional issues. Error on the preliminary issues considered by the trial court requires a complete new trial of the matter at considerable delay and expense for both the parties and the courts. *See also Johnson v. Highway Commission*, 259 N.C. 371, 130 S.E.2d 544 (1963) (plaintiff appealed from the trial

court's ruling after an N.C. Gen. Stat. § 136-108 hearing, and the Supreme Court found error in the trial court's ruling and remanded); *and City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 281 S.E.2d 667 (1981) (this Court allowed an interlocutory appeal from landowner when the trial court, pursuant to § 136-108, found that a certain tract was not united with the property taken, and therefore was not affected by the taking), *disc. review denied*, 304 N.C. 724, 288 S.E.2d 808 (1982). Thus, the rulings by the trial court following the hearing pursuant to N.C. Gen. Stat. § 136-108 should have been immediately appealed and are therefore not properly before us.

III

Evidence of Comparable Sale

[2] Defendants next contend that the trial court erred in allowing evidence relating to their conveyance of a ten-acre tract to the Hospitality Group approximately four months before the taking in question. After DOT announced its plans for the right of way, defendants sold ten acres of their land for $300,000 per acre to the Hospitality Group. The sale to the Hospitality Group was made in anticipation of the construction of the connector road over defendants' property, as the boundaries of the ten-acre tract follow the bounds of the right of way to be taken. At trial, DOT introduced evidence of the sale to the Hospitality Group, over the objections of defendants, as a comparable sale. Although defendants acknowledge that "the price paid at voluntary sales of land similar to condemnee's land at or about the time of the taking is admissible as independent evidence of the value of the land taken[,]" *State Highway Commission v. Conrad*, 263 N.C. 394, 400, 139 S.E.2d 553, 558 (1965), they argue that evidence of the sale was inadmissible because the sale price was indeterminate. The sale of the ten-acre tract included an option to buy remainder tract A at $200,000 per acre. The option was unrecorded and was not exercised at the time of the trial. In any event, defendants were allowed to offer evidence before the jury about the terms of the option and to fully argue its effect. Evidence of any dissimilarities goes to the weight to be given the evidence, not to its admissibility. The property was sold by defendants within four months of the taking in this case, was physically adjacent to the property of the defendants, and was sufficiently "comparable" to be introduced in evidence.

Moreover, DOT used the comparable sale to impeach the testimony of defendant Joe C. Rowe, who testified about his opinions of

the value of defendants' property both before and after the taking by DOT. The extent of cross-examination for impeachment purposes is normally in the discretion of the trial court and defendants have not shown any abuse of discretion. *Maddox v. Brown*, 233 N.C. 519, 524, 64 S.E.2d 864, 867 (1951). This assignment of error is overruled.

IV

[3] Defendants contend that the trial court erred when it sustained DOT's objection to defendants' attempt to offer evidence of the costs of opening the unopened streets near the remainder tracts B, C, and D, and the cost of raising the grade of tract A to make it level with the projected road. Defendants contend that the evidence was relevant as to the amount of defendants' damages. We disagree.

Defendants cite *Dept. of Transportation v. McDarris*, 62 N.C. App. 55, 302 S.E.2d 277 (1983), in support of the admissibility of the evidence. *In McDarris*, DOT was taking some of defendant's land in order to widen an existing highway; this Court held that the jury could properly consider the costs to defendant landowner of grading the remaining land so that it would be roughly level with the highway. As a result of the taking and highway construction, defendant's land was much lower than the new roadway, ranging from one foot to nine feet lower than the highway. In this case, however, defendants were speculating about the future construction of streets and the effects on their remainder property. The trial court, therefore, correctly sustained DOT's objections to the proffered testimony.

V

[4] Defendants further complain that they were not allowed to introduce a map showing the location of the deeded but unopened streets which lie between tracts B, C, and D. Defendants argue that they were entitled to "present this evidence and . . . convince the jury that *no unity* existed between the four tracts . . . ." Defendants contend that demonstrating the lack of unity to the jury would likely have resulted in the jury's reduction in the benefits resulting from the taking, and the award of "some compensation" to defendants. We disagree for two reasons.

First of all, the question of the "unity" of the tracts was a preliminary question of law for the trial court. N.C. Gen. Stat. § 136-108. Second, there was a wealth of other evidence about the location of the unopened streets between tracts B, C, and D. Therefore, even if the trial court erred in failing to allow the introduction of defendants'

exhibit, the error was not prejudicial, as the same evidence was before the jury on numerous other exhibits, including defendants' own exhibit 1. *See State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982) (no prejudicial error when evidence excluded if substantially similar evidence was admitted).

VI

[5] Defendants' remaining assignment of error presents the closest question for our consideration. There was a 4.753-acre tract adjacent to the right of way taken by DOT in this case of which 2.86 acres was also condemned. Richard Marlowe (Mr. Marlowe) testified for DOT about his valuations of defendants' property, both before and after the taking, and stated that, in his opinion, defendants' property was valued at only $50,000 per acre immediately prior to the taking by DOT. However, when counsel for defendants cross-examined him about the value prior to the taking he placed on the 4.753-acre tract, the following exchange occurred:

> Q. Now what was the value that you put on that 4.76 acre [tract] before?
>
> A. MR[.] MCKINNEY: Objection. I object to that because there is nothing that is comparable becuase [*sic*] of the size, they are entirely different size and we are talking about an 18 acre versus a four acre tract.
>
> COURT: Sustained.
>
> MR[.] PANNELL: May I be heard on that?
>
> (Counsel to the bench and back to their seats.)
>
> COURT: I have sustained the objection and will continue to sustain[] the objection. I have made my ruling.

At the conclusion of the evidence, Mr. Marlowe testified in the absence of the jury and for the record that he placed a before-taking value of $98,000 per acre on the 4.753-acre tract.

We note that defendants did not offer the evidence of the price of the 4.753-acre tract for substantive purposes, but to impeach the testimony of Mr. Marlowe. As we noted earlier, when discussing DOT's cross-examination of defendant Rowe, counsel is to be allowed considerable latitude in cross-examination. Here, however, the trial court abused its discretion in preventing Mr. Marlowe from testifying to his opinion as to the pre-taking value of the 4.753-acre tract. While there

were some differences in the size of the tracts, size is merely one of the factors for the trial court to consider in exercising its discretion in admitting the evidence of the sale price of comparable property. *Duke Power Company v. Smith*, 54 N.C. App. 214, 216, 282 S.E.2d 564, 566 (1981). In this case, defendants were not introducing evidence of a comparable sale, but of the appraisal made by Mr. Marlowe himself of nearby property. We particularly note that Mr. Marlowe testified that he used four comparable tracts in forming his opinion as to the before taking value of defendants' property; one of these tracts used by him was 5.093 acres in size and another was 3.55 acres in size. We believe that it was an abuse of the trial court's discretion to exclude evidence of Mr. Marlowe's appraisal of an adjacent 4.753-acre tract merely on the basis of size even though the appraisal of the 4.753-acre tract was performed contemporaneously with his appraisal of the subject property.

We further stress that defendants were not offering the evidence as substantive evidence but to impeach the testimony of an important witness for DOT. We believe that the jury should have been allowed to hear the evidence as to Mr. Marlowe's appraisal. DOT could then have ample opportunity to have Mr. Marlowe explain the differences in his opinion as to the before-taking values he assigned to the 4.753-acre tract and the 18-acre tract of defendants. Those differences go to the weight to be given Mr. Marlowe's testimony by the jury, not to its use for impeachment purposes. Therefore, in light of the failure of the jury to award any compensation to defendants, this error of the trial court in excluding the evidence was not harmless and requires that defendants be awarded a new trial.

New trial.

Judge WYNN concurred in this opinion prior to 30 September 1998.

Judge HUNTER concurs.

BENJAMIN G. ALFORD, ADMINISTRATOR OF THE ESTATE OF DREAMA SAMONE DAVIS, DECEASED, PLAINTIFF-APPELLEE v. BRADLEY DAVIS, RHONDA COOPER, DEFENDANTS-APPELLEES

BENJAMIN G. ALFORD, ADMINISTRATOR OF THE ESTATE OF DREAMA SAMONE DAVIS, DECEASED, PLAINTIFF-APPELLEE v. BRADLEY DAVIS, RHONDA COOPER, KEVIN LAMONTE WHITING, BY AND THROUGH HIS GUARDIAN AD LITEM DAVID A. STOLLER, BONITA M. WHITING AND DWAYNE M. WHITING, DEFENDANTS-APPELLEES

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v. RAM RAMCHANDANI, M.D., EMSA LIMITED PARTNERSHIP, MOVANTS-APPELLANTS

No. COA97-1597

(Filed 20 October 1998)

1. Appeal and Error— appealability—motion to intervene

An appeal from the denial of a motion to intervene in a wrongful death action was considered where the order denying intervention was interlocutory, but did not determine the entire controversy and the motion to intervene claimed substantial rights which might be lost if the order was not reviewed prior to final judgment.

2. Parties— motion to intervene—declaratory judgment action—determination of heirs for wrongful death action

The trial court did not err by denying appellants' motion to intervene in a declaratory judgment action to determine which potential heirs would share in any proceeds from a wrongful death action brought on behalf of a child where the child's adoption had begun but not been completed. Appellant, which had provided medical services to the child, contended that recoverable damages under the wrongful death statute are dependent in part on the number and identity of beneficiaries, but any interest of appellant in the adjudication of beneficiaries is contingent upon the outcome of the underlying wrongful death action, which has yet to be determined; that speculative interest is insufficient to warrant declaratory judgment under the Act.

3. Parties— motion to intervene—no significantly protectable interest—interpretation of intestate succession—limitation of tort liability

Appellants were not provided with a non-statutory basis for intervention by N.C.G.S. § 1A-1, Rule 24 where appellants were the defendants in a wrongful death action on behalf of a child

whose adoption had not been completed when she died and the administrator of her estate filed these declaratory judgment actions to determine which potential heirs would share in any proceeds from the wrongful death action. In order for a party to intervene as of right pursuant to Rule 24(a)(2), the interest at stake must be significantly protectable; the appellants here have no protectable interest let alone a significantly protectable interest. Appellants, as alleged tortfeasors, will not be permitted to intervene in this action to obtain an interpretation of the intestate succession laws in order to limit their own liability.

4. Parties— motion to intervene—permissive—denial not an abuse of discretion

The trial court did not abuse its discretion by denying appellant's motion for permissive intervention pursuant to N.C.G.S. § 1A-1, Rule 24(b) in a declaratory judgment action where appellants were a doctor and medical practice who had provided services to a child who died; the child's adoption had begun but had not been completed at the time of death; and the administrator of the child's estate filed this declaratory judgment action to determine the heirs who would share in the proceeds of a wrongful death action. The court found that appellants had no statutory right to intervene and no interest in the issues presented by the declaratory judgment action which would allow them to intervene; further found that any interest appellants might have was contingent due to their denial of liability and insufficient to warrant intervention; noted that equity and justice required that appellants not be heard on the determination of beneficiaries; and also noted that appellants' position was adequately represented by the natural mother.

Appeal by movants from order entered 6 May 1997 by Judge Clifton W. Everett, Jr., in Craven County Superior Court. Heard in the Court of Appeals 15 September 1998.

Donald J. Dunn, P.A., by Donald J. Dunn and Annie L. Sullivan, for plaintiff-appellee.

James M. Ayers, II, for defendant-appellee Rhonda Cooper.

David A. Stroller, Guardian ad Litem, for Kevin Whiting.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay and Charles A. Madison for movant-appellants.

MARTIN, John C., Judge.

On 11 August 1994 Dreama Davis, then two years and eight months old, died at Cherry Point Naval Hospital as a result of acute supperative appendicitis. Dreama had been examined and sent home earlier in the day by appellant Dr. Ramchandani who had diagnosed her as suffering from pneumonia. Plaintiff filed the underlying wrongful death action alleging that Dreama's death was caused by the negligence of Dr. Ramchandani and his employer EMSA Limited Partnership ("EMSA").

At the time of her death, Dreama was survived by her natural mother, Rhonda Cooper, and her half-brother, Kevin Cooper (Whiting). However, Rhonda Cooper had signed a consent for the adoption of both children and they had been placed in the home of Bonnie and Dwayne Whiting. The adoption, however, had not been completed and plaintiff brought these declaratory judgment actions to determine which of Dreama's potential heirs would share in the proceeds, if any, of the underlying wrongful death action. Dr. Ramchandani and EMSA moved to intervene, asserting that because plaintiff was seeking damages in the wrongful death suit, the amount of which are determined in part by the identity of the deceased's beneficiaries, they had an interest in the outcome of the litigation.

The trial court found that Dr. Ramchandani and EMSA had no interest in the issues presented by the declaratory judgment actions, and that even if they did have an interest in the actions, their interest would be adequately protected by the position of Rhonda Cooper, Dreama's natural mother. The trial court denied the motion to intervene and Dr. Ramchandani and EMSA (hereinafter "appellants") appeal.

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[1] The trial court's order denying appellants' motion to intervene is interlocutory, as it has not determined the entire controversy among all the parties. *United Services Auto. Assoc. v. Simpson*, 126 N.C. App. 393, 485 S.E.2d 337, *disc. review denied*, 492 S.E.2d 37 (1997). Although interlocutory orders are generally not immediately appealable, immediate appellate review may be granted where the order adversely affects a substantial right which the appellant may lose if an appeal is not granted prior to final judgment. *Id.*; N.C. Gen. Stat. § 1-277 (1996); N.C. Gen. Stat. § 7A-27(d) (1995). We believe appellants' motion to intervene claims substantial rights which might be lost if the order is not reviewed prior to final judgment; therefore we consider their appeal. *See United Services*, *supra* (appeal of

order denying Rule 24 motion to intervene affected movant's substantial rights).

A.

[2] First, appellants argue the trial court erred in denying their motion to intervene as of right pursuant to G.S. § 1A-1, Rule 24(a). Rule 24(a) provides a party with a right to intervene:

> (1) When a statute confers an unconditional right to intervene, or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a) (1990). Appellants assert that the Uniform Declaratory Judgment Act, G.S. § 1-253, *et seq.*, provides them with a statutory right to intervene pursuant to Rule 24(a)(1). The Act provides in pertinent part that parties "whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights . . . ." N.C. Gen. Stat. § 1-254 (1996). Appellants argue that because the wrongful death statute provides that recoverable damages are dependent, in part, on the number and identity of a decedent's beneficiaries, appellants are entitled to obtain a declaration of their rights pursuant to the wrongful death statute. We disagree.

It is well settled that in order for the Act to be invoked there must exist an actual justiciable controversy. *Ferrel v. Dept. of Transportation*, 334 N.C. 650, 656, 435 S.E.2d 309, 313 (1993). "There is a justiciable controversy if litigation over the matter upon which declaratory relief is sought appears unavoidable." *Id.* In the present case, appellants seek declaratory relief as to the identity of Dreama's beneficiaries. This is not, however, a matter which is available to be independently litigated by appellants, as they have no direct interest, and therefore no standing, in such an adjudication. Litigation on this matter involving appellants is by no means "unavoidable" and the Declaratory Judgment Act therefore does not afford them a right to declaratory relief.

In any event, any interest of appellants in the adjudication of Dreama's beneficiaries is contingent upon the outcome of the underlying wrongful death action which has yet to be determined. We find that such a speculative interest is insufficient to warrant declaratory relief under the Act. Courts have no jurisdiction to determine matters that are speculative, abstract, or moot, and they may not enter anticipatory judgments, or provide for contingencies which may arise thereafter. *Little v. Trust Co.*, 252 N.C. 229, 113 S.E.2d 689 (1960). "In sum, the sound principle that judicial resources should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions is fully applicable to the Declaratory Judgment Act." *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 703, 249 S.E.2d 402, 414 (1978). Appellants have asserted no valid basis for statutory intervention as of right.

[3] Appellants also assert that Rule 24(a)(2) provides them with a non-statutory basis for intervention. Under Rule 24(a)(2), a movant has a right to intervene in an action where (1) the movant has an interest relating to the property or transaction; (2) denying intervention would result in a practical impairment of the protection of that interest; and (3) there is inadequate representation of that interest by existing parties. *United Services*, at 397-98, 485 S.E.2d at 340; *In re Gertzman*, 115 N.C. App. 634, 446 S.E.2d 130, *disc. review denied*, 337 N.C. 801, 449 S.E.2d 571 (1994). The courts of this State have clearly established that the movant's interest in the property or transaction must be a legal interest "of such direct and immediate character that they will gain or lose by direct operation of the judgment." *Northwestern Bank v. Robertson*, 25 N.C. App. 424, 426, 213 S.E.2d 363, 365 (1975); *See also*, *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990) (holding homeowners' interest in common area where derived through membership in Homeowners Association too indirect to justify intervention).

This Court recently stated in *United Services* that the current approach to interpreting G.S. § 1A-1, Rule 24 is found in the Fourth Circuit Court of Appeals decision of *Teague v. Bakker*, 931 F.2d 259 (4th Cir. 1991). The *Teague* court, although holding that an interest which is contingent upon the outcome of pending litigation could be a significant enough interest to warrant intervention, required that the interest be "significantly protectable." *See United Services*, at 397, 485 S.E.2d at 340 (quoting *Teague*, 931 F.2d at 261). We agree with *Teague* and *United Services* that in order for a party to intervene as of right pursuant to Rule 24(a)(2) the interest at stake must

be significantly protectable, yet we distinguish the interests at stake in those cases from the interest of appellants in the case before us.

In *United Services*, the Court held the parties seeking intervention had a significantly protectable interest where, like the appellants in *Teague*, they were seeking to intervene in a coverage dispute between an insurer and its insured, and where the parties seeking to intervene were intended third-party beneficiaries of the insurance contract at issue. Clearly, the appellants in these cases had significant legal interests directly affected by the outcome of the declaratory judgment actions and worthy of legal protection.

In contrast, we find in this case that appellants have no protectable interest, let alone a "significantly protectable" interest, in the determination of Dreama's heirs. Appellants have no rights in the estate of Dreama Davis through the laws of intestate succession, the wrongful death statute, or any other law. Appellants, as alleged tortfeasors, will not be permitted to intervene in this action to obtain an interpretation of the intestate succession laws, in order to limit their own liability, in the event they are determined to have negligently caused the death of plaintiff's intestate. Moreover, because we hold that appellants have no significantly protectable interest in this action and have therefore failed to meet the first prong of the three requirements necessary for non-statutory intervention as of right, we need not address the remaining requirements.

B.

[4] Appellants also assign error to the trial court's denial of their motion for permissive intervention pursuant to G.S. § 1A-1, Rule 24(b). Under Rule 24(b), the trial court may, in its discretion, permit a movant to intervene in an action where a statute confers a conditional right to do so, or the movant's claim or defense in the main action has a question of law or fact in common with the present action. Permissive intervention under the rule "rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State ex. rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 474, 417 S.E.2d 296, 299 (1992). A trial court abuses its discretion where its ruling "is so arbitrary that it could not have been the result of a reasoned decision." *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).

In its order denying appellants' motion in the present case, the trial court enumerated findings that appellants had no statutory right to intervene, and that appellants had no interest in the issues presented by the declaratory judgment action which would allow them to intervene. The trial court further found that even if appellants did have an interest, such interest was contingent due to their denial of liability, and insufficient to warrant intervention. The trial court noted that equity and justice required that appellants not be heard on the determination of beneficiaries, and that in any event, appellants' position was adequately represented by the position of Rhonda Cooper, Dreama's natural mother. These findings are supported by the record, and are sufficient for us to conclude that the trial court's order was not so arbitrary that it could not have been the result of a reasoned decision. We must therefore uphold the order.

Affirmed.

Judges LEWIS and WALKER concur.

STATE OF NORTH CAROLINA v. MELINDA ANN WILKINS

No. COA97-1296

(Filed 20 October 1998)

1. Criminal Law— guilty plea—informed decision—no plea agreement

At a hearing on a motion for appropriate relief following defendant's guilty plea, there was competent evidence to support the trial court's finding that defendant knew she did not have a plea agreement with the State. The trial court examined defendant as required by N.C.G.S. § 15A-1022 before accepting her guilty plea and defendant then signed a plea transcript which detailed the charge to which she was pleading guilty but contained no plea agreement.

2. Criminal Law— guilty plea—informed and voluntary choice

At a hearing on a motion for appropriate relief following defendant's guilty plea, there was adequate evidence to support the court's conclusion that defendant had made an informed choice and entered her plea freely, voluntarily, and with an un-

derstanding of the consequences where the judge had questioned defendant concerning her plea before she signed the plea transcript.

3. Constitutional Law— effective assistance of counsel— guilty plea

At a hearing on a motion for appropriate relief following defendant's guilty plea, there was ample evidence to support the trial court's findings and conclusion that defendant was represented by competent counsel who was not ineffective in representing defendant.

Appeal by defendant from an order signed *nunc pro tunc* 9 January 1997 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 August 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Diane G. Miller, for the State.

Jay H. Ferguson for defendant-appellant.

WALKER, Judge.

On 27 November 1995, defendant was indicted for the offense of felony child abuse under N.C. Gen. Stat. § 14-318.4. She was charged with severely and permanently injuring her nineteen-month-old daughter. Defendant was initially represented by Rick Foster of the Public Defender's Office who discussed a plea bargain with her, but she was not interested. After Foster left the Public Defender's Office, defendant's case was assigned to Gregory L. Hughes of that office who also discussed a plea offer with her. According to defendant, Hughes told her that the State offered her a "split sentence" of four to six months' active with work release followed by six months' probation. However, Hughes testified that the only plea offer he ever discussed with defendant was an active sentence for a minimum of twenty months and that she refused this plea offer contending she was innocent of the charge. On 16 September 1996, defendant signed a written rejection of this plea offer and was arraigned on the charge of felony child abuse to which she entered a plea of not guilty.

On 7 November 1996, defendant participated in a mock jury trial in the Public Defender's Office. After the mock trial, Public Defender Robert Brown advised defendant that he believed she would be found

guilty at trial and receive the maximum sentence. At this time, Hughes also told defendant that, based on discussions at the status conference prior to arraignment, he believed Judge Hudson would be inclined to give her a split sentence involving some imprisonment and probation if she pled guilty.

Thereafter, defendant discussed her options with her employers, Jeffrey L. Scott and Susan A. Gaylord, telling them that she was offered a plea bargain of four to six months in jail. On 8 November 1996, according to Hughes, defendant told him that she decided to plead guilty. He went over the transcript of plea with defendant reviewing the questions and her answers to each question. He explained there was no plea bargain and each side would be free to argue what sentence she might receive. Hughes further testified that he advised defendant that she could receive an active sentence of thirty-one to forty-seven months.

After entering her plea of guilty, Judge Hudson advised defendant that he was going to ask her some questions and added, "If I ask you a question and you don't understand what I am asking you or you don't know how to answer, talk it over with your lawyer before you answer." Judge Hudson then proceeded to ask her the series of questions in the transcript of plea. She responded that she understood she was pleading guilty to felony child abuse and that she was satisfied with her lawyer's legal services. When asked if she had "any kind of plea bargain, plea arrangement, some kind of deal with the State," she answered that she did not. After defendant and her attorney signed the plea transcript, Judge Hudson accepted the plea and continued prayer for judgment until 11 November 1996.

At the sentencing hearing, the State presented evidence from Dr. Laura Gupman, a pediatrician with expertise in the area of child abuse and Director of the Child Protection Team, Department of Pediatrics at Duke University Medical Center. Based on her examination of the child at Duke University Hospital the day after she was admitted, Dr. Gupman determined that defendant's daughter was a victim of battered child syndrome. Following the presentation of the evidence, Judge Hudson sentenced defendant to an active sentence of thirty-one to forty-seven months.

On 22 November 1996, defendant filed a motion for appropriate relief. A hearing on the motion was held on 9 December 1996, at which time Judge Hudson heard testimony from defendant and her employers as well as from Hughes and Brown. In an order dated 9

January 1997, Judge Hudson denied the motion finding that neither Hughes nor Brown had advised defendant on 7 or 8 November 1996 that any plea offer was available, that defendant did not have a plea agreement, and that she knew she did not have a plea agreement with the State.

Judge Hudson concluded that defendant entered her guilty plea freely and voluntarily, that she understood the consequences of a guilty plea, that she was represented by competent counsel, and that defendant's rights were not violated before or during her entry of a guilty plea.

[1] On appeal, defendant contends the record lacks evidence to support the trial court's finding that defendant knew she did not have a plea agreement with the State when she entered her guilty plea. Defendant further contends the trial court erred in concluding that her guilty plea was an informed choice entered into voluntarily because she was misinformed of the consequences of her plea and denied the effective assistance of counsel.

When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. *State v. Pait*, 81 N.C. App. 286, 288-289, 343 S.E.2d 573, 575 (1986). However, the trial court's conclusions are fully reviewable on appeal. *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982).

In support of her argument, defendant points to *State v. Mercer*, 84 N.C. App. 623, 353 S.E.2d 682 (1987), in which this Court reversed a denial of a motion for appropriate relief and remanded for further findings. However, *Mercer* is distinguishable from the case at hand. *Mercer* concerned the voluntariness of a plea where the defendant contended promises were made to him by the district attorney in exchange for information, but where the plea transcript did not contain this agreement. *Id.*

In *State v. Crain*, 73 N.C. App. 269, 271-272, 326 S.E.2d 120, 122 (1985), the defendant plead guilty to two counts of armed robbery and one count of common law robbery. He signed a plea transcript which stated he could be imprisoned for a minimum of fourteen years and a maximum of ninety years. *Id.* at 269-270, 326 S.E.2d at 121. Prior to accepting the defendant's guilty plea, he was examined by the trial court pursuant to N.C. Gen. Stat. § 15A-1022 concerning his

guilty plea and the sentence he could receive. *Id.* Despite the fact that the defendant's evidence tended to show that his attorney informed him that he would only receive a seven-year sentence, this Court held the evidence from the plea transcript, the trial court's questions to defendant, and the testimony of defendant's attorney were sufficient to support the trial court's finding that the defendant was properly and adequately informed of the consequences of his plea and that he entered the plea agreement both knowingly and voluntarily. *Id.* at 271-272, 326 S.E.2d at 122.

As in *Crain*, here the trial court examined defendant as required by N.C. Gen. Stat. § 15A-1022 before accepting her guilty plea. Defendant then signed a plea transcript which detailed the charge to which she was pleading guilty but contained no plea agreement. This was competent evidence to support the trial court's finding that defendant knew she did not have a plea agreement with the State.

[2] Next, defendant contends that her guilty plea was not an informed choice entered into voluntarily. Defendant asserts that representations were made to her by her counsel which led her to believe that she would receive a sentence of no more than six months in prison, and that she was mistakenly under the impression that she could be sentenced to as much as ninety-eight months in prison if she went to trial. A guilty plea must be made knowingly and voluntarily and the record must affirmatively show it on its face. *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969); *In the Matter of Chavis*, 31 N.C. App. 579, 230 S.E.2d 198 (1976), *disc. review denied*, 291 N.C. 711, 232 S.E.2d 203 (1977). A plea is voluntary and knowing if it is made by someone fully aware of the direct consequences of the plea. *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1970); *Mercer*, 84 N.C. App. at 627, 353 S.E.2d at 684.

In cases where there is evidence that a defendant signs a plea transcript and the trial court makes a careful inquiry of the defendant regarding the plea, this has been held to be sufficient to demonstrate that the plea was entered into freely, understandingly, and voluntarily. *State v. Thompson*, 16 N.C. App. 62, 63, 190 S.E.2d 877, 878, *cert. denied*, 287 N.C. 155, 191 S.E.2d 604 (1972).

Here the evidence shows that Judge Hudson questioned defendant concerning her plea before she signed the plea transcript. By signing the plea transcript she made an informed decision to do so freely and voluntarily. Thus, there was adequate evidence to support Judge Hudson's conclusion that defendant made an informed choice and

entered her plea freely, voluntarily, and understanding the consequences of her guilty plea.

[3] Finally, defendant contends that she was denied effective assistance of counsel and had she received effective assistance, she would have insisted on a trial.

In order to receive a new trial based on ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) his deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-688, 80 L. Ed. 2d 674, 693, *rehearing denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). The errors made by counsel must be so serious that the defendant is deprived of a fair trial. *Id.* The assistance rendered by counsel must fall below an objective standard of reasonableness for it to be ineffective. *Id.*; *State v. Braswell*, 312 N.C. 553, 561-562, 324 S.E.2d 241, 247-248 (1985). There is a strong presumption that counsel's assistance falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-695.

There is evidence in the record which permitted the trial court to find that defendant was represented by Foster and then by Hughes of the Public Defender's Office, that Hughes met with defendant on several occasions and discussed a plea offer of a twenty-month active sentence which she rejected, and that the Public Defender's Office conducted a mock trial after which the jurors concluded that defendant was either "guilty" or "negligent." Thereafter, defendant decided to plead guilty and Hughes prepared a transcript of plea, went over each question, and wrote down her answers. He advised her that she could receive an active sentence of thirty-one to forty-seven months. Defendant responded that she was satisfied with her lawyer's services when questioned. Therefore, there is ample evidence to support the trial court's findings and conclusion that defendant was "represented by competent counsel and Hughes was not ineffective in his representation" of her.

The trial court's denial of defendant's motion for appropriate relief is

Affirmed.

Judges LEWIS and MARTIN, John C., concur.

WENDELL A. FORDHAM, PLAINTIFF-APPELLEE v. A. V. EASON AND WIFE, GRACE W. EASON; DEFENDANTS, AND AMERICAN WOODLAND INDUSTRIES, INC., DEFENDANT-APPELLANTS

No. COA98-57

(Filed 20 October 1998)

1. **Appeal and Error— brief—issues not addressed—abandoned**

   Issues not addressed in defendant's brief were abandoned.

2. **Trespass— wrongful cutting of timber—no ownership of land by plaintiff**

   Counterclaims for the wrongful cutting of timber and trespass arising from multiple contracts for the same timber were dismissed where appellant timber company could not show that it was the owner of the lands in question.

3. **Torts, Other— abuse of process—summary judgment—improperly granted**

   Summary judgment was improperly granted on an abuse of process claim in an action arising from multiple contracts for the same timber where one timber company (Woodland) raised a genuine issue of material fact concerning the other company's (Fordham) motives in obtaining an injunction to stop Woodland's removal of timber in that Fordham cut and removed timber after obtaining the injunction.

Appeal by defendant American Woodland Industries, Inc., from summary judgment entered 9 October 1997 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 23 September 1998.

At all relevant times, defendants A. V. Eason and wife, Grace W. Eason (the Easons), owned real property in Johnston County, North Carolina. The timber on the Easons' property was extensively damaged by Hurricane Fran. Several timber buyers were interested in purchasing the Easons' timber.

In the summer of 1996, plaintiff Wendell A. Fordham, the owner of Fordham Timber Company, Inc., talked with defendant A. V. Eason about the purchase of the Easons' timber. On 11 November 1996, defendants signed a paper entitled "Timber Cutting Contract" (Contract). The Contract allowed plaintiff to "enter, cut and

remove . . . forest products [all timber and pulpwood]" from all the lands of A. V. Eason in Johnston County until 1 June 1997.

The Contract provided the unit price plaintiff would pay for each type of forest product cut and removed. The Contract recites that the Easons made the agreement "for and in consideration of the payment made or to be made by [plaintiff]." The Contract was not recorded in the office of the Register of Deeds.

On 7 February 1997, appellant American Woodland Industries, Inc. (Woodland), also entered into a contract with the Easons for the purchase of the same timber. It was entitled "Timber Purchase and Sales Agreement" (Agreement), and provided that the Easons were selling to Woodland the "trees, tops or laps" on their property, and granted Woodland until 7 February 1999 to "enter, cut, and harvest and remove the said timber." Woodland agreed to pay a deposit of $30,000.00 to the Easons to be applied against the stumpage amounts, with additional funds to be paid when the deposit was depleted.

The Agreement then provided the unit prices for the various types of forest products to be cut and removed. The Easons signed the Agreement, their signatures were notarized, and the document was recorded in the office of the Johnston County Register of Deeds. The Agreement was not signed by a representative of Woodland. However, the name and address of Woodland is printed at the end of the document.

A. V. Eason testified that he entered into the second timber agreement because he "didn't get no results" from plaintiff. When A. V. Eason signed the Agreement with Woodland, plaintiff had not cut or removed any forest products from the Easons' land. Woodland was aware that the Easons had entered into a Contract with plaintiff, but learned at the office of the Register of Deeds that the Contract had not been recorded.

After the execution of the Agreement and payment of the $30,000.00 deposit, Woodland entered onto the Easons' land and began to cut timber in February 1997. On 12 February 1997, plaintiff filed an application and order extending the time to file a complaint, and secured a temporary restraining order preventing Woodland from cutting or removing any timber from the Easons' property until the matter could be heard by the trial court.

On 14 February 1997, plaintiff filed a complaint asking that a preliminary injunction be granted against Woodland to prevent fur-

ther cutting of the timber until a final determination of the matter. On 17 February 1997, the trial court granted plaintiff's motion for a preliminary injunction. Several days later, plaintiff entered the Easons' lands and began to cut and remove timber.

Woodland filed an answer and counterclaim, alleging wrongful timber cutting and abuse of process. Both Woodland and plaintiff moved for summary judgment. Defendants Eason and plaintiff voluntarily dismissed their respective claims and counterclaims against each other. The trial court granted the motions for summary judgment for both plaintiff and Woodland. Woodland appeals.

Narron, O'Hale and Whittington, P.A., by Jacquelyn L. Lee, O. Hampton Whittington, Jr., and James W. Narron, for plaintiff appellee.

Thomas Edward Hodges, for American Woodland Industries, Inc., defendant appellant.

HORTON, Judge.

Woodland asserts error to the summary dismissal of its counterclaims for: interference with contractual relations; unfair and deceptive trade practices; wrongful cutting of timber; trespass; and abuse of process.

The trial court granted summary judgment for plaintiff on all of these claims. Therefore, we must examine each of defendant's claims to determine whether a material question of fact exists for one or more of them.

I. Interference with Contractual Relations and Unfair and Deceptive Trade Practices

[1] Before we address the merits of this case, we note that appellate review is confined to those exceptions which pertain to the arguments presented. *Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 631, 224 S.E.2d 580, 588 (1976). 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 Woodland's brief failed to address the

issues of interference with contractual relations and unfair and deceptive trade practices. Therefore, these issues are abandoned.

II. Wrongful Cutting of Timber and Trespass

[2] The torts of wrongful cutting of timber and trespass are considered together since their purpose is to protect the rightful owner of real property. N.C. Gen. Stat. § 1-539.1 (1996) provides that

> [a]ny person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, *shall be liable to the owner of said land* for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

(Emphasis added).

In no sense was Woodland the "owner" of the lands in question, although Woodland was allowed to enter upon the Easons' lands to cut timber. "In order to sustain an action for permanent damages to the freehold, or to the ownership interest, such as an action for unlawful cutting of timber, *plaintiff must allege and show that he is the owner of the land from which the timber was cut.*" *Woodard v. Marshall*, 14 N.C. App. 67, 69, 187 S.E.2d 430, 431 (1972) (emphasis added). Woodland cannot show that it was the owner of the land. Therefore, the action for wrongful cutting of timber is dismissed.

Furthermore, a claim for trespass requires: (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff. *Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997). Since Woodland cannot show that it was the owner of the land, it cannot maintain a cause of action for trespass. Thus, this cause of action is dismissed as well.

III. Abuse of Process

[3] Finally, Woodland claims the trial court erred when it dismissed the claim for abuse of process. Abuse of process requires: (1) an ulterior motive; and (2) an act in the use of the process that is not proper in the regular prosecution of the proceeding. *Edwards v. Advo Systems, Inc.*, 93 N.C. App. 154, 157, 376 S.E.2d 765, 767 (1989), *overruled on other grounds*, *Johnson v. Ruark Obstetrics*, 327 N.C. 283,

395 S.E.2d 85 (1990). "[T]he gravamen of a cause of action for abuse of process is the improper use of the process after it has been issued." *Petrou v. Hale*, 43 N.C. App. 655, 659, 260 S.E.2d 130, 133 (1979), *disc. review denied*, 299 N.C. 332, 265 S.E.2d 397 (1980). "An ulterior motive alone is not sufficient" to sustain an abuse of process claim. *Id.*

In the instant case, Fordham obtained a preliminary injunction in order to prevent Woodland from continuing its removal of timber from the Easons' land. Fordham argued to the trial court that the status quo must be maintained until the case could be heard on the merits. Further, Fordham presented the trial court with a copy of N.C. Gen. Stat. § 1-487, which provides that "no order shall be made pending such action, permitting *either* party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action." (Emphasis added).

However, Woodland claims Fordham abused the legal process by obtaining an injunction merely to allow Fordham to cut the timber while Woodland was restrained by a court order. Woodland presented evidence that once Fordham obtained the preliminary injunction, Fordham thereafter entered upon the Easons' lands to cut and remove timber worth over $100,000.00. In addition, Woodland presented evidence that Fordham admitted he entered the Easons' property and cut and removed timber and pulpwood after the injunction was issued.

A review of this evidence shows that Woodland has raised a genuine issue of material fact concerning Fordham's motives in obtaining the injunction and Fordham's actions thereafter. Therefore, summary judgment was improper on the abuse of process claim.

In conclusion, summary judgment for interference with contractual rights and for unfair and deceptive trade practices is affirmed; summary judgment for the actions of wrongful cutting of timber and for trespass is affirmed; and summary judgment for the abuse of process claim is reversed.

Affirmed in part and reversed in part.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.

THE INSPIRATIONAL NETWORK, INC., PLAINTIFF v. MARGARET COMBS AND THOMAS PETREE, IN THEIR INDIVIDUAL CAPACITIES, DEFENDANTS

No. COA97-1109

(Filed 3 November 1998)

1. Jurisdiction— long arm statute—allegations in complaint

The trial court did not err by denying defendants' motion to dismiss for lack of personal jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(2) in an action for fraud and unfair trade practices where the uncontroverted and uncontradicted statements in plaintiff's complaint and the affidavit of its chief financial officer were sufficient to establish a prima facie showing of jurisdiction under North Carolina's long arm statutes, and the court's unimpeachable findings (based on uncontroverted assertions) supported its legal conclusion that the acts of MSN are imputed to defendants Petree and Combs. MSN (a Delaware corporation) solicited INSP (a North Carolina corporation) to prepare and broadcast infomercials in North Carolina; INSP performed the contracted services in North Carolina; MSN forwarded certain payments to North Carolina but defaulted on the full amount; defendants Combs and Petree contacted INSP to induce it to forego suit and accept MSN's note; INSP agreed to accept the note which was executed by Combs and governed by North Carolina law; and MSN ultimately defaulted. Plaintiff's allegations that Petree and Combs were the alter ego of MSN went uncontested and defendants waived any objection to the court's consideration of allegations in the complaint upon information and belief.

2. Jurisdiction— minimum contacts—sufficient

The trial court did not err by denying defendants' motion to dismiss for lack of personal jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(2) in an action for fraud and unfair trade practices where defendants had sufficient minimum contacts with North Carolina and exercise of jurisdiction over their persons did not offend due process. MSN, a Delaware corporation whose actions are imputed to defendants, initiated and voluntarily entered into a contractual arrangement with INSP, a North Carolina corporation, whereby a series of television production and broadcasting services were performed in North Carolina by INSP on behalf of MSN, which thus purposefully availed itself of the privileges of

conducting business in North Carolina to obtain a financial benefit; defendants failed to contest allegations that they initiated negotiations with INSP concerning a promissory note which Combs acknowledged signing on behalf of MSN in order to avoid a lawsuit; defendants Combs and Petree contacted INSP in North Carolina by telephone and correspondence and authorized checks and wire transfers that sent payments to INSP in North Carolina; and it is uncontroverted that INSP was injured by MSN's default. North Carolina has an interest in providing a convenient forum for its citizens to seek redress for injuries, there is no evidence that defendants would be unfairly prejudiced by litigation in North Carolina, and the promissory agreement was to be paid in North Carolina and construed in accordance with the laws of North Carolina.

Appeal by defendants from order filed 5 May 1997 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 April 1998.

Nicholls & Crampton, P.A., by Robin Adams Anderson, and Johnson, Prioleau & Lynch, L.L.C. by Keven Kenison, for plaintiff-appellee.

Poyner & Spruill, L.L.P., by Constance L. Young and Thomas L. Ogburn, III, for defendants-appellants.

JOHN, Judge.

Defendants Margaret Combs (Combs) and Thomas Petree (Petree) (defendants) appeal the trial court's 5 May 1997 order denying their motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2) (1990) (Rule 12(b)(2)). We affirm the trial court.

Relevant facts, as alleged by plaintiff, The Inspirational Network, Inc. (INSP), in its complaint and the affidavit of Mitchell S. Martin (Martin), Vice-President and Chief Financial Officer of INSP, as well as pertinent procedural information include the following: INSP is a North Carolina corporation and cable network which presents a variety of television programs and commercial advertisements. Merchant Square Network, Inc. (MSN) is a Delaware corporation. Petree serves as Chief Financial Officer of MSN, and is a Pennsylvania resident who owns no property in North Carolina. Combs, President and Chief Executive Officer (CEO) of MSN, is a West Virginia resident and also

owns no property in North Carolina. Neither Petree nor Combs own stock in MSN.

Following negotiations conducted through correspondence and via telephone, MSN entered into a contract with INSP whereby the latter produced and aired several "infomercials" in North Carolina. MSN sent and directed several payments to INSP in North Carolina, but ultimately defaulted on its contractual obligation to pay INSP for services rendered in this state.

Both Petree and Combs thereafter contacted Martin by telephone and through written correspondence in an effort to resolve the issue of payment absent litigation. The two MSN executives assured Martin that MSN was adequately capitalized to repay INSP by means of a promissory note. Relying on defendants' assurances, Martin agreed on behalf of INSP to accept MSN's note for the balance of its contractual obligation, and a note was subsequently executed in favor of INSP by Combs as President and CEO of MSN. The note provided: (1) MSN was to pay INSP the principal sum of $103,952.00 in ten monthly installments of $6,355.73, with a final balloon payment of $47,081.63; (2) upon default, any unpaid principal would bear twelve percent interest until full payment; and (3) the note was "to be governed and construed in accordance with the laws of the State of North Carolina."

MSN ultimately defaulted and INSP obtained a judgment against MSN for the debt. However, INSP was unable to recover because MSN had no assets or capital. On 4 December 1996, INSP filed suit against Combs and Petree individually, alleging fraud as well as deceptive trade practices in violation of N.C.G.S. § 75-1 *et seq.* (1994). On 6 February 1997, defendants jointly moved to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2). The trial court denied the motion in an order filed 5 May 1997, finding defendants had not denied or refuted plaintiff's assertions, set forth either in plaintiff's complaint or in the affidavit of Martin, that 1) "Defendants placed telephone calls to the Plaintiff to induce the Plaintiff to take the note," 2) "Defendants represented to [Martin] as Chief Financial Officer of the Plaintiff that MSN was able to repay the note," 3) defendants' statements were false and INSP accepted MSN's promissory note "[i]n reliance on [the] representation[]" that MSN was sufficiently capitalized to repay the note, and 4) that "Defendants had complete domination . . . of the policy and business practice of MSN, and MSN had at no time a separate mind, will or existence of its own."

The trial court concluded that the contacts between INSP and MSN were sufficient for purposes of assumption of jurisdiction by North Carolina courts over MSN, and that

> the unrefuted actions of the Defendants herein are sufficient that the minimum contacts of the corporation MSN are imputed to these two Defendants . . . .

The court ruled it thereby possessed jurisdiction over Combs and Petree. Defendants filed timely notice of appeal, contending the trial court erred in denying their Rule 12(b)(2) motion. We do not agree.

Initially, we observe that

> [a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . .

N.C.G.S. § 1-277(b) (1996). Such an appeal

> is limited to a determination of whether North Carolina statutes permit our courts "to entertain this action against defendant[s], and, if so, whether this exercise of jurisdiction violates due process."

Saxon v. Smith, 125 N.C. App. 163, 168, 479 S.E.2d 788, 791, (1997) (quoting *Styleco, Inc. v. Stoutco, Inc.*, 62 N.C. App. 525, 526, 302 S.E.2d 888, 889, *disc. review denied*, 309 N.C. 825, 310 S.E.2d 358 (1983)). We therefore first examine the relevant statutory provisions.

[1] G.S. § 1-75.4, commonly referred to as our "long arm" statute, *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977), governs the exercise of jurisdiction by North Carolina courts over out-of-state defendants. The section provides, *inter alia*, as follows:

> (4) Local Injury; Foreign Act.—In any action . . . claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury . . . .
>
> a. Solicitation or services activities were carried on within this State by or on behalf of the defendant . . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:

a. Arises out of a promise, made anywhere to the plaintiff . . . for the plaintiff's benefit, by the defendant to . . . pay for services to be performed in this State by the plaintiff; or

b. Arises out of services . . . actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant.

G.S. § 1-75.4.

Our jurisdiction statutes are to be "liberally construed in favor of finding that personal jurisdiction exists," *Chapman v. Janko, U.S.A., Inc.*, 120 N.C. App. 371, 374, 462 S.E.2d 534, 536 (1995), subject to the limitations of due process, *Bryson v. Northlake Hilton*, 407 F. Supp. 73, 75 (M.D.N.C. 1976). "[When] jurisdiction is challenged [by a defendant, the] plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists." *Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 424, 355 S.E.2d 177, 179 (1987) (citation omitted). Where unverified allegations in the complaint meet plaintiff's "initial burden of proving the existence of jurisdiction . . . and defendant[s] . . . d[o] not contradict plaintiff's allegations in their sworn affidavit," such allegations are accepted as true and deemed controlling. *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 45, 306 S.E.2d 562, 565 (1983); *see also Barclays Leasing, Inc. v. National Business Systems, Inc.*, 750 F. Supp. 184, 186 (W.D.N.C. 1990) (mere allegations of jurisdiction, if not controverted, may be sufficient for a *prima facie* showing of jurisdiction). Further, if the trial court makes findings of fact supported by competent evidence in the record, those findings are conclusive on appeal. *Church v. Carter*, 94 N.C. App. 286, 289-90, 380 S.E.2d 167, 169 (1989). Finally, if the court's findings of fact are not assigned as error, the court's findings are "presumed to be correct." *Saxon*, 125 N.C. App. at 169, 479 S.E.2d at 792; *see also Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986) (failure of appellant to "except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence . . . will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact").

Applying the foregoing principles to the record *sub judice*, we first note defendants have not assigned error to the trial court's factual determinations that: (1) Petree and Combs each placed telephone calls to INSP for purposes of inducing acceptance of MSN's

promissory note, (2) Petree and Combs each represented to Martin MSN's ability to repay the note, (3) the statements of defendants were false, and (4) the note was accepted by INSP in reliance thereon. Because defendants have failed to challenge these factual determinations on appeal, they are "presumed to be correct." *Saxon*, 125 N.C. App. at 169, 479 S.E.2d at 792.

In addition, the uncontroverted allegations of plaintiff's complaint included assertions that: (1) defendants contacted INSP to induce acceptance of MSN's promissory note for services requested and performed in North Carolina, (2) Combs executed the note on behalf of MSN, (3) defendants sent payments to North Carolina, (4) MSN defaulted on the note, (5) INSP was damaged by the default, and that (6) "upon information and belief," MSN "was a sham and facade controlled and directed by its alter ego, Defendants Combs and Petree," who "had complete domination, not only of finances, but of policy and business practice . . . to the extent that [MSN] had . . . no separate mind, will or existence of its own."

Further, Martin's uncontradicted affidavit stated, *inter alia*, that: (1) MSN solicited services to be performed in North Carolina, (2) INSP entered a contract with MSN, (3) MSN failed to pay for services rendered in North Carolina, (4) Petree and Combs induced Martin to accept a promissory note in lieu of suit, (5) Martin agreed to the note in reliance on defendants' assurances MSN was adequately capitalized to repay the debt, (6) the note was to be paid in North Carolina and governed by the laws of that state, and that (7) "upon information and belief," defendants utilized their "complete domination" of MSN to defraud INSP, defendants knew MSN was not sufficiently capitalized to pay the note, and they "made the promise to pay [INSP] with the intent to deceive [INSP] into rendering services in North Carolina without compensation."

The uncontroverted assertions of plaintiff and Martin support the trial court's factual determinations which are thereby "conclusive" on appeal. *Church*, 94 N.C. App. at 289-90, 380 S.E.2d at 169. In turn, the court's unimpeachable findings support its legal conclusion that the acts of MSN are imputed to Petree and Combs. What remains is whether the trial court properly concluded that the uncontroverted and uncontradicted statements in INSP's complaint and the affidavit of Martin were sufficient to establish a *prima facie* showing of jurisdiction over MSN under North Carolina's "long arm" statutes, G.S. § 1-75.4(4)(a) and (5)(a)&(b). *See Barclays Leasing, Inc.*, 750 F. Supp. at 186. We hold the trial court did not err.

G.S. § 1-75.4(4)(a) authorizes jurisdiction over a foreign defendant whose act or omission outside this State has caused injury within North Carolina, while at or about the time of that injury "solicitation or services activities were carried on within this State by or on behalf of the defendant." Plaintiff's unchallenged showing included the following: (1) MSN, a Delaware corporation, solicited INSP, a North Carolina corporation, to prepare and broadcast infomercials in North Carolina, (2) INSP performed the contracted services on behalf of MSN in North Carolina, (3) MSN forwarded certain payments to North Carolina for INSP's services, but defaulted on the full contractual amount, and (4) INSP was injured by MSN's default. Plaintiff thus *prima facie* satisfied the requirements of G.S. § 1-75.4(4)(a) for personal jurisdiction over MSN. *See Williams*, 85 N.C. App. at 424, 355 S.E.2d at 179.

G.S. § 1-75.4(5)(a)&(b) governs jurisdiction regarding contracts and services arising out of the promise to pay for services to be performed or actually performed in this State. In this regard, plaintiff's uncontroverted showing included the following: 1) MSN contracted with INSP to pay for the production and airing in North Carolina of infomercials; 2) Combs and Petree contacted INSP to induce it to forego suit and accept MSN's note in payment of services authorized by it and actually rendered in North Carolina for MSN by INSP; 3) in reliance upon the representations of Combs and Petree, INSP agreed to accept the note, which subsequently was executed by Combs and governed by North Carolina law, and 4) MSN ultimately defaulted on its promise to pay for services rendered by INSP. Plaintiff thus also made a sufficient showing of jurisdiction under G.S. § 1-75.4(5)(a)&(b). *See Williams*, 85 N.C. App. at 424, 355 S.E.2d at 179.

Notwithstanding, Petree and Combs maintain that as corporate officers, they may not be held personally liable absent a showing each as an officer was the alter ego of the corporation. *See Moore v. American Barmag Corp.*, 710 F. Supp. 1050, 1057 (W.D.N.C. 1989), *aff'd*, 902 F.2d 44 (1990). Defendants further claim that plaintiff's allegations based upon "information and belief" constitute mere "conclusory allegations" which may not be relied upon to support a *prima facie* showing of jurisdiction. We determine both arguments to be unavailing.

We first reiterate that plaintiff's allegations that Petree and Combs were the alter ego of MSN went uncontested. Plaintiff's alle-

gations were thus deemed true and controlling by the trial court, *Bush*, 64 N.C. App. at 45, 306 S.E.2d at 565, if properly considered in "information and belief" form.

Defendants point to *Hankins v. Somers*, 39 N.C. App. 617, 620, 251 S.E.2d 640, 642, *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979) as requiring rejection of allegations upon information and belief. In *Hankins*, the defendants argued the requirement of N.C.G.S. § 1A-1, Rule 56(e) (1990) (Rule 56(e)), that summary judgment affidavits "be made on personal knowledge" and "show affirmatively that the affiant is competent to testify to the matters stated therein," *id.*, should be read into N.C.G.S. § 1A-1, Rule 43(e) (1990) (Rule 43(e)), dealing with receipt of affidavits at motion hearings. *Hankins*, 39 N.C. App. at 619-20, 251 S.E.2d at 642.

The *Hankins* defendants, residents of Georgia, appealed the trial court's denial of their Rule 12(b)(2) motion to dismiss. *Id.* at 618, 251 S.E.2d at 641. This Court, reasoning that "[a] motion to dismiss can result in termination of a lawsuit just as much as a motion for summary judgment," *id.* at 620, 251 S.E.2d at 642, held that "[t]o the extent that Rule 43(e) applies to a motion to dismiss," *id.*, the trial court in ruling on a Rule 12(b)(2) motion "should rely only on material that would be admissible at trial." *Id.* The court thus should "consider whether there were sufficient allegations based upon plaintiff's personal knowledge to support the exercise of personal jurisdiction over the . . . defendants." *Id.*

However, assuming *arguendo Hankins* is controlling, *cf. Anderson v. Town of Andrews*, 127 N.C. App. 599, 600-04, 492 S.E.2d 385, 386-88 (1997) and *Lynn v. Overlook Development*, 98 N.C. App. 75, 79, 389 S.E.2d 609, 612-13 (1990), *reversed in part on other grounds*, 328 N.C. 689, 403 S.E.2d 469 (1991) (for purposes of overcoming local municipality's motion to dismiss for failure to state a claim under N.C.G.S. § 1A-1, Rule 12(b)(6) (1990) grounded upon sovereign immunity, allegation "upon information and belief" that municipality maintained liability insurance covering instant cause of action sufficient to allege waiver of governmental immunity); *Reynolds v. Murph*, 241 N.C. 60, 64, 84 S.E.2d 273, 276 (1954) ("positive allegations of fact, upon information and belief, . . . when denied, raise issues of fact determinable by jury"); and *Thompson v. Thompson*, 226 U.S. 551, 566, 57 L. Ed. 347, 353 (1913) (affidavit containing statement on information and belief, absent local law prohibiting use thereof, properly supported assumption of jurisdiction over subject

matter and "circumstance that it was averred on information and belief affected merely the degree of proof"), defendants have waived any objection to the trial court's consideration of allegations upon information and belief set out in plaintiff's complaint. *See RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 371, 432 S.E.2d 394, 396 (1993) ("[w]hether the affidavit meets the requirements of Rule 56(e) is immaterial in light of the fact that plaintiff failed to make a timely objection to the form of the affidavit").

We note the record reflects defendants' objection to "paragraphs 18 through 23 of [Martin's] affidavit . . . because [the statements therein are] upon information and belief and that's—that's not proper." Assuming the trial court's subsequent response, "Okay," constituted a ruling thereon in defendants' favor, *see* N.C.R. App. P. 10(b)(1) ("[i]n order to preserve a question for appellate review, a party must . . . obtain a ruling upon the party's . . . objection"), the record nonetheless fails to reflect a similar objection to allegations upon information and belief in the complaint. The trial court's order recites its reliance on the "pleadings" and affidavits, bases certain findings upon matters "alleged and not refuted," but pointedly makes no reference to those portions of Martin's affidavit encompassed within defendants' objection.

Accordingly, construing G.S. § 1-75.4 "liberally in favor of jurisdiction, as we must do, it becomes clear that each defendant accepted and ratified the rendition of services . . . provided by the plaintiff in this State." *Century Data Systems, Inc. v. McDonald*, 109 N.C. App. 425, 428-29, 428 S.E.2d 190, 192 (1993). Therefore, based upon the uncontroverted allegations contained in plaintiff's complaint and the uncontested statements in Martin's affidavit, plaintiff came forward with a *prima facie* showing sufficient to subject Combs and Petree to personal jurisdiction in North Carolina under either G.S. § 1-75.4(4)(a) or G.S. § 1-75.4(5)(a)&(b). *See Williams*, 85 N.C. App. at 424, 355 S.E.2d at 179.

[2] Having determined our long-arm statute has been satisfied, we next consider whether the exercise of personal jurisdiction over defendants would be violative of constitutional due process requirements. *Dillon*, 291 N.C. at 676, 231 S.E.2d at 631.

> The existence of personal jurisdiction . . . depends upon . . . a sufficient connection between the defendant and the forum [s]tate as to make it fair to require defense of the action in the forum [state].

Kulko v. California Superior Court, 436 U.S. 84, 91, 56 L. Ed. 2d 132, 141 (1978). Accordingly, the test is a defendant's "minimum contacts" with the forum state. *International Shoe Company v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945).

To effectuate minimum contacts, a defendant must have acted to purposefully avail itself of the privileges of conducting activities within North Carolina, thus invoking the benefits and protection of our laws. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979). The relationship between that defendant and North Carolina must be "such that [the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980) (citations omitted). As the United States Supreme Court has explained, the

> "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person, . . ." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum state.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985) (citations omitted). In considering the foreseeability of litigation, "the interests of, and fairness to, both the plaintiff and the defendant must be considered and weighed." *Dillon*, 291 N.C. at 678, 231 S.E.2d at 632.

The existence of "minimum contacts" depends upon the particular facts of each individual case. *United Buying Group, Inc.*, 296 N.C. at 518, 251 S.E.2d at 615. Pertinent factors include the "(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties." *New Bern Pool and Supply Company v. Graubart*, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159 (1989), *aff'd* 326 N.C. 480, 390 S.E.2d 137 (1990) (quoting *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E.2d 300, 302, *disc. review denied*, 313 N.C. 604, 330 S.E.2d 612 (1985)). No one factor is controlling, but all must be considered in relation to the circumstances of the case. *B.F. Goodrich Company v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986).

Reviewing the "quantity," the "nature and quality," and the "source" of the contacts, *New Bern Pool and Supply Co.*, 94 N.C. App. at 624, 381 S.E.2d at 159, in the case *sub judice*, we first note that MSN, the actions of which are imputed to defendants, initiated and voluntarily entered into a contractual arrangement with INSP, a North Carolina based corporation, whereby a series of television production and broadcasting services were performed in North Carolina by INSP on behalf of MSN. The latter thus "purposefully availed [itself] of the privileges of conducting business [in the state] for the purpose of obtaining a financial benefit." *Godwin v. Walls*, 118 N.C. App. 341, 354, 455 S.E.2d 473, 483 (1995).

Moreover, defendants failed to contest allegations they initiated negotiations with INSP, which is located in North Carolina, concerning the promissory note, and Combs acknowledged signing the note on behalf of MSN in order to avoid a lawsuit. Combs also stated she contacted INSP on various occasions. Petree admitted making "approximately a dozen telephone calls to Inspirational Network's location in Charlotte, North Carolina", and "directed correspondence to North Carolina approximately four times" to "work out the payment dispute[]." In addition, defendants did not contest Martin's allegation that each defendant assured him, via telephone and correspondence, that MSN was adequately capitalized to repay the note. By Petree's own admission, he "authorized [several] checks and wire transfers that sent payments to [INSP] in North Carolina" before MSN defaulted on the note.

In addition, North Carolina has an interest in providing a convenient forum for its citizens to seek redress for injuries. *Godwin*, 118 N.C. App. at 355, 455 S.E.2d at 483. "In light of the powerful public interest of [North Carolina] in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional . . . ." *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 608, 334 S.E.2d 91, 93 (1985). It is uncontroverted that INSP was injured in the principal amount of $103,952.00 by MSN's default on the note. There is also no evidence that defendants would be unfairly prejudiced by litigation of plaintiff's claims in North Carolina.

We further note that "[a] factor in determining fairness concerning a breach of contract . . . is whether the contract expressly provides that the law of the forum state would apply to actions arising out of the contract." *Cherry, Bekaert & Holland v. Brown*, 99 N.C. App. 626, 635, 394 S.E.2d 651, 657 (1990). The promissory agreement in the case *sub judice* was to be paid in North Carolina and "governed

and construed in accordance with the laws of the State of North Carolina."

Finally, defendants did not contradict plaintiff's allegations that MSN was a "sham and facade and controlled and directed by its alter ego, Defendants Combs and Petree, simply as a 'cloak and shield' to confuse and defraud their creditors," and that defendants had complete domination of MSN's finances, policy, and business practice in respect to execution of the note. These uncontroverted allegations were "presumed [by the trial court] to be correct," *Saxon*, 125 N.C. at 169, 479 S.E.2d at 792. In view of the uncontested alter ego status of Combs and Petree, therefore, and the consequent imputation to them individually of the acts of MSN, it cannot be said to be "[un]fair to require defense of the [instant] action" in North Carolina. *Kulko*, 436 U.S. at 91, 56 L. Ed. 2d at 141.

In sum, "[u]pon review of these factors and the relevant cases, we conclude that [the defendants have] sufficient minimum contacts, purposely made, with North Carolina and that exercise of jurisdiction over [their] person by our courts does not offend due process." *B.F. Goodrich Company*, 80 N.C. App. at 133, 341 S.E.2d at 68. Accordingly, we affirm the trial court's order denying defendants' Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

FIRST ATLANTIC MANAGEMENT, CORPORATION, PLAINTIFF v. DUNLEA REALTY, CO., H. STEVEN HARRIS, AND JEFFREY L. DUNLEA, DEFENDANTS

COA 97-540

(Filed 3 November 1998)

1. Appeal and Error— appealability—denial of summary judgments and motion to strike affidavits—interlocutory

Appeals from the denial of summary judgment motions by both parties and defendant's motion to strike certain affidavits were dismissed as interlocutory where there was no substantial right which could not be corrected upon appeal from final judgment.

2. Appeal and Error— appealability—partial summary judgment—possibility of inconsistent verdicts

The trial court correctly determined that a substantial right of plaintiff might be affected by delaying appeal of the grant of defendant's partial summary judgment on an unfair trade practices claim where plaintiff's claims of fraudulent misrepresentation and unfair trade practices rest upon nearly identical factual allegations and a jury would be required to render essentially identical factual determinations in order for plaintiff to prevail. Dismissal of plaintiff's appeal would raise the possibility of inconsistent verdicts.

3. Unfair Trade Practices— misrepresentation—sale of real estate management accounts

The trial court erred by granting summary judgment for defendants on an unfair trade practices claim arising from the sale of real estate management accounts where, viewing all inferences against defendants, the statements of defendant Harris concerning the status of the accounts may properly be considered deceptive in view of evidence that he knew the list of accounts attached to the Acquisition Agreement did not accurately represent the accounts which plaintiff believed it was purchasing. It is immaterial whether Harris misrepresented the status of the accounts out of negligence and in good faith or without intent to mislead. Although defendants contend that all of the documents were made effective on 1 April, before any misrepresentations, the agreement was not actually created until the closing on April 4, when the accounts were identified and verified.

4. Uniform Commercial Code— property management accounts—not goods under Article 2

Article 2 of the UCC was not applicable to the sale of property management accounts because those accounts are not "goods" within the meaning of Article 2.

5. Unfair Trade Practices— election of remedies—before instructions or after verdict

The trial court erred by entering summary judgment for defendants on an unfair trade practices claim arising from the sale of real estate management accounts where defendants contended that plaintiff had elected rescission as its principal relief and could not sue for inconsistent remedies. Although plaintiff's complaint sought damages under N.C.G.S. § 75-1.1 and relied

upon rescission in the alternative, N.C. law does not support the contention that election between remedies must be made at the filing of a complaint. The more recent trend in Chapter 75 cases is the election of remedies prior to the instruction of the jury or after the return of the jury verdict.

Appeal by plaintiff and cross appeal by defendants from order entered 6 March 1997 by Judge James R. Strickland in New Hanover County Superior Court. Heard in the Court of Appeals 14 January 1998.

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

Shanklin & McDaniel, L.L.P., by Kenneth A. Shanklin and Susan McDaniel, for defendants-appellees.

JOHN, Judge.

Plaintiff appeals the trial court's denial of its motion for partial summary judgment and allowance of defendants' motion for partial summary judgment on plaintiff's claim of unfair and deceptive trade practices. Defendants appeal denial of their motion for partial summary judgment alleging *res judicata*, and denial of their motion to strike certain affidavits offered by plaintiff. We reverse the trial court's grant of partial summary judgment to defendants and dismiss the remaining appeals.

Pertinent facts and procedural history include the following: In October 1994, James A. Holmes, III (Holmes) and F. Spruill Thompson (Thompson), officers and directors of plaintiff First Atlantic Management Corporation (First Atlantic), began negotiations with defendant Dunlea Realty Company (Dunlea Realty), acting through defendant H. Steven Harris (Harris), for the purchase of certain Dunlea Realty assets. The latter comprised property management accounts (the accounts) consisting of the right to receive payment from owners of rental property in exchange for management services.

On 23 February 1995, First Atlantic and Dunlea Realty entered into an Offer to Purchase and Contract regarding the accounts. Although a 28 February 1995 closing date was originally agreed upon, closing in actuality took place 4 April 1995. At that time, an Acquisition Agreement (Agreement) was executed, which included a listing of the accounts being sold to First Atlantic.

However, shortly before 4 April 1995, Harris was contacted by Ed Taylor (Taylor), president of Property Management Incorporated (PMI), a competitor of Dunlea Realty. During a 3 April 1995 telephone conversation, Taylor informed Harris that certain of the accounts desired to engage the services of PMI. Harris requested that information concerning the affected accounts be telefaxed to his office. However, Harris did not reveal to representatives of First Atlantic that some of the accounts involved in the asset sale were seeking to secure other property management services.

Several hours following conclusion of the closing on 4 April 1995 and after receiving a telefax list of accounts transferring to PMI, Harris went to plaintiff's offices and disclosed the pending loss of certain accounts including, according to plaintiff, "the Abee Account which . . . represented a substantial amount of the monthly revenues of the entire property management accounts."

On 3 May 1995, plaintiff filed suit alleging breach of contract, fraudulent misrepresentation and nondisclosure, and unfair and deceptive trade practices. Plaintiff thereafter moved for partial summary judgment on the issue of unfair and deceptive trade practices. The trial court denied the motion, and plaintiff voluntarily dismissed its action without prejudice on 3 April 1996.

Plaintiff reinstituted suit 25 April 1996 alleging breach of contract, fraudulent misrepresentation and nondisclosure, and unfair and deceptive trade practices under N.C.G.S. § 75-1.1 (1994). Plaintiff again moved for partial summary judgment on its claim of unfair and deceptive trade practices. Defendants in turn moved for summary judgment on the issue of unfair and deceptive trade practices, sought summary judgment predicated upon *res judicata*, and moved to strike certain affidavits relied upon by plaintiff in its motion.

In an order filed 6 March 1997, the trial court denied plaintiff's motion as well as that of defendants predicated upon *res judicata*, and further denied defendants' motion to strike. However, the court granted defendants' motion for partial summary judgment on plaintiff's claim of unfair and deceptive trade practices.

The court's order further provided that, upon plaintiff's motion, "this Order is hereby . . . certified for immediate appeal" pursuant to N.C.G.S. § 1A-1, Rule 54(b) (1990) (Rule 54(b) certification). Plaintiff and defendants thereafter filed timely appeals to this Court on 12 March 1997 and 18 March 1997 respectively.

I.

[1] Although the parties do not raise the issue, we must first consider *sua sponte* whether the parties' appeals are properly before this Court. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) ("if 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"). We do so in the spirit of attempting "to eliminate the unnecessary delay and expense of repeated fragmentary appeals." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951). As our Supreme Court has observed,

> [t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.

Veazey v. Durham, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950).

The trial court's order fails to resolve all issues between all parties and thus is not a final judgment, *id.* at 361-62, 57 S.E.2d at 381 (final judgment "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court"), but rather is interlocutory. *See* N.C.R. Civ. P. 54(a) (1990); *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) (order which does not completely dispose of case, such as order granting or denying motion for partial summary judgment, is interlocutory).

Interlocutory orders are ordinarily not directly appealable, *see Liggett*, 113 N.C. App. at 23, 437 S.E.2d at 677, but may be so in two instances:

> [f]irst, an interlocutory order can be immediately appealed if the order is final as to some but not all of the claims . . . and the trial court certifies there is no just reason to delay the appeal [pursuant to N.C.R. Civ. P. 54(b)]. Second, an interlocutory order can be immediately appealed under N.C. Gen. Stat. § 1-277(a) (1983) and 7A-27(d)(1) (1995) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review."

Bartlett v. Jacobs, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations omitted).

Rule 54(b) certification by the trial court is reviewable by this Court on appeal in the first instance because the trial court's denomination of its decree "a final . . . judgment does not make it so," *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979), if it is not such a judgment. Similarly, the trial court's determination that there is no just reason to delay the appeal, while accorded great deference, *see DKH Corp. v. Rankin-Patterson Oil Co., Inc.*, 348 N.C. 583, 500 S.E.2d 666, 668 (1998), cannot bind the appellate courts because "ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." *See Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984), and *McNeil v. Hicks*, 111 N.C. App. 262, 264, 431 S.E.2d 868, 869 (1993), *disc. review denied*, 335 N.C. 557, 441 S.E.2d 118 (1994) (Rule 54(b) certification "is not dispositional when the order appealed from is interlocutory").

Further,

> denial of a motion for summary judgment is not a final judgment and is generally (unless affecting a "substantial right") not immediately appealable, even if the trial court has attempted to certify it for appeal under Rule 54(b).

Cagle v. Teachy, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) (citations omitted). Accordingly, denial of a motion for summary judgment is not appealable unless a substantial right of one of the parties would be prejudiced should the appeal not be heard prior to final judgment. *See Leasing Corp. v. Myers*, 46 N.C. App. 162, 164, 265 S.E.2d 240, 242, *disc. review denied and appeal dismissed*, 301 N.C. 92, —— S.E.2d —— (1980).

Similarly, denial of a motion to strike is interlocutory and not a final judgment. *See Veazy*, 231 N.C. at 661-62, 57 S.E.2d at 381, and *Liggett*, 113 N.C. App. at 23, 437 S.E.2d at 677. Denial of such motion thus is properly appealable only if it "deprives the appellant of a substantial right which would be lost absent immediate review." *Bartlett*, 124 N.C. App. at 524, 477 S.E.2d at 695. A right is substantial "only when it 'will *clearly* be lost or irremediably adversely affected if the order is not reviewable before final judgment.' " *Brown v. Brown*, 77 N.C. App. 206, 208, 334 S.E.2d 506, 508 (1985), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986) (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)).

In the case *sub judice*, plaintiff and defendants have each appealed the trial court's denial of their respective summary judgment motions. Defendants likewise have appealed the denial of their motion to strike certain affidavits from plaintiff's summary judgment motion. In each instance, the order appealed from is interlocutory and the trial court's Rule 54(b) certification is ineffective as to each because it cannot by certification make its decree "immediately appealable [if] it is not a final judgment." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983); *see also Industries*, 296 N.C. at 491, 251 S.E.2d at 447. These appeals thus are not properly before this Court unless a substantial right has been affected. *See Cagle*, 111 N.C. App. at 247, 431 S.E.2d at 803.

As to denial of the parties' summary judgment motions, our thorough examination and consideration of the record reveals no substantial right which "could not be corrected upon appeal from final judgment." *Auction Co. v. Myers*, 40 N.C. App. 570, 573, 253 S.E.2d 362, 364 (1979). We thereby dismiss as interlocutory the appeals of plaintiff and defendants regarding denial of their respective summary judgment motions.

Concerning denial of defendants' motion to strike, we note the trial court rejected plaintiff's summary judgment motion, notwithstanding its refusal to strike consideration of certain affidavits in ruling thereon. In addition, this Court hereinabove has dismissed plaintiff's appeal of denial of its summary judgment motion. Suffice it to state we perceive no right, and certainly no "substantial" right, of defendants subject to being lost absent immediate appeal, *see id.*, of denial of their motion to strike. *See also Privette v. Privette*, 230 N.C. 52, 53, 51 S.E.2d 925, 926 (1949) (no substantial right "likely to be impaired or seriously imperiled" by denial of motion to strike allegations in motion before the court which "merely raises questions of fact for the judge to decide"). Accordingly, that appeal is likewise dismissed.

[2] However, the entry of partial summary judgment in favor of defendants on plaintiff's claim of unfair and deceptive trade practices is dispositive of that claim. While interlocutory in that other claims remain outstanding among the parties, the partial summary judgment order thus is immediately appealable provided 1) the trial court certified pursuant to Rule 54(b) that "there [wa]s no just reason to delay the appeal," *Bartlett*, 124 N.C. App. at 524, 477 S.E.2d at 695; *see also DKH Corp.*, 348 N.C. at 585, 500 S.E.2d at 668, and 2) this Court con-

cludes such certification was appropriate. *See McNeil*, 111 N.C. App. at 264, 431 S.E.2d at 869 (Rule 54(b) "certification is not dispositional when the order appealed from is interlocutory"); *see also Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985) (interlocutory appeal dismissed which did not "affect [appellant's] substantial rights," notwithstanding trial court's Rule 54(b) certification, because court's finding "must be construed [by this Court] in light of G.S. § 7A-27 and . . . well-settled case law concerning interlocutory appeals"), and *Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147, *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991) (no substantial right affected and interlocutory appeal "not immediately appealable, even if the trial court has attempted to certify it for appeal under Rule 54(b)").

In the case *sub judice*, the trial court certified there was "no just reason [to] delay" plaintiff's appeal because "of the finality of [the trial court's order] with respect to the plaintiff's unfair and deceptive trade practices claim for relief, an integral part of the plaintiff's case . . . ." We therefore consider the propriety of the trial court's certification.

Initially, we note with approval that the trial court's order sets forth the basis upon which it determined there existed "no just reason to delay," thus facilitating appellate review. *See In re Rogers*, 297 N.C. 48, 56, 253 S.E.2d 912, 917 (1979) (trial court's detailing of the facts upon which it based its decision facilitated judicial review).

In effect, the trial court concluded a substantial right of defendants would be adversely affected absent immediate appeal. While perhaps not the sole consideration, we hold application of the substantial right analysis was prerequisite to the court's decision regarding Rule 54(b) certification that there existed "no just reason to delay the appeal." *See Fraser*, 75 N.C. App. at 655, 331 S.E.2d at 218 (interlocutory appeal which did not "affect [appellant's] substantial rights" dismissed notwithstanding trial court's Rule 54(b) certification), and *Henderson*, 101 N.C. App. at 264, 399 S.E.2d at 147; *see also South Blvd. Video & News v. Charlotte Zoning Bd. of Adjust.*, 129 N.C. App. 282, 498 S.E.2d 623, 628, *disc. review denied and appeal dismissed*, 348 N.C. 501, —— S.E.2d —— (1998) ("statutes relating to the same subject should be construed *in* [*pari*] *materia*, in such a way as to give effect, if possible, to all provisions without destroying the meaning of the statutes involved") (citations omitted).

Accordingly, the trial court properly integrated this consideration into its order.

The sole issue which remains is whether the court correctly concluded a substantial right of defendants would be significantly impaired absent immediate appeal. Whether or not a substantial right will be prejudiced by delay of an interlocutory appeal generally must be decided on "a case by case basis." *Hoots v. Pryor*, 106 N.C. App. 397, 401, 417 S.E.2d 269, 272, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992). In addition,

> [i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which the appeal is sought is entered.

Bernick v. Jurden, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (quoting *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)).

The determination of appealability under the substantial right exception is a two step process. *Hoots*, 106 N.C. App. at 401, 417 S.E.2d at 272. First, the right in question must qualify as "substantial," and second, enforcement of that right, absent immediate appeal, must be "lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Id.* (quoting *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987)).

The avoidance of "one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal." *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (citations omitted). Further,

> the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.

Id. at 608, 290 S.E.2d at 596.

In the case *sub judice*, plaintiff's claims of "Fraudulent Misrepresentation and Nondisclosure" and of "Unfair and Deceptive Trade Practices" rest upon nearly identical factual allegations.

Moreover, in order for plaintiff to prevail on these claims, a jury would be required to render essentially identical factual determinations in plaintiff's favor. *See Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442-43 (1991) (proof of fraud necessarily constitutes violation of the prohibition against unfair and deceptive acts). While a decision as to whether the conduct of defendants constituted an unfair and deceptive trade practice would be for the court, *see Love v. Keith*, 95 N.C. App. 549, 554, 383 S.E.2d 674, 677 (1989), *overruled on other grounds*, 342 N.C. 133, 463 S.E.2d 199 (1995), the underlying conduct supporting that claim and plaintiff's claim of fraud would remain virtually the same. Hence, dismissal herein of plaintiff's appeal of the trial court's grant of summary judgment on plaintiff's unfair and deceptive trade practice claim would "raise the possibility of inconsistent verdicts in later proceedings." *Hoots*, 106 N.C. App. at 402, 417 S.E.2d at 273.

For example, it is conceivable that at trial on plaintiff's fraud claim, a jury could find defendants failed to commit the misrepresentations alleged. If, on appeal from that verdict, plaintiff was to renew its appeal regarding the grant of summary judgment on the unfair and deceptive trade practices claim and we determined the latter to have been error, a second trial would be required against defendants on the selfsame facts, at which trial a second jury conceivably could reach a verdict inconsistent with the first. *See id.*; *see also Webb v. Triad Appraisal and Adjustment Service, Inc.*, 84 N.C. App. 446, 449, 352 S.E.2d 859, 861-62 (1987) (plaintiff's allegations supportive of finding of fraud as well as finding of unfair and deceptive trade practices; thus she had "a substantial right to have [each cause] tried at the same time by the same judge and jury").

In short, the trial court correctly determined a substantial right of plaintiff might be affected by delaying its appeal of the grant of defendants' partial summary judgment motion until adjudication of all claims herein. The court thus properly certified pursuant to Rule 54(b) that there was "no just reason to delay" plaintiff's appeal. We therefore affirm that determination of the trial court and address plaintiff's appeal on its merits.

II.

[3] Summary judgment is appropriately granted if:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

> there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C.R. Civ. P. 56(c). A summary judgment movant bears the burden of establishing the lack of any triable issue, and may do so 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 . . . . All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.

Boudreau v. Baughman, 322 N.C. 331, 342-43, 368 S.E.2d 849, 858 (1988). We hold defendants have failed to meet their burden.

Chapter 75 of the North Carolina General Statutes prohibits unfair and deceptive acts which undermine ethical standards and good faith dealings between parties engaged in business transactions. *See* N.C.G.S. §§ 75-1.1 through 75-89 (1994); *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 657, 464 S.E.2d 47, 54 (1995). A trade practice is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *overruled on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Further, a trade practice is deceptive if it "possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception." *Forsyth Memorial Hospital v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 170 (1992), *disc. review denied*, 333 N.C. 344, 426 S.E.2d 705 (1993) (citations omitted).

To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby. *See Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992); N.C.G.S. § 75-1.1 (1994). The plaintiff must also establish it "suffered actual injury as a proximate result of defendants' misrepresentations" or unfair conduct. *See Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980); N.C.G.S. § 75-1.16 (1994). Once the plaintiff has presented evidence in support of each of these elements, the question whether defendants committed the alleged acts "is a question [of fact] for the jury;" the court must then determine as a matter of law whether the

"proven facts constitute an unfair or deceptive trade practice." *See Love*, 95 N.C. App. at 554, 383 S.E.2d at 677.

The parties do not dispute that sale of property management accounts would fall within the purview of G.S. § 75-1.1 as being "in or affecting commerce." *See, e.g., United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979) (applying G.S. § 75-1.1 to a bulk sale of business' assets). Nor is there any argument that plaintiff failed to present sufficient evidence of causation regarding damages. Neither is it argued that the actions of Harris would not be attributable to the other defendants. Rather, defendants vigorously contend plaintiff failed to present evidence that the conduct of Harris constituted an unfair or deceptive trade practice.

In his affidavit, Thompson stated:

> At the closing, various documents were executed which included the Acquisition Agreement. At no time during the closing or prior to the closing did the Defendants or anyone else inform me or any representative acting on behalf of the Plaintiff that the Defendant Harris was aware prior to the closing that owners of property management accounts which were to be sold to the Plaintiff were going to transfer those accounts to a competitor known as PMI. During the closing, I specifically asked Harris if there was any information about the status of the accounts which we needed to know. In response to this question, Harris stated that we knew everything that he knew. . . .
>
> If I had been informed prior to or at the closing of the information which Harris knew . . . I would not have agreed to close the transaction and would certainly not have paid the purchase price to the corporate Defendant. . . .
>
> I knew that, as a result of a loss of [the accounts], the Plaintiff would have a substantial negative monthly cash flow. In fact, that has occurred, and the Plaintiff has continued to lose money on a monthly basis.

In addition, the deposition of Harris contained the following:

> Q: Well, [PMI] told you during that conversation that there would be some accounts leaving Dunlea Realty and going to his business; Is that Correct?

A: He said there were a couple of accounts that wanted to transfer.

. . . .

Q: Did you say, "[PMI], how many accounts are you talking about?"

A: I can tell you what I said if you'd like. I said, "[PMI], fax over some paper work, and I'll look at it" . . . .

. . . .

Q: But you did not inform [First Atlantic] of the April 3 conversation; Right?

A: Right.

. . . .

Q: Had you alerted anyone at Dunlea's Office that you had told [PMI] to fax you that information?

A: No.

Q: Had you told anyone associated with Dunlea on the morning of April 4, 1995, and prior to the closing of your conversation with [PMI]?

A: No.

A misrepresentation may constitute an unfair and deceptive trade practice under G.S. § 75-1.1, *see Hardy v. Toler*, 288 N.C. 303, 311, 218 S.E.2d 342, 347 (1975), but deliberate acts of deceit or bad faith need not be shown. *Contreras*, 107 N.C. App. at 614, 421 S.E.2d at 170. Rather, a party's words or conduct must possess the "tendency or capacity to mislead" or create the "likelihood of deception." *Id.*

Viewing all inferences of fact against defendants, *see Boudreau*, 322 N.C. at 342-43, 368 S.E.2d at 858, we conclude the statements of Harris to Thompson concerning the status of the accounts may properly be considered deceptive in view of evidence that Harris knew the list of the accounts attached to the Agreement did not accurately represent the accounts which plaintiff believed it was purchasing. *See Kron Medical Corp. v. Collier Cobb & Associates*, 107 N.C. App. 331, 339, 420 S.E.2d 192, 196, *disc. review denied*, 333 N.C. 168, 424 S.E.2d 910 (1992) (failure to disclose information may be tantamount to misrepresentation and thus constitute an unfair or deceptive trade prac-

tice). Thus, assuming for purposes of summary judgment that Harris made the alleged representations to plaintiff, those statements of Harris "creat[ed] the likelihood of deception" and constituted sufficient evidence of an unfair and deceptive trade practice. *See Contreras*, 107 N.C. App. at 614, 421 S.E.2d at 170.

Although Harris asserted in his deposition that he "didn't take [PMI] seriously on the account transfers," it is immaterial whether he misrepresented the status of the accounts out of negligence and in good faith, or without intent to mislead. *See, e.g., Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991) ("that defendants may have made misrepresentations negligently and in good faith, in ignorance of their falsity, and without intent to mislead, affords no defense" in actions under G.S. § 75-1.1).

Notwithstanding, defendants maintain Harris may not be chargeable with a misrepresentation on 4 April 1995 since "all of the documents, including the Acquisition Agreement, the Bill of Sale, the Assignment of Rights . . . were expressly made effective April 1, 1995." More specifically, defendants contend that in order for Harris to have misled plaintiff, his failure to disclose on 4 April 1995 would of necessity have to be applied to the earlier date "when the contract was created and the obligations of the parties established." This argument is unfounded.

The Agreement was not actually "created" or executed until closing of the transaction on 4 April 1995. It is undisputed that the closing documents were executed only after the accounts were identified and verified on 4 April 1995. Hence, the very documents upon which defendants rely to assert the 1 April 1995 effective date were procured, viewing the evidence in the light most favorable to plaintiff, *Boudreau*, 322 N.C. at 343, 368 S.E.2d at 858, by Harris' wilful nondisclosure at closing of the pending transfer of certain of the accounts.

[4] Likewise, defendants' arguments relying upon the Uniform Commercial Code (the U.C.C.) are inapposite because property management accounts do not constitute "goods" within the meaning of Article 2 of the U.C.C. (*See* N.C.G.S. § 25-2-105 (1995)). Article 2 is therefore inapplicable to the sale of the accounts.

[5] Finally, defendants assert plaintiff "elected as its principal relief the remedy of rescission," and that, as a consequence, it cannot sue for damages under G.S. § 75-1.1 because these remedies are "incon-

sistent." *See United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 190-91, 437 S.E.2d 374, 378-79 (1993).

Defendant is correct that it is well established in our jurisprudence that

> [w]hen a person discovers that he has been fraudulently induced to purchase property he must choose between two inconsistent remedies. He may repudiate the contract of sale, tender a return of the property, and recover the value of the consideration with which he parted; or, he may affirm the contract, retain the property, and recover the difference between its real and its represented value. He may not do both. Once made, the election is final . . . .

Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975), *disc. review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976) (citations omitted).

In a fraud case, damage is the amount of loss caused by the difference between what was received and what was promised through a false representation. *See River Birch Associates v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 556 (1990). The remedy of rescission, as opposed to the notion of damage, seeks to undo the transaction and return the parties to their original status. *Triangle Porsche-Audi*, 27 N.C. App. at 717, 220 S.E.2d at 811.

Plaintiff's complaint reveals it seeks damages under G.S. § 75-1.1, relying upon rescission in the alternative. However, North Carolina law does not support defendants' contention that election between remedies must be made at the time of filing a complaint. *See* N.C.G.S. § 1A-1, Rule 8(e) (1990) ("party may set forth two or more statements of a claim . . . alternatively or hypothetically").

The more recent trend in Chapter 75 cases has been to require election of remedies prior to instruction of the jury, *see Winant v. Bostic*, 5 F.3d 767, 772, 775-76 (4th Cir. 1993) (plaintiff filing action seeking damages based upon G.S. § 75-1.1, or alternatively recission, not entitled to trebling of award since plaintiff later elected restitution and district court instructed jury upon same), or after return of the jury verdict, *see Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 427, 344 S.E.2d 297, 301, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 464 (1986) (plaintiff allowed to elect remedy between punitive damages or treble damages under G.S. § 75-1.1 after jury verdict). Accordingly, entry of summary judgment against plaintiff on its

unfair and deceptive trade practices claim would be inappropriate on the basis of inconsistent remedies.

To summarize, plaintiff's appeal of the denial of its motion for partial summary judgment, and defendants' appeals of the denial of their motions to strike and for partial summary judgment are each dismissed. However, defendants failed to overcome plaintiff's *prima facie* showing of an unfair and deceptive trade practice, *see Boudreau*, 322 N.C. at 342-43, 368 S.E.2d at 858, and the trial court's grant of partial summary judgment in favor of defendants on plaintiff's claim of unfair and deceptive trade practices is reversed.

Dismissed in part; reversed in part.

Judges GREENE and MARTIN, M., concur.

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

No. COA98-12

(Filed 3 November 1998)

1. **Compromise and Settlement— partial settlement—not a sham**

A settlement agreement in an action arising from a false invoice embezzlement scheme was valid and binding and not an arrangement designed to alleviate the malefactors of any liability and provide the victim with a double recovery where the agreement applied only to fraud claims which may be time barred and not to other claims against defendant banks.

2. **Damages and Remedies— partial settlement—credit refused—not the same injury**

The trial court did not err in an action arising from a false invoice embezzlement scheme by refusing defendant banks a credit for damages plaintiff had received from a settlement with the malefactors, an insurance company, the company for which one of the malefactors worked, and that company's successor. The record reflects that the trial court carefully considered the

matter, and the majority in the Court of Appeals on this issue did not agree that the sum already received partly reimbursed plaintiff for the "same injury" at issue in this case.

Judge WALKER concurring in part and dissenting in part.

Judge GREENE joins Judge WALKER's dissenting opinion, forming the majority as to issue 2.

Appeal by defendants from judgment entered 19 September 1997 by Judge Chase B. Saunders in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 1998.

Smith Helms Mulliss & Moore, L.L.P., by Jonathan E. Buchan and T. Jonathan Adams, for plantiff appellee.

Parker, Poe, Adams & Bernstein, L.L.P., by William L. Rickard, Jr., Craig T. Lynch, Kiah T. Ford, IV, and R. Bruce Thompson, III, for defendants appellants.

WYNN, Judge.

Plaintiff, The Knight Publishing Company, Inc. ("Knight Publishing"), and defendants, The Chase Manhattan Bank, N.A. ("Chase Manhattan") and First Union National Bank of North Carolina ("First Union"), have been involved in this protracted litigation for over six years. Indeed, Knight Publishing initially filed a complaint against Chase Manhattan and First Union in July 1992 seeking to recover for the improper handling of checks drawn on Knight Publishing's account as part of a fraudulent invoice scheme. The facts recited below are drawn in part from our earlier opinion regarding this matter. *See Knight Publishing Co. v. Chase Manhattan Bank*, 125 N.C. App. 1, 479 S.E.2d 478, *disc. rev. denied*, 346 N.C. 280, 487 S.E.2d 548, *mot. dismissed*, 347 N.C. 137, 492 S.E.2d 22 (1997).

From 1980 until 1992, Oren Johnson headed Knight Publishing's camera/platemaking department. Beginning in 1985, Johnson conspired with John Rawlins and Lloyd Douglas Moore ("the malefactors"), the owners of Graphic Image, Inc. ("Graphic Image"), to defraud Knight Publishing. Specifically, Graphic Image would deliver bogus invoices to Johnson and charge Knight Publishing for supplies it never received. Johnson would forward the invoices to Knight Publishing's accounts payable department, which would issue checks payable to "Graphic Image." Graphic Image would receive these

checks, cash them, and Johnson, Rawlins, and Moore would divide the monies.

Knight Publishing maintained a checking account at both Chase Manhattan and First Union. All but two checks were drawn on Knight Publishing's Chase Manhattan account. All of the checks, however, were deposited at First Union's banks.

From 1985 until 1987, Marilyn Mabe, a Graphic Image bookkeeper, deposited the improperly obtained checks into Graphic Image's First Union account. In July 1987, this procedure changed after Conbraco, Inc. purchased fifty-percent of Graphic Image's stock, leaving Rawlins and Moore each with a twenty-five percent share. Rawlins and Moore were concerned their embezzlement scheme would be discovered by Conbraco employees, and therefore instructed Mabe to deposit Knight Publishing's checks into Graphic Image Color Preparation's ("Graphic Preparation") account—Graphic Preparation being a wholly owned partnership of Rawlings and Moore. As instructed, Mabe began depositing the checks into Graphic Preparation's account by indorsing them "FOR DEPOSIT ONLY Graphic Image COLOR PREP ACCT. # 7048286557." From January 1988 to May 1992, Mabe deposited approximately fifty-five checks into the Graphic Preparation account with a total face amount of $1,479,003.96.

In June 1992, Knight Publishing discovered the embezzlement scheme and demanded reimbursement from Chase Manhattan and First Union. On 26 October 1994, Judge Chase B. Saunders entered an Order and Judgment finding: (1) defendant Chase Manhattan liable for charging improperly endorsed checks against Knight Publishing's account; (2) defendant Chase Manhattan's liability was limited to those checks charged after 19 June 1989 because Knight Publishing's claim against any checks prior to that time was time barred under U.C.C. § 4-406; and (3) defendant First Union's summary judgment motion should be granted. Thereafter, on 9 January 1995, the trial court entered a Final Order and Judgment whereby Knight Publishing was awarded $1,202,344.84 in damages, representing the principal amount of Knight Publishing's non-time barred losses. Knight Publishing and Defendant Chase Manhattan appealed both of those orders.

On 7 January 1997, this Court ruled on the aforementioned appeals. Specifically, we affirmed the trial court's granting of summary judgment against Chase Manhattan, reversed the trial court's

decision to grant First Union's summary judgment motion, and reversed the trial court's decision concerning the applicable rate of interest. *Id.*

In accordance with our ruling, Judge Sanders held three hearings in September 1997 to consider Knight Publishing's proposed Modified Final Order and Judgment. It was during one of these hearings that Chase Manhattan and First Union first discovered Knight Publishing had settled claims ("Settlement Agreement") with Graphic Images' successor corporation, Performance Printing Inc. ("Performance Printing"), and Conbraco, Inc. According to the Settlement Agreement's terms, Performance Printing & Conbraco would pay Knight Publishing $625,000 for the checks drawn on Knight Publishing's account prior to June 19, 1989. Moreover, Rawlins and Moore agreed to transfer all of their Conbraco stock to Conbraco and Knight Publishing agreed to dismiss all claims against Graphic Images, Graphic Preparation, Rawlins and Moore. Lastly, Knight Publishing agreed not to enforce federally imposed restitution orders against Rawlings and Moore.

Upon learning of the Settlement Agreement, Chase Manhattan and First Union argued, *inter alia*, that they were entitled to credits on the judgment corresponding to the monies received by Knight Publishing under the Settlement Agreement. Judge Saunders scheduled a third hearing on 10 September 1997, at which time Chase Manhattan and First Union filed a Credit Motion and a Motion for Discovery to determine how Knight Publishing reached the Settlement Agreement and to what claims the monies received were applied. After hearing arguments and accepting briefs, on 19 September 1997, Judge Saunders entered an Order Denying the Credit Motion and the Discovery Motion, and then set forth the Modified Final Order and Judgment awarding Knight Publishing damages without crediting Chase Manhattan and First Union for any of the monies Knight Publishing already received with regard to this matter. Chase Manhattan and First Union appeal.

I.

[1] On appeal, Chase Manhattan and First Union are not attempting to re-litigate issues which have already been decided by this Court. Rather, Chase Manhattan and First Union request this Court to act in equity, utilizing principles of fairness and justice. Specifically, Chase Manhattan and First Union ask this Court to grant them a credit equal to the monies Knight Publishing received through its Settlement

Agreement with Graphic Images, Graphic Preparation, Conbraco, the malefactors and other sources. Chase Manhattan and First Union argue this offset is a fair compromise because the Settlement Agreement was "an attempt to recover amount which [Knight Publishing] is not legally entitled to recover, while eliminating the Banks' ability to recover their own statutorily imposed losses from the actual perpetrators of the fraud." We note, however, that although the power of equity is as broad as equity and justice require, the case *sub judice* is more aptly guided by concrete principles of law.

First, Chase Manhattan and First Union argue that the Settlement Agreement is inequitable because it allows Knight Publishing to recover monies for which it is not legally entitled to recover, while, at the same time, eliminating the ability of Chase Manhattan and First Union to recover their own losses from the actual perpetrators of the fraud. Chase Manhattan and First Union support this argument by noting that the Settlement Agreement was structured in such a manner as to grant Knight Publishing recovery for only the time-barred checks—that is, the checks prior to 19 June 1989. Chase Manhattan and First Union note that if the Settlement Agreement included the checks at issue in their case (the post June 1989 checks), they would be entitled to a credit as a matter of law. Therefore, according to Chase Manhattan and First Union, Knight Publishing "conveniently" left these checks out of the Settlement Agreement in order to achieve a double recovery.

It is important to note that at the heart of Chase Manhattan and First Union's argument is the fact that the Settlement Agreement corresponded to claims that Chase Manhattan and First Union conclude were barred by the statute of limitations. Chase Manhattan and First Union support their conclusion by noting that a fraud claim's three year statute of limitations begins to run from "the date when the fraud should have been discovered in the exercise of ordinary care." *Shepherd v. Shepherd*, 57 N.C. App. 680, 682, 292 S.E.2d 169, 170 (1982). According to Chase Manhattan and First Union, since Knight Publishing's own internal investigation "conclude[d]" that Knight Publishing "should have known" about the embezzlement scheme early in its inception, Knight Publishing's fraud claim against the malefactors was time barred.

Chase Manhattan and First Union also argue that the Settlement Agreement was more form than substance. They support this argument with numerous conclusory and speculative theories. For exam-

ple, they state the Settlement Agreement may in reality be an arrangement whereby: (1) Conbraco can purchase 100% ownership of Performance Printing for only $625,000, while, at the same time, ridding itself of two criminal directors; (2) Rawlings and Moore can absolve themselves of any financial liability by settling the claim and using the proceeds from the sale of their stock to pay off Knight Publishing; and (3) Knight Publishing receives the $625,000 "bird in the hand," rather than a significantly larger sum that they may be awarded in the future.

Although the "conclusions" drawn by Chase Manhattan and First Union may in fact be true, they have little import in the case *sub judice*. It is well settled that "an agreement to compromise and settle disputed matters is valid and binding." *York v. Westall*, 143 N.C. 276, 277, 55 S.E. 724, 725 (1906). Indeed, the law favors the avoidance of litigation, and a compromise made in good faith "will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well." *Id.* Moreover, the agreement will be upheld without any serious regard to the merits of the controversy or the character or validity of the claims. *Id.*; *Bohannon v. Trotman*, 214 N.C. 706, 713, 200 S.E. 852, 860 (1939). The real consideration is not found in the parties sacrifice of rights, but in the bare fact that they have settled the dispute. *York*, 143 N.C. at 277, 55 S.E. at 725. Thus:

> no investigation into the character of relative values of the different claims involved will be entered into, . . . it being enough if the parties to the agreement thought at the time that there was a question between them—an actual controversy—without regard to what may afterwards turn out to have been an inequality of consideration.

Id.

Although the aforementioned rules apply directly to matters whereby one party contends that a compromise and settlement did not constitute adequate consideration, we find that the underlying policy issues are nonetheless useful here. Therefore, unless there is evidence of bad faith, deception, fraud or mistake, this Court will not address the argument of Chase Manhattan and First Union that the Settlement Agreement was an unbargained for sham "arrangement." *Bohannon*, 214 N.C. at —, 200 S.E. at 860 (holding that compromise settlements are binding absent evidence of deception, fraud or mistake).

In conducting this analysis, we accept that given the evidence available, it appears that Knight Publishing's fraud claims may in fact be time barred. Nonetheless, this first impression guesstimate is far from a legal certainty. Indeed, this guesstimate is based in part upon Knight Publishing's independent auditor's conclusions. These conclusions, however, are based upon only one person's opinions, and moreover are factual conclusions, not legal ones. Given this uncertainty, along with the monetary and time costs involved with pursuing the fraud litigation, we find that Knight Publishing and the malefactors entered into the Settlement Agreement in good faith and to avoid subsequent uncertainty and costs. Therefore, we hold the Settlement Agreement was a valid and binding compromise and settlement, not an "arrangement" designed to alleviate the malefactors of any liability and provide Knight Publishing with a double recovery.

[2] Chase Manhattan and First Union, in asking this Court to apply equitable principles and thereby credit them for the monies received by Knight Publishing, also note that regardless of whether the Settlement Agreement was intended to provide Knight Publishing with a double recovery, it nonetheless does so provide. Chase Manhattan and First Union therefore argue that regardless of Knight Publishing's intent, they are entitled to be credited for the monies Knight Publishing received.

With respect to this aspect of the credit issue, it is uncontroverted that while Knight Publishing is entitled to fully recover its damages, Knight Publishing is not entitled to a "double recovery" for the same loss or injury. *Markham v. Nationwide Mutual Fire Ins. Co.*, 125 N.C. App. 443, 455, 481 S.E.2d 349, 357, *disc. rev. denied*, 346 N.C. 281, 487 S.E.2d 551 (1997). As stated by our Supreme Court, "there can be but one recovery for the *same injury* or damage, . . . and further that, when merely a covenant not to sue, as distinguished from a release, is executed by the injured party to one joint tortfeasor for a consideration, the amount paid for such covenant will be held as a credit on the total recovery in actions against the other joint tortfeasors." *Holland v. Southern Public Utilities Co., Inc.*, 208 N.C. 289, 290, 180 S.E. 592, 593 (1935). According to the Court, "the weight of both authority and reason is to the effect that *any* amount paid by *anybody* . . . for and on account of any injury or damage should be held for a credit on the total recovery in any action for the *same injury* or damage." *Id.* (emphasis added). Although *Holland* involved joint tortfeasors, it has been quoted as controlling law in numerous types of damage cases. *See*

e.g., 25 C.J.S. Damages Sec. 99(2) at 1016 (footnotes omitted); *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 681-82, 384 S.E.2d 36, 47 (1989); *Bumgarner v. Tomblin*, 63 N.C. App. 636, 643, 306 S.E.2d 178, 184 (1983); *Nebel v. Nebel*, 223 N.C. 676, 686, 28 S.E.2d 207, 214 (1943). Therefore, it is necessary to conduct a further examination into whether the monies Knight Publishing received as a result of the Settlement Agreement emanate from the "same injury" claimed in the case *sub judice*.

Knight Publishing contends that any monies received from the Settlement Agreement do not stem from the "same injury" at issue in the case *sub judice*. Indeed, Knight Publishing notes the explicit language of the Settlement Agreement which states that "[the] recovery was for a loss *separate and distinct* from the losses related to the checks improperly charged against [Knight Publishing's] bank accounts and deposited into the accounts of Graphic Image Color Prep"—that is, the Settlement Agreement compensated Knight Publishing for losses distinct from the losses related to the checks at issue here. This statement, however, is simply a conclusory assertion without legal tenability. Moreover, it is a statement with which I disagree.

Knight Publishing has but one injury in this case—the money lost when Knight Publishing's improperly endorsed checks were unlawfully charged against its accounts. Although Chase Manhattan, First Union and the malefactors were independently liable, their actions were nonetheless concurrent and were it not for Chase Manhattan and First Union's unlawful acts, the malefactors' scheme would never have succeeded. Moreover, the injury created by the malefactors' scheme—Knight Publishing's monetary loss—is the same injury caused by the failure of Chase Manhattan and First Union to notice the malefactors' unlawful acts. Indeed, the amount of loss depended on the malefactors, not the bank; for if the malefactors embezzled $1 million, $5 million, or $10 million, Knight Publishing's loss would correspond to the injury created by the malefactors, not by any actions or non-actions taken by Chase Manhattan and First Union. Thus, Chase Manhattan and First Union's acts, or lack thereof, created no additional loss.

The Michigan Supreme Court, in *Riverview Co-op, Inc. v. First Nat. Bank & Trust Co. of Michigan*, 417 Mich. 307, 337 N.W.2d 225 (1983), was asked to determine whether a defendant's recovery from both check converters and the bank from which the check cleared constituted a double recovery for the same injury. The court ruled

that "[w]hile the converters and the bank are each, on the facts alleged, guilty of separate and distinct wrongdoing, [defendant] *suffered but a single injury.* Consequently, [defendant] may have but one satisfaction for that injury and may not have double redress." *Id.* at 231 (emphasis added). In making this ruling, the Michigan court used an election of remedies analysis, noting the election of remedies doctrine is a procedural rule designed not to prevent recourse of alternate remedies, but to prevent double redress for a single injury. *Id.* at 226. The court proceeded to state the elements essential for the doctrine to apply: (1) the existence of two or more remedies; (2) the inconsistency between such remedies; and (3) a choice of one of them. *Id.* Under the facts of the case, the court stated that the first and third requirements were clearly met because defendant could have sued either the converter or the bank, and a choice was available as demonstrated by the fact that defendant sued the converter first and the bank second. *Id.* Lastly, the court noted that the remedies were not inconsistent because the defendant did not "ratify" or "affirm" the bank's payment to the converter by suing the converter first. *Id.* at 229.

The *Riverview* analysis is sound, and accordingly would apply it to the case *sub judice.* Therefore, while the malefactors, Chase Manhattan and First Union are each guilty of separate wrongdoing, Knight Publishing suffered but a single injury. "The remedies sought do not proceed from opposite and irreconcilable claims of right and are not inconsistent in the sense that a party may not logically pursue one remedy without renouncing the other." *Id.* at 231. Accordingly, because I would find there is but a "single injury," *Holland* requires this Court to hold that any monies Knight Publishing received through the Settlement Agreement or other arrangements relating to this matter must be credited against Knight Publishing's total recovery.

Further, we must thereafter determine how much credit Chase Manhattan and First Union are entitled to from Knight Publishing's Settlement Agreement. Knight Publishing argues that its total damages amount to $2,023,890.48. Moreover, Knight Publishing argues that even under the most optimistic theory supporting Chase Manhattan and First Union, it still will be unable to recover that amount. Therefore, according to Knight Publishing, there is no risk that it will be able to receive a double recovery. Knight Publishing, however, has failed to adequately substantiate the damages in excess of the Modified Final Order and Judgment described below.

Chase Manhattan and First Union, on the other hand, contend that Knight Publishing is legally entitled to recover only $1,244,011.18—the principal amount of non-time barred losses resulting from the embezzlement scheme. Chase Manhattan and First Union do concede that Knight Publishing is entitled to interest upon this amount.

In its Modified Final Order and Judgment, the trial court awarded Knight Publishing damages as follows: (1) $1,202,344.84 from Chase Manhattan for lost principal; (2) $277,199.45 from Chase Manhattan as prejudgment interest; (3) $289,058.25 from Chase Manhattan as additional interest; and thereafter $296.47/day until the judgment is paid; (4) $41,666.34 from First Union for lost principal; (5) $8,901.75 from First Union for prejudgment interest; and (6) $9.13/day of interest until the judgment is paid.

Knight Publishing has already received $779,879.30 in damages. Specifically, Knight Publishing received $625,000 in damages from the Settlement Agreement, $68,223 from the malefactors personally, and $86,656.30 from Knight Publishing's insurance company. As stated, these monies partly reimburse Knight Publishing for the "same injury" at issue in the case *sub judice*. Chase Manhattan and First Union are, therefore, entitled to have this money credited in its entirety, and therefore offset their liability under the Modified Final Order and Judgment. Accordingly, this case is remanded to the trial court with instructions to amend its Modified Final Order and Judgment to reflect the $779,879.30 credit due Chase Manhattan and First Union.

Affirmed.[1]

Judge WALKER concurs in part and dissents in part.

Judge GREENE concurs with Judge WALKER.

This opinion was authored by Judge WYNN prior to 1 October 1998.

1. Because Judge Greene joins in Judge Walker's dissenting opinion, the issue raised in that dissenting opinion represents the majority opinion as to that issue, with Judge Wynn's opinion on that issue representing the dissent.

Judge WALKER concurring in part and dissenting in part.

[2] I respectfully dissent from that part of the majority opinion which allows a credit of $779,879.30 to Chase Manhattan and First Union. The record reflects that the trial court carefully considered this matter before entering judgment for the plaintiff in the combined amount of $1,244,011.18 without interest. I disagree that the sum of $779,879.30, which plaintiff has already received in damages, is money which partly reimburses plaintiff for the "same injury" at issue in the case. The authority and reasoning for allowing the credit of $779,879.30 is unpersuasive and I would affirm the judgment of the trial court entered on 19 September 1997.

INTEGON INDEMNITY CORPORATION, PLAINTIFF v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, CENTRAL MUTUAL INSURANCE COMPANY, AND GRIFFIN MOTOR COMPANY, INC., DEFENDANTS

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, THIRD-PARTY PLAINTIFF v. RANDALL BAUCOM, THIRD-PARTY DEFENDANT

No. COA97-385

(Filed 3 November 1998)

1. Insurance— car rental agreement—disavowal of liability—disapproved

Language in a car rental agreement purporting to disavow provision of liability insurance in "consideration" of the lessee's acknowledgment of complete liability was disapproved. N.C.G.S. § 20-279.21 and N.C.G.S. § 20-281 specifically and unambiguously impose upon Griffin, as a corporation in the business of leasing or renting automobiles, the obligation to provide certain minimal insurance.

2. Insurance— rental car policies—excess and primary

In a declaratory judgment action arising from an automobile accident involving a rental car in which the victim's insurer, Central, brought a subrogation action, the trial court erred by declaring that Integon (the driver's insurer) provided primary coverage and that Universal (the rental company's insurer) provided excess coverage. Under the "our share" and "most we will pay" provisions of the Integon and Universal policies respec-

tively, Integon and Universal are liable to Central in pro rata shares up to the minimum limits required by the Financial Responsibility Act.

Appeal by plaintiff and defendant from order entered 31 December 1996 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 20 November 1997.

Michael R. Greeson, Jr., for plaintiff-appellant.

Kilpatrick Stockton LLP, by James H. Kelly, Jr., and Susan H. Boyles, for defendant-appellant Universal Underwriters Insurance Company

JOHN, Judge.

In this declaratory judgment action, plaintiff Integon Indemnity Corporation (Integon) and defendant and third-party plaintiff Universal Underwriters Insurance Company (Universal) each appeal the trial court's 31 December 1996 order. The court ruled that an automobile insurance policy issued by Integon furnished primary coverage and a policy issued by Universal provided excess coverage for claims arising out of a 19 May 1995 motor vehicle collision involving third-party defendant Randall Baucom (Baucom). For the reasons set forth below, we reverse the order of the trial court.

Pertinent facts and procedural history include the following: On 18 May 1995, Baucom rented a Pontiac automobile from defendant Griffin Motor Company, Inc. (Griffin), a corporation engaged in leasing and renting automobiles. At that time, Baucom was insured by Integon under an automobile liability policy (the Integon policy) providing bodily injury coverage in the amount of $25,000 per person and $50,000 per accident, and $15,000 for property damage.

The Integon policy covered "damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident." An "insured" was defined as "[y]ou or any **family member** for the ownership, maintenanance [sic] or use of any auto or **trailer**." The policy further provided:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Baucom executed a written rental agreement with Griffin which included the following language:

> The undersigned hereby acknowledges that the lessor is not providing any type of insurance protection or collecting any charges therefor. In consideration of the foregoing acknowledgment the undersigned agrees to pay for all loss and damage to the described automobile and to hold Lessor harmless from any liability as a result of the lessee's usage thereof.

Baucom further represented in the rental agreement that he was insured under the Integon policy.

On 19 May 1995 in Myrtle Beach, South Carolina, Baucom was involved in an automobile collision with a vehicle owned and operated by James Wooten (Wooten), and insured by defendant Central Mutual Insurance Company (Central). Central tendered payment to Wooten and his passengers under its policy, and thereafter instituted a subrogation claim in Union County to recover the amount of its payments from Baucom and Griffin.

At the time of the collision, Griffin was insured under a policy issued by Universal (the Universal policy), known as a "fleet insurance policy," covering Griffin's changing inventory of vehicles. The Universal policy included an endorsement, entitled "RENTAL AND LEASING AUTOS EXCLUDED," which read as follows:

> No insurance is provided by this Coverage Part on any AUTO owned by an AUTO manufacturer (or any of its subsidiaries or affiliated companies) and rented or leased by YOU to others. No insurance is provided by this Coverage Part on any AUTO owned or leased by YOU and used in connection with any such rental or leasing operations.

However, with respect to auto hazards, the Universal policy included as encompassed within its definition of "WHO IS AN INSURED,"

> (4) Any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission.

The Universal policy also stated:

> With respect to part (4) of WHO IS AN INSURED, the most WE will pay in the absence of any other applicable insurance, is the minimum limits required by the Motor Vehicle Laws of North

Carolina. When there is other applicable insurance, WE will pay only OUR pro rata share of such minimum limits.

Integon, the insurer of Baucom as defendant in the Union County subrogation action, instituted the instant declaratory judgment action 3 May 1996, seeking judicial determination "that the coverage provided by [Universal, the insurer of Griffin as defendant in the Union County action] [wa]s primary to [the extent of] the limits of liability" required by law. Universal denied liability and maintained the Integon policy was the only coverage required either by law or by the terms of the policies at issue.

Universal and Integon each moved for summary judgment. Following a hearing and in an order entered 31 December 1996, the trial court declared that the Integon policy "provide[d] primary coverage for the accident on May 19, 1995, up to the stated limits of its policy." The court further stated that the Universal policy "provide[d] excess coverage for any claims against Randall Baucom arising out of the accident on May 19, 1995, under the Financial Responsibility Act." Both Universal and Integon filed timely notice of appeal.

On appeal, Integon asserts the trial court erred in adjudging the coverage afforded by the Integon policy regarding the 19 May 1995 collision as "primary," *i.e.*, exclusive to the extent of its policy limits of any other available coverage, specifically that set forth in the Universal policy. Universal contends the trial court properly designated Integon's coverage as "primary," but disagrees with the determination that its policy provided excess coverage.

Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, admissions and affidavits show the movant is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c); *State Farm Mut. Automobile Ins. Co. v. Branch*, 114 N.C. App. 234, 237, 441 S.E.2d 586, 588, *disc. review denied*, 336 N.C. 610, 447 S.E.2d 412 (1994). The meaning of specific language used in a policy of insurance is a question of law, *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970), and summary judgment may be granted in a declaratory judgment action. *Threatte v. Threatte*, 59 N.C. App. 292, 294, 296 S.E.2d 521, 523 (1982), *appeal dismissed*, 308 N.C. 384, 302 S.E.2d 226 (1983). The scope of appellate review thereof is the same as for other actions. N.C.G.S. § 1-258 (1996); *Dickey v. Herbin*, 250 N.C. 321, 325, 108 S.E.2d 632, 635 (1959).

"The avowed purpose of the Financial Responsibility Act . . . is to compensate the innocent victims of financially irresponsible

motorists." *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 346, 338 S.E.2d 92, 96 (1986). Two statutory sections, N.C.G.S. § 20-279.21(b)(2) (Cum. Supp. 1997) and N.C.G.S. § 20-281 (1993), govern the obligation of an automobile lessor such as Griffin to insure lessees of its vehicles. *Hertz Corp. v. New South Ins.*, 129 N.C. App. 227, 497 S.E.2d 448, 449-50. G.S. § 20-281 "accommodates" G.S. § 20-279.21, which is part of the Motor Vehicle Safety and Financial Responsibility Act (FRA) (N.C.G.S. §§ 20-279.1-20.319 (1993)). *Jeffreys v. Snappy Car Rental, Inc.*, 128 N.C. App. 171, 172, 493 S.E.2d 767, 768-69 (1997), *disc. review denied*, 348 N.C. 73, —— S.E.2d ——, (1998).

G.S. § 20-179.21(b)(2) mandates that motor vehicle owners purchase liability insurance which

> [s]hall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle . . . .

G.S. § 20-279.21(b)(2). G.S. § 20-281 obligates "any person, firm or corporation . . . engag[ing] in the business of renting or leasing motor vehicles to the public" to obtain liability insurance

> insuring the owner and rentee or lessee . . . against loss from any liability imposed by law for damages . . . for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such motor vehicle . . . .

G.S. § 20-281. Both sections require the identical minimum limit of insurance, *see Hertz*, 129 N.C. App. at ——, 497 S.E.2d at 450, *i.e.*, coverage in the amounts of $25,000 for bodily injury or death of one person in any one accident, $50,000 for bodily injury or death of two or more persons in any one accident, and $15,000 for injury to or destruction of property of others in any one accident (25/50/15). *See* G.S. § 20-279.21(b)(2) and G.S. § 20-281.

[1] Preliminarily, we express our disapproval of the language in Griffin's rental agreement purporting to disavow provision of liability insurance in "consideration" of the lessee's acknowledgment of complete liability. G.S. § 20-279.21 and G.S. § 20-281 specifically and

unambiguously impose upon Griffin, as a corporation in the business of leasing or renting automobiles, the obligation to provide certain minimal insurance. Indeed, Universal acknowledges that "if . . . Baucom did not have his own insurance [policy], G.S. § 20-281 would [have] required [Griffin Motor Company] to provide 25/50/15 coverage" on the rental vehicle." *See Ins. Co. of North America v. Aetna Life & Casualty Co.*, 88 N.C. App. 236, 242-43, 362 S.E.2d 836, 840 (1987), *disc. review denied*, 321 N.C. 743, 366 S.E.2d 860 (1988) (rental company's policy must provide minimum coverage to unauthorized driver under § 20-281 where no other coverage existed).

[2] We turn now to the issues at hand. Initially, we observe that Integon sought a declaration in the instant suit that "coverage provided by [Universal] is primary to the limits of liability" provided by law. In its appellate brief, however, Integon makes no reference to the "our share" provision of the Integon policy, and relies almost entirely on the decision of our Supreme Court in *Integon Indemnity Corp. v. Universal Underwriters Ins. Co.*, 342 N.C. 166, 463 S.E.2d 389 (1995) (*Integon I*). We do not read that decision to support Integon's position.

On the other hand, Universal in sum asserts it was absolved of liability because Baucom individually maintained the Integon policy meeting the minimum requirements of the FRA. *Integon I* also fails to support Universal's contention, this precise argument having been rejected when previously advanced therein by Universal.

In *Integon I*, Integon and Universal disputed the issue of coverage under circumstances analogous to those *sub judice*. An automobile dealership loaned an automobile to Allen and Hope Bridges (the Bridges), whose daughter subsequently was involved in a collision while operating the vehicle with her parents' permission. *Id.* at 167, 463 S.E.2d at 490. At the time of the accident, the Bridges were covered by an Integon policy in the minimum amounts required by law, and the automobile dealership was insured under a policy issued by Universal (the *Integon I* Universal policy). *Id.* at 167-68, 463 S.E.2d at 490.

Similar to the Universal policy herein, the *Integon I* Universal policy extended liability coverage, among others, to:

> [a]ny other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission.

Id. at 169, 463 S.E.2d at 391. As a permissive user of the dealership's vehicle, the Bridges' daughter was thereby provided coverage by the *Integon I* Universal policy maintained by the dealership "unless [that policy] contain[ed] language limiting or excluding coverage." *Id.*

Regarding the question of limitation, the Court examined the "most we will pay" provision in the *Integon I* Universal policy, identical to that contained in the Universal policy herein, which provided:

> the most WE will pay in the absence of any other applicable insurance, is the minimum limits required by the Motor Vehicle Laws of North Carolina. When there is other applicable insurance, WE will pay only OUR pro rata share of such minimum limits.

Id. at 169-170, 463 S.E.2d at 391. Because the Bridges' daughter carried other applicable insurance, the Court reasoned that "under the terms of [its] policy, Universal [wa]s responsible for a pro rata share of the minimum limits." *Id.* at 170, 463 S.E.2d at 392.

In *Integon I*, Universal unsuccessfully maintained that because the Bridges' daughter was insured under other policies which met the minimum requirements of the Financial Responsibility Act, she was not an individual "required by law" to be insured by Universal. *Id.* Universal in essence resurrects the same argument herein by contending the Integon policy alone completely satisfied the requirements of the FRA and that § 20-281 imposes no additional requirements on an automobile lessor when the lessee otherwise has available 20/50/15 coverage. Therefore, Universal concludes, the instant Universal policy afforded no liability coverage for claims arising out of the 19 May 1995 collision.

This argument is virtually indistinguishable from that rejected by our Supreme Court in *Integon I*. *See id.*, 463 S.E.2d at 391-92 (noting its earlier holding that an individual operating an automobile with the owner's permission was an individual "required by law" to be insured, the Court "disagreed[d] with Universal's argument that its policy precludes coverage to a driver 'required by law' to be an insured when the driver already has sufficient liability coverage"). As in the "most we will pay" provision of the *Integon I* Universal policy, the instant Universal policy expressly and unambiguously recited its agreement to pay a pro rata share. *See id.*, 463 S.E.2d at 392.

Notwithstanding, Universal insists, as it did in *Integon I*, that the holding of *United Services Auto. Assn. v. Universal Underwriters*

Ins. Co., 332 N.C. 333, 420 S.E.2d 155 (1992) requires a different result. Our Supreme Court determined *United Services* to be distinguishable, *Integon I*, 342 N.C. at 171-72, 463 S.E.2d at 392-93, and neither Universal nor the instant circumstances offer any basis for relieving us of our obligation to follow that directive. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (this Court required to follow decisions of our Supreme Court until that Court rules otherwise).

As our Supreme Court observed,

> [t]he Universal policy at issue in *United Services* clearly limited liability coverage for individuals "required by law" to be an insured to "only the amount (or amount in excess of any other insurance available to them) needed to comply with the minimum limits" of any applicable law.

Integon I, 342 N.C. at 172, 463 S.E.2d at 392. However, the *Integon I* Universal policy, as well as that herein, contained "significant differences," *id.* at 171, 463 S.E.2d at 392, namely the agreement of Universal, in the event of other applicable insurance, to be responsible for its pro rata share of the minimum limits required by law. *See id.*, 463 S.E.2d at 393.

Universal attempts to distinguish *Integon I* as involving a loaned vehicle whereas the instant case concerns a rental automobile. Suffice it to state this constitutes a distinction without a difference, at least in terms of analyzing the identical policy provisions concerned.

Finally, Universal argues *Integon I* does not control because of the specific exclusion for rental vehicles in the Universal policy *sub judice*. We disagree.

As discussed above and conceded by Universal, Griffin is obligated as a matter of law to provide liability insurance for its lessees. *See* G.S. § 20-281. Griffin presented the Universal policy as its applicable coverage, and the statutory requirements must be read into the policy. *See Brown v. Truck Ins. Exch*ange, 103 N.C. App. 59, 64, 404 S.E.2d 172, 175 (provisions of the FRA are written into every automobile liability policy as a matter of law and where provisions of insurance policy conflict with provisions of the FRA, the statute prevails), *disc. review denied*, 329 N.C. 786, 408 S.E.2d 515 (1991) and *American Tours*, 315 N.C. at 344, 338 S.E.2d at 95 ("[w]hen a statute is applicable to the terms of a policy of insurance, the pro-

visions of that statute become part of the terms of the policy to the same extent as if they were written in it"). While an automobile owner's policy may "exclude coverage in the event the driver of a vehicle is covered under some other policy for the minimum amount of liability coverage" required by the FRA, *see Jeffreys*, 128 N.C. App. at 172-73, 493 S.E.2d at 769, that is not the circumstance *sub judice*. The Universal policy provides that it will pay its pro rata share when those required by law to be insured (here, Baucom) have other applicable insurance.

Prior to concluding our discussion of Integon's appeal, we note it has advanced no argument asserting application in the instant case of the coverage limitation in the Integon policy "for a vehicle you do not own" to the "excess over any other collectible insurance." Accordingly, we have not addressed, nor do we express any opinion, as to the effect of this provision upon our analysis herein. *See In re Appeal of Mount Shepherd Methodist Camp*, 120 N.C. App. 388, 390, 462 S.E.2d 229, 231 (1995) (appellate review "limited to the . . . arguments presented in the briefs to this Court"), and N.C.R. App. P. 28(a) ("[r]eview . . . limited to questions . . . presented in the several briefs").

In short, under *Integon I* and the "our share" and "most we will pay" provisions of the Integon and the Universal policies respectively, Integon and Universal are liable to Central in pro rata shares up to the minimum limits required by the FRA for claims arising out of the 19 May 1995 automobile collision involving Baucom. Accordingly, the trial court's declaration that the Integon policy provided "primary" coverage is reversed.

In its appeal, Universal cites as error the trial court's ruling that the Universal policy provided "excess coverage." In view of our holding above, we likewise reverse this portion of the trial court's order.

Reversed.

Judges MARTIN, John C. and SMITH concur.

STATE OF NORTH CAROLINA v. JOHN BRYANT DAVIDSON

No. COA97-1353

(Filed 3 November 1998)

1. **Search and Seizure— warrant—time of execution—bank records—not produced within 48 hours**

The trial court did not err in a prosecution for securities fraud by denying defendant's motion to suppress bank records seized via a search warrant where the warrant was issued on 22 April and served on the bank on 23 April, but the Investigator did not begin receiving the records until 6 May. Although defendant contends that the warrant was not executed within the forty-eight-hour period required by N.C.G.S. § 15A-248, defendant failed to show that the failure to produce the documents within forty-eight hours constitutes a substantial violation within the meaning of N.C.G.S. § 15A-974 and failed to show prejudice.

2. **Crimes, Other— securities fraud—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss charges of securities fraud under N.C.G.S. § 78A-8(2) and N.C.G.S. § 78A-8(3) for insufficient evidence. Defendant's failure to tell two investors that he would be using their funds to trade stock options after promising to invest their funds at a fixed interest rate constituted an untrue statement of material fact and an omission of a material fact necessary to not misleading investors under N.C.G.S. § 78A-8(2). Defendant's continuing misrepresentation of his employment is encompassed by N.C.G.S. § 78A-8(3)'s broad definition.

3. **Criminal Law— additional argument refused— additional instructions mere clarification**

The trial court did not abuse its discretion in a prosecution for securities fraud by denying defendant's request to further argue to the jury after the trial court gave additional instructions. The court merely clarified an earlier instruction and no additional instructions were given, so that allowing additional argument was within the discretion of the court.

Appeal by defendant from judgment entered 27 June 1997 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 August 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Christopher E. Allen, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Phillip D. Harward, for defendant-appellant.

WALKER, Judge.

Defendant was charged in a bill of indictment with two counts of securities fraud under N.C. Gen. Stat. § 78A-8(2) (omission of a material fact) and two counts of securities fraud under N.C. Gen. Stat. § 78A-8(3) (engaging in an act, practice, or course of business that operates as a fraud). The jury convicted him on all four counts of securities fraud and he was sentenced to four concurrent nine-year terms of imprisonment.

The State's evidence tended to show that defendant worked as a stock broker at Capital Investment Group until January 1994. On 21 September 1993, defendant opened a checking account in the name of Union Assurance which was not registered as a corporation or as a partnership authorized to deal in securities in North Carolina nor was it registered in Florida where defendant provided an address for the company. From December 1993 to February 1994, defendant solicited funds from Robert Jackson and Rufus Plonk, two of his established Capital Investment Group clients. Defendant convinced both Jackson and Plonk to liquidate funds from their accounts with Capital Investment Group and he placed those funds in the Union Assurance checking account in the Bank of Union in Monroe, North Carolina. Both Jackson and Plonk testified that defendant represented to them that in exchange for the investment, they would receive a high fixed rate of interest. As a result, Jackson invested a total of $296,000 and Plonk invested $50,000 in what they understood were investments paying a fixed interest rate.

The defendant opened an E-trade brokerage account on 30 September 1993 in the name of Union Assurance with J.B. Oxford & Company, formerly known as RKS, Inc. (RKS), which allowed defendant to trade securities via computer. He traded under this brokerage account until 30 December 1994. On 10 October 1994, defendant opened a second E-trade account in the name of Union Assurance with Herzog, Heine and Geduld, Inc. (Herzog). He traded under this account until 27 October 1995. Through the RKS and Herzog accounts, defendant traded exclusively in "put" and "call" stock

options.[1] In total, over $600,000, which included the funds of Jackson and Plonk, was deposited into the Union Assurance checking account. Some $370,000 of those funds was used by defendant to trade stock options with the remaining funds being used by defendant for his personal use.

Investigator Elizabeth Powell of the North Carolina Secretary of State's Office of Securities Enforcement and Richard Bryant, president of Capital Investment Group, both testified that the National Association of Securities Dealers (NASD) requires brokers to execute separate contracts with clients explaining the excessive risks of options trading before any such trades are made. Neither Jackson nor Plonk ever agreed orally or in writing for the defendant to use his funds to trade in stock options.

Bryant testified further that after defendant left Capital Investment Group in January 1994, he no longer had the authority to use its name, a substantially similar name, or any letterhead labeled with its name or a similar name in communications with clients.

Jackson is an elderly man confined to a wheelchair who testified that he was trustee of a trust for his nephew and had known defendant since March 1992 when he first opened an investment management account with defendant. He further testified that he had relied completely on defendant for investment advice since opening that account, but to the best of his knowledge, defendant had never engaged in options trading on his behalf. After defendant convinced Jackson to liquidate his Capital Investment Group investment management account in favor of a high fixed interest rate account with Union Assurance, Jackson endorsed checks totaling $296,000 over to Union Assurance in February 1994.

After endorsing the checks, Jackson heard nothing more from defendant until June 1995, when he called defendant to complain that he had not received any statements or a prospectus about the fixed interest rate investment which he had requested. As a result of this call, Jackson received a statement on Union Assurance stationery the following week which indicated that his funds were invested at the fixed rate of 8.15% interest and that his balance in the account was

1. A "put" is an option permitting its holder to sell a stated quantity of a certain stock or commodity at a fixed price within a stated period of time. *Black's Law Dictionary* 1237 (6th ed. 1990). The holder of a "put" expects the price of the stock to fall so that he can sell the stock or commodity at a profit. *Id.* A "call" allows its holder to purchase at a fixed price. The holder expects the price to rise in order to profit. *Id.* at 204.

$326,884.88 including accrued interest. Thereafter, no other statements were received.

In August 1995, Jackson called to withdraw some of the funds but was informed by defendant that he could not get any of his money until February 1996. Soon thereafter, Jackson received a letter from defendant on a letterhead labeled "Capital Group" even though defendant had left Capital Investment Group in January 1994. Jackson testified that throughout the time he was involved with defendant he understood that Union Assurance was a division of Capital Investment Group where the defendant was still employed. On 17 June 1996, Jackson sent a letter to defendant at Union Assurance's address in Florida requesting that his account be closed; however, he never received a response. Later, he called a telephone number given to him by defendant but found it had been disconnected. Jackson did not recover any of his $296,000 or the interest promised him.

Plonk, a retiree who relied on his investments for income, testified that he had known defendant since the late 1970s and that defendant had provided investment services for him including some "put" options trading during the 1980s. Plonk testified that he would have refused to invest the money had defendant told him that it would be used to trade options because he had lost money on the previous transactions.

In December 1993, Plonk withdrew $50,000 from his Capital Investment Group account, endorsed the check over to the defendant, and received a "guaranteed interest rate certificate" on Capital Investment Group letterhead noting that it was to be invested at 7.85% interest payable quarterly. Plonk testified further that defendant had told him the investment "was in the form of an investment house that placed pension money out for interest," that most of the investments were in England, and that the investment guaranteed a fixed interest rate. Plonk first heard of Union Assurance when he began receiving his quarterly interest checks and noticed the name on the checks.

In June 1995, when the second quarter interest payment was credited to his principal rather than paid to him directly, Plonk contacted defendant seeking a refund of his money. He spoke with defendant a number of times and eventually received the interest payment for the second quarter; however, he received no more interest payments. Thereafter, as a result of the investigation by the Securities

Enforcement section, he learned that there were no funds remaining in the Union Assurance account. Plonk did not recover any of his $50,000 or any of the interest promised him after the second quarter of 1995.

Jackson and Plonk testified that defendant failed to inform them that he would be using the funds to trade in stock options or for his personal use.

The Securities Enforcement section began investigating Union Assurance and defendant in late 1995. As part of the investigation, Investigator Powell applied for and was issued a search warrant to obtain the bank records of Union Assurance held by the Bank of Union. The warrant was issued on 22 April 1996 in Wake County by Superior Court Judge E. Lynn Johnson. Investigator Powell gave the warrant to Investigator John Curry who, on 23 April 1996, delivered the warrant to the Monroe Police Department. Monroe police officers served the warrant on the Bank of Union on 23 April 1996, leaving a copy with the branch manager, Linda Thomas and returning the original to the Clerk of Court's Office. Investigator Powell testified that she received some of the records from the bank on 6 May 1996, with the remainder of the records arriving shortly thereafter.

[1] Defendant first contends that the trial court erred in denying his motion to suppress the bank records obtained via the search warrant issued 22 April 1996. Defendant argues that because the warrant was issued on 22 April 1996, but the records were not received by Investigator Powell until 6 May 1996, the warrant was not executed within the forty-eight hour period as required by N.C. Gen. Stat. § 15A-248 which provides:

> A search warrant must be executed within 48 hours from the time of issuance. Any warrant not executed within that time limit is void and must be marked "not executed" and returned without unnecessary delay to the clerk of the issuing court.

N.C. Gen. Stat. § 15A-248 (1997).

The suppression of unlawfully obtained evidence is dictated by N.C. Gen. Stat. § 15A-974 which states:

> Upon timely motion, evidence must be suppressed if:
>
> (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court 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 of this Chapter.

N.C. Gen. Stat. § 15A-974 (1997). The trial court found that there was no willful violation of any constitutional provision or of Chapter 15A and that the deviation from the statute was so minor that no prejudice would result to defendant.

Defendant attempts to distinguish *State v. Dobbins* by asserting that the case focused on the single issue of the unsworn return of service for a search warrant which the Supreme Court held was not a substantial violation of N.C. Gen. Stat. § 15A-257. *State v. Dobbins*, 306 N.C. 342, 293 S.E.2d 162 (1982). Likewise, this Court in *State v. Fruitt* held that the failure to read a search warrant before entering an outbuilding and failure to leave a copy of the warrant and inventory of items seized at the premises in violation of N.C. Gen. Stat. §§ 15A-252 and 254 did not amount to a substantial violation. *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

Here the search warrant was served and returned within the statutory period, but the delay in receiving the documents resulted from the need to locate and collect those to be seized. The defendant fails to cite any authority to support his contention that the failure to produce the documents to be seized under the search warrant within forty-eight hours constitutes a substantial violation within the meaning of N.C. Gen. Stat. § 15A-974. Further, he has failed to show prejudice as a result of the trial court's denial of his motion to suppress the bank records. Even where a substantial violation has occurred, 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, 245 S.E.2d 754 (1978); *State v. Vick*, 130 N.C. App. 207, 502 S.E.2d 871 (1998). "(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.* As in *Dobbins* and *Fruitt*, we conclude that the failure to receive the documents to be seized under the search warrant does not amount to a substantial violation of N.C. Gen. Stat. § 15A-974. Therefore, defendant's first argument is without merit.

[2] Next, defendant assigns as error the trial court's denial of his motion to dismiss the charges because of insufficient evidence. Specifically, defendant argues that his options trading was insufficient to meet the "security requirement of the statute" and that the State failed to present evidence which establishes a "nexus" between defendant's options trading and any misrepresentation, fraud, or deceit against Plonk and Jackson.

In ruling on a motion to dismiss for insufficient evidence, "the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom." *State v. Elliott*, 344 N.C. 242, 266, 475 S.E.2d 202, 212 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997). However, substantial evidence must exist to show the essential elements of the crime charged and that the defendant was the perpetrator of the crime. *Id.* at 266-67, 475 S.E.2d at 212.

Defendant was charged under N.C. Gen. Stat. § 78A-8 which states:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme, or artifice to defraud,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or,
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

N.C. Gen. Stat. § 78A-8 (1997).

N.C. Gen. Stat. § 78A-8 closely parallels the Rule 10b-5 antifraud provision of the Securities Exchange Act. *State v. Williams*, 98 N.C. App. 274, 390 S.E.2d 746, *disc. review denied*, 327 N.C. 144, 394 S.E.2d 184 (1990). Cases construing the federal rule are instructive

when examining our statute. It is well settled that stock options fall within the definition of "security" found in 15 U.S.C. § 78c(a)(10) of the Securities Exchange Act. *Fry v. UAL Corp.*, 84 F.3d 936 (7th Cir. 1996). Similarly, stock options are securities as defined by N.C. Gen. Stat. § 78A-2(11) (1997). *See State v. Clemmons*, 111 N.C. App. 569, 433 S.E.2d 748 (1993) (where defendant failed to purchase stock options as promised and therefore did not purchase or attempt to purchase a "security"). Thus, the "security" requirement of N.C. Gen. Stat. § 78A-8 is met where the fraud or misrepresentation is directly or indirectly connected to the offer, sale, or purchase of stock options.

The State's evidence tended to show that defendant solicited funds from both Plonk and Jackson promising an investment which provided a fixed rate of interest. Rather than invest those funds as agreed, he deposited them into a checking account and proceeded to use those funds to trade stock options and for his personal use without their knowledge. Further, he continued to communicate with both investors on letterhead stationery labeled "Capital Group" even though he had left Capital Investment Group and had no authority to use its letterhead.

The evidence presented by the State falls well within the purview of sections 2 and 3 of N.C. Gen. Stat. § 78A-8. Section 2 prohibits an untrue statement of a material fact or the omission of a material fact necessary to make statements not misleading. "[T]o determine if an omitted fact is material, evidence must be presented that 'there is a substantial likelihood that a reasonable [purchaser] would consider it important in deciding [whether or not to purchase].' " *Williams*, 98 N.C. App. at 280, 390 S.E.2d at 749 (*quoting TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 48 L. Ed. 2d 757, 766 (1976)). Both Investigator Powell and Richard Bryant testified as to the excessive risk of stock options and the precautions required by the NASD. In the light most favorable to the State, defendant's failure to tell Plonk and Jackson that he would be using their funds to trade stock options after promising to invest their funds at a fixed interest rate constituted not only an untrue statement of material fact but also an omission of a material fact necessary so as not to mislead investors. The evidence was sufficient to defeat defendant's motion to dismiss the two counts charged under N.C. Gen. Stat. § 78A-8(2).

Section 3 prohibits "any act, practice, or course of business which operates . . . as a fraud or deceit upon any person." N.C. Gen. Stat. § 78A-8(3) (1997). The statute's broad definition encompasses

defendant's continuing misrepresentation of his employment with Capital Investment Group. Defendant used letterhead stationery labeled "Capital Group" in a manner calculated to deceive Jackson and Plonk with whom he had a prior relationship. In addition, he failed to deliver a prospectus regarding Jackson's investment and issued a "guaranteed interest rate certificate" on Capital Investment Group letterhead to Plonk. This provided additional evidence of defendant's fraudulent and deceptive acts. Thus, viewed in the light most favorable to the State, the evidence was sufficient to defeat defendant's motion to dismiss the charges under N.C. Gen. Stat. § 78A-8(3).

[3] Finally, defendant assigns as error the trial court's denial of his request to make further argument to the jury after the trial court gave additional instructions pursuant to N.C. Gen. Stat. § 15A-1234. The instructions at issue were a clarification of the original instructions dealing with securities fraud in the course of business pursuant to N.C. Gen. Stat. § 78A-8(3). The trial court originally instructed the jury:

> (T)hat the Defendant solicited and obtained investment funds . . . while through words and conduct, represented that he was acting as an employee of Capital Investment, Inc.

Later, the court corrected that instruction to read "words and/or conduct." Defendant argues that this correction changes the permissible verdicts of the jury and therefore he was entitled to make further argument to the jury.

N.C. Gen. Stat. § 15A-1234(c) provides in part that:

> The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

N.C. Gen. Stat. § 15A-1234(c) (1997). Where a trial judge clarifies or repeats instructions previously given, these are not "additional instructions" as contemplated in N.C. Gen. Stat. § 15A-1234(c). *State v. Farrington*, 40 N.C. App. 341, 253 S.E.2d 24 (1979). Here, the trial court merely clarified an earlier instruction and no "additional instructions" were given. Thus, whether to allow additional argument by defendant was within the discretion of the trial court. Absent any showing of an abuse of such discretion, the trial court's decision will

not be overturned. No abuse of discretion has been shown in this instance.

No error.

Judges LEWIS and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. ANDY RAY WAGONER, DEFENDANT

No. COA97-1495

(Filed 3 November 1998)

1. **Constitutional Law— right to confrontation—hearsay—child victim of sexual assault**

The state and federal constitutional rights to confrontation of a defendant charged with taking indecent liberties with a child and first-degree sexual offense were not violated where the trial court admitted out-of-court statements made by the child under the catch-all hearsay exception after finding that she was incompetent to testify. No evidence suggests that she was incapable of telling the truth or of distinguishing reality from imagination at the time of the assault; therefore, her incompetence to testify at trial does not disqualify her out-of-court statements, which were sufficiently trustworthy to be admissible under the catch-all hearsay exception.

2. **Evidence— hearsay—particularized guarantee of trustworthiness—corroborating evidence**

There was no error in a prosecution for taking indecent liberties with a child and first-degree sexual offense in admitting statements of the child to others after she was found incompetent to testify where defendant argued that the court inappropriately considered corroborating physical evidence in evaluating trustworthiness. Although corroborating evidence should not be used to support a hearsay statement's particularized guarantee of trustworthiness, the trial court noted many factors inherent in the circumstances of the statements themselves which show sufficient trustworthiness to merit admission.

3. Evidence— sexual offenses—expert testimony—defendant not a high risk sexual offender—excluded

The trial court did not err in a prosecution for taking indecent liberties with a child and first-degree sexual offense by excluding expert testimony that defendant has no mental illness, no substance abuse problems, and is not a high risk sexual offender. N.C.G.S. § 8C-1, Rule 404(a) prohibits character evidence offered to prove conduct in conformity therewith, with an exception for a pertinent character trait. While evidence of a sexual pathology would have been relevant to motive, the lack of mental problems does not qualify as a pertinent character trait. Even expert testimony on the lack of sexual attraction to children would have been inadmissible because any relevancy would be substantially outweighed by the prejudicial effect.

Appeal by defendant from judgments entered 28 April 1997 by Judge Melzer A. Morgan, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 23 September 1998.

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

Brewer and Brewer, by Joe O. Brewer, for defendant-appellant.

MARTIN, John C., Judge.

Defendant was charged in a bill of indictment with one count of statutory sexual offense, in violation of G.S. § 14-27.4 (1993), and one count of indecent liberties with a child, in violation of G.S. § 14-202.1 (1993). He entered pleas of not guilty.

The evidence at trial tended to show that defendant's niece, who was then two years and eight months old, reported to her mother an incident which occurred on or about 14 July 1995, in which defendant had touched her vaginal area with his finger. Two subsequent medical examinations of the child indicated some trauma of a sexual nature. The child described the sexual offense with the aid of drawings and anatomically correct dolls, and she identified defendant as her assailant in statements made to her mother, an examining nurse practitioner, a social worker, a detective, and two licensed physicians. By the time of trial in April 1997, the child—then four years old—was found incompetent to testify because she could not then remember the events of two years earlier, could not express herself in court, and

did not understand the obligation of the oath or the duty to tell the truth.

Defendant was found guilty of both charges. The trial court entered judgment upon the verdicts imposing lengthy consecutive active sentences. Defendant appeals.

The record on appeal contains two assignments of error. We have considered defendant's arguments with respect to each of them, and conclude that defendant received a fair trial, free from prejudicial error.

I.

[1] First, defendant contends the trial court violated his constitutional right to confront the witnesses against him, when it admitted into evidence out-of-court statements made by the child-victim after finding that she was incompetent to testify. Specifically, defendant challenges the child-victim's out of court statements to a social worker and a detective in which she identified defendant as the perpetrator. These statements were admitted under G.S. § 8C-1, Rule 804(b)(5) (1992), the "catch all" exception to the hearsay rule. Defendant argues these statements lack the requisite guarantees of trustworthiness to justify their admission. We disagree.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Erroneously admitted hearsay statements violate the defendant's right to confront witnesses, unless the State shows the necessity for using the hearsay declaration and the inherent trustworthiness of the declaration. *Idaho v. Wright*, 497 U.S. 805, 813-14 (1990). Such an error would also violate the Confrontation Clause of the North Carolina Constitution Article I, Section 23. *State v. Waddell*, 130 N.C. App. 488, 504 S.E.2d 84 (1998); *In the Matter of Lucas*, 94 N.C. App. 442, 380 S.E.2d 563 (1989); *State v. Gregory*, 78 N.C. App. 565, 338 S.E.2d 110 (1985), *disc. review denied*, 316 N.C. 382, 342 S.E.2d 901 (1986). Because a constitutional right is implicated, the defendant need only show error in admitting the hearsay statements. Once a constitutional error is shown, the State must show beyond a reasonable doubt that the error was harmless. N.C. Gen. Stat. § 15A-1443(b) (1997); *State v. Tyler*, 346 N.C. 187, 485 S.E.2d 599 *cert. denied*, 139

L.Ed.2d 411 (1997). We find no error and need not reach the question of prejudice.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801(c) (1992). "Hearsay testimony 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). When the declarant is unavailable and no other specific exception covers the hearsay statement, the "catch-all" Rule 804(b)(5) allows the admission of the statement when there are "equivalent circumstantial guarantees of trustworthiness." N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (1992); *see State v. Tyler*, 346 N.C. 187, 485 S.E.2d 599 (1997); *State v. Chapman*, 342 N.C. 330, 464 S.E.2d 661 (1995), *cert. denied*, 518 U.S. 1023, 135 L.Ed.2d 1077 (1996); *State v. Daughtry*, 340 N.C. 488, 513-14, 459 S.E.2d 747, 759-60 (1995), *cert. denied*, 516 U.S. 1079, 133 L.Ed.2d 739 (1996).

To apply the catch-all exception to the hearsay rule, certain requirements must be met. After determining the unavailability of the declarant, the trial court must then consider:

> (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
>
> (3) *That the statement possesses "equivalent circumstantial guarantees of trustworthiness";*
>
> (4) That the proffered statement is offered as evidence of a material fact;
>
> (5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and
>
> (6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Swindler, 339 N.C. 469, 473-74, 450 S.E.2d 907, 910 (1994) (emphasis added) (quoting *State v. Ali*, 329 N.C. 394, 408, 407 S.E.2d

183, 191-92 (1991)); *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986).

In this case the parties agree that the victim is unavailable. Proper notice has been given to defendant regarding the intended use of the hearsay testimony. The evidence is material, concerning statements by the victim regarding acts forming the basis of the conviction. While similar statements were made to other witnesses, the statements to the social worker and detective were among the most complete and detailed accounts of the abuse; thus they are not merely additive. The question of trustworthiness remains, and must also be considered as a part of the constitutional right to confront a witness.

While no showing of necessity or trustworthiness is required for the other "firmly rooted hearsay exceptions," *State v. Jackson*, 349 N.C. 287, 503 S.E.2d 101 (1998), a showing of necessity and trustworthiness is required for statements admitted under the catch-all exception to the hearsay rule to avoid violating the constitutional right to confront. *State v. Waddell, supra.*

> 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"

Id. at 404, 504 S.E.2d at 88, (quoting *State v. Gregory*, 78 N.C. App. at 568, 338 S.E.2d at 112). The necessity of the statements in this case is not at issue. "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.*, (quoting *Gregory* at 568, 338 S.E.2d at 112-13).

The remaining issue is whether the circumstances of the statements show sufficient guarantees of trustworthiness, allowing admission under the catch-all exception of Rule 804(b)(5). When evaluating the circumstantial guarantees of trustworthiness, the Court considers the following factors:

(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.

State v. Triplett, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986).

In this case, the trial court found factors, independent of corroborating physical evidence, "which supply sufficient guarantees of trustworthiness so as not to violate the Confrontation Clause of the United States Constitution." According to the trial court, "[t]hese factors include the consistent repetition of [the victim's] account of what happened, her spontaneity, her mental state on July 19, and September 1, 1995, her use of terminology unexpected of a child of similar age, and her lack of motive to fabricate." The court also noted that the victim "never specifically recanted her statement" to the social worker or the detective. In addition, "the use of anatomically correct dolls and drawings" bolster the trustworthiness of the victim's statements.

We agree with the trial court that the circumstances of each challenged hearsay statement show sufficient guarantees of trustworthiness for admission under Rule 804(b)(5). The child spoke with "personal knowledge of the underlying events," and had no motive to lie. While the victim did state at one point "Uncle Andy never did any thing," the evidence tends to show that someone had instructed her to say this, and that she promptly demonstrated how the defendant abused her by sticking her finger in the female doll's vagina. The victim never specifically recanted these statements. The first three factors suggest that the statements were made in circumstances of sufficient trustworthiness to justify their admission under the catch-all exception of Rule 804(b)(5).

The fourth requirement, concerning the practical availability of the declarant, has been rephrased to clarify its meaning: The court should consider "the reason, within the meaning of Rule 804(a), for the declarant's unavailability." *State v. Garner*, 330 N.C. 273, 285 n. 1, 410 S.E.2d 861, 867 n. 1 (1991) (quoting *State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988)). Generally, when a witness is incompetent to testify at trial, prior statements made with personal knowledge are not automatically rejected as lacking the requisite guarantees of trustworthiness. *State v. Waddell*, *supra*; *State v. Rogers*, 109 N.C. App. 491, 498, 428 S.E.2d 220, 224, *disc. review denied*, 334 N.C.

625, 435 S.E.2d 348 (1993) (holding that just because a witness is incompetent to testify does not deem their "out-of-court statements *per se*, or even presumptively, unreliable"). A child may be incompetent to testify, but incompetence is not "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.* However, when the declarant's unavailability is due to an inability to tell truth from falsehood or reality from imagination, then previous statements necessarily lack the requisite guarantees of trustworthiness to justify admission under the catch-all exception. *State v. Stutts*, 105 N.C. App. 557, 563, 414 S.E.2d 61, 64 (1992) ("It is illogical that one be held unavailable to testify due to an inability to discern truth from falsehood or to understand the difference between reality and imagination and yet have their out-of-court statements ruled admissible because they possess guarantees of trustworthiness.")

When finding the victim incompetent to testify, the trial court in this case found no indication in 1995 and early 1996 that the victim was "unable to intelligently and truthfully relate personal information." The trial judge also specifically noted that the victim "is not unavailable to testify because of an inability to tell truth from fantasy." Thus at the time of the events, the trial court found the victim was able to truthfully relate personal information, and was able to discern truth from fantasy. Two years later and at the time of trial, the court concluded that the victim could not: "understand the obligation of the oath," understand "the duty to tell the truth," "articulate and express herself in court," and remember the "subject matter from July, 1995."

The trial court's conclusion that the victim was incompetent to testify does not invalidate prior statements made truthfully with personal knowledge. *See State v. Holden*, 106 N.C. App. 244, 251-52, 416 S.E.2d 415, 420, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 413 (1992) (statements made by two-and-one-half year old victim were sufficiently trustworthy to be admitted under residual hearsay exception, despite trial judge's statement during in camera hearing that child "did not understand the consequences of not telling the truth"). No evidence suggests the victim in this case was incapable of telling the truth or distinguishing reality from imagination at the time of the assault; therefore, her incompetence to testify at trial does not disqualify her out-of-court statements under *Stutts;* and we hold the statements were sufficiently trustworthy to be admissible under the catch-all hearsay exception of Rule 804(b)(5).

[2] Defendant also argues the trial court inappropriately considered corroborating physical evidence in evaluating the trustworthiness of the statement in the circumstances. It is true that corroborating evidence should not be used to support a hearsay statement's particularized guarantee of trustworthiness. *Idaho v. Wright*, 497 U.S. at 823; *Swindler*, 339 N.C. 469, 450 S.E.2d 907. However, the trial court noted many factors inherent in the circumstances of the statements themselves which show sufficient trustworthiness to merit admission under Rule 804(b)(5); thus there was no error in admitting these statements.

II.

[3] Defendant next assigns as error the trial court's exclusion of evidence concerning "his psychological make-up to commit the crimes charged." Defendant offered expert testimony by a forensic psychologist to show (1) that defendant has no mental illness, (2) that he has no substance abuse problems, and (3) that he is not a high risk sexual offender. The trial court sustained the State's objection to this expert testimony as irrelevant. We agree.

G.S. § 8C-1, Rule 401 defines relevant evidence as any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989).

Rule 404 prohibits the admission of character evidence offered for the purpose of proving conduct in conformity therewith. N.C. Gen. Stat. § 8C-1, Rule 404(a) (1992). An exception exists for "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." N.C. Gen. Stat. § 8C-1, Rule 404(a)(1). "Pertinent" means " 'relevant in the context of the crime charged.' " *State v. Bogle*, 324 N.C. 190, 198, 376 S.E.2d 745, 749 (1989) (quoting *State v. Squire*, 321 N.C. 541, 548, 364 S.E.2d 354, 358 (1988)). "In criminal cases, in order to be admissible as a 'pertinent' trait of character, the trait must *bear a special relationship to* or *be involved in* the crime charged." *Id.* at 201, 376 S.E.2d at 751 (emphasis original). "For example, if one were charged with a crime of violence, character for peaceableness would be pertinent; and if charged with embezzlement, honesty would be pertinent." *State v. Sexton*, 336 N.C. 321, 359-60, 444 S.E.2d 879, 901, *cert. denied*, 513 U.S. 1006, 130 L.Ed.2d 429 (1994).

The exception allowing evidence of a "pertinent" trait should be "restrictively construed," since such evidence is excluded as a general rule. *Id.* Thus, "[p]ursuant to this rule, an accused may only introduce character evidence of 'pertinent' traits of his character and not evidence of overall 'good character.' " *State v. Mustafa*, 113 N.C. App. 240, 245-46, 437 S.E.2d 906, 909, *cert. denied*, 336 N.C. 613, 447 S.E.2d 409 (1994) (quoting *State v. Squire*, 321 N.C. 541, 364 S.E.2d 354 (1988)).

In the present case, evidence of defendant's general "psychological make-up" is not "pertinent" to the commission of a sexual assault. At *voir dire*, defendant was unable to forecast to the trial court that his forensic psychologist would provide "any evidence that this person is any different than any other normal person." While evidence of a sexual pathology would have been relevant to show motive, evidence of the lack of several mental problems does not qualify as a "pertinent" character trait. *Mustafa* at 245-46, 437 S.E.2d at 909 (finding evidence of defendant's honorable discharge from military service was not specifically relevant to defendant's guilt or innocence in rape case and, thus, was inadmissible).

Even if the defendant had offered pertinent expert testimony, based on acceptable scientific methods, specifically concerning the lack of sexual attraction to children, it would not have been admissible. Any relevancy of such evidence would be substantially outweighed by prejudicial effect. *See State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812, *disc. review denied*, 341 N.C. 655, 462 S.E.2d 524 (1995); *United States v. Powers*, 59 F.3d 1460, 1472 (4th Cir. 1995) (holding that absent "supporting evidence showing that those who are not fixated pedophiles are less likely to commit incest abuse", evidence of a "non-proclivity for pedophilia" was irrelevant).

No error.

Judges TIMMONS-GOODSON and HORTON concur.

WILLIAM H. MURRAY, EMPLOYEE, PLAINTIFF v. AHLSTROM INDUSTRIAL HOLDINGS, INC., EMPLOYER, EMPLOYERS INSURANCE OF WAUSAU, CARRIER, DEFENDANTS

No. COA98-152

(Filed 3 November 1998)

1. Workers' Compensation— jurisdiction of Industrial Commission—out-of-state job

The Industrial Commission did not err by finding that a contract was made in North Carolina and that the Industrial Commission had jurisdiction where plaintiff had been laid off by defendant from a previous job; his old supervisor telephoned plaintiff at his home in North Carolina and offered him employment; the first offer was rejected; the supervisor called again and offered plaintiff a supervisor position at a higher wage; plaintiff accepted the offer; the supervisor responded that plaintiff was hired and that he should report to work in Mississippi immediately; and plaintiff experienced a work related injury in Mississippi. The contract for employment was complete when the supervisor responded that plaintiff was hired. The paperwork filled out by plaintiff in Mississippi was mostly administrative, more a consummation of the employment relationship than the last act required for a binding obligation.

2. Workers' Compensation— notice of appeal—Rule 60 motion—excusable neglect

The Industrial Commission did not err in a workers' compensation action by hearing an appeal from a deputy commissioner where the notice of appeal was filed four days after the fifteen-day statutory limit, but it appeared that counsel argued excusable neglect under N.C.G.S. § 1A-1, Rule 60(b) even though Rule 60 was not delineated in his motion. The Commission had the authority pursuant to Rule 60 to grant the relief sought in plaintiff's motion for extension of time.

Appeal by defendants from Opinion and Award entered 16 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 October 1998.

Scott E. Jarvis & Associates, by Scott E. Jarvis, for plaintiff.

Root & Root, P.L.L.C., by Louise Critz Root, for defendants.

SMITH, Judge.

Plaintiff was employed by defendant Ahlstrom Industrial Holdings, Inc. (hereinafter "Ahlstrom") as an instrument and pipe foreman on two separate projects. Plaintiff was initially hired to work at a project located in Calhoun, Tennessee. After the completion of the Calhoun, Tennessee project, plaintiff was laid off and remained unemployed for a period of about two and one-half months. His former supervisor, Brian Kear, telephoned plaintiff at plaintiff's residence in Canton, North Carolina and offered him an identical position (as instrument and pipe general foreman) at a project in Corinth, Mississippi. Mr. Kear offered plaintiff an hourly rate, which was unsatisfactory to plaintiff, and plaintiff turned down the offer. After consulting with his supervisor, Mr. Kear again called plaintiff and offered him the position at an increased hourly rate. Plaintiff accepted the offer. Mr. Kear told plaintiff he was hired and told him to report to work. Plaintiff packed up his family in a camper and went to Mississippi to begin work, at no time abandoning his permanent residence in North Carolina.

Upon his arrival at the work site on 13 June 1994 (which was the Monday following the aforementioned telephone conversation), plaintiff was required to fill out certain administrative paperwork, but because he was a rehire (as opposed to a new hire) he was not required to submit to a physical, drug test, or go to the local employment security office. On 1 July 1994, plaintiff experienced a work-related injury while working for Ahlstrom in Corinth, Mississippi. Plaintiff filed a Request for Hearing before the North Carolina Industrial Commission on 2 December 1994. The matter was tried before Deputy Commissioner William C. Bost on 26 March 1996, the sole issue being determined was that of jurisdiction of the North Carolina Industrial Commission. On 12 July 1996, Deputy Commissioner Bost rendered a decision holding that North Carolina did not have jurisdiction in this matter. Plaintiff gave Notice of Appeal on 6 August 1996, on which date plaintiff also made a Motion for Extension of Time in which to file his appeal. The Motion was held in abeyance until it could be argued before the Full Commission.

This matter was heard before the Full Commission on 31 January 1997. By Opinion and Award filed 17 September 1997, the Full Commission found that North Carolina did have jurisdiction to hear this matter. Defendants appeal.

It is important to note at the outset that the Commission's findings are accorded great deference.

> In appeals from the Industrial Commission, when the assignments of error bring forward for review the findings of fact made by the Commission, the Court will review the evidence to determine whether there is any competent evidence to support the findings; if so, the findings of fact are conclusive. If a finding of fact is a mixed question of fact and law, it is also conclusive if supported by competent evidence.

Thomas v. Overland Express, Inc., 101 N.C. App. 90, 94-95, 398 S.E.2d 921, 924 (1990), *review denied*, 328 N.C. 576, 403 S.E.2d 522 (1991) (*citing Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E.2d 410 (1954)).

[1] The first issues before the Court on this appeal relate to whether the Full Commission erred in finding that the North Carolina Industrial Commission has jurisdiction over this claim. The statute that grants jurisdiction to the Commission is N.C. Gen. Stat. § 97-36 (1991). This section states that North Carolina has jurisdiction to settle controversies over injuries occurring outside of this state "(i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State." N.C. Gen. Stat. § 97-36 (1991). The record shows, and it is not disputed here, that Ahlstrom's principal place of business is outside the state of North Carolina. Furthermore, it is clear that the full extent of plaintiff's employment occurred outside the state of North Carolina. Thus, in order for the Commission to have jurisdiction over this matter, the contract for employment must have been entered into in this state. *See* N.C. Gen. Stat. § 97-36 (1991).

To determine where a contract for employment was made, the Commission and the courts of this state apply the "last act" test. *See Goldman v. Parkland*, 277 N.C. 223, 176 S.E.2d 784 (1970); *Thomas*, 101 N.C. App. at 96, 398 S.E.2d at 926. "[F]or a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Thomas*, 101 N.C. App. at 96, 398 S.E.2d at 926 (*citing Goldman*, 277 N.C. 233, 176 S.E.2d 784). Defendants argue that the employment contract was not entered into until plaintiff arrived in Mississippi and completed the requisite paperwork. This argument is not persuasive. It is undisputed in the record that an offer for employment was made to plaintiff when Mr. Kear telephoned him at his home in Canton, North Carolina. Mr. Kear's first offer was not accepted because the hourly wage was too low.

However, after consulting with a superior, Mr. Kear telephoned plaintiff and again offered him the foreman position at a higher wage. At this point, plaintiff accepted the offer. Mr. Kear responded that plaintiff was hired and that he should report to work in Corinth, Mississippi immediately.

At this point the contract for employment was complete. Relying upon this employment contract, plaintiff packed up his family and moved to Mississippi for the duration of the project. Although the paperwork filled out by plaintiff was required before he could begin work, this seems to be, and in fact was admitted by Mr. Kear to be, mostly administrative. The paperwork appears to be more of a consummation of the employment relationship than the "last act" required to make it a binding obligation. *See Warren v. Dixon and Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960) (offer of employment made and accepted in North Carolina; accepting plaintiff on the job site "was merely the consummation of what had been previously arranged, that is, the employment"). The Commission's findings were based upon ample competent evidence, and the conclusion that the contract was made in North Carolina was correct.

[2] The last issue raised on appeal is whether the Full Commission erred in hearing the appeal. Defendants argue that the Commission erred in reviewing the matter and reversing the decision of the Deputy Commissioner because plaintiff's Notice of Appeal was not timely filed pursuant to N.C. Gen. Stat. § 97-85 (1991). Section 97-85 states:

> If application is made to the Commission *within 15 days* from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award.

N.C. Gen. Stat. § 97-85 (1991) (emphasis added). In this case the record indicates, and plaintiff concedes, that plaintiff filed his Notice of Appeal four days after the fifteen day limit prescribed by the statute.

The same argument that defendants now assert was addressed by this Court in *Jones v. Yates Motor Co.*, 121 N.C. App. 84, 464 S.E.2d 479 (1995). In that case, the defendant argued that because plaintiff's motion to reconsider the evidence was not timely, the Commission

erred in reconsidering the evidence and reversing the prior order. Because plaintiff was unaware of the fifteen day period in which to file a timely motion, this Court held that the motion should be considered not under the time restrictions of G.S. 97-85, but under the "reasonable time" standard of N.C. Gen. Stat. § 1A-1, Rule 60(b) (1990). Rule 60(b) states,

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . . .
>
> The motion shall be made *within a reasonable time*, and . . . not more than one year after the judgment, order, or proceeding was entered or taken.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (1990) (emphasis added). In *Jones*, twenty-seven days after entry of the judgment was not considered "unreasonable" and this court held that "the Commission should have considered the motion as a Rule 60(b) motion for relief from the judgment." *Jones*, 121 N.C. App. at 87, 464 S.E.2d at 481 (*citing Long v. Reeves*, 77 N.C. App. 830, 336 S.E.2d 98 (1985)).

The facts in the case at hand are quite similar to the *Jones* case. In plaintiff's Motion for Extension of Time, filed with the Industrial Commission on 6 August 1996, plaintiff's counsel explains the reason for the delay in filing.

> Counsel was on family vacation and out of the state of North Carolina from July 12 through July 21, 1996, and accordingly, was not in his office at the time the Opinion and Award arrived. The Opinion and Award was placed in the case file in the office by clerical staff, through inadvertence, and no entry was made on the office calendar showing the date of the arrival of the Opinion and Award, nor the proper date for the appeal time.

Thus, it appears that counsel is arguing "excusable neglect," as per Rule 60(b), even though it is not delineated in his motion. Pursuant to Rule 60(b), the Commission had the authority to grant the relief sought by plaintiff. *See Jones*, 121 N.C. App. at 86-87, 464 S.E.2d at 481. Though the Commission made no order regarding the Motion for Extension of Time, it is apparent from the Commission's

decision to reverse the Deputy Commissioner that they did grant such relief.

Affirmed.

Judges GREENE and WALKER concur.

BRACY DEESE, EMPLOYEE, PLAINTIFF v. CHAMPION INTERNATIONAL CORPORATION, EMPLOYER (SELF-INSURED), DEFENDANT AND SEDGWICK JAMES OF THE CAROLINAS, ADMINISTRATOR, DEFENDANTS

No. COA97-1581

(Filed 3 November 1998)

1. **Workers' Compensation— review of deputy commissioner's determination—credibility issues**

The Industrial Commission abused its discretion in a workers' compensation action by reversing the deputy commissioner without addressing credibility issues raised by plaintiff's testimony and surveillance videotapes which were critical factors relied upon by the deputy commissioner.

2. **Workers' Compensation— disability—determination—post-injury earning capacity**

The relevant factor in assessing disability is the plaintiff's post-injury earning capacity rather than actual wages earned.

Appeal by defendants from Opinion and Award entered 4 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 1998.

John A. Mraz, P.A., by John A. Mraz, for plaintiff-appellee.

Robinson & Lawing, L.L.P., by Jane C. Jackson and Jolinda J. Steinbacher, for defendants-appellants.

WALKER, Judge.

On 4 August 1989, plaintiff injured his back lifting a box of plugs while employed at defendant's paper mill. Defendant admitted liability and a Form 21 agreement was approved by the Industrial Commission on 16 January 1990.

Since the injury, plaintiff has had four back surgeries. The first two were performed in 1989 by Dr. Steven Stranges and the last two were performed by Dr. Todd Chapman of the Miller Orthopaedic Clinic. Following the last surgery, Dr. Chapman continued to see plaintiff in 1992 and 1993. Dr. Chapman released plaintiff in October 1993 to return as needed. He determined that plaintiff had a thirty percent impairment of the spine and that he could not return to his job with defendant or any job requiring manual labor or prolonged standing.

In addition, beginning on 1 September 1992, plaintiff was treated by Dr. Joshua Miller of the Southeastern Pain Clinic who prescribed various medications for plaintiff's back pain. At that time, plaintiff also began treatment with Dr. Walter J. Lawless, a clinical psychologist, who concluded that plaintiff suffered from depression and anxiety. On 5 March 1993, due to his improvement, plaintiff was released from Dr. Lawless' care.

In February 1994, plaintiff applied for a motor vehicle dealership license so he could start a used car sales business with his brother. The business operated as Deese's Auto Sales from February through May 1994 when plaintiff signed over his interest in vehicles owned by Deese's Auto Sales to his wife, Judith Deese. She then opened a used car business under the name of J & J Auto Sales which continued to do business until late 1994 or early 1995. Mr. William Gregory, a private investigator hired by defendants, conducted surveillance and recorded it on videotapes which showed plaintiff on the premises of J & J Auto Sales on a number of occasions during August and September 1994.

On 12 December 1994, defendants filed a Form 24 to terminate plaintiff's benefits which they supported with documents and videotapes of plaintiff's activities. Plaintiff filed no response to the application to terminate his benefits and on 13 February 1995, the Commission entered an order terminating benefits as of 15 February 1994.

After a hearing, the deputy commissioner found that plaintiff was actively engaged in the sale of automobiles at J & J Auto Sales; however, he did not report any of this activity to either defendant-employer or their servicing agent. In addition, the deputy commissioner's findings included the following:

> 17. The investigator, William Gregory, conducted surveillance and recorded it on videotapes which show plaintiff present

at J & J Auto Sales on every occasion surveillance was conducted there in 1994. The videotapes depict plaintiff inspecting vehicles, including looking under the hood, talking with customers, and working in the office. At times, plaintiff was the only person present on the premises, clearly indicating he was running the business that day.

18. As shown on the videotapes, and as supported by David Goode's testimony, the work at Deese's Auto Sales was not strenuous and was consistent with plaintiff's capabilities. David Goode testified that he was working at Deese's Auto Sales because he himself could no longer work at Deese's Bait due to a back problem and lifting restrictions. Goode was able to do the sales work at the auto dealership.

19. In addition to the surveillance, William Gregory spoke with David Goode over the phone to ask about the price of a vehicle on J & J's lot. Mr. Goode said he would need to check with the owner and identified Bracy Deese as the owner of the dealership. Mr. Gregory also visited J & J Auto Sales and spoke with Mr. Goode, who told him he worked for Bracy Deese.

20. The business records of J & J Auto Sales also indicate plaintiff's involvement. On October 15, 1994, plaintiff signed a check from the business account of J & J Auto Sales to Linda's Auto Sales for "cars". Notations on other checks for the account dated July 5, 1994, indicate plaintiff was involved in purchasing other items for the business, specifically a motor and a jeep.

21. At the hearing, plaintiff denied involvement in auto sales, but could not explain why he secured a dealership license in his name. The plaintiff also had attempted to operate these businesses without the knowledge of the defendants. Plaintiff never mentioned either business to the defendants or to any of his treating physicians until after he learned that his activities had been videotaped.

22. The videotapes are significant in that they shed light on the plaintiff's veracity. The plaintiff's attempts to operate these businesses without the knowledge of the defendants, coupled with the contradiction of his testimony by the videos are circumstances the undersigned finds significant in assessing the plaintiff's propensity for truth. In view of the documentary evidence and videotape evidence, the undersigned finds plaintiff's testimony that he was not involved in vehicle sales to be unbelievable.

Based on these findings, the deputy commissioner concluded that as of February 1994, defendants had shown that plaintiff regained his wage earning capacity and were permitted to terminate his benefits as of 15 February 1994.

On appeal, the Commission, with one commissioner dissenting, rejected the findings of the deputy commissioner and awarded plaintiff temporary total benefits. Included in the findings of the Commission are the following:

> 17. The Deputy Commissioner in this matter found plaintiff's testimony regarding his association with his brother's car business and his later investment in said business was not credible. The Deputy Commissioner found that plaintiff had attempted to keep his involvement with the car business hidden from defendant and that plaintiff had never mentioned his involvement to any of his treating physicians until after he learned that his activities had been videotaped.
>
> 18. Despite the Deputy Commissioner's first hand observations of the witness at hearing, the Full Commission finds that plaintiff's testimony regarding his association with his brother's car business and his later investment in said business to be credible for the following reasons: plaintiff informed Dr. Lawless that he had been spending some time with his brother at his brother's car dealership; plaintiff's statements to Dr. Lawless are corroborated by statements to Dr. Lawless by plaintiff's wife; Ms. Donna Kropelnicki, the rehabilitation nurse assigned by defendant to plaintiff's case, had knowledge of the fact that plaintiff was attempting to get out of his house and that he had been frequently visiting his brother's business, and; it was only after Ms. Kropelnicki reported these activities to defendant that the later videotapes were taken.

[1] Defendants contend the Commission erred in improperly disregarding the credibility determination of the deputy commissioner and failing to give reasons for the reversal of that determination.

Upon appeal from a deputy commissioner, the Commission is not required to receive new evidence and may decide the case on the record. N.C. Gen. Stat. § 97-85 (1991). Ordinarily, the Commission is the sole judge of the credibility of witnesses. However, when the Commission decides a case by only reviewing the record, this Court has held the deputy commissioner is in a better position to assess the

credibility of the witnesses because "he is a first hand observer of the witnesses whose testimony he must weigh and accept or reject." *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 639-640, 478 S.E.2d 223, 225 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997) (*quoting Pollard v. Krispy Waffle*, 63 N.C. App. 354, 357, 304 S.E.2d 762, 764 (1983)); *See Taylor v. Caldwell Systems, Inc.*, 127 N.C. App. 542, 544, 491 S.E.2d 686, 689 (1997).

When the Commission makes findings reversing a deputy commissioner's credibility determination, those findings are reviewable by this Court and will be sustained if supported by competent evidence. The Commission must make findings, "showing why the deputy commissioner's credibility determination should be rejected." *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226.

Here, after receiving evidence and viewing surveillance videotapes, the deputy commissioner determined plaintiff was involved in the auto sales business beginning with his obtaining a dealer license in February 1994. The deputy commissioner then found plaintiff's testimony that he was not involved in auto sales to be unbelievable.

In finding the plaintiff's testimony to be credible, the Commission based its determination on statements made by the plaintiff to his psychologist, Dr. Lawless, and to his rehabilitation nurse, Ms. Kropelnicki. However, plaintiff's statement that he was "spending some time" at his brother's car dealership was, according to testimony at the hearing, made to Dr. Lawless in 1992, as was the corroborating statement made by plaintiff's wife to Dr. Lawless. In addition, the statement made by plaintiff to Ms. Kropelnicki that he was visiting his brother's car lot was made in early January 1994. We fail to see how these statements were relevant to the deputy commissioner's determination that plaintiff was not credible as he did not become involved in the auto sales business until February 1994. The Commission likewise failed to address the credibility issues raised by plaintiff's testimony and the surveillance videotapes, two critical factors that the deputy commissioner relied on in making her credibility determination.

In reversing the deputy commissioner without addressing these credibility issues, the Commission abused its discretion. For this reason, we reverse the Opinion and Award of the Commission and remand to the Commission for consideration of the deputy commissioner's findings of credibility.

[2] Next, defendants contend the Commission should have applied the standard required by N.C. Gen. Stat. § 97.2(9) of plaintiff's wage earning capacity rather than his actual wages.

In order for plaintiff to continue to receive temporary total disability he must be "disabled." Disability is defined as the "incapacity because of injury to earn 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) (1991).

The plaintiff's post-injury earning capacity rather than his actual wages earned is the relevant factor in assessing the disability. *McGee v. Estes Express Lines*, 125 N.C. App. 298, 300, 480 S.E.2d 416, 418 (1997); *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

The Opinion and Award of the Commission is reversed and remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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

SHIRLEY F. LEONARD, GUARDIAN AD LITEM FOR TERRI JEAN LEONARD, A MINOR, AND SHIRLEY F. LEONARD, INDIVIDUALLY, PLAINTIFF-APPELLANTS v. LOWE'S HOME CENTERS, INC., DEFENDANT-APPELLEE

No. COA98-13

(Filed 3 November 1998)

Negligence— attractive nuisance—natural conditions—mowing and bush-hogging slope—artificial condition not created

A judgment dismissing plaintiff's complaint with prejudice was affirmed where plaintiff sought to recover damages for injuries sustained by her daughter when she rode her bicycle down a path on a steep slope maintained by defendant and collided with a car; defendant's motions for summary judgment and directed verdict at the close of plaintiff's evidence were denied;

the jury found defendant negligent but the minor plaintiff contributorily negligent and judgment was entered on the verdict; plaintiff appealed, requesting a new trial; and defendant cross-assigned as error the denial of its motion for directed verdict. The doctrine of attractive nuisance does not apply; defendant's actions in mowing and bush-hogging the property were reasonable steps in maintaining the land rather than the negligent maintenance of an artificial condition dangerous to children of tender years.

Appeal by plaintiffs from judgment entered 14 July 1997 by Judge H. W. Zimmerman, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 23 September 1998.

Gabriel Berry & Weston, L.L.P., by M. Douglas Berry and Robert A. Wells, for plaintiff-appellants.

Karl N. Hill, Jr., and Allan R. Gitter for defendant-appellee.

MARTIN, John C., Judge.

Plaintiff seeks to recover damages for personal injuries on behalf of her minor daughter, Terri Jean Leonard, and medical expenses. On 7 August 1990, nine-year-old Terri Jean was seriously injured when she rode her bicycle down a dirt pathway on a steep slope from defendant's property into the street and collided with a car. The slope is located partially upon defendant's property, and was created when defendant graded its property for development as a store site in 1986. Since developing the property, defendant has maintained the area by mowing it. Neighborhood children have used the property to walk to schools located across the street, and have worn a path across the slope. Plaintiffs alleged the pathway on the steep slope is a dangerous condition subjecting defendant-landowner to liability under the doctrine of attractive nuisance.

Defendant answered, denying the material allegations of the complaint and asserting the minor's contributory negligence as an affirmative defense. Defendant's motion for summary judgment was denied, as was its motion for directed verdict at the close of the plaintiffs' evidence at trial. A jury found defendant negligent but found the minor plaintiff contributorily negligent. A judgment was entered upon the verdict, dismissing the action with prejudice. Plaintiffs appeal.

In support of their request for a new trial, plaintiffs argue ten assignments of error in which they complain the trial court erred by submitting the issue of contributory negligence to the jury and by excluding certain evidence. Defendant cross-assigns error to the denial of its motion for summary judgment, and the denial of its motion for a directed verdict. Defendant's second assignment of error is dispositive of this appeal.

N.C.R. App. P. 10(d) permits an appellee, without taking an appeal, to cross-assign as error an act or omission of the trial court which deprives the appellee of an alternative legal ground for supporting the judgment in its favor. *Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982). By its second cross-assignment of error, defendant contends, as an alternative grounds for upholding the trial court's judgment dismissing plaintiffs' claims, that the trial court erred in denying its motion for directed verdict, because the evidence was insufficient to invoke the doctrine of attractive nuisance. Because we find merit in defendant's argument, we need not address plaintiffs' assignments of error.

Defendant's motion for directed verdict raises the legal question of whether the evidence, when considered in the light most favorable to the plaintiffs, is sufficient to submit to the jury. *Samuel v. Simmons*, 50 N.C. App. 406, 273 S.E.2d 761, *disc. review denied*, 302 N.C. 399, 279 S.E.2d 352 (1981). The trial court must give plaintiff the benefit of every reasonable inference which can be drawn from the evidence in determining whether the evidence is sufficient to withstand the motion for a directed verdict. *Id.*

"As set forth in Restatement (Second) of Torts § 339 (1965), generally the elements of an action based on a theory of attractive nuisance are as follows:"

> *Artificial Conditions Highly Dangerous to Trespassing Children.*
>
> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an *artificial condition* upon the land if:
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children (emphasis added).

Broadway v. Blythe Industries, Inc., 313 N.C. 150, 154, 326 S.E.2d 266, 269 (1985); *Griffin v. Woodard*, 126 N.C. App. 649, 651-52, 486 S.E.2d 240, 242, *disc. review denied*, 347 N.C. 266, 493 S.E.2d 453 (1997).

Although the drafters of the Restatement have expressed "no opinion as to whether the rule stated in this Section may not apply to natural conditions of the land," Restatement 2d. § 339 caveat (1965), North Carolina case law limits the application of the doctrine to conditions that are not natural and obvious—i.e., "artificial."

> "A danger which is not only obvious but natural, considering the instrumentality from which it arises, is not within the meaning of the attractive nuisance doctrine, for the reason that an owner or occupant is entitled to assume that the parents or guardians of a child will have warned him to avoid such a peril. Pits and excavations on land embody no dangers that are not readily apparent to everyone, even very young children. For this reason, the proprietor is under no obligation, as a rule, to fence or otherwise guard such places, and he will not be liable for injuries to children who may have fallen therein."

McCombs v. City of Asheboro, 6 N.C. App. 234, 243, 170 S.E.2d 169, 176 (1969) (quoting 38 Am.Jur., Negligence, § 151, p. 818); *see also Fitch v. Selwyn Village*, 234 N.C. 632, 635, 68 S.E.2d 255, 257 (1951) ("The rule with respect to liability for these dangers which exist in nature," is that the landowner's "liability bears a relation to the char-

acter of the thing whether natural and common, or artificial and uncommon.").

In *McCombs*, a six-year-old child was killed by a collapsing ditch, excavated in the construction of a sewer line. The court held that while, "[t]his creates some obvious danger, . . . we do not categorize it as an attractive nuisance. Nor do we perceive that the city had any duty to place a fence the entire length of the ditch. Neither was there any duty on the part of the city to shore up the sides of the ditch." *Id.* at 244, 170 S.E.2d at 176.

In addition to "pits and excavations on land," bodies of water and streets have generally been considered so natural, pervasive and obvious a danger, that landowners cannot be expected to protect young children from the dangers—despite their allurement to children of tender years. *Hedgepath v. City of Durham*, 223 N.C. 822, 823, 28 S.E.2d 503, 504-05 (1944) (landowner has right to maintain an unenclosed pond or pool on his premises without being found negligent). "Streets, like streams, cannot be easily guarded and rendered inaccessible to children." *Fitch*, at 635-36, 68 S.E.2d at 257-58 ("A street is ordinarily an unsafe place for a child of tender years to play, but the location of a house near a street, does not impose upon the landlord any obligation to protect his tenant from injury caused by playing in such street.").

The distinction between artificial conditions and "natural and obvious" risks is not always clear. As the cases show, the mere fact that a landowner has actively altered conditions on the land is insufficient to make a condition "artificial." Some human-made conditions are so common, obvious, and pervasive as to constitute "natural" conditions exempt from the doctrine of attractive nuisance. Courts have considered several factors in determining whether a condition is artificial or "natural and obvious":

(1) Is the condition so common, expansive, or pervasive that it is an unreasonable burden to require all landowners to insulate children from the risk? *Walker v. Sprinkle*, 267 N.C. 626, 630, 148 S.E.2d 631, 634 (1966) ("No one is an insurer of the safety of children merely because he is the owner of places that may appeal to their youthful fancies. It is required only that he take reasonable precautions to prevent injury to them.") As this Court stated in *McCombs*, " '[t]he use of property, to which an owner is entitled, should not be encumbered with the necessity of taking precautions against every conceivable danger to which an irrepressible spirit of adventure may lead a child.

There is no duty to take precautions where to do so would be impracticable, unreasonable, or intolerable.' " *McCombs* at 244-45, 170 S.E.2d at 176-77 (quoting 38 Am.Jur., Negligence, § 147, p. 813).

(2) Is the risk so common or pervasive that parents, rather than landowners, should have the duty to instruct their young children about safety and supervise their conduct? *Fitch* at 635, 68 S.E.2d at 257 ("As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care.")

(3) Has the landowner actively developed or maintained some condition, beyond the ordinary servicing of the property, that has created some unreasonable risk to young children? *Hedgepath* at 823, 28 S.E.2d at 504 ("[t]he result of such doctrine is that one is negligent in maintaining an agency which he knows, or reasonably should know, to be dangerous to children of tender years"); *Hawkins v. Houser*, 91 N.C. App. 266, 371 S.E.2d 297 (1988) (considering, as a factor, that defendants did nothing to either conceal or enhance the danger). While none of these factors are controlling, they may assist in determining whether a condition is "artificial" or "natural and obvious."

The down-hill path in the present case, like the excavation in *McCombs*, is a natural and obvious condition, creating no legal duty upon defendant to take precautions against harm to young children. Plaintiffs contend that defendant created a dangerous condition when developing the hill and regularly mowing the property. Plaintiffs agree that children, rather than the land owner, created the path by crossing defendant's land. The path is a natural and obvious condition; defendant's actions in mowing and bush-hogging the property were reasonable steps in maintaining the land, rather than the negligent maintenance of an artificial condition dangerous to children of tender years. Thus, we hold there was no evidence of an "artificial condition" on defendant's property involving an unreasonable risk of harm to children, the doctrine of attractive nuisance does not apply, and defendant's motion for directed verdict should have been allowed.

None of the assignments of error argued by plaintiffs, if sustained, would result in the availability of evidence to demonstrate the existence of an "artificial" condition or instrumentality of harm within the doctrine of attractive nuisance. Thus, plaintiffs' assign-

ments of error are inconsequential to our decision and we need not discuss them.

For the reasons stated, the judgment dismissing plaintiffs' complaint with prejudice is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA v. ERICH HAROLD CABE

No. COA97-1151

(Filed 3 November 1998)

1. Evidence— expert testimony—premeditation and deliberation—door opened by defendant

The trial court did not err in a first-degree murder prosecution by admitting expert testimony from the State concerning whether defendant acted with premeditation and deliberation. Defendant opened the door to the State's otherwise inadmissible expert testimony by specifically questioning his own expert as to premeditation and deliberation.

2. Criminal Law— defendant's argument—punishment

There was no prejudicial error in a first-degree murder prosecution where the court erroneously sustained the State's objection to defense counsel's closing argument concerning punishment, but defense counsel had informed the jury during voir dire without objection that defendant's punishment if found guilty would be life without parole and defense counsel added a similar reference after the objection was sustained to his closing argument. The jury received sufficient notice of the serious consequences defendant faced if found guilty of first-degree murder.

Appeal by defendant from judgment dated 12 November 1996 by Judge Zoro J. Guice, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 18 August 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Norma S. Harrell, for the State.

Belser & Parke, P.A., by David G. Belser, for defendant appellant.

GREENE, Judge.

Erich Harold Cabe (Defendant) appeals from entry of judgment on a jury verdict finding him guilty of first-degree murder.

On 6 September 1995, Defendant shot and killed Steven Curtis Landis (Landis) in a grocery store parking lot. While questioning the prospective jurors for Defendant's trial, defense counsel, without objection from the State, stated: "[Defendant is] charged with the crime of First Degree Murder which is punishable under our law of North Carolina with life without parole; those are the stakes in this case."

At trial, the evidence tended to show that, after shooting Landis, Defendant waited for the police to arrive. When the first officer arrived on the scene, Defendant walked over to the officer, surrendered, and stated: "I'm the one that did it." Defendant testified:

> [A]ll I remember, like I said, from the time I seen him getting out of the car, the next thing I remember was hearing the pow pow; and then I remember, the only thing I do remember about [Landis], he dropped to his knees and then other than that, you know, the next thing I know I was standing outside with a gun in my hand.

Dr. Anthony Sciara (Dr. Sciara), a psychologist hired by Defendant, testified that Defendant was under a great deal of stress during the weeks preceding the murder, and that testing of Defendant revealed:

> [Defendant's behavior was] consistent with somebody who really [is] in a significant stress overload state that has been building for a long time, a perceived threat from things that have been said before, a distortion of what's actually occurring, and then does what we call dissociates; that is, that they act automatically. They're not thinking consciously, "I'm doing X, Y, and Z; I'm pulling a trigger." There's no thought about that, it is an automatic action that occurs. And this occurs with an overload of emotions and a distortion, both of which are incredibly present with [Defendant].

Dr. Sciara stated that "[d]issociation is often a very brief period of time and, again, it relates to significant stress overload, [and a] highly emotional provoking situation, all of which were there with [Defendant]." Defense counsel asked Dr. Sciara whether "[Defendant's] behavior as has been described to you on the night of September the 6th [was] consistent with someone who has premeditated and deliberated upon those actions?" Dr. Sciara responded:

> Well, I really have to answer that in kind of two ways; a deliberate action to choose to drive to the location, to make the phone call, to say let's get it over with, absolutely. That was all deliberate, that was conscious, that was directed if you would. The action of shooting, on the other hand, would be inconsistent with a deliberate action but would be more consistent with an impulse based on distortion, an impulse based on I'm defending myself, protecting myself, and that dissociated state, so I'd really have to answer it two ways.

Dr. Nicole Wolfe (Dr. Wolfe), a forensic psychiatrist, testified during the State's rebuttal as follows:

> Q: Now, based on your understanding of the facts of this crime and taking into account the factors that you just mentioned to us about planning and so forth, are those suggestive to you one way or the other as to whether or not this crime was premedicated [sic] and deliberated?
>
> A: The fact that he met the victim with a gun definitely suggested some element of forethought, I mean cause you don't just drive around with a gun in your car for no reason.
>
> Q: Were you aware of the fact that he called the victim moments before the killing and told him to come to the location?
>
> A: Yeah, he said that he had driven to Forest City and actually saw [Landis] driving around, and then waited for him to get home to call him . . . and said, "Meet me in the [grocery store] parking lot."
>
> Q: Is that suggestive to you of premeditation and deliberation?
>
> A: Certainly there's some element of it, yes.
>
> Q: Dr. Wolfe, did you find anything at all in your testing of [Defendant] that in your opinion would negate the element of premeditation and deliberation?

A: The question of how harassed [Defendant] was is still very unclear to me. If somebody were extremely harassed and fearful for their life, then there would be some element of over-reacting to a stressor. But it doesn't remove, like I said, putting the gun in your car and telling somebody to meet me at such and such a location.

During closing arguments, defense counsel argued to the jury:

[The State is] gonna ask you, I believe, to find [Defendant] guilty of First Degree premeditated and deliberated murder and ask you to send him to prison for the rest of his life without parole. That's what this case is all about, that's what they're gonna ask you to do. I want you to think about that decision because if you check block one, that's the result. There's no discretion of the Court. The Court has to impose life without parole.

The prosecutor objected on the ground that "the Court's sentencing is not for [the jury's] consideration." The trial court stated: "Ladies and gentlemen of the jury, the matter of sentencing is for the Court and you're not to concern yourself with that." Defense counsel then continued his closing argument, stating: "Thank you, Your Honor, but that's what's going to happen if you find him guilty of First Degree premeditated murder. I want you to think about that . . . ."

The jury returned a verdict of guilty of first-degree murder, and the trial court sentenced Defendant to life imprisonment without parole.

The issues are whether: (I) the admission of Dr. Wolfe's testimony concerning Defendant's premeditation and deliberation was error; and (II) Defendant had the right to inform the jury of the punishment for first-degree murder.

I

[1] "Premeditation" and "deliberation" are legal terms of art. *State v. Rose*, 323 N.C. 455, 460, 373 S.E.2d 426, 429 (1988). Medical expert opinion testimony as to whether these elements were met by a defendant's behavior is inadmissible. *Id.* at 460, 373 S.E.2d at 430. Our courts, however, "wisely permit[] evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself." *State v. Hudson*, 331 N.C. 122, 154, 415 S.E.2d 732, 749 (1992), *cert. denied*, 506 U.S. 1055, 122 L. Ed. 2d 136, *reh'g denied*, 507 U.S. 967, 122 L. Ed. 2d 776 (1993).

In this case, the testimony elicited by the State from its expert witness, Dr. Wolfe, was inadmissible expert opinion testimony that Defendant had acted with at least "some" premeditation and deliberation when he shot and killed Landis. The State elicited this testimony, however, only as rebuttal evidence following similarly inadmissible testimony from Defendant's expert witness. Defense counsel asked Dr. Sciara if Defendant's behavior "on the night of September the 6th [was] consistent with someone who has premeditated and deliberated upon those actions?" Dr. Sciara replied that "[t]he action of shooting . . . would be inconsistent with a deliberate action . . . ." Defendant therefore "opened the door" to the State's otherwise inadmissible expert testimony by specifically questioning his own expert as to premeditation and deliberation. Under these circumstances, the trial court did not err in allowing Dr. Wolfe's testimony.

II

[2] The punishment for first-degree murder committed by an adult is "death or imprisonment in the State's prison for life without parole . . . ." N.C.G.S. § 14-17 (Supp. 1997). The defendant has the right to inform the jury of the punishment prescribed for the offense for which he is being tried. N.C.G.S. § 7A-97 (1995) ("In jury trials the whole case as well of law as of fact may be argued to the jury."); *State v. Barber*, 93 N.C. App. 42, 48, 376 S.E.2d 497, 500, *disc. review denied*, 328 N.C. 334, 381 S.E.2d 775 (1989). Indeed, defense counsel may "read or state to the jury a [relevant] statute or other rule of law . . . *including the statutory provision fixing the punishment for the offense charged.*" *State v. Britt*, 285 N.C. 256, 273, 204 S.E.2d 817, 829 (1974) (emphasis added). "[S]uch information serves the salutary purpose of impressing upon the jury the gravity of its duty." *State v. Walters*, 294 N.C. 311, 314, 240 S.E.2d 628, 630 (1978). Providing "[n]otice to the jury of the consequences [of the verdict reached] is the right protected by [law]." *State v. Buckner*, 342 N.C. 198, 216, 464 S.E.2d 414, 424 (1995), *cert. denied*,— U.S. —, 136 L. Ed. 2d 47 (1996) (holding that where the jury was "repeatedly and specifically" informed as to the punishment for the crime charged, the court's subsequent instructions to disregard arguments about punishment were not so prejudicial as to require a new trial).

Defense counsel's closing argument comments in this case were a correct statement of the punishment prescribed for first-degree murder and therefore constituted a proper argument. It follows that

the trial court erred in sustaining the State's objection.[1] Such an error requires a new trial, however, only where there is a reasonable possibility that a different result would have been reached by the jury had the error in question not been committed. N.C.G.S. § 15A-1443(a) (1997). During *voir dire* of this case, defense counsel informed the jury without objection from the State that Defendant's punishment, if found guilty of first-degree murder, would be "life without parole." In addition, following his closing argument comments (that Defendant faced a mandatory sentence of life without parole if convicted of first-degree murder) and the trial court's statement sustaining the State's objection, defense counsel stated, without any additional objection: "[B]ut that's what's going to happen if you find him guilty of First Degree premeditated murder. I want you to think about that . . . ." The jury therefore received sufficient notice of the serious consequences Defendant faced if found guilty of first-degree murder. Accordingly, there is no reasonable possibility that a different result would have been reached by the jury had the error in question not been committed, and Defendant is not entitled to a new trial.

No error.

Judges JOHN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. FRANKIE SHELTON PEARSON, JR., DEFENDANT

No. COA98-23

(Filed 3 November 1998)

1. Evidence— motion to suppress—required affidavit

The trial court erred in a prosecution for driving while impaired by allowing defendant's motion to suppress Intoxilyzer results obtained by an officer outside his jurisdiction. The motion to suppress was not accompanied by the affidavit required by N.C.G.S. § 15A-977(a).

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1. The trial court's statement to the jury that "sentencing is for the Court" is a correct statement of the law. Although arguably this statement did not technically sustain the State's objection, the State concedes that the trial court sustained its objection. In any event, the trial court's statement, in this context, would have appeared to a reasonable juror to sustain the State's objection.

2. Evidence-Intoxilyzer results— officer out of jurisdiction— not a substantial violation of defendant's rights

The trial court erred in a prosecution for driving while impaired by allowing defendant's motion to suppress Intoxilyzer results where the Intoxilyzer in the county where defendant was arrested displayed an incorrect date and time, defendant was taken to another county for an Intoxilyzer test and taken before the magistrate there, and defendant moved to suppress the Intoxilyzer results based on the administering officer being out of his jurisdiction. Even if the motion to suppress was procedurally valid, the officer's technical violation would not be so serious as to constitute a substantial violation of defendant's rights.

Judge GREENE concurring in the result.

Appeal by the State, pursuant to N.C. Gen. Stat. § 15A-1445(b) (1997), from order allowing defendant's Motion to Suppress entered 9 October 1997 by Judge James R. Vosburgh in Halifax County Superior Court. Heard in the Court of Appeals 6 October 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Jonathan P. Babb, for the State.

Hux, Livermon & Armstrong, L.L.P., by James S. Livermon, Jr., for defendant.

SMITH, Judge.

Defendant was arrested for driving while impaired (DWI), in violation of N.C. Gen. Stat. § 20-138.1 (1993), on 9 October 1995. On 3 October 1997, defendant filed a Motion to Suppress breathalyzer results obtained after his arrest. The Halifax County Superior Court entered an order allowing the Motion to Suppress on 9 October 1997. The State appeals. We reverse the decision of the trial court and remand for trial.

Defendant was arrested in Roanoke Rapids, Halifax County, North Carolina, and was taken to the Roanoke Rapids Police Department. The arresting officer, L. S. Spragins, a certified chemical analyst, advised defendant of his Intoxilyzer rights and began preparing the Intoxilyzer machine, which displayed an incorrect date and time. After consulting with a superior officer, Officer Spragins took defendant to the Halifax County Sheriff's Department, in Halifax, North Carolina, for an Intoxilyzer test. Officer Spragins administered

the Intoxilyzer test and took defendant before the Magistrate in Halifax where Officer Spragins testified that defendant's alcohol level was 0.13, based upon the results of the Intoxilyzer.

Prior to trial, defendant made a motion to suppress the Intoxilyzer test results, arguing that the actions of Officer Spragins were in violation of North Carolina law in that he was outside of his territorial jurisdiction when he administered the test. Defendant made this argument at the hearing on the motion and in his Memorandum of Law, but failed to include an affidavit in support of the motion.

[1] The State argues that defendant's motion should have been denied pursuant to N.C. Gen. Stat. § 15A-977(a) because it was not accompanied by an affidavit. Section 15A-977 sets forth what is required, procedurally, on a motion to suppress evidence. The statute states in relevant part,

> A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion *must be accompanied by an affidavit containing facts supporting the motion.*

N.C. Gen. Stat. § 15A-977(a) (1997) (emphasis added).

The North Carolina Supreme Court has held, "A defendant who seeks to suppress evidence upon a ground specified in G.S. 15A-974 *must* comply with the procedural requirements outlined in G.S. 15A-971, *et seq.*" *State v. Satterfield*, 300 N.C. 621, 624, 268 S.E.2d 510, 513 (1980) (emphasis added). The grounds specified in G.S. 15A-974 are for constitutional violations or if the evidence was "obtained as a result of a substantial violation of the provisions of this Chapter." N.C. Gen. Stat. § 15A-974 (1997). Although defendant did not specifically designate this Chapter as grounds for his motion, the trial court held "that the violation of the Defendant's rights is a *substantial violation*." This language comes directly from G.S. 15A-974. As such, in order for defendant to attempt to suppress the evidence that was obtained through means substantially violative of defendant's rights, his motion to suppress must meet the procedural requirements of G.S. 15A-977(a).

[2] Even if the motion to suppress were valid, the officer's actions can not be construed as "substantially violative" of defendant's rights. Defendant sought to have the evidence suppressed because the offi-

cer acted outside of his territorial jurisdiction. Even if the officer's actions were contrary to statutory authority, which we do not believe to be the case, this technical violation would not be so serious as to constitute a "substantial violation" of defendant's rights. In fact, this Court has held that "[i]t is not fundamentally unfair nor prejudicial to a defendant that evidence is obtained by police officers outside of their territorial jurisdiction." *State v. Afflerback*, 46 N.C. App. 344, 347, 264 S.E.2d 784, 785 (1980) (referring to evidence obtained pursuant to an undercover investigation).

Finally, we note that defendant-appellee's brief was not double-spaced and violated Rule 26(g) of the North Carolina Rules of Appellate Procedure. *See Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996). We caution counsel that such conduct is unacceptable to this Court.

Reversed and remanded.

Judge WALKER concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

The defendant's primary argument in support of the order of suppression is that the Roanoke Rapids police officer acted beyond his territorial jurisdiction in transporting the defendant to another jurisdiction, the town of Halifax, for the purpose of securing an Intoxilyzer test. Neither party disputes that the officer had authority to make the arrest, as the arrest occurred within the officer's jurisdiction of the town limits of Roanoke Rapids. I agree with the State that the limits on the territorial authority of the police contained in N.C. Gen. Stat. § 160A-285 and § 160A-286 do not preclude the transportation of a person after arrest to another destination, including a place outside of the territorial jurisdiction of the arresting officer, for the purpose of administering a test of the defendant's breath in compliance with N.C. Gen. Stat. 20-16.2(a). N.C.G.S. §§ 160A-285, -286 (1994); *see also* N.C.G.S. § 20-16.2(a) (Supp. 1997). Because the order of the trial court was based on the belief that the transportation of the defendant to Halifax, for the purpose of securing a Intoxilyzer test, was in violation of the officer's authority, that order must be reversed. On this basis, I concur with the result reached by the majority.

WADE S. LAMBERTH AND WIFE, LOUISE F. LAMBERTH, PLAINTIFFS V. ROLAND ALTON McDANIEL AND WIFE, RITA S. McDANIEL, DEFENDANTS

No. COA98-35

(Filed 3 November 1998)

Mortgages— installment land sales—right of redemption—applicable

The trial court did not err by determining that defendants were entitled to redeem real property by the payment of the balance due plus interest and taxes where plaintiffs had sold the land to defendants, financing the transaction with an installment sales contract, defendants did not pay ad valorem taxes as agreed, and plaintiffs paid the taxes and filed this complaint. The right of redemption applies to installment land sales contracts.

Appeal by plaintiffs from judgment entered 20 October 1997 by Judge Jimmy L. Myers in Iredell County District Court. Heard in the Court of Appeals 23 September 1998.

Pope, McMillan, Kutteh, Simon & Baker, P.A., by Anthony J. Baker, for plaintiff-appellants.

Homesley, Jones, Gains, Homesley & Dudley, P.A., by T.C. Homesley, Jr., and L. Ragan Dudley, for defendant-appellees.

MARTIN, John, C., Judge.

Plaintiffs sold land to defendants, financing the transaction with an installment sales contract. The installment sales contract, executed on 14 June 1990, provided that plaintiffs would hold the deed until defendants paid purchase price plus interest. Defendants were also required to pay ad valorem taxes until purchase price was paid. The forfeiture provision of the contract states in relevant part:

> 5. It is agreed and understood that if the Buyers shall be in default in the payment of any monthly installment as hereinabove set out for a period of more than thirty (30) days, or if the Buyers default in the performance of any other term and condition of this contract and said default continues for more than thirty (30) days, *then the Sellers may, at their option, declare the contract forfeited, and all sums paid by the Buyers hereunder shall be considered as rent for the property.* If the Buyers rights under this contract shall be forfeited, then the Sellers shall be at liberty

> to make such disposition of the property as they may see fit, free and clear of any rights of the Buyers hereunder, and the Buyers further agree that after forfeiture they will give peaceful possession to the premises (emphasis added).

In November of 1995, defendant-buyers notified plaintiff-sellers that, due to financial difficulties, they would delay payments. Defendants promised to catch up payments as soon as possible, and plaintiffs consented to late payments. The November payment was made in January of 1996, and again plaintiffs consented to late payments in the future. Ad valorem taxes were not payed from 1993 to 1996, and plaintiffs paid taxes on behalf of defendants to avoid a tax lien.

In March of 1996, plaintiffs filed their complaint in this action in which they alleged defendants' failure to make the payments was a forfeiture of the installment sales contract, and they sought to recover possession, past due monthly payments, and ad valorem taxes. Defendants answered and asserted a counterclaim in which they alleged they had tendered the entire balance due upon being served with plaintiffs' complaint, and they sought judgment requiring plaintiffs to convey the property upon defendants' payment of the full balance due plus ad valorem taxes and costs.

Both parties moved for summary judgment. The trial court determined that defendants were entitled to exercise the equity of redemption and entered judgment ordering plaintiffs to convey the property to defendants upon receipt of the balance of the purchase price, interest, and ad valorem taxes. Plaintiffs appeal.

Plaintiffs' sole argument is that the provisions of the installment sales contract allowing past payments to be treated as rent upon default is enforceable, and not subject to the equity of redemption. We disagree and affirm the trial court's summary judgment in favor of defendants.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c); *Toole v. State Farm Auto. Ins. Co.*, 127 N.C. App. 291, 488 S.E.2d 833 (1997). All of the evidence is viewed in the light most favorable to the non-moving party. *Garner v. Rentenbach Constructors, Inc.*, 129 N.C. App. 624, 501 S.E.2d 83 (1998). "Where there is no genuine issue as to the facts, the presence

of important or difficult questions of law is no barrier to the granting of summary judgment." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). In this case, the parties agree there are no material facts in dispute.

"It has been held repeatedly that 'the relation between vendor and vendee in an executory agreement for the sale and purchase of land is substantially that subsisting between mortgagee and mortgagor, and governed by the same general rules.' " *Brannock v. Fletcher*, 271 N.C. 65, 70-71, 155 S.E.2d 532, 539 (1967) (citations omitted); *see also, Boyd v. Watts*, 316 N.C. 622, 342 S.E.2d 840 (1986); *In re Foreclosure of a Deed of Trust and Taylor*, 60 N.C. App. 134, 298 S.E.2d 163 (1982). "As between the parties, the vendor may be considered a mortgagee and the vendee a mortgagor." *Brannon*, at 71, 155 S.E.2d at 539 (citations omitted). Upon default, the vendor-mortgagees may choose a variety of remedies, including forfeiture if the contract allows. *Boyd v. Watts*, 316 N.C. 622, 628, 342 S.E.2d 840, 843 (1986) ("The vendor, *inter alia*, may bring an action to quiet title, accept the noncompliance as a forfeiture of the contract, or bring an action to declare it at an end.").

However, upon default, vendee-mortgagors have the right to redeem their interest under the contract to prevent forfeiture. *Anderson v. Moore*, 233 N.C. 299, 302, 63 S.E.2d 641, 644 (1951) ("If the mortgagee in possession has received sufficient rents and profits to liquidate the indebtedness secured by his mortgage, the mortgagor is entitled to have an entry of satisfaction entered on the judgment of foreclosure, the mortgage or deed of trust cancelled, and the premises surrendered to him free and clear of the indebtedness secured thereby."); *see c.f., Tech Land Development, Inc. v. South Carolina Ins. Co.*, 57 N.C. App. 566, 291 S.E.2d 821 (1982). The right to redeem cannot be waived by contract at the time of the agreement.

> If the transaction be a mortgage in substance, the most solemn engagement to the contrary, made at the time, cannot deprive the debtor of his right to redeem . . . . Nor can a mortgagor, by any agreement at the time of the execution of the mortgage that the right to redeem shall be lost if the money be not paid by a certain day, debar himself of such a right (citation omitted).

Wilson v. Fisher, 148 N.C. 535, 539, 62 S.E. 622, 624 (1908); Webster, *Real Estate Law in North Carolina* § 13-5 (1994). In *Brannock*, the Court indicated that the right to redeem under the law of mortgages

would also apply to installment land contracts, even if vendees have surrendered the property and are behind in mortgage payments:

> Having surrendered possession, they were still entitled—even if they were in arrears—to tender to defendants the unpaid balance of the purchase price within a reasonable time and to have specific performance of their contract to convey. . . . But until a vendee has made full payment he is not in condition to demand conveyance of the land.

Brannock, at 73, 155 S.E.2d at 540-41.

Plaintiffs argue that *Boyd v. Watts*, 316 N.C. 622, 342 S.E.2d 840 (1986), eliminated a vendee's right of redemption in an installment sale contract for the sale of land when the *Boyd* Court affirmed the vendor's election of the contractual forfeiture remedy. We disagree. No attempt to exercise the right of redemption was considered in *Boyd;* the Court discussed the narrow issue of forfeiture under land sales contracts, and explicitly reserved other issues regarding the application of mortgage law to installment land sales contracts. *Id.* at 627-28, 342 S.E.2d at 844. Indeed, the Court in *Boyd* affirmed the general approach taken in *Brannock*, applying equitable principles of mortgage law to installment land sales contracts. *Id.* at 627-28, 342 S.E.2d at 843. Further application of these principles requires us to recognize the right of redemption in installment land sales contracts.

In the present case, defendants sought, after default, to exercise their right of redemption by tendering the entire balance due, plus interest. We affirm the trial court's determination that "defendants are entitled to redeem the property by the payment to the plaintiffs of the balance due of the purchase price, plus interest and ad valorem taxes."

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

INTEGON INDEMNITY CORPORATION, PLAINTIFF v. FEDERATED MUTUAL INSURANCE COMPANY, MONTGOMERY MOTORS, INC., JOSEPH BURGESS HARRIS, AND PAUL RAY BRANSON, DEFENDANTS

No. COA98-117

(Filed 3 November 1998)

1. **Insurance— coverage—automobile loaned by garage—driver both customer and employee—summary judgment for garage insurer**

In a declaratory judgment action to determine insurance coverage arising from an auto accident involving a Montgomery Motors employee driving a loaner while his car was being repaired, summary judgment was properly granted for Montgomery Motors and Federated, its insurer, and against the insurer of an employee, Integon, where the Federated policy covered employees but excluded customers. The employee was billed for repairs to his vehicle and there was testimony that he received the loaner because he was a customer; on the record, he was a "customer" under the Federated policy.

2. **Insurance— automobile—loaner vehicle—driver both employee and customer—policy not ambiguous**

The trial court did not err by not finding as a matter of law that an insurance policy was ambiguous where defendant Montgomery Motors had loaned an auto to an employee while Montgomery was performing repairs on the employee's auto, for which the employee paid; the employee became involved in an accident while driving the loaner; and Montgomery's policy covered employees but not customers. Nothing in the policy requires that an employee cannot be considered a customer for purposes of determining insurance coverage.

Appeal by plaintiff from order entered 18 July 1997 by Judge William C. Griffin, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 5 October 1998.

On 20 August 1994, defendant Paul Ray Branson was in an automobile accident with defendant Joseph Burgess Harris in Greenville, North Carolina. At the time of the accident, Branson was driving a used car owned by his employer, defendant Montgomery Motors, Inc. ("Montgomery Motors"). Branson's personal car was in the Montgomery Motors repair shop and Montgomery Motors provided

Branson the Montgomery Motors' automobile on loan for his personal use. Montgomery Motors had a policy of loaning "vehicles without charge to good customers who need a vehicle for their personal use while their car is being serviced or repaired" in their shop. On the date of the accident, Branson had a personal automobile insurance policy with plaintiff Integon Indemnity Corporation ("Integon"). Defendant Montgomery Motors also had an automobile liability insurance policy in force and effect with defendant Federated Mutual Insurance Company ("Federated").

On 2 May 1995, defendant Burgess filed a tort action against defendant Branson seeking monetary damages for injuries sustained in the 20 August 1994 accident. That action is being defended on behalf of Branson by counsel employed by Integon under a reservation of rights pursuant to the terms of the Integon policy.

On 28 September 1995 Integon filed this declaratory judgment action seeking to determine whether it was required to provide Branson coverage for claims arising out of the 20 August 1994 accident. Defendants Federated and Montgomery Motors moved for summary judgment on 17 April 1997. Plaintiff Integon moved for summary judgment on 6 June 1997. On 18 July 1997 an order was entered granting Federated's and Montgomery Motors' motions for summary judgment and denying Integon's motion for summary judgment. Plaintiff appeals.

Dunn, Dunn, Stoller & Pittman, LLP, by Anne D. Edwards, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Robert H. Sasser, III and Mark A. Davis, for defendant-appellees.

EAGLES, Chief Judge.

[1] We first consider whether the trial court erred in granting summary judgment. Plaintiff contends that there was a genuine issue of material fact as to whether an employee getting his car repaired by his employer was a "customer" or an "employee" under the terms of the insurance policy at issue. Plaintiff argues that Branson was covered under the Federated policy if, at the time of the accident, he was an "employee" of Montgomery Motors and was using an auto owned by Montgomery Motors.

Defendants contend that Integon provides sole coverage because the Federated policy excludes "customers" from its definition of who

is an "insured." Defendants contend that the policy further provides that the term "customers" includes "your employees . . . who pay for [repair] services performed." Defendants contend that the record and exhibits clearly demonstrate that Branson was a "customer" of Montgomery Motors when he was provided with the vehicle. Defendants cite the testimony of both Branson and Harold S. Asbill, the owner of Montgomery Motors, who testified that Branson received the vehicle because he was a "customer." Accordingly, defendants argue that Branson was not an "insured" under the Federated policy.

After careful review of the record, briefs and contentions of the parties, we affirm. The Federated policy states that "[w]e will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from 'garage operations' involving the ownership, maintenance or use of covered 'autos.' " It is undisputed that the automobile driven by Branson was a "covered auto" under the terms of the policy because the vehicle was owned by Montgomery Motors. Additionally, the "garage operations" definition was satisfied because of the "use" of a "covered auto." However, under the terms of the policy, Branson was not an insured because he was a "customer," and "customers" are excluded from coverage.

The term "customer" is not defined anywhere in the policy. While the section determining whether an auto is a "covered auto" states that "customers" include "your employees . . . who pay for [repair] services performed," this definition applies solely for the determination of whether an automobile left by an employee for service is a "covered auto" under the policy, and not whether the employee is a "customer" under the terms of the policy. Accordingly, since "customer" is not defined in the policy, the term "customer" should be defined by its ordinary meaning. *See McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 290, 444 S.E.2d 487, 491-92, *disc. rev. denied*, 337 N.C. App. 694, 448 S.E.2d 528 (1994) ("In the absence of policy definitions," the court should use a term in accordance with ordinary speech and is "encouraged to use 'standard, nonlegal dictionaries' as a guide."). Webster's Dictionary defines "customer" as "one that purchases a commodity or service." *Webster's Ninth New Collegiate Dictionary* 318 (1985). Branson was billed almost $800.00 for repairs made by Montgomery Motors during the time Branson had the loaner car. Both Branson and Asbill testified that Branson received the vehicle because he was a "customer" and not because he

was an "employee." Accordingly, we hold that on this record Branson was a "customer" under the Federated policy. The assignment of error is overruled.

[2] We next consider whether the trial court erred by failing to find as a matter of law that the terms of the policy were ambiguous with regard to coverage for employees who also were customers. Plaintiff argues that the Federated policy contains conflicting provisions which provide an exception precluding coverage for "customers," while at the same time providing coverage for "employees" using covered vehicles with permission. Plaintiff contends that because of this ambiguity the policy must be interpreted to find coverage for the individual employee/customer. Additionally, plaintiff contends that the policy is ambiguous because there are no policy provisions requiring that an individual who is both a "customer" and an "employee" be treated as a "customer" only for the purposes of limiting coverage. Plaintiff argues that once the Federated policy conflict is resolved in favor of finding coverage for Branson, the terms of the Integon and Federated policies indicate that Federated provides primary coverage.

Defendants contend that there was no ambiguity and that the key provisions of the Federated policy are not in conflict. Defendants argue that although Branson was an "employee," he was a "customer" on this occasion. Defendants assert that there is no reason that a "customer," who happens to work for Montgomery Motors, should not fall within the "customer" exclusion.

We hold that the Federated policy is not ambiguous. Nothing in the policy requires that an "employee" cannot be considered a "customer" for purposes of determining insurance coverage. The policy clearly excludes coverage for "customers." Accordingly, because Branson acquired the car on loan because his own car was being repaired by Montgomery Motors, he was therefore a "customer" and not an "insured" under the Federated policy. The assignment of error is overruled and summary judgment is affirmed.

Affirmed.

Judges LEWIS and HUNTER concur.

KRISTY LYN CORBETT, PLAINTIFF v. HAL SMITH, DEFENDANT

No. COA98-65

(Filed 3 November 1998)

Insurance— coverage—uninsured vehicle—ATV—excluded

The trial court did not err by granting summary judgment for State Farm in a negligence action arising from an ATV accident where the ATV was excluded from policy coverage by language which excludes "equipment designed for use principally off public roads."

Appeal by plaintiff from judgment entered 11 March 1996 by Judge G.K. Butterfield in Johnston County Superior Court. Heard in the Court of Appeals 17 September 1998.

Lucas, Bryant, & Denning, P.A., by Sarah E. Mills for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio, for defendant-appellee.

HUNTER, Judge.

Plaintiff filed an action against defendant alleging that she was injured when defendant negligently caused his all-terrain vehicle (ATV) to overturn while plaintiff was riding on the back. The ATV was not insured by defendant, however, plaintiff's insurance with State Farm Mutual Automobile Insurance Company (State Farm) included coverage for bodily injury caused by an "uninsured motor vehicle." State Farm was served with a copy of the summons and complaint against defendant and appeared as an uninsured motorist carrier pursuant to the provisions in N.C. Gen. Stat. § 20-279.21(b)(3)(a). State Farm made a motion to dismiss on the grounds that the ATV was not included as an "uninsured motor vehicle" as defined by the State Farm policy issued to plaintiff and the North Carolina Motor Vehicle Financial Responsibility Act. Summary judgment was granted in favor of State Farm on 11 March 1996 and plaintiff gave notice of appeal on 2 April 1996. This Court found that the appeal was interlocutory and the lawsuit against defendant proceeded to trial. *Corbett v. Smith*, slip op. (No. COA96-633, filed 7 January 1997). Defendant failed to appear and judgment was entered against him in the amount of $425,000.00. On 5 November 1997, plain-

tiff again filed notice of appeal of the order granting summary judgment in favor of State Farm and that appeal is now properly before this Court.

Plaintiff's policy with State Farm insures her for bodily injury caused by an "uninsured motor vehicle." On appeal, plaintiff contends that her policy is ambiguous as to whether defendant's ATV was a "motor vehicle" within the terms of the contract and, because of the ambiguity, the interpretation of the contract should have been left to a jury.

It is well-established that "[a] contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law." *Cleland v. Children's Home*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983) (citations omitted). "If an agreement is ambiguous, on the other hand, and the intention of the parties unclear, interpretation of the contract is for the jury." *Id.* (citation omitted). The question before this Court is whether the definition of the term "uninsured motor vehicle" within the State Farm policy is unambiguous as a matter of law and, therefore, whether the trial court erred by granting summary judgment.

The State Farm policy language in question appears in "Part C—Uninsured Motorists Coverage" and states an "uninsured motor vehicle does not include any vehicle or equipment . . . [w]hich is a farm type tractor or equipment designed mainly for use off public roads, while not on public roads." Plaintiff contends that the word "farm" in the exclusionary language is used to modify the words "tractor" and "equipment" and the ATV is neither a "farm tractor" nor "farm equipment." Plaintiff also contends that N.C. Gen. Stat. § 20-279.5 of the Motor Vehicle Safety and Financial Responsibility Act was not incorporated into plaintiff's policy with State Farm and, therefore, the statute should not be used to assist in interpreting the terms of the contract.

Our Supreme Court has found that "[t]he provisions of the Financial Responsibility Act are 'written' into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail." *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977) (citations omitted). This precedent, along with the fact that the exclusionary language quoted from State Farm's policy is identical to the exclusionary language included in N.C. Gen. Stat. § 20-279.21(b)(3)(b)(e), supports the conclusion that any precedent

which has interpreted the ambiguity of the same exclusionary language in the statute or another contract should be considered in this case.

The uninsured motorists section of N.C. Gen. Stat. § 20-279.21 was enacted "to provide financial recompense to innocent persons who receive injuries through the wrongful conduct of motorists who are uninsured and financially irresponsible." *Autry v. Insurance Co.*, 35 N.C. App. 628, 632, 242 S.E.2d 172, 175 (1978) (citation omitted).

> Construing "uninsured motor vehicle" in light of the foregoing, we must conclude that the term is intended to include motor vehicles which should be insured under the Act but are not, and motor vehicles which, though not subject to compulsory insurance under the Act, are at some time operated on the public highways . . . [The] purpose [of the act] would not be served by interpreting the uninsured motorists provision so as to cover accidents involving motor vehicles not subject to compulsory insurance and which occur on private property. Such an interpretation would result in absolute financial protection against injury by motor vehicle, a concept neither contemplated nor intended by the original Act.

Id. at 632-633, 242 S.E.2d at 175.

In *Autry* this Court found that the three wheeled vehicle was not equipped to be operated on public highways, was not operated on public highways, and was not required to be registered with the Department of Motor Vehicles. *Id.* at 633, 242 S.E.2d at 175. Based on these findings, and in light of the purpose of uninsured motorist coverage, the Court determined the ATV was not a "motor vehicle" subject to compulsory insurance requirements. *Id.* Accordingly, the Court found that the vehicle was not an "uninsured motor vehicle" within the intended scope of the provisions of the insurance agreement or statute so as to entitle plaintiff to coverage thereunder. *Id.* at 633, 242 S.E.2d at 176.

The ATV in question in the case before us lacks rear view mirrors, directional signals, a horn, a speedometer, and does not have a differential on its back axle, making it difficult to drive on paved surfaces. The vehicle could not have passed inspection for operation on the highways or have been registered as a vehicle in North Carolina. There are warning labels on the vehicle stating that it is "designed and manufactured by Honda for off road use only" and defendant tes-

tified that the vehicle had never been driven on a public highway. In light of this evidence, and the precedent established by *Autry*, the term "uninsured motor vehicle" is not ambiguous within the State Farm policy and the ATV was excluded from policy coverage by the language which excludes "equipment designed for use principally off public roads." The order granting summary judgement is

Affirmed.

Judge McGEE concurs.

Judge WYNN concurred in result prior to 1 October 1998.

BOB KILLIAN TIRE, INC., PLAINTIFF v. DAY ENTERPRISES, INC., DEFENDANT

No. COA98-172

(Filed 3 November 1998)

Pleadings— amendment to complaint—corporate name added—no relation back—complaint time barred

The trial court did not err by dismissing a complaint under the statute of limitations where the complaint clearly named Troy Day, an individual, as defendant and alleged that he was a citizen and resident of Cabarrus County, and an amendment substituted the corporate defendant, Day Enterprises, Inc., for the individual defendant, thereby naming a new party-defendant rather than correcting a misnomer. The amendment does not relate back and the claim against the corporate defendant is barred by N.C.G.S. § 1-52(16).

Appeal by plaintiff from order entered 17 December 1997 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 7 October 1998.

Lovekin & Associates, by Stephen L. Lovekin and D. Shawn Clark, for plaintiff-appellant.

Tate, Young, Morphis, Bach & Taylor, L.L.P., by Thomas C. Morphis and Paul E. Culpepper, for defendant-appellee.

MARTIN, John C., Judge.

On 3 July 1995, plaintiff filed a complaint naming "Troy Day t/a Day Enterprises" as defendant, and alleging defendant had, in October 1994, negligently excavated its property which was adjacent to plaintiff's property, resulting in damage to plaintiff's land. The summons and a copy of plaintiff's complaint were served on Troy Day who filed an answer denying the allegations of the complaint and moved to dismiss the action pursuant to G.S. § 1A-1, Rule 12(b)(7), for plaintiff's failure to join a necessary party.

On 19 November 1997, shortly before the matter was scheduled for trial, plaintiff filed a motion to amend the complaint "to change the name of the defendant from 'Troy Day t/a Day Enterprises' to 'Day Enterprises, Inc.' " Defendant objected and alternatively moved to dismiss the amended complaint as barred by the statute of limitations.

The trial court found that Day Enterprises, Inc., rather than Troy Day, was the proper party from whom relief was sought by plaintiff and permitted the amendment to the complaint. However, the court determined that plaintiff's failure to name the proper defendant was neither a misnomer nor a clerical error, that the amendment substituting the new party defendant was a new action and did not relate back to the date of filing of the original complaint, that the conduct of Day Enterprises, Inc., complained of by plaintiff occurred more than three years prior to the effective date of the amended complaint, and that plaintiff's action against Day Enterprises, Inc., was therefore barred by G.S. § 1-52(16). Plaintiff appeals from the trial court's order dismissing the complaint. We affirm.

G.S. § 1A-1, Rule 15(c), provides:

> [a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (1990). The notice requirement of Rule 15(c) cannot be met where an amendment has the effect of adding a new party to the action, as opposed to correcting a misnomer. *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995). Thus, the sole issue presented by this appeal is whether plaintiff's amended complaint, naming "Day Enterprises, Inc." as defendant rather than

"Troy Day t/a Day Enterprises" had the effect of adding a new party, or whether the amendment simply corrected a misnomer, permitting relation back pursuant to Rule 15(c).

Plaintiff argues that its original intent to sue Day Enterprises, Inc., is reflected in its original complaint, that it was only after the statute of limitations had run that plaintiff discovered it had "inaccurately described" the defendant, and therefore, plaintiff never intended to add a new party to the litigation. Plaintiff's intent, however, is not dispositive.

In *Crossman, supra*, the plaintiff sued for personal injuries arising from an automobile collision, naming Van Dolan Moore and the Van Dolan Moore Company, Inc., as defendants in her original complaint. However, Van Dolan Moore, II, the son of the named defendant, had been the actual driver of the vehicle involved in the collision. The plaintiff moved to amend her complaint to reflect Van Dolan Moore, II, as the defendant and sought to have the amendment relate back to the original filing. As in the present case, the trial court granted the plaintiff's motion to amend, but denied the motion that the amendment relate back to the time of the filing of the complaint. The effect of the trial court's order was that plaintiff's claim was barred by the statute of limitations. The Supreme Court affirmed, stating unequivocally:

> When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. *We hold that this rule does not apply to the naming of a new party-defendant to an action. It is not authority for the relation back of a claim against a new party.*

Id. at 187, 459 S.E.2d at 717 (emphasis added).

In *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 450 S.E.2d 24 (1994), *affirmed*, 342 N.C. 404, 464 S.E.2d 46 (1995), the plaintiffs named "Winn Dixie Stores, Inc." as defendant in their original complaint, rather than the proper defendant "Winn-Dixie Raleigh, Inc." We held plaintiffs' failure to name the proper defendant did not result from a misnomer, and the amendment did not relate back. *Id.* at 40, 450 S.E.2d at 31.

In the present case, plaintiff's original complaint clearly named Troy Day, an individual, as defendant and alleged that he was "a citizen and resident of Cabarrus County." Plaintiff's amendment to the complaint substituted the corporate defendant, Day Enterprises, Inc., for the original individual defendant, thereby naming a new party-defendant rather than correcting a misnomer. Accordingly, under *Crossman*, the amendment does not relate back and plaintiff's claim against Day Enterprises, Inc., is barred by G.S. § 1-52(16). *See Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 468 S.E.2d 447 (1996). The order dismissing the action must be affirmed.

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 OCTOBER 1998

COLEMAN v. HANSEN No. 97-1328	Surry (96CVS762)	Affirmed
HAYWOOD COUNTY DSS ex rel. THOMAS v. LOWE No. 98-153	Haywood (91CVD964)	Affirmed
PICKETT v. N.C. DEP'T OF CORRECTION No. 97-1416	Ind. Comm. (369736)	Affirmed
POWELL v. DAWSON CONSUMER PROD. No. 97-1582	Ind. Comm. (176151)	Reversed and Remanded
ROBINSON v. POWELL No. 96-285-2	Catawba (94CVS334)	Affirmed in part; Reversed and remanded in part
SANFORD v. INSCOE No. 98-480	Davidson (95CVS2138)	Dismissed
SMITH v. SMITH No. 97-1318	Halifax (96CVD156)	Affirmed
STATE v. CHESNEY No. 98-401	Lee (97CRS3526)	No Error
STATE v. CHESNEY No. 98-423	Lee (97CRS3527) (97CRS3528) (95CRS4149) (95CRS0672) (93CRS2771)	No Error
STATE v. DWIGGINS No. 98-450	Davie (96CRS1135) (96CRS1136)	No Error
STATE v. HEARNS No. 98-441	Craven (97CRS5612)	No Error
STATE v. JONES No. 98-322	Robeson (95CRS10980) (95CRS10981) (95CRS15502) (95CRS15503)	No Error
STATE v. MITCHELL No. 98-207	New Hanover (96CRS1120)	No Error

STATE v. PARTOZES No. 98-442	Wake (97CRS15704) (97CRS15705) (97CRS34798)	No error in the trial; judgment sentencing defendant for habitual felon status in (97CRS34798 is arrested; judg ments in 97CRS15704 and 97CRS15705 remanded
STATE v. WILEY No. 97-606	Cabarrus (95CRS10740) (95CRS10741) (95CRS10742) (95CRS10744) (95CRS10745) (95CRS10746) (95CRS10747) (95CRS10748) (95CRS10749) (95CRS10750) (95CRS10753) (95CRS10754)	No Error
STATE ex rel. UMSTEAD HOSPITAL v. WEBB No. 98-59	Wake (96CVS4599)	Reversed and Remanded
THOMPSON v. COLLEGE VILLAGE CAFE, INC. No. 97-1501	Ind. Comm. (344773)	Affirmed
VANCE v. VANCE No. 97-841	Wake (96CVS00958)	Affirmed
WHITE v. WHITE No. 97-1577	Richmond (94CVS866)	Affirmed
WHITLEY v. WHITLEY No. 97-1403	Pitt (93CVD1141)	Reversed in part, Vacated in part, and Remanded

FILED 3 NOVEMBER 1998

BRICE v. SHERATON, INC. No. 97-1331	Ind. Comm. (521460)	Vacated and Remanded
HUGGARD v. VAUGHAN No. 97-1601	Ind. Comm. (403632)	Affirmed
IN RE ESTATE OF ROBINSON No. 97-925	Lincoln (96E137)	Affirmed

ISENHOUR v. UNIVERSAL UNDERWRITERS GROUP No. 98-181	Catawba (92CVS1442)	Affirmed
KATH v. SIKES No. 98-124	Pender (95CVS658)	Affirmed
NEWELL v. COMPAGNIE NATIONALE AIR FRANCE No. 97-1587	Guilford (97CVD8189)	Affirmed
PULLEY v. FRANCHISE ENTERS. No. 98-129	Ind. Comm. (240859)	Reversed and remanded for findings consistent with this opinion
STATE v. BUCK No. 97-744	Hertford (95CRS4394) (95CRS4395) (95CRS4396) (95CRS4397) (95CRS4398) (95CRS4399) (95CRS4400) (95CRS4401) (95CRS4402) (95CRS4403) (95CRS4404) (95CRS4405)	No Error

TAYLOR v. ROBINSON

[131 N.C. App. 337 (1998)]

TRACEY TAYLOR, PLAINTIFF v. EBONY NAYTASHA ROBINSON AND JULIO ESQUILINA, DEFENDANTS

No. COA97-1407

(Filed 17 November 1998)

Juveniles— undisciplined fifteen-year-old—commitment for contempt—Juvenile Code—exclusive authority

The trial court erred by committing a fifteen-year-old defendant to the Division of Youth Services for contempt; interpreting the general enforcement provision of the Parental Control Act in light of the more recent and specific Juvenile Code, which has exclusive authority over a discrete age group of possible defendants, the court should have followed the statutory process under the Juvenile Code rather than immediately committing a fifteen-year-old for undisciplined behavior.

Judge LEWIS dissenting.

On writ of certiorari to review order entered 5 June 1997 by Judge Paul A. Hardison in Onslow County District Court. Heard in Court of Appeals 26 August 1998.

No brief filed for plaintiff.

No brief filed for defendants.

Attorney General Michael F. Easley, by Special Deputy Attorney General John R. Corne, for Division of Youth Services, Department of Health and Human Services.

MARTIN, John C., Judge.

On 21 May 1997, plaintiff filed a complaint pursuant to G.S. § 110-44.1 *et seq.*, the "Parental Control Act",[1] alleging that her daughter Ebony Robinson, then fifteen years of age, had removed herself from plaintiff's home and had refused to submit to parental control. The court entered an amended temporary order on 22 May 1997, requiring that Ebony reside with her mother, attend school, submit to the supervision and control of her mother, obey a 6:00 p.m. curfew, and avoid contact with Julio Esquilina.

1. Repealed effective 1 July 1999, 1998 N.C. Sess. Laws 1998-202.

On 5 June 1997, the court found that Ebony Robinson had failed to follow the "rules of her mother's home," continued to "talk back to her mother and step-father," and damaged "personal property of her mother's and step-father's." The trial court found Ebony's conduct to be a "willful violation of the prior Court Order," adjudicated her to be in contempt of court, and ordered her commitment to the New Hanover Regional Detention Center for thirty days, twenty days of which were suspended. Contending the district court is without statutory authority and/or jurisdiction to commit a child under the age of sixteen to the custody of the Division of Youth Services of the Department of Health and Human Services pursuant to G.S. § 110-44.4, the DYS/DHSS petitioned this Court for a writ of certiorari.

We note at the outset that the power of the courts to punish minors for contempt is not at issue in this appeal. Specifically, the narrow question presented is whether the district court, acting pursuant to G.S. § 110-44.4, may commit a minor under the age of sixteen years into the custody of DYS/DHSS as punishment for criminal contempt for the minor's violation of the court's order by engaging in what essentially is undisciplined and non-criminal behavior.[2] Resolution of this question requires that we examine the relationship between the Parental Control Act, G.S. § 110-44.1 through 110-44.4, and the Juvenile Code, G.S. § 7A-516 through 7A-732.

The intent of the legislature controls statutory interpretation. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

> Interpretations that would create a conflict between two or more statutes are to be avoided, and "statutes should be reconciled with each other . . ." whenever possible. *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). When a more generally applicable statute conflicts with a more specific, special statute, the "special statute is viewed as an exception to the provisions of the general statute . . . ." *Domestic Electric Service, Inc. v. City of Rocky Mount*, 20 N.C. App. 347, 350, 201 S.E.2d 508, 510, *aff'd* 285 N.C. 135, 203 S.E.2d 838 (1974).

Meyer v. Walls, 122 N.C. App. 507, 512, 471 S.E.2d 422, 426 (1996) *aff'd in part, rev'd in part*, 347 N.C. 97, 489 S.E.2d 880 (1997). This principle has been more fully explained by the North Carolina Supreme Court:

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2. G.S. § 7B-205, effective 1 July 1999, specifically permits undisciplined juveniles to be confined in an approved detention facility upon being held in contempt for wilful failure to comply with an order of the court. 1998 N.C. Sess. Laws 1998-202 § 6.

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true a fortiori when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage."

McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (quoting *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-629, 151 S.E.2d 582, 586 (1966)); *Banks v. County of Buncombe*, 128 N.C. App. 214, 494 S.E.2d 791, *aff'd*, 348 N.C. 687, 500 S.E.2d 666 (1998); *see also Stewart v. Johnston County Board of Ed.*, 129 N.C. App. 108, 498 S.E.2d 382 (1998).

In this case the Parental Control Act, a general statute with authority over defendants of all ages, conflicts with the Juvenile Code, a specialized statute with exclusive jurisdictional age requirements. We believe the legislature intended the Juvenile Code should govern the commitment of minors, under the age of sixteen, into state custody.

The Parental Control Act, G.S. § 110-44.1 through 110-44.4, gives the district court the authority to "issue an order directing the child personally to appear before the court at a specified time to be heard in answer to the allegations of the plaintiff and to comply with further orders of the court." N.C. Gen. Stat. § 110-44.4 (1997). The authority of the court to require children to appear and answer the allegations is undisputed. The Act states that the district court "shall also have authority to order that any person named defendant in the order or judgment shall not harbor, keep, or allow the defendant child to remain on said person's premises or in said person's home." *Id.* Likewise, the district court's authority over those harboring children against the will of parents is not in dispute.

The orders entered under the Parental Control Act are "punishable as for contempt." *Id.* ("Failure of any defendant to comply with the terms of said order or judgment shall be punishable as for contempt."). The Parental Control Act orders apply to defendants of all

ages, and these orders may be enforced against minors and those harboring minors. The question is whether enforcement of such orders against undisciplined minors under the age of sixteen also necessarily entails the Juvenile Code. We hold that it does.

In the present case the trial court, recognizing that it violates federal and state public policy to hold a minor in contempt and place them in adult custody, summarily committed the juvenile to DYS/DHSS, rather than follow the specific provisions of the Juvenile Code which apply to undisciplined juveniles of defendant's age. We believe it was error to bypass the procedures specified by the Code.

In 1979, the General Assembly enacted comprehensive reforms in this State's juvenile justice laws which gave, without exception, exclusive and original jurisdiction to the district court, under the Juvenile Code, in matters of undisciplined and delinquent juvenile behavior. N.C. Gen. Stat. § 7A-523 (1995). These comprehensive reforms, recommended by the legislatively created Juvenile Code Revision Committee, *see* N.C. Gen. Stat. § 143B-480(c)(5)-(6) (1978), superseded and altered the jurisdiction of other courts in juvenile matters under previous statutes, such as the Parental Control Act, which was enacted in 1969. N.C. Gen. Stat. § 7A-516 to -732 (1979); *see also* Mason P. Thomas, *Juvenile Justice in Transition—A New Juvenile Code for North Carolina*, 16 Wake Forest L. Rev. 1 (1980).

Among the many reforms to the juvenile justice system included a change in the jurisdictional scope of the Juvenile Code. Prior to 1979, the jurisdictional scope of the Juvenile Code was defined by G.S. § 7A-279 (1977), which stated: "The court shall have exclusive, original jurisdiction over any case involving a child who resides in or is found in the district and who is alleged to be delinquent, undisciplined, dependent, or neglected . . . *except as otherwise provided.*" N.C. Gen. Stat. § 7A-279 (1977) (emphasis added). The "otherwise provided" language permitted courts other than the juvenile court to exercise jurisdiction over juveniles in other matters such as habeas corpus petitions by parents for custody. *In re Greer*, 26 N.C. App. 106, 112, 215 S.E.2d 404, 408, *cert. denied*, 287 N.C. 664, 216 S.E.2d 910 (1975) (finding that despite the "exclusive and original" jurisdiction language, "[n]evertheless, it has been held that the jurisdiction statute applicable to juveniles places no limitation upon the jurisdiction previously conferred by statute upon the Superior Court to issue writs of habeas corpus and to determine the custody of children of separated parents").

The Juvenile Code Revision Committee proposed, and the General Assembly accepted, the removal of the "except as otherwise provided" clause of the jurisdictional definition of the Juvenile Code. The new jurisdictional statute, G.S. § 7A-523, "clarifies when jurisdiction of the court attaches and makes it clear that there is no minimum age for jurisdiction. Jurisdiction is determined based on the age of the juvenile at the time of the offense." Juvenile Code Revision Committee, *The Final Report of the Juvenile Code Revision Committee*, 111-12 cmt. C (1979). After 1979, the District Court, under the Juvenile Code, "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent" without exception. N.C. Gen. Stat. § 7A-523 (1995). By definition, the Juvenile Code applies only to undisciplined and delinquent minors who have not reached the age of sixteen. N.C. Gen. Stat. § 7A-517(20) (1995). Thus, after the 1979 revisions, the Juvenile Code is the exclusive provision governing the commitment of allegedly undisciplined minors under the age of sixteen. N.C. Gen. Stat. § 7A-517(12),(20),(28) & 7A-523 (1995).

An undisciplined juvenile, under the statute, is one who "is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home." N.C. Gen. Stat. § 7A-517(28) (1995); *In re Walker*, 14 N.C. App. 356, 188 S.E.2d 731 (1972). The complaint filed in this action alleged, and the court found in its contempt order, behavior by Ebony Robinson which essentially was undisciplined behavior, as defined by the statute. Ebony was fifteen years of age when the complaint was filed; therefore, the commitment procedures under the Juvenile Code provided the exclusive enforcement mechanism for the Parental Control Act order.

Defining the jurisdictional scope of the Juvenile Code as exclusive in the commitment of delinquent and undisciplined juvenile behavior assures that the purposes of the revised Juvenile Code are better served by preventing circumvention of juvenile procedures carefully crafted to "provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C. Gen. Stat. § 7A-516(5) (1995). Allowing courts to summarily place juveniles in State custody, outside of the intended juvenile process, undermines the statutory diversion of juvenile offenders to intake services

created to help juveniles "remain in their homes" and receive treatment "through community-based services." N.C. Gen. Stat. § 7A-516(1) (1995).

Rather than immediately committing a fifteen year old for undisciplined behavior, the court should have followed the statutory process for handling complaints of undisciplined behavior, under the Juvenile Code. This process would include the: screening of complaints by a court counselor, G.S. § 7A-530 (1995), preliminary inquiry regarding jurisdiction, divertability, and legal sufficiency, G.S. § 7A-531 (1995), evaluation by intake counselor considering diversion to a community resource, G.S. § 7A-532, 533, 289.6(1) (1995), referral, follow-up and request for review by prosecutor, G.S. § 7A-534, 535, filing of petition, G.S. § 7A-560, 561, 563 (1995) and ultimate adjudication and disposition by the juvenile court, G.S. § 7A-629, 640 (1995).

Several dispositional alternatives for undisciplined juveniles are available under G.S. § 7A-647, 7A-648, (home supervision under the Department of Social Services, medical or psychiatric evaluation, protective supervision of the court counselor); however, commitment to the Division of Youth Services is not a dispositional alternative for undisciplined juveniles. N.C. Gen. Stat. § 7A-648 (1995); *In re Kenyon N.*, 110 N.C. App. 294, 298, 429 S.E.2d 447, 449 (1993) ("Without a valid adjudication of delinquency, the trial court in Buncombe County was without jurisdiction to commit the juvenile to the Division of Youth Services."); *In re Bullabough*, 89 N.C. App. 171, 187, 365 S.E.2d 642, 651 (1988); *In re Hughes*, 50 N.C. App. 258, 261, 273 S.E.2d 324, 326 (1981) ("If commitment to the Division of Youth Services had been grounded on the commission of this offense alone, we would have been compelled to reverse the juvenile court on the grounds that such commitment is not a statutorily permissible dispositional alternative for 'undisciplined' behavior."). "An undisciplined child generally may not be placed in secure custody in a pre-hearing detention facility or in any cell of a local jail; a status offender should be placed in a non-secure custody resource like a foster home." Mason P. Thomas, *Juvenile Justice in Transition—A New Juvenile Code for North Carolina*, 16 Wake Forest L. Rev. 1, 17 (1980); N.C. Gen. Stat. § 7A-574, 7A-576 (1995). Only under limited circumstances may an undisciplined juvenile be held in secure custody for twenty-four to seventy-two hours. *See* N.C. Gen. Stat. § 7A-574(b)(5)-(7) (1995).

This Court has found an express legislative intent to avoid committing undisciplined juveniles into state custody, *In re Jones*, 59 N.C.

App. 547, 297 S.E.2d 168 (1982). A finding that a juvenile is in criminal contempt for violating a court order does not provide grounds for finding the juvenile "delinquent" for which commitment to the Division of Youth Services is authorized. *Id.* (the legislature only intended criminal activity to provide a basis for a finding of delinquency).

> The provision which would allow an undisciplined child to become a delinquent by merely violating probation without committing a crime was deleted from the statute effective 1 July 1978. . . . The amendment of former statute G.S. 7A-278(2), removing the violation of probation from the definition of delinquent child, indicates an intent that only criminal activity could provide the basis for an adjudication of delinquency. The legislative purpose in removing probation violations as the basis for adjudications of delinquency would be frustrated if the courts take those very same violations, treat them as criminal contempt, and then base adjudications of delinquency on the contempt proceedings.

Id. at 549, 297 S.E.2d at 169. Thus, committing Ebony Robinson to the New Hanover Regional Detention Center violated the legislative intent of the Juvenile Code, and the district court had no jurisdiction to summarily commit her under the contempt power of G.S. § 110-44.4 (1997), without duly considering the Juvenile Code.[3]

A final question remains: how does the Parental Control Act, passed in 1969, relate to the Revised Juvenile Code of 1979? The General Assembly intended the more specific Juvenile Code to operate as the exclusive provision for the commitment of juveniles alleged to be "delinquent, undisciplined, abused, neglected, or dependent." Such additional procedures are not required, under the Parental Control Act, to restrain adult defendants, like Julio Esquilina in this case, from harboring a child of any age, or to enforce parental control over defendant minors aged sixteen and seventeen who refuse to comply with parental direction. With respect to such defendants, G.S. § 110-44.4 clearly authorizes the unrestricted exercise of the court's contempt power. N.C. Gen. Stat. § 110-44.4 (1997). Acting in conjunction, with their respective jurisdictional age limits and procedures, both acts offer parents a means to recover runaway children and enforce their authority as parents over their children. Undisciplined and delinquent children under the age of sixteen receive the addi-

3. However, after 1 July 1999, G.S. § 7B-205 provides for punishment for undisciplined juveniles for contempt of court. 1998 N.C. Sess. Laws 1998-202.

tional consideration and protection afforded them under the Juvenile Code.

The dissent interprets our holding as a repeal of the Parental Control Act by implication. We believe this characterization to be erroneous. The trial court's general enforcement of the Parental Control Act order contradicted the more recent and specific provisions of the Juvenile Code with respect to defendants under the age of sixteen. Under these circumstances, the more specific statute controls. *Meyer v. Walls, supra; McIntyre v. McIntyre, supra; Banks v. County of Buncombe, supra; Stewart v. Bd. of Educ., supra.* In addition, "where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded." *Duncan v. Carpenter & Phillips*, 233 N.C. 422, 64 S.E.2d 410 (1951). We are neither disregarding nor repealing the Parental Control Act, we are simply interpreting its general enforcement provision in light of a more recent and specific statute with exclusive authority over a discrete age group of possible defendants.

The dissent also notes that no petition for secure custody was filed, and concludes that secure custody, G.S. § 7A-574(b), would not have been appropriate in this case. While we agree that secure custody was probably inappropriate in this case, the fact that a child was committed to state custody, without any party requesting such custody, without any of the procedural protections afforded by the Juvenile Code, further demonstrates the importance of exclusive juvenile procedures in keeping non-criminal children out of state detention. The trial court and the dissent both agree that public policy is violated when juveniles are held in adult custody, yet they both ignore equally important legislative and judicial statements, as embodied in the Juvenile Code, that district courts are without the authority to summarily commit juveniles into custody for undisciplined, non-criminal behavior.

For the reasons stated above, we hold that committing the fifteen year old defendant, Ebony Taylor, to the Division of Youth Services for contempt in this case was error. The order of the district court is reversed.

Reversed.

Judge LEWIS dissents.

Judge WALKER concurs.

Judge LEWIS dissenting.

With due respect to the majority, my approach to this case would begin with a review of the statutes that expressly authorize the actions of the district court judge. Section 110-44.1 of the North Carolina General Statutes reads, "Notwithstanding any other provision of law, *any child under 18 years of age*, except as provided in G.S. 110-44.2 and 110-44.3, shall be subject to the supervision and control of [her] parents." N.C. Gen. Stat. § 110-44.1 (1997) (emphasis added). Section 110-44.4 permits parents, guardians, and persons standing in loco parentis to a child to bring a civil action in district court for the purpose of enforcing the provisions of the Parental Control Act. The section provides in relevant part,

> Upon the institution of such action by a verified complaint, **alleging that the defendant child has left home or has left the place where [she] has been residing and refuses to return and comply with the direction and control of the plaintiff**, the court may issue an order directing the child personally to appear before the court at a specified time to be heard in answer to the allegations of the plaintiff and to comply with further orders of the court. . . . Upon the filing of an answer by or on behalf of said child, any district court judge holding court in the county or district court district as defined in G.S. 7A-133 where said action was instituted shall have jurisdiction to hear the matter, without a jury, and to make findings of fact, conclusions of law, and render judgment thereon. . . . The district judge issuing the original order or the district judge hearing the matter after answer has been filed shall also have authority to order that any person named defendant in the order or judgment shall not harbor, keep, or allow the defendant child to remain on said person's premises or in said person's home. **Failure of any defendant to comply with the terms of said order or judgment shall be punishable as for contempt.**

N.C. Gen. Stat. § 110-44.4 (1997) (emphasis added).

In this case, Tracey Taylor, the mother of fifteen-year-old Ebony Robinson, brought a civil action in district court alleging that her daughter had left home and refused to return. The district court judge ordered the Onslow County Sheriff to seize Ebony and bring her to court. Ebony was in fact seized, and after a hearing, the district court

judge entered a "Temporary Order for Parental Control" on 22 May 1997. The court found that Ebony "ha[d] previously removed herself from [her] parents' residence," ordered Ebony to submit to the supervision and control of her mother, and decreed that any person who violated the court's order would be compelled to show cause why she should not be held in contempt. The civil action filed by Ms. Taylor, the proceedings that followed, and the district court judge's disposition of the case were all expressly authorized by G.S. 110-44.4.

At a hearing on 5 June 1997, the district court judge reviewed the Temporary Order for Parental Control. It found that Ebony was in willful violation of the prior court order and concluded that she was in contempt. DYS has not assigned error to either of these findings.

Pursuant to the authority expressly conferred by section 110-44.1, the district court judge punished Ebony "as for contempt," ordering her detained for thirty days, twenty days suspended. *See* N.C. Gen. Stat. § 5A-11(3) (Cum. Supp. 1997) (stating that willful disobedience of a court order constitutes criminal contempt); § 5A-12 (Cum. Supp. 1997) (authorizing imprisonment as punishment for criminal contempt). Because Ebony was only fifteen years old when the contempt order was entered, it would have violated the public policy of this State and of the United States to place her in an adult prison. *See* N.C. Gen. Stat. § 7A-693 (1995) ("[T]o every extent possible, it shall be the policy of [this State] that *no juvenile or delinquent juvenile* shall be placed or detained in any prison, jail, or lockup nor be detained or transported in association with criminal, vicious or dissolute persons." (emphasis added)); 42 U.S.C. § 5633 (12) through (14) (1994) (conditioning states' eligibility for certain federal funding on states' agreement not to confine juveniles "in any jail or lock-up for adults"). In keeping with these policies, the district court judge ordered that Ebony be committed to the New Hanover Regional Detention Center, a juvenile detention facility.

I see no reason to overturn the court's ruling, based as it is on express statutory authority and on established public policy. According to section 110-44.4, persons who violate court orders issued thereunder may be punished "as for contempt," without limitation. To hold, as does the majority, that a district court judge cannot punish a juvenile contemnor by ordering imprisonment seriously diminishes the efficacy of court orders under the Parental Control Act. Furthermore, the choice to place Ebony in a detention facility separate from an adult prison was in keeping with the custody provisions of the Revised Juvenile Code: The Code states that certain juve-

nile offenders found to be delinquent or undisciplined may be held in "secure custody," but only in facilities separate from adult penal institutions. *See* N.C. Gen. Stat. § 7A-576(b) (Cum. Supp. 1997).

In its appellate brief, DYS makes the following assertion: "There are only two portals of entry into juvenile detention homes. These are set forth in Chapter 7A, Article 46, N.C. Gen. Stat. §§ 7A-571 et seq. (Temporary Custody; Secure and Nonsecure Custody; Custody Hearings), and Chapter 7A, Article 49, N.C. Gen. Stat. §§ 7A-608 et seq. (Transfer to Superior Court)." DYS does not cite a single statute or case to support this assertion. This is because no such statute or case exists.

DYS correctly notes that this case has nothing to do with General Statutes Chapter 7A, Article 49: Under this Article, once a district court judge has transferred, to superior court, jurisdiction over a juvenile alleged to have committed a felony, the district court judge must order that the juvenile be held in a detention home pending trial. N.C. Gen. Stat. § 7A-611 (1995). It does not follow, however, as DYS claims, that "Article 46 [of Chapter 7A] is the only other possible source of authority for the district court's order" that Ebony Robinson be committed to the New Hanover Regional Detention Center. A more comprehensive look at the North Carolina Juvenile Code reveals why.

As noted by the majority, the Juvenile Code, codified at sections 7A-516 through 7A-749 of the General Statutes, establishes, among other things, procedures for the disposition of cases "involving a juvenile alleged to be delinquent, undisciplined, abused, neglected, or dependent." N.C. Gen. Stat. § 7A-523(a) (Cum. Supp. 1997). Under the Code, an "intake counselor" must screen all complaints alleging that a juvenile is undisciplined or delinquent. N.C. Gen. Stat. § 7A-530 (1995). The intake counselor must determine whether the complaint should be filed with the district court as a petition, based on a consideration of whether reasonable grounds exist to believe the facts alleged are true, whether the facts alleged constitute a delinquent or undisciplined offense within the jurisdiction of the court, and whether the facts alleged are sufficiently serious to warrant court action. N.C. Gen. Stat. §§ 7A-530, 7A-532 (1995). Upon the approval of the intake counselor or the prosecutor, *see* N.C. Gen. Stat. § 7A-536 (1995), a petition is filed with the district court alleging "the facts which invoke jurisdiction over the juvenile." N.C. Gen. Stat. § 7A-560 (1995).

It is in this context that section 7A-574(b) must be read. This section provides that "**[w]hen a request is made for secure custody**, the judge may order secure custody only where he finds there is a reasonable factual basis to believe **that the juvenile actually committed the offense as alleged in the petition**, and" that one of eight enumerated conditions is met. N.C. Gen. Stat. § 7A-574(b) (emphasis added). By its own terms, section 7A-574(b) applies only to cases in which the district court judge is asked to commit a juvenile to secure custody, based on a petition alleging that the juvenile has committed an offense. This is not such a case.

In this case, a complaint was filed against Ebony Robinson alleging that Ebony had refused to submit to the supervision and control of her mother. The complaint did *not* request that Ebony be committed to secure custody; rather, in accordance with G.S. 110-44.4, the complaint prayed the district court judge to issue an order directing Ebony to reside with plaintiff and to submit to plaintiff's parental control and supervision. It was only later, three weeks after the district court judge issued the order requested, that the case was reviewed and Ebony was found to be in willful violation of the order. For her failure to comply with the decree, she was held in contempt and ordered imprisoned as section 110-44.4 expressly permits. Simply put, section 7A-574(b) does not apply to this case.

The majority holds that the district court judge had no authority to punish Ebony Robinson for criminal contempt by ordering her confinement with DYS. This holding is based on a single provision of the Juvenile Code: "The [district] court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent." N.C. Gen. Stat. § 7A-523(a) (Cum. Supp. 1997). From this provision—which unquestionably vests the district court with exclusive jurisdiction over the juvenile cases listed—the majority concludes that "the Juvenile Code is the exclusive provision governing the commitment of allegedly undisciplined minors under the age of sixteen." Slip op. at 7. The conclusion does not follow from the premise.

It is one thing to say that the district court, and no other tribunal, is to have exclusive jurisdiction over cases involving juveniles who are alleged to be undisciplined or delinquent: section 7A-523(a) so provides. It is quite another to say that the Juvenile Code provides the exclusive source of statutory authority for adjudicating claims against juveniles who refuse to submit to parental control. There is no statute that so provides.

Despite claims to the contrary, the majority effectively holds that when the Revised Juvenile Code was enacted in 1979, it repealed the Parental Control Act to the extent it applies to children age fifteen and under. The majority so holds despite the fact the Parental Control Act was not expressly repealed when the Revised Juvenile Code was passed, and despite the fact that G.S. 110-44.1 continues to read, "Notwithstanding any other provision of law, *any child under 18 years of age* . . . shall be subject to the supervision and control of [her] parents" (emphasis added).

It has been the law in North Carolina since at least 1849 that the repeal of statutes by implication is disfavored. *See, e.g., State v. Woodside*, 31 N.C. 496, 500 (1849); *Winslow v. Morton*, 118 N.C. 486, 493, 24 S.E. 417, 418-19 (1896); *Person v. Garrett*, 280 N.C. 163, 165-66, 184 S.E.2d 873, 874 (1971); *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 593, 447 S.E.2d 768, 782 (1994). " '[T]here is a presumption against inconsistency, and when there are two or more statutes on the same subject, in the absence of an express repealing clause, they are to be harmonized and every part allowed significance, if it can be done by fair and reasonable interpretation.' " *Empire Power*, 337 N.C. at 593, 447 S.E.2d at 782 (quoting *In re Miller*, 243 N.C. 509, 514, 91 S.E.2d 241, 245 (1956)). I find nothing in the Juvenile Code that necessitates a finding that the Parental Control Act has been implicitly repealed to the extent it applies to children under the age of sixteen.

This case does not, moreover, provide the occasion to apply the rule of construction favoring a specific statute over a general statute. The rule set forth by our Supreme Court is that, where two statutes are *necessarily* repugnant to one another in some respect, the specific statute prevails over the general. *Krauss*, 347 N.C. at 378, 493 S.E.2d at 433. We do not in this case confront two statutes, one specific and one general, in necessary conflict with each other. Instead, we have before us two sets of statutes, the Juvenile Code and the Parental Control Act, which specifically address different proceedings and different remedies sought, neither of which inherently conflicts with the other. The majority perceives a clash between the Code and the Act, but I see none.

I believe it was fully within the power of the district court to punish Ebony Robinson for contempt of court by ordering her commitment with DYS. I respectfully dissent.

STATE OF NORTH CAROLINA v. SAMMIE LEE LOVE

No. COA 97-862

(Filed 17 November 1998)

1. **Constitutional Law— pro se appearance—advised of risks—no error**

The trial court did not err in a prosecution for trafficking in cocaine by possession, conspiracy to traffic in cocaine, possession of drug paraphernalia, and employing a minor to traffic in cocaine by allowing defendant to appear pro se. Defendant was properly advised and repeatedly warned by the court of the risks he took in declining the assistance of assigned counsel and there is nothing in the record to indicate that he had any reservations prior to his conviction.

2. **Criminal Law— joinder of offenses—no abuse of discretion—harmless error**

The trial court did not abuse its discretion in a cocaine prosecution by allowing the State's motion for joinder of a possession count from 22 November with four others committed on 21 July. Moreover, any error would have been harmless because the later offense was dismissed early in the proceedings and never submitted to the jury.

3. **Criminal Law— pretrial suppression motion—timing of ruling—within court's discretion**

There was no abuse of discretion in a cocaine prosecution in the court's failure to rule on a motion to suppress evidence before trial where the charge to which the motion applied was dropped early in the proceedings. The decision as to when to rule on a pretrial suppression motion is in the court's discretion. N.C.G.S. § 15A-976(c).

4. **Evidence— other offenses—employing minor to distribute cocaine—no plain error**

There was no plain error in a prosecution for various cocaine charges which included employing a minor to traffic in cocaine where the trial court allowed the State to introduce without objection testimony from a minor that he had previously sold cocaine for defendant. The testimony was properly admitted to show intent to plan and commit a conspiracy and was not unduly

prejudicial, and, in light of other testimony, the jury probably would not have reached a different verdict even excluding this testimony.

5. Evidence— redirect examination—new evidence—court's discretion

There was no abuse of discretion in a cocaine prosecution where a bag from which defendant's employee, Lowry, sold cocaine was marked for identification during the testimony of a detective and later introduced and Lowry identified it as "an individual bag dope was in" over defendant's objection on redirect. Redirect cannot be used to repeat direct testimony or to introduce an entirely new matter, but the trial judge has the discretion to permit counsel to introduce relevant evidence which could have been but was not brought out on direct.

6. Appeal and Error— offer of proof—required

There was no abuse of discretion in a cocaine prosecution where defendant cited numerous instances of the court sustaining objections by the State or the court itself but the record does not indicate what the witness's testimony would have been. Moreover, there was no plain error because there was no indication that the jury would have reached a different result without this evidence.

7. Witnesses— subpoena of witnesses—denied—pro se defendant—no abuse of discretion

There was no abuse of discretion in a cocaine prosecution in which the defendant represented himself where defendant contended on appeal that the trial court denied his request to have certain individuals subpoenaed but there was no evidence that defendant was denied access to subpoena forms; defendant was unable to provide any information to the court as to the anticipated testimony of the individuals on his witness list, which included a district attorney, a judge, two lawyers, and various law enforcement officers; when the issue next arose, during defendant's presentation of evidence, defendant provided the substance of the anticipated testimony and acknowledged that he knew how to subpoena witnesses but apparently chose not to do so; and the court found that the testimony of the proposed witnesses would not be probative.

8. Criminal Law— prosecutor's closing argument—misery in cocaine—no plain error

There was no plain error in a cocaine trial where the State in its closing argument asked the jury about the misery contained in a bag of cocaine.

9. Sentencing— noncapital—consecutive terms—not cruel and unusual

There was no abuse of discretion or cruel and unusual punishment in consecutive sentences on cocaine convictions.

Judge HORTON dissenting.

Appeal by defendant from judgments and commitments entered 24 October 1996 by Judge Wiley F. Bowen in Robeson County Superior Court. Heard in the Court of Appeals 1 April 1998.

Attorney General Michael F. Easley, by Associate Attorney General Julie A. Risher, for the State.

Bowen & Berry, PLLC, by Sue A. Berry, for defendant-appellant.

LEWIS, Judge.

Defendant was convicted in Robeson County Superior Court of trafficking in cocaine by possession, conspiracy to traffic in cocaine, possession of drug paraphernalia, and employing a minor to traffic in cocaine. Defendant appeals.

[1] In his first assignment of error, defendant contends that the trial court erred in allowing him to appear *pro se* at trial without first determining that he had knowingly, voluntarily, and in writing waived his right to the assistance of counsel.

The record reflects that defendant requested, and was assigned, counsel on 22 November 1995. Defendant pled not guilty to all charges at his arraignment on 11 September 1996. That same day, defendant executed a "Waiver of Counsel" in which he was permitted to waive either his right to assigned counsel or his right to "all assistance of counsel which includes [his] right to assigned counsel and [his] right to the assistance of counsel," but not both. Defendant elected to waive his right to assigned counsel instead of waiving his right to the assistance of counsel. The Waiver of Counsel form included a Certificate of Judge, signed by Judge Thomas W. Seay, Jr., on 11 September 1996, which read:

> I certify that the above named person has been fully informed in open court of the charges against him, the nature of and the statutory punishment for each charge, and the nature of the proceeding against him and his right to have counsel assigned by the court *and his right to have the assistance of counsel to represent him in this action*; that he comprehends the nature of the charges and proceedings and the range of punishments; that he understands and appreciates the consequences of his decision and that he has voluntarily, knowingly and intelligently elected in open court to be tried in this action . . . without the assignment of counsel.

(emphasis added). The court entered an order on 11 September 1996 which stated in part:

> Defendant, in open Court, stated that *he desired to waive counsel and to represent himself or to obtain privately retained counsel* and . . . this statement was made repeatedly by the Defendant, even though the Court repeatedly advised the Defendant that he was entitled to appointed counsel and that the Defendant was making a serious mistake by this election to represent himself.

(emphasis added).

Defendant's trial began on 23 October 1996. There is no indication in the record that any further inquiry was conducted into defendant's choice to represent himself or to obtain private counsel. It appears, however, that defendant was fully satisfied with his decision to represent himself. Defendant made a motion to dismiss, made a motion that amounted to a motion to suppress evidence, and asked the Court for assistance in issuing subpoenas. Also during pretrial motions, defendant stated that he "want[ed] to go forward with a jury." Furthermore, in defendant's opening statement to the jury, he explained, "I am representing myself. Why am I representing myself? Because I am not guilty of anything." Despite his apparent desire to represent himself at trial, defendant now contends the trial court's failure to determine whether his waiver of the assistance of counsel was knowing and voluntary requires that he be granted a new trial. We disagree.

It is well established that the Sixth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment, provides a criminal defendant with the right to the assistance of counsel. *State v. Michael*, 74 N.C. App. 118, 119, 327

S.E.2d 263, 264 (1985). "Implicit in defendant's constitutional right to counsel is the right to refuse the assistance of counsel and conduct his own defense." *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981). "[T]he waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will." *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980).

Consistent with constitutional requirements, our General Statutes provide:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (1997). "The wording of the statute and the decisions of our appellate courts clearly demonstrate that the provisions of the statute are mandatory in every case where an accused requests to proceed *pro se*." *Michael*, 74 N.C. App. at 119, 327 S.E.2d at 265 (1985).

In this case, defendant completed an Affidavit of Indigency indicating that his total monthly income consisted of disability payments in the amount of $250. Based on this fact, the court found that defendant "is not financially able to provide the necessary expenses of legal representation" and "that the applicant is an indigent and is entitled to the services of counsel as contemplated by law," and it ordered "that he shall be represented by . . . the public defender in this judicial district." Nevertheless, defendant declined to accept the assigned counsel to which he was entitled and proceeded *pro se* at trial.

The Waiver of Counsel form executed by defendant and certified by the trial court follows N.C. Gen. Stat. § 15A-1242 and its counter-

part for indigents, section 7A-457 (1995). This Court has previously stated that "[w]hen a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). This language, while originally used in a case in which a defendant had waived his right to assigned counsel, speaks to the complete waiver of counsel. The court in *Warren* did not distinguish the waiver of assignment of counsel and assistance of counsel, but the defendant in the case before us now wishes to do so. Such a distinction seems to invite error by the trial court.

There are only two choices available on the Waiver of Counsel form, and only one of these may be selected by a defendant wishing to waive his rights. It could be argued that an indigent defendant who has waived his right to the assignment of counsel has realistically waived his right to the assistance of counsel, since he cannot be expected to retain counsel himself. In any case, the trial court's order of 11 September 1996 granting defendant's wish to waive assigned counsel established that defendant "desired to waive counsel and to represent himself or to obtain privately retained counsel." With nothing in the record to indicate otherwise, *Warren* requires us to presume that defendant knowingly, intelligently, and voluntarily elected to proceed *pro se*. The decision not to seek further assistance of counsel was his alone to make.

Defendant was properly advised and repeatedly warned by the trial court of the risks he took in declining the assistance of his assigned counsel. He cannot now claim after defending himself for the entire course of the trial without asking for assistance that even more should have been done for him. As this Court noted in an earlier case in which an indigent defendant executed a written, certified waiver of counsel, "The burden of showing the change in the desire of the defendant for counsel rests upon the defendant." *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41 (1974), *cert. denied*, 285 N.C. 595, 206 S.E.2d 866 (1974). Finding nothing in the record to indicate that this defendant had any reservations in his decision prior to his conviction, we can find no error in the trial court's decision to allow defendant to proceed *pro se*.

[2] Defendant next asserts that the trial court erred in allowing the State's motion for joinder of offenses. Specifically, defendant argues that 95 CRS 22923, possession of cocaine, should not have been

joined with the four other counts on which the State proceeded because this offense occurred on 22 November 1995, well after the others were committed on 21 July 1995.

Offenses which are "based on . . . a series of acts or transactions connected together or constituting parts of a single scheme or plan" may be joined for trial against the same defendant. N.C. Gen. Stat. § 15A-926(a) (1997). The trial court in this case, noting the difference in the dates of commission, nevertheless joined all five drug-related offenses for trial. The decision to join offenses is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985). Defendant has failed to demonstrate any abuse of discretion by the trial court, and in light of the fact that the later offense was dismissed early in the proceedings and never submitted to the jury, any error would be harmless.

[3] In his third assignment of error, defendant argues that the trial court erred in failing to consider before the trial his motion to suppress evidence surrounding the subsequently dropped November charge. The trial court ruled in defendant's favor regarding this evidence at a later stage in the proceedings. The decision as to when to rule on a pretrial suppression motion is made in the trial court's discretion, N.C. Gen. Stat. § 15A-976(c) and Official Commentary (1997), and defendant has failed to produce evidence of any abuse of this discretion by the trial court. In fact, had the trial court elected to rule on defendant's motion before the trial, it could have summarily dismissed it for defendant's failure to file an affidavit or written motion. *See State v. Harris*, 71 N.C. App. 141, 143, 321 S.E.2d 480, 482 (1984). Defendant's argument on appeal that the trial court erred by not ruling on this motion when it was first made is without merit.

[4] Next, defendant claims that the State improperly introduced evidence of his other crimes, wrongs, or acts, and that the trial court erred by allowing this evidence to be admitted. The evidence at issue concerns the testimony of Shane Lendwright "Rock" Lowery, a minor at the time in question, who testified without objection by defendant that he had previously sold cocaine for defendant and been paid by defendant in drugs and currency.

We agree with the State that this testimony was not unduly prejudicial, Rule of Evidence 403 (1992), and that it was properly admitted under Rule 404(b) to show defendant's intent to plan and commit a conspiracy. *See State v. Rosario*, 93 N.C. App. 627, 638-39, 379 S.E.2d

434, 441, *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989). We further agree with the State that this did not constitute error by the trial court, and it certainly did not rise to the level of plain error. *See* N.C.R. App. P. 10(b)(1); *State v. Walker*, 316 N.C. 33, 38-39, 340 S.E.2d 80, 83-84 (1986). We are not "convinced that absent the error the jury probably would have reached a different verdict." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. However, even excluding Lowery's statements regarding his previous drug-related work for defendant, in light of other testimony about the sale on 21 July 1995 defendant cannot meet this burden.

[5] In his fifth argument, defendant claims that two exhibits, numbers 7 and 10, were improperly introduced into evidence at trial. The defendant did not object at trial to the introduction of Exhibit 10, so this objection is waived absent a showing of plain error. *See* Rule 10(b)(1) and *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. There was no plain error here.

Exhibit 7, the plastic bag from which defendant's employee Lowery sold cocaine to the informant, was marked for identification purposes during the testimony of Narcotics Detective James Campbell and later introduced into evidence. Later still, it was identified by Lowery as "an individual bag that the dope was in" over defendant's objection during redirect examination. Defendant notes correctly the general rule that redirect examination cannot be used to repeat direct testimony or to introduce an entirely new matter. However, "the trial judge has discretion to permit counsel to introduce relevant evidence which could have been, but was not brought out on direct." *State v. Locklear*, 60 N.C. App. 428, 430, 298 S.E.2d 766, 767 (1983). There was no abuse of discretion in this instance, as the evidence was relevant and the State properly laid the foundation for its introduction.

[6] Defendant argues in his sixth assignment of error that the trial court abused its discretion in sustaining numerous objections by the State and the court itself. However, in none of the many instances cited by defendant does the record indicate what the witnesses' testimony would have been had they been permitted to testify, as required by our case law. "[F]or a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985).

Defendant's failure to demonstrate in the record that he complied with *Simpson* precludes reversal on this ground. There was no plain error, either, because there is no indication that without this evidence the jury would have reached a different result. *See Walker*, 316 N.C. at 39, 340 S.E.2d at 83.

[7] Next, defendant asserts that the trial court abused its discretion and violated his state and federal constitutional rights by denying his request to have certain individuals subpoenaed as defense witnesses. While our statutes provide that "[a] material witness order may be obtained upon motion supported by affidavit showing cause for its issuance," N.C. Gen. Stat. § 15A-803(d) (1997), " '[t]he right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests.' " *State v. House*, 295 N.C. 189, 206, 244 S.E.2d 654, 663 (1978) (quoting *Hoskins v. Wainwright*, 440 F.2d 69, 71 (5th Cir. 1971)). " '[An accused] 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)).

There is no evidence in the record that defendant was denied access to subpoena forms, and the State had no burden to see to it that he procured the attendance of the witnesses he desired to have present. *See Tindall, supra.* Defendant was unable to provide any information to the court as to the anticipated testimony of the eleven individuals on his witness list, which included a district attorney, a judge, two other lawyers, and various law enforcement officers. Without defendant's demonstration of a colorable need under *House, supra*, the court did not err in declining at that time to subpoena these witnesses. When the issue next arose, during the defendant's presentation of evidence, he did provide the court with the substance of the witnesses' anticipated testimony and acknowledged that he knew how to subpoena witnesses but apparently chose not to do so. The court found that the testimony of defendant's proposed witnesses would not be probative and declined to issue the subpoenas. This did not constitute an abuse of discretion, and we find no error.

[8] Defendant's eighth argument is that the State engaged in prosecutorial misconduct during its closing argument, and that the trial

court erred in allowing the State to make its argument as it did. Specifically at issue are the prosecutor's questions to the jury,

> How much misery is contained in this bag? How many families would do without for what is contained in this bag? How many children will be abused or go without or neglected [sic] because of what is in this bag, and how does it get to people to be used?

Defendant claims that such comments were highly inflammatory, prejudicial, and not supported by the evidence. Because defendant did not object at trial, "our review on appeal is limited to the question of whether the arguments of the prosecutor were so grossly improper as to require the trial court to intervene *ex mero motu*." *State v. Garner*, 340 N.C. 573, 597, 459 S.E.2d 718, 731 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). "On appeal, particular prosecutorial arguments are not viewed in an isolated vacuum," but are considered in context based upon the underlying facts and circumstances. *State v. Mosley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). In light of this standard and the failure of the prosecutor's arguments to "stray so far from the bounds of propriety as to impede the defendant's right to a fair trial," *State v. Davis*, 305 N.C. 400, 422, 290 S.E.2d 574, 587 (1982), defendant's argument is without merit.

[9] Finally, defendant asserts that the trial court abused its discretion in sentencing him to consecutive terms of imprisonment, thereby imposing cruel and unusual punishment upon him. The trial court has the authority to impose a sentence consecutive to any other sentence imposed at the same time, N.C. Gen. Stat. § 15A-1354(a) (1997), and "[t]he imposition of consecutive . . . sentences, standing alone, does not constitute cruel or unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). Defendant nevertheless argues that "unguided discretion leads to abuse of discretion," and states that "there must be some mechanism or rationale to determine whether concurrent or consecutive sentences are most appropriate as to any offender and his or her offenses." This is, at best, a question for the legislature to resolve, but for our purposes it is an argument without merit on appeal.

No error.

Judge GREENE concurs.

Judge HORTON dissents.

Judge HORTON dissenting.

I respectfully dissent from the holding of the majority that this indigent and incarcerated defendant knowingly, intelligently, and voluntarily chose to represent himself in the defense of four serious charges which resulted in his imprisonment for a minimum term in excess of 13 years.

The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. This right to the assistance of counsel is made applicable to the states by the Fourteenth Amendment to the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963). Our North Carolina Constitution also provides that "[i]n all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense . . . ." N.C. Const. art. I, § 23.

Although a defendant may waive his right to counsel and represent himself, that waiver "must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will." *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980).

The crucial issue in this case is whether this defendant understandingly and voluntarily waived his right to the assistance of counsel at trial based on a waiver of his right to the assistance of court-appointed counsel at his arraignment six weeks prior to his trial. I do not believe the record demonstrates a constitutionally valid waiver by defendant. I therefore believe that he is entitled to a new trial.

The public defender was appointed counsel for defendant on 22 November 1995 based on an affidavit of indigency. The affidavit showed that defendant's monthly income was a $250 disability payment. At defendant's arraignment on 11 September 1996, however, defendant moved that his court-appointed counsel be relieved of further duties. The trial court entered an order on 11 September 1996 reciting that defendant wished to represent himself or obtain privately retained counsel. The trial court advised defendant that he was making a "serious mistake" but found as a fact that "the Defendant understands the nature of his cases, that his motion is well taken and the Court concludes as a matter of law that the relief sought by the Defendant ought to be allowed." The transcript of the arraignment and motions hearing is not before us; therefore, we are not advised of

statements made by defendant which provided a basis for the trial court's conclusions concerning the informed nature of defendant's decision.

On that same date, defendant signed a form entitled "Waiver of Counsel." This form gave defendant a choice of two alternative waivers, and reads in part:

> I freely, voluntarily and knowingly declare that:
>
> (check only one)
>
> 1. [X] I waive my right to assigned counsel and that I, hereby, expressly waive that right.
> 2. [ ] I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

The trial court then signed the following "Certificate of Judge" which appeared on the same "Waiver of Counsel" form:

> I certify that the above named person has been fully informed in open court of the charges against him, the nature of and the statutory punishment for each charge, and the nature of the proceeding against him and his right to have counsel assigned by the court and his right to have the assistance of counsel to represent him in this action; that he comprehends the nature of the charges and proceedings and the range of punishments; that he understands and appreciates the consequences of his decision and that he has voluntarily, knowingly and intelligently elected in open court to be tried in this action:
>
> (check only one)
>
> 1. [X] without the assignment of counsel.
> 2. [ ] without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

It is also significant that the "Waiver of Counsel" form includes the following note in bold type at the bottom:

> **Note: For a waiver of assigned counsel only, both blocks numbered "1" must be checked. For a waiver of all assistance of counsel, both blocks numbered "2" must be checked.**

It is clear from the "Waiver of Counsel" form that defendant did not waive his right to be represented by counsel, but only waived the right to court-appointed counsel.

After his arraignment, defendant remained continuously in custody until 23 October 1996, when he was brought to the courtroom and advised that his trial was about to begin. The following colloquy then occurred between defendant, the trial court and the district attorney:

> THE COURT: Are you ready to proceed?
>
> DEFENDANT LOVE: No, sir, I am not.
>
> * * * *
>
> DEFENDANT LOVE: I have some witnesses I have to subpoena for this case. I have never been charged with drugs in my life whatsoever, never been convicted of any felony whatsoever in my life. All of this stuff here is just a bunch of lies. So I want to go forward with a jury. I want to subpoena witnesses. I have not been notified that this was going to be a trial date. My trial date was set for the 23rd of last month, and the District Attorney's office—*I do not have a lawyer to represent me.* Also Judge, I would like to—
>
> THE COURT: Wait a minute. Let's address one thing at a time. Is it on the calendar this week?
>
> MR. TODD: It is, Your Honor.
>
> THE COURT: Was he notified it was on the calendar this week?
>
> DEFENDANT LOVE: No, sir.
>
> [There was no contrary answer from the district attorney or clerk.]
>
> * * * *
>
> THE COURT: You tell me who you want to subpoena and we will see what we can do about it.
>
> DEFENDANT LOVE: Yes I do, Your Honor.
>
> * * * *
>
> THE COURT: Mr. Love, we are going to try your cases, and the motion to consolidate for joinder of the cases is allowed. We are

going to start the jury selection in a few minutes. And we will just proceed accordingly. (Emphasis added).

There was no inquiry made by the trial court regarding defendant's right to be represented by counsel, nor did the trial court exercise its discretion to appoint standby counsel for defendant. The State contends that defendant "clearly" wanted to represent himself as shown by his statement to the jurors "[s]o with me, yeah, I am representing myself. Why am I representing myself? Because I am not guilty of anything." That statement was made, however, in the context of the trial court having denied what amounted to a motion to continue the case even though defendant had asked to subpoena witnesses he thought important to his defense. Defendant also advised the trial court that he was not represented by counsel at the same time that he stated that he was not ready to proceed. Whether defendant intended to revoke his waiver of appointed counsel cannot be determined from the record, because the trial court interrupted defendant's statement and did not subsequently make any inquiry into whether defendant had decided to represent himself.

N.C. Gen. Stat. § 15A-1242 provides that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel *only after the trial court makes thorough inquiry* and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (1997) (emphasis added).

In this case defendant's earlier waiver of assigned counsel does not amount to a waiver by defendant to appear without the assistance of *any* counsel. "Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). Consequently, the trial court was required to make

some inquiry into defendant's intention with regards to having counsel at his trial. That is particularly true because defendant told the trial court that he did not have a lawyer to represent him; he had not had the opportunity to subpoena witnesses; he was not advised of the date of his trial; the trial court did not even consider appointing standby counsel for defendant pursuant to N.C. Gen. Stat. § 15A-1243 (1997); and defendant continued to maintain his innocence.

In *State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (1983), this Court held that a purported waiver of court-appointed counsel by defendant Williams was not constitutionally valid. When Williams was tried, no inquiry was made as to his *pro se* appearance because he had initially informed the trial court that he wanted to hire his own lawyer. In granting him a new trial, this Court held the following:

> The waiver in the present case is deficient in several respects. First, no determination was made as to whether defendant was represented by counsel. Second, even though defendant clearly was not represented, he was not informed of his right to counsel. Third, defendant was never asked and the court never determined whether he was able to afford the private counsel that he indicated that he "would like to hire." Lacking in these particulars and in light of defendant's answers to Judge Morgan that he wanted a lawyer and did not wish to waive the right, defendant's waiver is not constitutionally valid.

Id. at 505, 309 S.E.2d at 725.

A waiver of such a hallowed fundamental constitutional right should not be lightly inferred from fragments of a long and sometimes ambiguous record. As Justice Sutherland eloquently observed in *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [*sic*] a perfect one. He requires the guiding hand of counsel

at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68-69, 77 L. Ed. at 170 (1932).

Here, an incarcerated lay defendant was required to proceed to trial without any meaningful notice, without counsel and without witnesses. This record does not reveal a constitutionally valid waiver of counsel, and defendant is entitled to a new trial. Furthermore, even if such a valid waiver could be found from this record, I believe there was also plain error in requiring defendant to proceed to trial without notice and an opportunity to prepare his cases, and therefore he is also entitled to a new trial on that alternate basis.

LORA WILLIAMSON, PLAINTIFF v. FOOD LION, INC., DEFENDANT

No. COA97-1589

(Filed 17 November 1998)

Negligence— slip and fall—grape on grocery aisle—knowledge of store—speculation or conjecture

The trial court properly granted summary judgment for defendant-grocery store in a slip and fall negligence action where plaintiff slipped on a grape in a store aisle but was unable to establish that defendant knew or should have known of the grape. Negligence is not presumed from the mere fact of injury; plaintiff is required to offer legal evidence tending to establish essential elements beyond mere speculation or conjecture.

Judge WALKER dissenting.

Appeal by plaintiff from orders entered 8 October 1997 by Judge H.W. Zimmerman, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 15 September 1998.

Michael R. Nash for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Douglas M. Martin and S. Mujeeb Shah-Khan, for defendant-appellee.

LEWIS, Judge.

On 7 November 1996, plaintiff allegedly slipped on a grape and fell while on the premises of Food Lion grocery store number 187 in Winston-Salem ("defendant's store"). She instituted this action on 18 November 1996, alleging that defendant Food Lion, Inc. was negligent in the maintenance of its premises. Both parties moved for summary judgment, and Judge Zimmerman granted defendant's motion but denied plaintiff's. From this decision, plaintiff appeals.

Plaintiff's evidence tended to show that she entered defendant's store at approximately 8:30 a.m. on the morning of 7 November. While walking down aisle twelve, the dairy/bread aisle, plaintiff slipped on a grape and fell at approximately 8:42 a.m. Plaintiff did not see the grape prior to this fall but testified that she saw black juice smeared on the floor afterwards, indicating to her that the floor must have been dirty.

Plaintiff's evidence further tended to show that a Food Lion employee had walked down aisle twelve at 7:34 that morning but, in violation of store policy, failed to pick up a loaf of bread that was on the floor. However, this loaf of bread was picked up at 7:59 a.m.

With these facts in mind, plaintiff first argues that the trial court erred in granting defendant's motion for summary judgment, asserting that there were genuine issues of material fact that should have been tried by the jury. We disagree.

Summary judgment is appropriate when the moving party meets its burden of "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 would bar the claim." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). "Once a moving party meets its burden, then the nonmovant must 'produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.' " *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (quoting *Collingwood, supra*, at 66, 376 S.E.2d at 427). However, "[n]egligence is not presumed from the mere fact of injury. Plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, nonsuit is proper." *Id.* at 68, 414 S.E.2d at 345 (citing *Heuay v. Halifax Constr. Co.*, 254 N.C. 252, 118 S.E.2d 615 (1961)).

As a customer entering defendant's store during business hours to purchase goods, plaintiff was an invitee. *Morgan v. Great Atlantic & Pac. Tea Co.*, 266 N.C. 221, 226, 145 S.E.2d 877, 881 (1966). Defendant was therefore under a duty to "use ordinary care to keep in a reasonably safe condition those portions of its premises which it [might] expect [would] be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they [could] be ascertained by reasonable inspection and supervision," *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963), but as a proprietor defendant was not the insurer of its invitees' safety. *Wrenn v. Hillcrest Convalescent Home, Inc.*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967). In light of the relationship between these parties, plaintiff could demonstrate that defendant was negligent by proving that "defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat, supra*, at 64, 414 S.E.2d at 342-43.

In this case, plaintiff's answers to defendant's questions in a deposition indicated that while her complaint may have stated a claim for negligence, the actual evidence she offered could not. In a deposition taken 14 May 1997, plaintiff stated that she had "no idea" whether any Food Lion employees knew that the grape was on the floor prior to her accident. When asked how she believed the grape got on the floor, plaintiff similarly stated that she had "no idea." She went on to say, "It's not my belief [a Food Lion employee] dropped it on the floor," but that she thought it "possible" that the grape had gotten there in that manner. Plaintiff did not know when the floors were last inspected before her accident, but estimated solely from her own work in an Arby's restaurant that the grape had been on the floor at least 45 minutes. This evidence fails to meet *Roumillat*'s requirements for something greater than "mere speculation or conjecture," and allowing this plaintiff to have such a claim heard before a jury would place an unreasonable burden on store owners to customers.

Plaintiff cannot demonstrate that defendant negligently created the condition or that it failed to correct the condition after having actual notice of its existence, but attempts to demonstrate that defendant failed to act after receiving constructive notice. Plaintiff implies in her arguments that defendant had constructive notice of the grape's presence in that an employee who would walk past a loaf of bread on the floor would surely walk past a grape on that same aisle. This inference is without merit, as the bread which was over-

looked earlier had been picked up approximately 43 minutes before plaintiff slipped and had no bearing on the grape-related accident in question. Furthermore, there is no evidence that the surveillance cameras captured an image of the grape or that any person ever saw the grape there for any period of time before the fall.

Another attempt to establish constructive notice is found in plaintiff's reliance on *Long v. National Food Stores, Inc.*, 262 N.C. 57, 136 S.E.2d 275 (1964), but the facts of that case can be distinguished from those currently before us. In *Long*, which involved a customer who had slipped and fallen on a number of grapes, the Supreme Court stated that summary judgment in favor of the defendant was inappropriate because a jury could find that "by reason of the grapes being 'full of lint and dirt,' [a] dangerous and unsafe condition was created by an employee of defendant who in the scope of his employment had swept the grapes and lint and dirt there." *Id.* at 61, 136 S.E.2d at 278-79. This case can be distinguished for a number of reasons. In *Long*, the evidence involving lint and dirt dealt with the grapes on the floor that had *not* been mashed, *id.* at 59, 136 S.E.2d at 277 (emphasis added), but under our facts there is but one grape in question. Any presence of lint or dirt on it could have come from plaintiff's shoe, and as noted above plaintiff was unable to demonstrate that one of defendant's employees had swept or otherwise placed the grape there. Of course, we need not even address that point until we know in fact that there was lint and dirt on the floor, and there is no credible evidence that this was the case. Plaintiff claims that the color of the juice emitted by the grape indicated to her that the floor was dirty, but there is nothing in the evidence beyond this speculation to indicate the original color of the grape, the presence of dirt on the floor prior to the fall, or the presence of any lint or additional debris before the accident. We cannot imply any constructive notice to defendant from plaintiff's evidence.

Carter v. Food Lion, Inc., 127 N.C. App. 271, 488 S.E.2d 617 (1997), *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997), on which plaintiff also relies, can be distinguished from the present action as well. In that case, a customer slipped shortly after 7:00 p.m. on "vegetable material" in a noticeably dirty area near the exit to the store, with "visible 'buggy tracks' " present and receipts and coupons littered about the floor. *Id.* at 272, 275, 488 S.E.2d at 618, 620. This Court concluded that

> a reasonable trier of fact could conclude that defendant knew or should have known of the presence of the vegetable material *due*

> *to the presence of paper and the dirty condition of the floor*, that defendant failed to warn of its presence, and that as a result of the fall, plaintiff suffered injuries.

Id. at 275-76, 488 S.E.2d at 620 (emphasis added). In the present action, plaintiff's slip and fall occurred early in the morning on one grape on the dairy/bread aisle, far from where grapes would ordinarily be found. It goes without saying that this part of the store had not had as much traffic before 8:45 in the morning as a store exit has by 7:00 in the evening, and this lack of traffic decreases the likelihood that it was as dirty as the relevant portion of the floor in *Carter*. The failure of plaintiff to establish the presence of any dirt, other than through her own hypothesis, further demonstrates this point. The presence of other litter or debris on the floor, a crucial element in *Carter*, was not offered as proof in this action and serves to indicate plaintiff's misreliance on that case.

While the doctrine of res ipsa loquitur does not apply to slip and fall cases, *Skipper v. Cheatham*, 249 N.C. 706, 709, 107 S.E.2d 625, 628 (1959), even if it did this accident would not speak for itself. The grape may have been on aisle twelve because one of defendant's employees threw it there from its proper location, or because it fell from another customer's shopping cart, or because it was already stuck to the bottom of plaintiff's shoe; the possibilities are seemingly endless. In any case, plaintiff is unable to establish through anything more than "mere speculation or conjecture" that defendant knew or should have known of the grape, and as such her case cannot withstand defendant's motion for summary judgment. *Roumillat, supra.*

Because we hold that summary judgment in favor of defendant was properly granted, we need not address plaintiff's second argument, that summary judgment should have been granted in her favor. That argument is without merit.

No error.

Judge MARTIN, John C., concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from the majority's conclusion that summary judgment in favor of defendant was properly granted.

Plaintiff's evidence tended to show that employees of Food Lion began arriving to work at approximately 6:00 a.m. Plaintiff arrived at Food Lion a short time before her fall in aisle 12 at 8:45 a.m. In answer to interrogatories, defendant stated that Customer Service Manager Cathy Myers inspected aisle 12 at approximately 7:34 a.m. However, according to plaintiff, a surveillance videotape shows Myers walking along aisle 12 on two occasions at approximately 7:30 a.m. and 7:34 a.m. She does not appear to be looking at the floor where there is a loaf of bread, but instead she passes by twice without picking it up. This was an admitted violation of store policy. Plaintiff further asserts the videotape also shows that at 8:16 a.m., another employee, Kelly Chatman, was in aisle 12; however, she detours to her left to avoid the bread man and does not appear to inspect the aisle at the point where the fall occurred. Further, there is no evidence that Food Lion had an aisle inspection policy in place at that time. Plaintiff testified that she saw the grape after her fall and that there was "black juice" smeared on the floor which indicated to her that the floor was dirty.

This evidence, coupled with evidence of the lack of a reasonable aisle inspection that morning, leads to the permissible inference that the smashed grape in aisle 12 was a dangerous condition which had existed for such a length of time that the "defendant knew or by the exercise of reasonable care should have known of its existence and given warning." *Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 274, 488 S.E.2d 617, 619, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997).

Therefore, I conclude that there is a genuine issue of material fact concerning the negligence of defendant.

STATE OF NORTH CAROLINA v. RICKY DEAN ANDREWS

No. COA98-107

(Filed 17 November 1998)

1. Witnesses— child—witness to her mother's murder—competent to testify

The trial court did not abuse its discretion in a non-capital first-degree murder prosecution by allowing the daughter of the victim to testify where the child was four at the time of the inci-

dent and five at the time of trial; she stated during voir dire that she would tell the truth, then seemed confused and said it was not good to tell the truth; the prosecutor asked additional questions to determine whether she knew what it meant to tell the truth; she replied that it was not the truth to say her blue dress was red, that she knew she would get a spanking if she did something wrong, and that it was wrong to tell a lie; and she told the prosecutor that she knew she was in court to talk about defendant shooting her mother and that she wanted to tell the truth about the incident.

2. Evidence— clergy privilege—waiver

There was no plain error in a non-capital first-degree murder prosecution in allowing the testimony of a minister who served as chaplain for the sheriff's office to testify where the minister was called to the sheriff's office to talk to defendant because of the possibility of defendant being suicidal; the minister was aware of defendant's privilege and asked whether he could divulge information to officers; defendant agreed; defense counsel withdrew his objection at trial after defendant stated that he waived the privilege; the court questioned defendant to make sure that he understood that he possibly had a privilege; and defendant said that he understood and still wanted to waive the privilege. N.C.G.S. § 8-53.2

3. Homicide— instructions—premeditation and deliberation—examples of circumstances supporting inference

There was no plain error in a prosecution for non-capital first-degree murder in the trial court's examples in its instructions of circumstances from which premeditation and deliberation may be inferred.

4. Criminal Law— instructions—lapsus linguae

The trial court's use of "lack of provocation by the defendant" rather than "lack of provocation by the victim" in its instructions in a prosecution for non-capital first-degree murder was a mere lapsus linguae and the jury was not misled.

5. Criminal Law— instructions—false, contradictory, and conflicting statements

There was no plain error in a non-capital first-degree murder prosecution in the trial court's instructions on false, contradictory, and conflicting statements.

Appeal by defendant from judgment entered 26 June 1997 by Judge Julius A. Rousseau in Davidson County Superior Court. Heard in the Court of Appeals 21 October 1998.

On 12 October 1996 at about two o'clock in the morning, 21-year-old Kimberly Dawn Morris (Dawn) was shot through the head with a .357 caliber magnum revolver owned by her boyfriend, defendant Ricky Dean Andrews. The victim and her four-year-old child Kori were living with defendant.

The State offered evidence that the gun was between two and four feet away from Dawn when it was fired, and that the weapon in question functioned properly and would not fire unless the trigger was pulled. Defendant called 911 and stated that "his girlfriend had just shot herself." When asked whether any children were present, defendant told the 911 operator that "she was right here." Later in the same conversation, defendant told the 911 operator that he and his girlfriend had "struggled for the gun and it went off."

The first officer to arrive on the scene of the shooting found Dawn's body in a back bedroom with a "large caliber stainless steel revolver lying beside her right hand on the floor." Defendant gave several versions of the incident to police. In one version, defendant claimed Dawn had been falsely accused of being a drug addict and an alcoholic, and that she was going to confront the accuser with the gun. However, defendant and Dawn were struggling over the gun and it went off. There was evidence tending to show that prior to the incident, defendant's friends had told him about Dawn's job at a massage parlor and about her affair with another man. However, the State also presented evidence that Dawn had told several people prior to her death that defendant would kill her if he learned of the job or the affair. In another version, defendant entered the bedroom with the gun in his hand, "ran into something and the gun went off."

Dawn's mother testified that her daughter had lived with defendant for a year and a half. During the time Dawn and defendant lived together, Dawn's mother had picked up Dawn on a number of occasions when Dawn called her because defendant was "intoxicated or on drugs." Dawn's mother further testified that in the early morning hours of 12 October 1996, Dawn had called her twice. On the first occasion, Dawn asked her mother to come get her and the child. However, when the mother arrived, Dawn came outside and told her mother that she was going to stay because defendant had calmed down. At about five minutes before two o'clock, Dawn called her

mother again to come get her and the child. She was waiting outside defendant's home when the first officer arrived.

Dawn's mother also testified that after the shooting, Kori came to live with her. About two weeks after the incident, Kori began talking about her mother's death. Kori told her grandmother that her mother was sitting on the edge of the bed putting Kori's bedroom shoes on when defendant came in and shot "her mama." Kori also told her grandmother that Ricky placed the gun in Dawn's hand and told the child to tell the police that it was an accident. Kori testified at trial, similar to her grandmother's testimony, that defendant shot her mother while Kori was sitting on the bed in her bedroom and Dawn was sitting on the floor putting on Kori's bedroom shoes.

Defendant was tried for non-capital murder. A verdict of guilty was returned, and defendant was sentenced to life imprisonment without the possibility of parole.

Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell, for the State.

Paul Pooley for defendant appellant.

HORTON, Judge.

Defendant contends the trial court erred in: (I) finding Kori competent to testify; (II) admitting the testimony of Reverend Knight; and (III) failing to properly instruct the jury.

I.

[1] Kori was born on 4 September 1992. She was four years old at the time of the incident and almost five years old at the time of trial. After a voir dire hearing, Kori was allowed to testify concerning her recollection of the incidents on 12 October 1996. Defendant did not object to her competency as a witness at trial.

Determining whether a child is competent to testify is a matter within the sound discretion of the trial court. *State v. Jenkins*, 83 N.C. App. 616, 621, 351 S.E.2d 299, 302 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987). Furthermore, the trial court's decision will not be reversed on appeal unless it is shown that it could not have been the result of a reasoned decision. *State v. Spaugh*, 321 N.C. 550, 554, 364 S.E.2d 368, 371 (1988). When exercising its discretion, the trial court "must rely on [its] personal observation of the child's demeanor

and responses to inquiry on *voir dire* examination." *State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 555 (1985). "[T]he vast majority of cases in which a child witness' competency has been addressed have resulted in the finding, pursuant to an informal *voir dire* examination of the child before the trial judge, that the child was competent to testify." *Jenkins*, 83 N.C. App. at 621, 351 S.E.2d at 302-03.

N.C. Gen. Stat. § 8C-1, Rule 601(b) (1992) provides that "[a] person is disqualified to testify as a witness when the court determines that [she] is . . . (2) incapable of understanding the duty of a witness to tell the truth." In *State v. Jones*, 310 N.C. 716, 722, 314 S.E.2d 529, 533 (1984), the North Carolina Supreme Court cited as evidence of competency that the child knew that if she did not tell the truth she would get a spanking.

In the instant case, the trial court determined during a voir dire hearing that Kori was competent to testify. During voir dire, Kori stated she would tell the truth, but then seemed confused and said it was not good to tell the truth. Thereafter, the prosecutor asked additional questions to determine whether Kori knew what it meant to tell the truth. The prosecutor asked Kori if it was true to say her blue dress was red, and she responded that it was not the truth. Additionally, she said she knew she would get a spanking if she did something wrong and she knew it was wrong to tell a lie. Furthermore, Kori told the prosecutor that she knew she was in court to talk about defendant shooting her mother and she wanted to tell the truth about the incident. Thus, the trial court was correct when it concluded that Kori was competent to testify.

II.

[2] In addition, defendant contends the trial court, on its own motion, should have refused to allow the testimony of Reverend Knight, minister of the First Pentecostal Holiness Church in Lexington and the chaplain for the sheriff's office. The sheriff's office paged Reverend Knight to come to the jail to counsel defendant. Defendant contends the admission of the testimony was plain error.

The plain error rule requires defendant to show that he would not have been convicted if the error had not been made or that a miscarriage of justice would result if the error is not corrected. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983). In the instant case, defendant has not met his burden.

Our Supreme Court has held that the wording of N.C. Gen. Stat. § 8-53.2 has two requirements for the clergyman privilege to apply, including: (1) defendant must be seeking the counsel and advice of his minister; and (2) the information must be entrusted to the minister as a confidential communication. *State v. West*, 317 N.C. 219, 223, 345 S.E.2d 186, 189 (1986). In *West*, the minister was a personal friend of defendant and initiated contact with defendant instead of defendant seeking the advice of the minister. Thus, the Supreme Court concluded the privilege did not apply.

However, the instant case is distinguishable from the *West* case because the sheriff's office called Reverend Knight to talk to defendant because of the possibility of defendant being suicidal. Based on the potential conflict of interest because Reverend Knight worked for the sheriff's office, the privilege would be applicable to protect defendant. Reverend Knight, as the chaplain for the sheriff's office, was aware of defendant's privilege and asked defendant whether the Reverend could divulge the information to the officers. Defendant talked to Reverend Knight and agreed afterwards to allow Reverend Knight to share the information with the officers.

At trial, defense counsel initially objected to Reverend Knight being able to testify based on privilege, but withdrew his objection after defendant stated he waived that privilege. The trial court questioned defendant to make sure he understood that he possibly had a privilege. The trial court specifically asked defendant whether he understood that the Reverend was paged by the sheriff's department to come talk to defendant, which could possibly keep it from being admissible. Defendant said he understood and still wanted to waive his privilege. N.C. Gen. Stat. § 8-53.2 (1986) provides that the statute "shall not apply where communicant in open court waives the privilege conferred." Therefore, the trial court did not err when it allowed Reverend Knight to testify.

III.

Finally, defendant contends the trial court failed to properly instruct the jury: (A) on the circumstances from which it could infer premeditation and deliberation; and (B) on false, contradictory, and conflicting statements. Defendant failed to object to these instructions at trial. Thus, the plain error rule requires defendant to show that he would not have been convicted if the error had not been made or that a miscarriage of justice would result if the error is not corrected. *Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378.

(A)

[3] Defendant claims the trial court committed plain error in the jury instructions when it allowed examples of circumstances from which premeditation and deliberation may be inferred, which were not supported by the evidence. For example, defendant claims the facts of this case do not disclose a "vicious and brutal" killing, and there is no showing that defendant used excessive force. However, our Supreme Court has already stated that these examples are offered only for illustrative purposes. *State v. Leach*, 340 N.C. 236, 241, 456 S.E.2d 785, 789 (1995). Thus, these examples did not amount to plain error.

[4] Further, defendant claims the trial court committed plain error when it said "lack of provocation by the defendant" rather than "lack of provocation by the victim" in the jury instructions. However, "the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984). In fact, a "mere slip of the tongue by the trial judge in his charge to the jury which is not called to the court's attention at the time it is made will not constitute prejudicial error when it is apparent from the record that the jury was not misled thereby." *State v. Simpson*, 303 N.C. 439, 450, 279 S.E.2d 542, 549 (1981). A review of the record in the instant case shows that the trial court had a mere *lapsus linguae*, and the jury was not misled thereby. Thus, this assignment of error is overruled.

(B)

[5] In addition, defendant argues the trial court committed plain error in its jury instructions regarding false, contradictory, and conflicting statements. The trial court gave the following instruction:

> Now, the State contends and, of course, the defendant denies that the defendant made false, contradictory and conflicting statements. If you find that the defendant made such statements, they may be considered by you with the circumstances tending to reflect the mental process the person possessed of a guilty conscience seeking to divert suspicion or to exculpate himself, and you shall consider this evidence along with all other believable evidence in this case.
>
> If, however, you find the defendant made such statements and they do not create a presumption of guilt and such evidence standing alone is not sufficient to establish guilt, such evidence

may not be considered as tending to show premeditation and deliberation.

As already noted, the jury instructions must be construed contextually. *Boykin*, 310 N.C. at 125, 310 S.E.2d at 319. A review of this instruction shows the trial court essentially conveyed the appropriate pattern jury instruction. The given instruction enabled the jury to determine that the statements do not create a presumption of guilt and that the contradictory statements alone are not sufficient to show guilt. Defendant has not met his burden of showing there would have been a different result in the outcome of this case by merely pointing out in the transcript that appropriate punctuation marks for the instructions are missing. Thus, this assignment of error is overruled.

For the foregoing reasons, the trial court's decision was free from prejudicial error.

No error.

Judges MARTIN, John C. and TIMMONS-GOODSON concur.

WILLIAM C. NEAL, PETITIONER-APPELLEE v. FAYETTEVILLE STATE UNIVERSITY, RESPONDENT-APPELLANT

No. COA97-1423

(Filed 17 November 1998)

1. Public Officers and Employees— RIF policy—failure to follow—no presumption of harm

The trial court erred in an action arising from the elimination of petitioner's state government position by finding that the substantial evidence in the whole record does not support the conclusion that FSU's failure to follow the State's RIF policy was harmless. The presumption in *N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30, that harm is presumed from a violation of RIF policy does not apply here because petitioner was not one of a class of employees from which one would be chosen to be terminated and a reviewing court would not be forced to speculate on how an agency would weigh factors. Petitioner made no showing that jobs were available during the delay in informing him of his priority reemployment status and therefore failed to show harm.

2. Appeal and Error— inadequate relief at trial—properly raised by cross-appeal

A cross-assignment of error in which petitioner contended that the relief granted was inadequate was overruled; such argument can only be made by cross-appeal.

Appeal by respondent from an order entered 1 October 1997 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 26 August 1998.

Hilliard & Jones, by Thomas Hilliard, III, for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General R. Bruce Thompson, II and Associate Attorney General Joyce S. Rutledge, for respondent-appellant.

WALKER, Judge.

Petitioner initiated this action by filing a petition for a contested case hearing in the Office of Administrative Hearings on 12 April 1995. The issue presented at the hearing was whether respondent, Fayetteville State University (FSU), had failed to comply with state reduction in force (RIF) policy resulting in harm to the petitioner. The Administrative Law Judge (ALJ) issued a recommended decision ruling in favor of FSU on 22 April 1996 in which she concluded that any error made by FSU in following the RIF policy was harmless. The State Personnel Commission adopted that decision on 9 June 1997 denying petitioner's request for reinstatement, back pay, and attorney fees. Petitioner filed for review and the trial court reversed the Commission and found that because RIF policy was violated, harm to the petitioner was presumed. The trial court then ordered that the petitioner be compensated for his reduction in salary from July 1993 until May 1994 and for reasonable attorney fees.

Petitioner worked for FSU from 1980 until 29 April 1994. From 1 October 1988 until 1 July 1993, he was employed as a Business Officer I, pay grade 73, and his title was Director of Business Services. His duties were to manage the vending, switchboard, print shop, facilities management, bookstore and postal operations, and his position was funded by the receipts of those operations. On 30 April 1993, petitioner was informed by a letter from Benson Otovo, Vice Chancellor for Business and Finance, that his position was being eliminated due to a reorganization of his responsibilities, which included the con-

tracting out of bookstore operations and the reassignment of other operations to different FSU departments. At that time, petitioner was not informed of his right to priority reemployment consideration as required by 25 North Carolina Administrative Code (NCAC) 1D.0510. Even though the petitioner's position of Director of Business Services was eliminated on 30 June 1993, the Business Officer I designation remained on the personnel inventory for FSU. Otovo testified that it was common practice for state agencies to "park" designated positions that were on their personnel inventory during periods when the actual jobs were not needed or when there was a lack of funding. This was done to avoid the protracted process of requesting a new position from State Personnel when needs increased.

On 1 July 1993, petitioner transferred to the position of Accountant I, pay grade 71, in a separate department at FSU. As a result, his pay was decreased by $6,861. Soon after this transfer, petitioner inquired of the personnel director at FSU about his RIF status. As a result of this contact, petitioner was placed in the RIF system. The RIF system is a database maintained by State Personnel that lists state employees whose positions have been eliminated recently and who are eligible for priority consideration for state employment vacancies.

On 30 July 1993, petitioner received a letter from State Personnel informing him that he was eligible for priority reemployment consideration for a period of 12 months from 30 April 1993, the date he was notified of the elimination of his job. After receiving this notification, petitioner complained to the personnel director that he had not yet been placed in the RIF system, and as a result, petitioner's priority status was extended for three additional months until 30 July 1994. On 29 April 1994, petitioner resigned from FSU to accept a job as Budget Officer, pay grade 73, at the Department of Mental Health in Raleigh.

After petitioner's resignation, FSU received an additional appropriation from the General Assembly for a number of construction projects and a portion of the funds was used to create the new position of Assistant to the Vice Chancellor for Business and Finance, which petitioner contended was the same Business Officer I designation held by him.

[1] FSU assigns as error the trial court's finding that "the substantial evidence in the whole record does not support the conclusion that FSU's failure to follow RIF policy was harmless." Also, they contend

the trial court erred in concluding the Personnel Commission erred in adopting the conclusions of the ALJ, and in awarding attorney fees and compensation to petitioner. FSU further contends that the trial court erroneously relied on the holding in *N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30, 367 S.E.2d 392 (1988) in finding that harm to the petitioner is presumed from a violation of RIF policy. *N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30, 367 S.E.2d 392 (1988), *overruled on other grounds*, *Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990). Petitioner argues that any violation of RIF policy creates the *Eaker* presumption of harm and that such a presumption was properly applied by the trial court.

The standard of review on appeal from an order affirming or reversing an agency decision is the same as that employed by the trial court. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 560, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996). Thus, when the issue on appeal is whether the agency decision is supported by the evidence, the "whole record" test is appropriate, and if the issue is whether there is an error of law, *de novo* review is required. *Id.* Since the trial court reviewed the whole record to determine whether the agency's decision was supported by the evidence, we likewise apply the whole record test.

Section .0504 of the State personnel regulations governing procedures for RIF policy regarding state employees is as follows:

> A State government agency may separate an employee whenever it is necessary due to shortage of funds or work, abolishment of a position or other material change in duties or organization. Retention of employees in classes affected shall, as a minimum, be based on a systematic consideration of all the following factors: type of appointment, relative efficiency, actual or potential adverse impact on the diversity of the workforce and length of service.

N.C. Admin. Code tit. 25, r. 1D.0504 (June 1998). Section .0510 provides that if an employee is separated due to RIF, he or she will be given priority reemployment consideration. N.C. Admin. Code tit. 25, r. 1D.0510 (June 1998). The procedure for conferring the priority status along with the purpose for the policy is described in section .0511:

> Upon written notification of imminent separation through reduction in force, an employee shall receive priority reemploy-

> ment consideration for a period of 12 months pursuant to G.S. 126-7.1(c1). . . . Priority reemployment consideration is intended to provide employment at an equal employment status to that held at the time of notification.

N.C. Admin. Code tit. 25, r. 1D.0511 (June 1998).

In reviewing the agency action, we must examine petitioner's separation due to RIF in the context of *Eaker* and the presumption of prejudice created by that decision. In *Eaker*, the Department of Justice sought to eliminate a Research Associate position in their Sheriff's Standards Division. *Eaker*, 90 N.C. App. at 31, 367 S.E.2d at 394. Mr. Eaker's position was eliminated and he petitioned for a contested case hearing. Alleging political discrimination and RIF violations, he presented evidence that he had qualifications equal to or better than other Research Associates within the Division whose positions were not eliminated. The Personnel Commission rejected Eaker's political discrimination claim but held that the Department had failed to properly consider the factors outlined in 25 NCAC 1D.0504 when determining which employee to terminate and ordered that Eaker be reinstated. The trial court reversed the Commission on the ground that petitioner had failed to show prejudice resulting from the Department's failure to consider the factors under section .0504.

On appeal, this Court reversed the trial court and found that a presumption of prejudice existed where petitioner showed that the Department had not considered the section .0504 factors. The Court's reasoning was as follows:

> To show prejudice from failure to follow the policy, petitioner would have to show, not only how he stood in relation to other employees in the same class as to type of appointment, length of service, and work performance, but he would have to show the weight which the Department would attribute to each of those factors. The Commission and the reviewing court would be relegated to speculating how the Department would weigh each factor.

Id. at 38, 367 S.E.2d at 398. This Court then held that because the Commission's regulations are promulgated under statutory authority, they have the effect of law and must be strictly followed and enforced. *Id.* Thus, we concluded that the presumption existed because Eaker, as a member of a class from which one employee

would be terminated, would be required to compare himself against the other members of the class to meet his burden to show prejudice. That burden would be nearly impossible to meet; therefore, the presumption was necessary.

In the present case, the facts are distinguishable from *Eaker*. The petitioner was not part of a class of employees from which one would be chosen to be terminated. Petitioner's position was the only one to be eliminated because those duties were being reassigned. Although a RIF by definition, the elimination of petitioner's job did not require the consideration of the factors listed in section .0504 because the petitioner was not being compared to other employees. Since no comparison was required which would force a reviewing court to speculate how an agency would weigh factors, the *Eaker* presumption does not apply in this case.

The trial court found that FSU delayed telling petitioner about his priority reemployment consideration status for three months after he was notified that his job was being eliminated. Even though there was a delay contrary to RIF policy set forth in section .0511, this delay does not entitle petitioner to recover unless he can show resulting injury. *Jones v. Dept. of Human Resources*, 300 N.C. 687, 268 S.E.2d 500 (1980); *Carey v. Piphus*, 435 U.S. 247, 55 L. Ed. 2d 252 (1978). Petitioner has made no showing that in the three-month period from 30 April 1993 until 30 July 1993, during which he could not avail himself of the RIF priority status, that jobs were available for which he could have used the priority status to gain employment. Therefore, petitioner has failed to show any harm from the delay for which he can recover.

[2] The petitioner has cross-assigned as error the trial court's failure to reinstate him to the Business Officer I position now titled Assistant to the Vice-Chancellor for Business and Finance at FSU. Appellate Rule 10(d) governs cross-assignments of error and provides that "an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of *an alternative basis in law for supporting the judgment, order, or other determination from which the appeal was taken.*" N.C.R. App. P. 10(d) (emphasis added). Petitioner contends that the relief granted was inadequate; however, such argument can only be made by cross-appeal. *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E.2d 775 (1984). Therefore, petitioner's cross-assignment of error is overruled.

Although FSU failed to inform petitioner of his priority reemployment consideration status at the time he was notified of his job being eliminated, after a careful review of the record, we find that he has failed to show any harm by the delay. Therefore, the order of the trial court is reversed and the case is remanded to the trial court for reinstatement of the order of the State Personnel Commission.

Reversed and remanded.

Judges LEWIS and MARTIN, John C., concur.

KENNETH RALPH SANDERS, EMPLOYEE, PLAINTIFF v. BROYHILL FURNITURE INDUSTRIES, INSURED (TRIGON ADMINISTRATORS, ADMINISTERING AGENT), EMPLOYER, DEFENDANT

No. COA97-1445

(Filed 17 November 1998)

1. **Workers' Compensation— credibility determination—deference due the deputy commissioner's determination**

The Industrial Commission in a workers' compensation action gave proper deference to the credibility determination of the deputy commissioner in its reversal of the deputy commissioner's decision.

2. **Workers' Compensation— Form 18 not timely filed—no prejudice**

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff's failure to timely file a Form 18 was reasonably excused where plaintiff testified that he told his supervisor about his injury and the Commission specifically found that defendant knew about the injury; moreover, assuming that defendant did not know about the injury, defendant presented no evidence that it was prejudiced in any way by the ten month delay in filing the claim.

3. **Workers' Compensation— medical treatment—designed to effect relief**

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff's medical treatment was

designed to effect a relief, give a cure, or lessen the period of disability where there was evidence to support the finding that plaintiff first went to his family doctor and was then seen by a series of physicians and therapists, each upon a valid medical referral, and that plaintiff was not attempting to find support for his claim but was following the recommendations and referrals of his medical providers in an attempt to improve his condition.

4. Workers' Compensation— continuous disability—evidence sufficient

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff had been continuously disabled since 17 December 1991. Several doctors noted that plaintiff was in extreme pain because of his work related injury, plaintiff's neurosurgeon advised defendant that plaintiff was totally disabled and would not be able to return to manual labor, and vocational consultants concluded after extensive testing that plaintiff was not capable of returning to his prior position.

Appeal by defendant from an opinion and award entered 15 August 1997 by the full Commission. Heard in the Court of Appeals 21 September 1998.

In December 1991, plaintiff was 52 years old and had been employed by defendant for approximately 32 years. On 17 December 1991 as plaintiff was pulling a load of "stock" on a flatbed truck, the load got stuck on a bolt in the floor. Plaintiff started pushing the truck and the "standard" that held the load on the truck broke. Plaintiff twisted and fell to the floor. He felt a "sharp, sickening pain" in his back and had to hold onto something until the pain subsided.

After the accident, plaintiff had a co-worker help him push his load because he could not do it himself. Plaintiff testified that he told his job supervisor, Dwight Davis, about his back injury. Dwight Davis denies that he was ever told about the injury. After work that evening, plaintiff could barely walk.

The next day, plaintiff returned to work but could not do his job alone. Throughout the week after plaintiff's injury, a co-worker, Morris Parsons, occasionally helped plaintiff with his work. During plaintiff's Christmas vacation, plaintiff spent most of his time in bed. After vacation, he tried to work for two days but was unable to perform his job. Plaintiff then went to his family doctor, Dr. Carpenter, who referred plaintiff to Dr. David Jones, a neurosurgeon. Dr. Jones

performed surgery on plaintiff in February 1992. After surgery, plaintiff was still in pain and continued to take pain medication.

Plaintiff filed 13 weeks of disability under his insurance plan before filing his workers' compensation claim. Plaintiff testified that he did not understand how workers' compensation benefits worked. Until plaintiff spoke with his attorney, plaintiff thought an employee had to be totally disabled before he or she was allowed to file a claim. Reba Cobb, an insurance clerk for defendant, testified that she did not know plaintiff's injury was work-related until he filed his Form 18.

Plaintiff was evaluated by Vocational Consultants at Blue Ridge Vocational Services on 11 October 1993. The consultants concluded that plaintiff had a "great deal of difficulty with any physical exertion" and had a limited tolerance for standing and sitting. The consultants also concluded that plaintiff was not able to return to his previous work.

On 23 February 1994, the deputy commissioner entered an opinion and award denying plaintiff's workers' compensation claim. The full Commission overturned the deputy commissioner. In a two-to-one decision the full Commission found that plaintiff suffered a compensable injury by accident; that plaintiff's medical treatment was designed to effect a cure or lessen the period of disability; that defendant was not prejudiced by plaintiff's failure to timely file a Form 18, and that plaintiff had been continuously disabled since 17 December 1991.

Defendant filed a notice of appeal with the North Carolina Court of Appeals. In an opinion filed 3 December 1993, this Court reversed the full Commission and remanded the case for proper consideration of the deputy commissioner's findings on credibility. Plaintiff then petitioned the Court of Appeals for rehearing and petitioned the Supreme Court for discretionary review. Both petitions were denied. The full Commission then re-reviewed the record without a hearing and in an opinion and award renewed its reversal of the deputy commissioner and awarded plaintiff workers' compensation benefits. Defendant now appeals.

N. Douglas Beach, Jr., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J.A. Gardner, III and Erica B. Lewis, for defendant-appellant.

EAGLES, Chief Judge.

[1] First we consider whether the full Commission failed to give proper deference to the deputy commissioner's credibility determination. Defendant argues that the full Commission did not acknowledge the general rule that deputy commissioners are in a better position to judge credibility as mandated by *Sanders v. Broyhill.* Defendant further argues that plaintiff's ignorance of workers' compensation law is not a valid justification for finding plaintiff credible.

We reaffirm our holding in *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 640-41, 478 S.E.2d 223, 225-26 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997). In *Sanders* we held that

> prior to reversing the deputy commissioner's credibility findings on review of a cold record, the full Commission must, as it did in Pollard, demonstrate in its opinion that it considered the applicability of the general rule which encourages deference to the hearing officer who is the best judge of credibility. . . . What we require today is documentation that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one. In doing so, we encourage the full Commission to include findings showing why the deputy commissioner's credibility determination should be rejected.

Id. But cf. Holcomb v. Pepsi Cola Co., 128 N.C. App. 323, 325, 494 S.E.2d 609, 610 (1998).

Here in finding of fact number five, the full Commission found

> 5. The Deputy Commissioner who initially heard this matter found plaintiff's sworn testimony regarding the cause and extent of his injury not to have been credible. The Full Commission, however, finds to the contrary, that plaintiff's testimony relating to his injury and its cause was credible. The Full Commission's finding on this issue is based, in part, on plaintiff's lack of understanding in general of the workers' compensation system and with the specific requirements related to reporting his injury and filing his claim. Additionally, the Full Commission finds that any inconsistencies in plaintiff's testimony are not indicative of any deception on his part, and further, are reasonably explained given his unfamiliarity

> with the workers' compensation system and the nature of the proceedings before the Industrial Commission.

The full Commission met the *Sanders* standard. The Commission recognized and considered that the deputy commissioner found plaintiff not to be credible but disagreed with the deputy's credibility determination. The Commission went on to explain the rationale behind its decision. The Commission stated that it was plaintiff's unfamiliarity with the workers' compensation system and not a propensity to lie that led to the inconsistencies within plaintiff's testimony. After reviewing the record on appeal, it is clear that there was competent evidence to support the full Commission's findings of fact and conclusions of law. Accordingly, the full Commission's decision to reverse the deputy commissioner's decision is affirmed.

[2] Next, we consider whether the Industrial Commission erred in finding that plaintiff's failure to timely file a Form 18 was reasonably excused. Defendant contends that it had no notice of plaintiff's alleged work injury until the Form 18 was filed in September 1992. Defendant argues that it was prejudiced because the employer was unable to investigate the alleged work accident on 17 December 1991 and was unable to direct plaintiff's medical care. After careful review, we disagree.

In reviewing a decision of the Industrial Commission, we are limited to two questions: 1) whether there is any competent evidence before the Commission to support its findings of fact; and 2) whether the findings of fact justify the Commission's conclusions of law. *Guy v. Burlington Industries*, 74 N.C. App. 685, 689, 329 S.E.2d 685, 687 (1985).

Here, the Industrial Commission found in finding of fact number ten that

> [p]laintiff's failure to provide written notice to the employer of his injury within the thirty days is reasonably excused and did not prejudice defendant in any manner. Defendant had actual knowledge of plaintiff's injury through his reporting it to his supervisor, Mr. Davis.

Assuming defendant did not know about plaintiff's work injury, defendant presented no evidence that it was prejudiced in any way by plaintiff waiting ten months to file his workers' compensation claim. Moreover, the Industrial Commission specifically found that the defendant employer knew about plaintiff's injury. Plaintiff

testified that he told his supervisor Mr. Davis about his injury at work. Accordingly, there was competent evidence to support the Commission's findings of fact and this assignment of error is overruled.

[3] Next, we consider whether the Industrial Commission erred in finding that plaintiff's medical treatment was designed to effect a relief, give a cure, or lessen the period of disability. Defendant argues that plaintiff was not referred to some of his doctors by specialists and as a result, plaintiff's treatment should not be considered "medical treatment" under G.S. 97-2(19). Defendant further argues that plaintiff had hip pain prior to the 17 December 1991 work injury. After careful review, we disagree.

The Industrial Commission found that the first doctor plaintiff went to see was plaintiff's family doctor, Dr. Carpenter. The Commission further found that

> [a]though plaintiff was seen by a series of physicians and therapists, each was seen upon a valid medical referral. The Full Commission finds that plaintiff was not attempting [sic] find a medical provider to support his claim, but rather was following the recommendations and referrals of his medical providers in an attempt to improve his condition.

Because there was competent evidence to support the Commission's finding of fact, the defendant's assignment of error is overruled.

[4] Finally, we consider whether the Industrial Commission erred in concluding that plaintiff had been continuously disabled since 17 December 1991. Defendant argues that there was no evidence that the work related injury caused defendant's medical problems and inability to work. In determining whether there is a "disability" there must be competent evidence to support findings of fact that an employee is incapable of earning the same wages which the employee was receiving at the time of the injury in the same or any other employment as a result of the specific traumatic incident at work. *Gilliam v. Perdue Farms*, 112 N.C. App. 535, 536, 435 S.E.2d 780, 781 (1993).

Here, several doctors noted that plaintiff was in extreme pain because of plaintiff's work related injury. In addition, Dr. Jones advised defendant employer that plaintiff "was totally disabled" and that plaintiff would "not be able to return to a position requiring manual labor." After extensive testing, Vocational Consultants at the Blue Ridge Vocational Services also concluded that plaintiff was not capa-

ble of returning to his prior position with defendant employer. Accordingly, there was sufficient evidence to support the Industrial Commission's conclusion that plaintiff had been continuously disabled since 17 December 1991. This assignment of error is overruled.

Affirmed.

Judges LEWIS and HUNTER concur.

SARA LOCKLEAR, PLAINTIFF-APPELLEE v. STEDMAN CORP./SARA LEE KNIT PRODUCTS, DEFENDANT, SELF/CONSTITUTION STATE SERVICE COMPANY, DEFENDANT AND/OR M.J. SOFFE COMPANY, INC., DEFENDANT-APPELLANT, SELF/KEY RISK MANAGEMENT SERVICES, DEFENDANT-APPELLANT

No. COA98-192

(Filed 17 November 1998)

1. **Workers' Compensation— occupational disease—significant contribution**

   There was competent evidence in a workers' compensation action to support the Industrial Commission's conclusion that plaintiff's textile work environment significantly contributed to the development of asthma to the extent that it disabled her. Although the witnesses did not use the exact words "significantly contributed" in describing the development of plaintiff's asthma, there were no other clear factors which aggravated the condition.

2. **Workers' Compensation— occupational disease—last exposure**

   The Industrial Commission's finding of fact in a workers' compensation action that plaintiff's employment with defendant Soffe augmented her respiratory condition, however slightly, was supported by competent evidence.

3. **Workers' Compensation— statute of limitations—date plaintiff informed of occupational disease by medical authority**

   There was competent evidence in the record in a workers' compensation action to support the Industrial Commission's finding and conclusion that plaintiff's claim was not barred by the two year statute of limitations where plaintiff filed her claim

on 8 June 1992 and, while there may be some evidence to support a finding that she knew about her illness prior to 13 June 1990, when she ceased work, there is also competent evidence which shows that she was not advised by competent medical authority before 13 June 1990 that her disease was related to her work environment.

Appeal by M.J. Soffe Company, Inc., and Self/Key Risk Management Services from an opinion and award filed 25 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 October 1998.

Ben E. Roney, Jr., for plaintiff appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Robin H. Terry, for Stedman Corp./Sara Lee Knit Products and Self/Constitution State Service Company, defendant appellees.

Carruthers & Roth, P.A., by Kenneth L. Jones, for M.J. Soffe Company, Inc., and Self/Key Risk Management Services, defendant appellants.

HORTON, Judge.

Sara Locklear (plaintiff) was employed by defendant-employer Stedman Corp./Sara Lee Knit Products (Stedman) as a sewing machine operator from 27 May 1968 to 27 May 1969, 18 March 1970 to 21 April 1971, 2 February 1972 to 22 November 1972, and 22 May 1975 to 25 September 1989. Plaintiff was exposed to and inhaled cotton dust and lint on a daily basis. At the end of her shift, plaintiff and other workers cleaned lint from their machines and their clothing with compressed air. In the fall of 1985, plaintiff began coughing and having trouble breathing and by the summer of 1988 the coughing and wheezing had become constant symptoms.

During plaintiff's shift on 4 February 1989, a roof-mounted air conditioning unit was serviced and a liquid chemical spilled from the air conditioning unit onto the floor. Plaintiff testified that the fumes took her breath away. Two days later, she was admitted to the hospital in severe respiratory distress. Plaintiff was discharged on 15 February 1989 in an improved condition, but diagnosed with severe asthmatic bronchitis and severe airway disease. Her treating physician, Dr. F. Farrell Collins (Dr. Collins), had difficulty with an etiologic diagnosis but indicated in the discharge summary that the prob-

lems might be related to the work environment. He did not diagnose plaintiff with an occupationally related disease or instruct her to stop working. Dr. Collins testified that, if he had had a strong suspicion that plaintiff's problems were work-related, he would have told her to cease her employment.

In November 1989 plaintiff began working for defendant M.J. Soffe (Soffe), because she understood that the Soffe plant was "cleaner" and had less airborne dust and lint due to sewing machines with internal cleaning systems. Plaintiff's symptoms, however, continued to progress in severity during her employment with Soffe. On 13 June 1990, plaintiff's employment with Soffe ended and she ceased working altogether. Plaintiff filed a workers' compensation claim on 8 June 1992 naming Stedman and Soffe as responsible employers.

During the time plaintiff worked for Soffe, Dr. Martin Brooks was her treating physician. He advised her to stop work, but indicated her problems were not work-related. James M. Sullivan, a physician's assistant, and Dr. Lloyd McCaskill have also treated plaintiff for asthma and other illnesses but did not advise her that her condition was work-related.

Dr. John Eugene Gardella (Dr. Gardella), an expert in the field of internal medicine and pulmonary disease expressed his opinion that plaintiff had asthma and that her airway problem was permanent. He acknowledged that plaintiff's employment with Stedman placed her at an increased risk of developing pulmonary disease as compared to the general public. When asked if plaintiff's work environment "significantly contributed to [her] pulmonary disease," Dr. Gardella replied that the exposure had "contributed to her pulmonary condition." He further stated that he could not assign a probability to how much the work environment contributed to plaintiff's disease but that it was "entirely possible that her occupational exposures may have contributed to her asthmatic problem." When asked again if he had an opinion as to whether the exposure plaintiff experienced at Stedman and Soffe "significantly contributed to the permanent epithelial damage," Dr. Gardella stated that "it may well have contributed, but [he could not] put any more precise qualifiers on it." He further testified that the environment at Soffe likely augmented, however slight, plaintiff's pulmonary disease process.

Dr. Scott Donaldson (Dr. Donaldson), an expert in internal medicine and pulmonary disease is plaintiff's treating pulmonary disease physician. Although he testified that she has asthma and that plain-

tiff's work environment placed her at an increased risk for developing pulmonary diseases as compared to the general population, he also stated that plaintiff's work did not cause her asthma. When asked if the occupational exposure made a "significant contribution" to the asthma, Dr. Donaldson answered that plaintiff's "exposure to dust and lint contributed to a worsening of her asthma" and that it was "more likely than not, that her occupational exposure worsened her asthma." He could not identify any clear factors other than work-related exposure which would identify with the development or aggravation of the asthma. He further believed that plaintiff's occupation contributed to the permanent epithelium damage.

The Industrial Commission (Commission) found that plaintiff "became disabled secondary to asthma or severe obstructive lung disease" and made the following conclusions of law:

> 2. Plaintiff timely filed claims for medical compensation and compensation for incapacity to earn wages against Stedman Corporation and M.J. Soffe, Inc. on June 8, 1992. [Citation omitted.]
>
> * * * *
>
> 5. Plaintiff's occupational exposure to dust, lint and other respirable pulmonary irritants while working at Stedman Corporation significantly increased her risk of developing epithelium damage and obstructive pulmonary disease over that of the general public and either significantly contributed to the development of, or significantly aggravated her severe obstructive lung disease/asthma. Plaintiff's employment also significantly contributed to the development of epithelium damage. . . .
>
> 6. Plaintiff's occupational exposure to dust, lint, and other respirable pulmonary irritants while working for M.J. Soffe, Inc. proximately augmented her severe obstructive lung disease/asthma and epithelium damage, however slight.

The Commission awarded plaintiff total permanent disability and Soffe appealed.

The issues in this case are whether: (I) plaintiff contracted a compensable occupational disease; (II) plaintiff's employment with Soffe augmented her condition, however slight; and (III) plaintiff filed her workers' compensation claims within the applicable statute of limitations.

This Court is limited to two questions when reviewing an opinion and award from the Commission: (1) whether there is *any* competent evidence in the record to support the Commission's findings of fact; and (2) whether those findings of fact 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). Thus, if there is competent evidence to support the findings, those findings are conclusive on appeal even though there is plenary evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997).

I

[1] For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)).

The first two elements are satisfied if the occupation exposed plaintiff to a greater risk of contracting the disease than the general public. *Id.* The causal connection prong is established if the work environment "significantly contributed to, or was a significant causal factor in, the disease's development." *Id.* at 101, 301 S.E.2d at 369-70.

> *Significant* means "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." *Significant* is to be contrasted with *negligible*, *unimportant*, *present but not worthy of note*, *miniscule*, or *of little moment*. The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Id. at 101-02, 301 S.E.2d at 370 (citation omitted).

In this case, there is competent evidence in the record to support the Commission's conclusion that plaintiff's work environment

significantly contributed to the development of the asthma to the extent that it disabled her. Dr. Gardella stated that the exposure "more likely than not" contributed to the worsening of her asthma and there was evidence in the form of Dr. Donaldson's testimony that plaintiff's asthma was severe enough to prevent her from working. Although the witnesses did not use the exact words "significantly contributed" in describing the development of plaintiff's asthma, there were no other clear factors which aggravated the condition. Therefore, this assignment of error is overruled.

II

[2] N.C. Gen. Stat. § 97-57 states that "the employer in whose employment the employee was last injuriously exposed to the hazards of such disease . . . shall be liable." N.C. Gen. Stat. § 97-57 (1991). This language has been interpreted to include occupational exposure which augmented the illness to any extent, regardless of how slight. *Caulder v. Waverly Mills*, 314 N.C. 70, 74, 331 S.E.2d 646, 647 (1985). In this case, Dr. Gardella testified that plaintiff's exposure at Soffe likely augmented her illness, however slight. Therefore, the Commission's finding of fact on this issue is supported by competent evidence in the record and this assignment of error is overruled.

III

[3] An employee must file a workers' compensation claim within two years of being advised by competent medical authority that he or she has an occupational disease. N.C. Gen. Stat. § 97-58 (1991); *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 706, 304 S.E.2d 215, 218 (1983), *reh'g denied*, 311 S.E.2d 590 (1984). In this case, there is competent evidence in the record to support the Commission's finding and conclusion that plaintiff's claim was not barred by the statute of limitations. Although there may be some evidence to support a finding that plaintiff knew about her illness prior to 13 June 1990, there is also competent evidence which shows that she was not advised by competent medical authority before 13 June 1990 that her disease was related to her work environment. Dr. Collins testified that while he may have indicated in the discharge summary that plaintiff's problems might be related to her work environment, he did not diagnose her with an occupational disease nor did he instruct her to stop working.

Affirmed.

Judges MARTIN, John C. and TIMMONS-GOODSON concur.

IN RE DECLARATORY RULING PETITION FOR JUDICIAL REVIEW, COUNTY OF DURHAM, APPELLANT v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, APPELLEE, AND CURRIN BROS., INC., A NORTH CAROLINA CORPORATION, INTERVENOR-APPELLEE

No. COA98-157

(Filed 17 November 1998)

1. Environmental Law— landfills—land clearing not sanitary

The trial court did not err by upholding a declaratory ruling by the North Carolina Department of Environment and Natural Resources (NCDENR) that Land Clearing and Inert Debris (LCID) landfills are not sanitary landfills under N.C.G.S. § 130A-294(a)(4)a. NCDENR is cloaked with rulemaking authority with regard to issues of solid waste management and determines how sanitary landfills are to be defined and managed. It is undeniable that NCDENR intended for sanitary landfills and LCID landfills to be treated differently, each with its own definition, regulations, and application procedures.

2. Environmental Law— landfills—notice requirements—sanitary and land clearing distinguished

The notice requirements of N.C.G.S. § 130A-294(b1)(2) refer exclusively to sanitary landfills and do not apply to LCID (Land Clearing and Inert Debris) landfills.

Appeal by petitioner, County of Durham, from judgment entered 28 October 1997 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 6 October 1998.

Assistant Durham County Attorney Lesley F. Moxley for petitioner-appellant County of Durham.

Attorney General Michael F. Easley, by Assistant Attorney General Nancy E. Scott, for the respondent-appellee North Carolina Department of Environment and Natural Resources.

Poyner & Spruill, L.L.P., by Timothy P. Sullivan, for intervenor-appellee Currin Bros., Inc.

SMITH, Judge.

Located within the County of Durham (County) are three Land Clearing and Inert Debris (LCID) landfills, two of which are owned

and operated by Intervenor-Appellee, Currin Brothers. As LCID landfills, each is permitted to receive solid waste generated from land clearing activities, yard trash, untreated or unpainted wood, and solid waste that is virtually inert and likely to retain its physical and chemical structure. *See* N.C. Gen. Stat. § 130A-290(a)(14)-(15) (1997). The North Carolina Department of Environment and Natural Resources (NCDENR) approved the applications for each of the LCID landfills and issued permits for their operation "in accordance with Article 9, Chapter 130A, of the General Statutes of North Carolina and all rules promulgated thereunder." NCDENR notified County's planning department of the proposed landfills and County provided NCDENR with zoning approval letters. *See* N.C. Admin. Code tit. 15A, r. 13B.0565 (January 1993) (stating that before the *situs* of an LCID landfill can be approved, NCDENR must receive "[a]n approval letter from the unit of local government having zoning authority over the area . . . stating that the site meets all of the requirements of the local zoning ordinance"). A public hearing was not held prior to the approval of the permits nor was the clerk to the board of commissioners informed of the applications.

Pursuant to N.C. Gen. Stat. § 150B-45 (1991), County requested a declaratory ruling from NCDENR that (1) LCID landfills are not "demolition landfills" within the meaning of N.C. Gen. Stat. § 130A-294(a)(4)a. (1997), and (2) LCID landfills are subject to the notice and hearing provisions of N.C. Gen. Stat. § 130A-294(b1)(2) (1997). On 20 November 1996, NCDENR issued a declaratory ruling that LCID landfills are not "sanitary landfills" pursuant to N.C. Gen. Stat. § 130A-294(a)(4)a. and that the notice procedures under the statute only apply to sanitary landfills. Thus, NCDENR concluded, the notice requirements of the statute do not apply to LCID landfills.

County then filed a petition for judicial review of NCDENR's findings, pursuant to N.C. Gen. Stat. § 150B-4 (1991). On 28 October 1997, the Superior Court of Durham County upheld the declaratory ruling issued by NCDENR. County appeals.

In determining whether an agency erred in interpreting a statutory term, an appellate court employs a de novo review. *See Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981). However, even when reviewing a case de novo, courts recognize the long-standing tradition of according deference to the agency's interpretation. *See Newsome v. N.C. State Bd. of Elections*, 105 N.C. App. 499, 507, 415 S.E.2d 201, 205 (1992) (citing *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E.2d 324

(1978)). It is a tenet of statutory construction that a reviewing court should defer to the agency's interpretation of a statute it administers "so [] long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Carpenter v. N.C. Dept. of Human Resources*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584, *temporary stay allowed*, 332 N.C. 482, 421 S.E.2d 348, *review allowed*, 332 N.C. 664, 424 S.E.2d 398 (1992), *review denied as improvidently granted*, 333 N.C. 533, 427 S.E.2d 874 (1993). "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 81 L. Ed. 694, 703, *reh'g denied*, 468 U.S. 1227, 82 L. Ed. 2d 921 (1984). Thus we review this case de novo but accord considerable weight to NCDENR's interpretation of the statute at issue.

[1] The first issue presented to the Court for review is whether the superior court erred in affirming NCDENR's declaratory ruling that LCID landfills are not sanitary landfills under N.C. Gen. Stat. § 130A-294(a)(4)a., and consequently the applicability of the notice requirements of N.C. Gen. Stat. § 130A-294(b1)(2). When resolving an issue of statutory construction, we must first look to the language of the statute. *See Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996). Section 130A-294(a)(4)a. requires NCDENR to

> [d]evelop a permit system governing the establishment and operation of solid waste management facilities. A landfill with a disposal area of ½ acre or less for the on-site disposal of land clearing and inert debris is exempt from the permit requirement of this section and shall be governed by G.S. 130A-301.1. A landfill for the disposal of demolition debris generated on the same parcel or tract of land on which the landfill is located that has a disposal area of one acre or less is exempt from the permit requirement of the section and rules adopted pursuant to this section, and shall be governed by G.S. 130A-301.2. The Department shall not approve an application for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill, excluding demolition landfills as defined in the rules of the Commission for Health Services, except as provided in subdivisions (3) and (4) of subsection (b1) of this section.

N.C. Gen. Stat. § 130A-294(a)(4)a. (1997). It is the permit requirements referred to in this statute that County brings to issue in this

case. This single paragraph addresses several distinct categories of solid waste disposal facilities. A "landfill" is statutorily defined as a "disposal facility . . . where waste is placed in or on land." N.C. Gen. Stat. § 130A-290(a)(16) (1997). Likewise, a "sanitary landfill" is defined as "a facility for disposal of solid waste on land in a sanitary manner *in accordance with the rules concerning sanitary landfills.*" N.C. Gen. Stat. § 130A-290(a)(31) (1997) (emphasis added). Thus, NCDENR, cloaked with the rulemaking authority with regard to issues of solid waste management, determines how sanitary landfills are to be defined and managed.

By defining "demolition landfill" as "a *sanitary landfill* that is limited to receiving stumps, limbs, leaves, concrete, brick, wood, uncontaminated earth or other solid wastes as approved by the Division," NCDENR intended for demolition landfills to be a subcategory of, and thus encompassed by the rules concerning, sanitary landfills. N.C. Admin. Code. tit. 15A, r. 13B.0101(4) (October 1995) (emphasis added). Likewise, because of the language used in the rules, NCDENR did *not* intend for sanitary landfills to encompass LCID landfills. Rule 13B.0501 provides:

> (a) The disposal of solid waste shall be by the following approved methods or any combination thereof:
>
> (1) Sanitary landfill;
>
> (2) Land clearing and inert debris landfill;
>
> (3) Incineration; or
>
> (4) Disposal by other sanitary methods which may be developed and demonstrated to be capable of fulfilling the basic requirements of these rules and which have been approved by the Division.

N.C. Admin. Code tit. 15A, r. 13B.0501 (October 1993). By enumerating both sanitary landfills and LCID landfills as approved methods of solid waste disposal, NCDENR made a marked distinction between the two. In addition, NCDENR established entirely separate application and operational requirements for sanitary landfills and LCID landfills. *Compare* N.C. Admin. Code tit. 15A, r. 13B.0504 (February 1991), 13B.0505 (September 1990) (Application Requirements and Operational Requirements for Sanitary Landfills); *with* N.C. Admin. Code tit. 15A, r. 13B.0565 (January 1993), 13B.0566 (January 1993) (Application Requirements and Operation Requirements for LCID

Landfills). Furthermore, NCDENR set up separate permit requirements for LCID landfills. *See* N.C. Admin. Code tit. 15A, r. 13B.0563 (January 1993). Rule 13B.0563 sets forth when a permit is and is not required for LCID landfills and makes no mention whatsoever of notice to or approval by the local government. The rule applicable to LCID landfills is starkly different from the rule regarding application requirements for sanitary landfills. *See* N.C. Admin. Code tit. 15A, r. 13B.0504 (February 1991). To obtain approval for a sanitary landfill, the application must be accompanied by a permit *under all conditions*, and before an application can be granted, the local government *must* approve of the landfill and confirm that the landfill meets all requirements of local zoning ordinances. These rules governing sanitary and LCID landfills evidence NCDENR's intention to treat the two types of landfills differently.

In addition, the relative risk each poses to the public's health and safety mandates a distinction between the two. Sanitary landfills are filled with household garbage and items that are likely to decompose, thus emitting odor, attracting disease-carrying vermin, and causing health concerns. Land clearing debris is "generated solely from land-clearing activities" and has a natural, organic composition. *See* N.C. Gen. Stat. § 130A-290(a)(15) (1997). Likewise, inert debris, by its statutory definition, must "consist[] solely of material that is virtually inert and that is likely to retain its physical and chemical structure under expected conditions of disposal." *See* N.C. Gen. Stat. § 130A-290(a)(14) (1997). Therefore, the additional safeguards that apply to sanitary landfills are unnecessary for LCID landfills.

It is undeniable that NCDENR intended for sanitary landfills and LCID landfills to be treated differently, each with its own definition, regulations, and application procedures. Thus, the trial court did not err in upholding NCDENR's declaratory ruling.

[2] Because we have determined that LCID landfills do not fall within the statutory definition of "sanitary landfill," we turn next to the question of the applicability of the notice requirements of N.C. Gen. Stat. § 130A-294(b1)(2). This section as written pertains exclusively to sanitary landfills.

> Within 10 days after receiving an application for a permit, for the renewal of a permit, or for a substantial amendment to a permit for a *sanitary landfill*, the Department shall notify the clerk of the board of commissioners of the county or counties in which the sanitary landfill is proposed to be located . . . .

N.C. Gen. Stat. § 130A-294(b1)(2) (1997) (emphasis added). Because this section refers exclusively to sanitary landfills and we have concluded that LCID landfills are *not* sanitary landfills, it follows that the notice requirements of this section are inapplicable to LCID landfills.

The trial court's decision is therefore

Affirmed.

Judges GREENE and WALKER concur.

JAMIE WADKINS HOLLINGSWORTH, EMPLOYEE, PLAINTIFF v. CARDINAL CONTAINER SERVICE, EMPLOYER, COMPSOURCE, INC., CARRIER, DEFENDANTS

No. COA97-1437

(Filed 17 November 1998)

Workers' Compensation— credibility determination—deputy commissioner reversed by full commission—abuse of discretion

The Industrial Commission abused its discretion in a worker's compensation action when it acknowledged that the deputy commissioner had the ability to observe the witnesses first hand but did not recognize that this makes the deputy commissioner the best judge of credibility and relied only on the printed words before it to reverse what the deputy commissioner had seen and heard with his own eyes and ears and substituted its judgment of credibility for his. The need for the full commission to acknowledge the deputy commissioners' superior position to make findings regarding credibility was especially important in light of the facts in this case, where no one who testified actually saw what happened to a plaintiff who had previously stated that her employer would be "screwed" if she were hired and who reported three separate work-related claims in less than her first four weeks on the job, so that credibility was the single most important issue.

Appeal by defendants from opinion and award entered 25 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 August 1998.

Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan and Maranda J. Freeman, for defendants-appellants.

C. Roland Krueger for plaintiff-appellee.

LEWIS, Judge.

In less than four weeks on her job at Cardinal Container Service ("Cardinal"), plaintiff made three separate work-related injury claims. The third of these injuries purportedly occurred on 19 June 1995 when, according to plaintiff, she stepped in a dip in the floor and twisted her left ankle some time before lunch. Working the remainder of her shift that day, plaintiff sought no medical attention at the time but filled out an accident report on 20 June 1995, the next day. The workers' compensation claim arising from this injury came before Deputy Commissioner Bost on 7 November 1996.

Among the findings of fact made by the deputy commissioner were the following. Plaintiff's fiancé was also employed by Cardinal, and prior to her starting work there plaintiff would often drive him to work and pick him up. It was on one of these occasions that plaintiff told the wife of another Cardinal employee that the company would be "screwed" if plaintiff were ever hired there. On 24 May 1995, plaintiff's second day on the job at Cardinal, she claimed to have scratched her ear canal inserting an ear plug; a week after that, she claimed to have hurt her back at work. While attending a company softball game in late May or early June, plaintiff's fiancé told a Cardinal employee and his wife, who had noticed plaintiff limping, that plaintiff had hurt herself when she fell between a bed and a wall at home. On the morning of the injury in question, a Cardinal employee noticed plaintiff limping on her way into work before starting her shift.

Appearing before the deputy commissioner, plaintiff produced no witnesses to her fall of 19 June. After considering plaintiff's testimony and the testimony of plaintiff's family, other Cardinal employees, and an employee of North Carolina Vocational Rehabilitation, the deputy commissioner determined that he was "unable to accept plaintiff's testimony as credible, based on plaintiff's testimony and demeanor and based on other credible testimonial record." As such, plaintiff's claim was denied.

Plaintiff then appealed to the Full Commission, seeking to have the case remanded for the taking of expert medical testimony. Despite this limited request, the Full Commission stated in its opinion

filed 25 September 1997, "The appealing party has shown good ground to reconsider the evidence." Receiving no additional witness testimony and hearing no oral arguments, the Full Commission, with Commissioner Sellers dissenting, then reversed the deputy commissioner's opinion and award. Defendants now appeal to this Court.

We have repeatedly stressed the need of the Full Commission to acknowledge the deputy commissioner's superior position to make findings regarding credibility when the Full Commission is reviewing these findings with only a cold record before it. *See Holcomb v. Pepsi Cola Co.*, 128 N.C. App. 323, 325, 494 S.E.2d 609, 610 (1998); *Taylor v. Caldwell Systems, Inc.*, 127 N.C. App. 542, 545, 491 S.E.2d 686, 689 (1997); *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 639-41, 478 S.E.2d 223, 225-26 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997). This would seem especially important in light of the facts in this case, where no one who testified actually saw what happened to a plaintiff who had previously stated that her employer would be "screwed" if she were hired and who seemingly supported this suggestion by reporting three separate work-related injury claims in less than her first four weeks on the job. Credibility is the single most important issue involved.

When the Full Commission reconsidered the entire evidence on its own initiative, the majority stated in one form or another throughout its opinion and award that it acknowledged "the Deputy Commissioner's first hand observations of the witnesses." This acknowledgment falls short of our requirement that the Full Commission document "that sufficient consideration was paid to the fact that credibility may be *best* judged by a first-hand observer of the witness when that observation was the only one." *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226 (emphasis added). The decision to "overrule the deputy commissioner's ruling on credibility . . . cannot be made lightly when the deputy commissioner is the only person who has observed the witnesses," *id.* at 640, 478 S.E.2d at 225, and the Full Commission must "demonstrate in its opinion that it considered the applicability of the general rule which *encourages deference to the hearing officer* who is the *best* judge of credibility." *Id.* (citing *Pollard v. Krispy Waffle*, 63 N.C. App. 354, 304 S.E.2d 762 (1983)) (emphasis added). To say that the deputy commissioner could observe the witnesses first-hand is one thing; it is quite another to recognize that when a claim hinges entirely upon a plaintiff's honesty and the Full Commission has only a cold record before it, the deputy commissioner's observations are inherently better than any credibil-

ity findings the Full Commission can attempt to make. This is what we read *Sanders* and its progeny to require. To hold otherwise would virtually eliminate the need for a deputy commissioner to make any credibility determinations at all.

To find plaintiff credible despite never observing the testimony of any witness involved in this case, the majority selectively determined in Findings of Fact 15 and 16 which witnesses' testimony should be given weight, addressing only two witnesses in this regard. It acknowledged that the deputy commissioner had the "ability to observe the witnesses first hand," but did not recognize that this makes the deputy commissioner the best judge of credibility. The Full Commission relied only on the printed words before it to reverse what the deputy commissioner had seen and heard with his own eyes and ears, and substituted its judgment of credibility for his. This is a manifest abuse of discretion, and cannot stand on appeal.

In her dissent, Commissioner Sellers states that "the deputy commissioner correctly analyzed plaintiff's credibility and the competent evidence in this case, applied the appropriate law, and came to the conclusion mandated by the evidence; that plaintiff did not suffer a work-related injury and is not entitled to compensation." She goes on to cite *Sanders*, and concludes by stating, "Because the compensability of the instant matter is completely dependent upon the plaintiff's honesty as to the alleged incident, and because Deputy Commissioner Bost was the only one with the opportunity to observe plaintiff and judge plaintiff's credibility, I would affirm the Deputy Commissioner." We agree with Commissioner Sellers that the majority has "dismisse[d]" the deputy commissioner's credibility findings and "ignore[d] the testimony of four disinterested witnesses that contradict[ed] plaintiff's claims." Because the majority of the Full Commission abused its discretion, we reverse and remand the case for a complete evaluation of the deputy commissioner's findings as to credibility.

Reversed and remanded.

Judges MARTIN, John C. and WALKER concur.

TAKEY CRIST, PLAINTIFF v. CITY OF JACKSONVILLE, DEFENDANT

No. COA98-326

(17 November 1998)

Zoning— findings—denial of variance

A decision of the Jacksonville Board of Adjustment was reversed and remanded where the Board did not make findings of fact when denying plaintiff a variance from a side setback requirement. Findings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which the Board's decision can be reviewed.

Appeal by plaintiff from order entered 10 October 1997 by Judge James D. Llewellyn in Onslow County Superior Court. Heard in the Court of Appeals 27 October 1998.

Jeffrey S. Miller for plaintiff appellant.

Warlick, Milsted, Dotson & Carter, by Marshall F. Dotson, Jr., for defendant appellee.

HORTON, Judge.

Plaintiff owns and lives on property located in the City of Jacksonville, North Carolina. Plaintiff's property is located within the Residential-7 zone of Jacksonville and is therefore subject to various restrictions including mandatory setback lines for "accessory buildings." In May of 1994, plaintiff commissioned several craftsmen to create a replica of the Church of Saint Irene (the replica) near the eastern boundary of his property. The replica is situated within five feet of the boundary line of plaintiff's property. The replica does not contain plumbing or electricity.

On 2 June 1994, a written Stop Work Order was issued by Bill McElwee (McElwee), administrator of the Building/Fire Inspection Division of the City of Jacksonville. In March of 1995, plaintiff received a letter from McElwee which stated that plaintiff had violated the "side setback" requirements of section 25-8(A)3(a) of Jacksonville's zoning ordinances. The ordinance states that "no accessory building shall be built or placed within five (5) feet of the rear or side property line." The letter further informed plaintiff that

he could "apply to the Board of Adjustment for a variance to move the structure to a legal location on [his] lot . . . ."

Plaintiff applied to the Board of Adjustment for a variance and a hearing was held on the request. The Board of Adjustment voted to deny the variance but made no findings of fact upon which the denial of the variance was based. Plaintiff appealed the Board of Adjustment's decision through a writ of certiorari to the trial court which affirmed the Board of Adjustment's decision. The dispositive issue before this Court is whether the trial court erred in affirming the Board of Adjustment's denial of plaintiff's request for a variance.

We initially note that, although plaintiff asked the trial court for a declaratory judgment stating that the location of the replica was not in violation of the zoning ordinance, the trial court's order only reviewed the denial of the variance request by the Board of Adjustment. The issue of whether the replica is an "accessory building" within the meaning of the zoning ordinance, therefore, is not properly before this Court at this time because it was not addressed in the trial court.

> Judicial review of the decision of the Board of Adjustment is limited to: (1) reviewing the record for errors in law; (2) insuring procedures specified in both statute and ordinance are followed; (3) insuring appropriate due process rights of a petitioner are protected, including the right to offer evidence, to cross-examine witnesses, and to inspect documents; (4) insuring decisions of the town board are supported by competent, material and substantial evidence in the whole record; and (5) insuring the decisions are not arbitrary and capricious.

Shoney's v. Bd. of Adjustment for City of Asheville, 119 N.C. App. 420, 421, 458 S.E.2d 510, 511 (1995). The reviewing court does not make findings of fact, but instead, determines whether the Board of Adjustment made sufficient findings of fact which are supported by the evidence before it. *Id.* Findings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which this Court can review the Board's decision. *Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 365, 219 S.E.2d 223, 226-27 (1975).

In this case, there are no findings of fact made by the Board of Adjustment in the record for us to review. The minutes of the hearing merely state that "[a]fter some discussion from the board, . . . [a

motion was entertained for] the board to grant or deny the variance request. Jim Autry made a motion to deny the variance and Rev. Batts seconded the motion." There is no showing of how the Board of Adjustment arrived at its decision and therefore nothing to protect plaintiff from an arbitrary decision.

Although the City of Jacksonville argues that neither N.C. Gen. Stat. § 160A-388 (1994) (the enabling statute for Boards of Adjustment), nor section 25-33 of the Jacksonville City Code (which established the Board of Adjustment), requires findings of fact in denying a variance, a judicial decision of this Court may require findings of fact. *Shoney's*, 119 N.C. App. at 423, 458 S.E.2d at 512. We therefore remand this case to the trial court to further remand it to the Board of Adjustment to make findings of fact to support their decision.

Reversed and remanded.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. DANNY PAUL DAYBERRY

No. COA98-424

(Filed 17 November 1998)

1. **Appeal and Error— appellate rules—gross disregard—remand for sanctions**

An Anders appeal was remanded to the trial court for a hearing to determine the appropriate sanction against defendant's appointed counsel for gross disregard of the appellate rules.

2. **Criminal Law— *Anders* brief—no prejudicial error**

There was no prejudicial error in a prosecution for second-degree murder, driving while license revoked, driving while impaired, reckless driving, and failure to stop for a stop sign which was submitted on an *Anders* brief.

Appeal by defendant from judgment entered 22 September 1997 by Judge James U. Downs in Rutherford County Superior Court. Heard in the Court of Appeals 10 November 1998.

Attorney General Michael F. Easley, by Associate Attorney General Tina A. Krasner, for the State.

David William Rogers for defendant appellant.

GREENE, Judge.

On 22 September 1997, Danny Paul Dayberry (Defendant) pleaded guilty to two counts of second-degree murder, to driving while license revoked, to reckless driving, to failure to stop for a stop sign, and to driving while impaired. Judgment was entered and Defendant was sentenced to 151-91 months imprisonment. From his convictions, Defendant appeals.

Defendant's appointed counsel, David William Rogers, was unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal, and has filed an *Anders* brief asking this Court to conduct its own review of the record for possible prejudicial error. Counsel has advised Defendant of his right to file written arguments with this Court and has provided Defendant with the documents necessary for him to do so.

Before addressing the merits of Defendant's appeal, we note that it is particularly important that counsel file an adequate record in cases where an *Anders* brief is filed, so that this Court may fully review the appeal. *State v. Bennett*, 102 N.C. App. 797, 404 S.E.2d 4 (1991) (sanctioning defendant's counsel for failure to file a complete record with his *Anders* brief); *see also Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967); *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

[1] In this case, Defendant's counsel has violated a number of appellate rules. First, counsel has failed to include a statement of the organization of the trial tribunal in the record on appeal. *See* N.C.R. App. P. 9(a)(3)(b). In addition, counsel's *Anders* brief before this Court was untimely filed. *See* N.C.R. App. P. 13(a)(1). Counsel has also failed to file a transcript of the hearing on Defendant's pleas. *See* N.C.R. App. P. 9(c)(3). It was only after this Court telephoned counsel to request the necessary transcript that he forwarded it to us. Finally, and most importantly, counsel has failed to include a copy of the judgment from which Defendant appeals. *See* N.C.R. App. P. 9(a)(3)(g). Counsel appended a copy of this judgment to his *Anders* brief; however, without an appropriate motion to amend the record on appeal, this item is not properly a part of the record. *Dist. Bd. of Metro.*

Sewerage Dist. v. Blue Ridge Plating Co., 110 N.C. App. 386, 391, 430 S.E.2d 282, 287 (1993). Acting in our discretion, however, we allow the judgment to "be included or designated in the record" to facilitate proper appellate review. *Id.*; N.C.R. App. P. 2. In light of counsel's gross disregard of our appellate rules, we remand to the trial court for a hearing to determine an appropriate sanction against Defendant's appointed counsel, David William Rogers. N.C.R. App. P. 34(c) & (d).

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[2] The issue is whether the record reveals any issues of arguable merit in Defendant's appeal or whether the appeal is wholly frivolous.

Where counsel is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal, counsel may file an *Anders* brief with this Court asking us to conduct our own review of the record for possible prejudicial error. *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498; *Kinch*, 314 N.C. at 102-03, 331 S.E.2d at 666-67. In addition, counsel must advise the defendant that he or she has the right to file written arguments with this Court, and must provide the defendant with any necessary documents. *Id.*

In this case, counsel has been unable to identify any meritorious issue and has requested this Court to conduct our own review of the record. Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders* and *Kinch* by advising Defendant of his right to file written arguments with this Court and by providing him with the documents necessary for him to do so. Defendant has not, however, filed any written arguments on his own behalf with this Court, and a reasonable time in which he could have done so has passed. In accordance with *Anders*, we have fully examined the record to determine whether it contains any issues of arguable merit or whether the appeal is wholly frivolous. We have found no possible prejudicial error in the record, and therefore conclude that the appeal is wholly frivolous.

No error in the judgment; remanded for sanctions hearing.

Judges TIMMONS-GOODSON and HUNTER concur.

ROWE v. ROWE

[131 N.C. App. 409 (1998)]

GWENDOLYN S. ROWE, PLAINTIFF v. O. REAGAN ROWE, DEFENDANT

No. COA97-1574

(Filed 17 November 1998)

Divorce— postseparation support—appeal interlocutory

An appeal from a postseparation support order was dismissed as interlocutory. Although the legislature has replaced alimony pendente lite with postseparation support, the considerations in *Stephenson v. Stephenson*, 55 N.C. App. 250, for holding that alimony pendente lite awards were interlocutory and not immediately appealable are still valid.

Appeal by defendant from judgments entered 25 July 1997 and 19 November 1997 by Judge Yvonne Mims Evans in Mecklenburg County District Court. Heard in the Court of Appeals 15 September 1998.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III and Katherine Line Thompson Kelly, for plaintiff-appellee.

Casstevens, Hanner, Gunter & Conrad, P.A., by Nelson M. Casstevens, Jr. and Teresa L. Conrad for defendant-appellant.

WALKER, Judge.

Plaintiff and defendant were married on 18 June 1950 and separated on 16 June 1996. On 21 October 1996, plaintiff filed a complaint seeking postseparation support, alimony, attorneys' fees, and equitable distribution. A hearing was held for determination of postseparation support on 9 and 10 June 1997. At the hearings, plaintiff established monthly financial needs and expenses of approximately $5,000. Plaintiff offered the affidavit of Thomas Randolph Witt, a certified public accountant who professed to be knowledgeable of the tax laws, and he determined that plaintiff would need $8,300 per month as postseparation support to meet her tax liability.

On 25 July 1997, the trial court ruled that plaintiff's reasonable needs and expenses per month were $4,950.81 rounded up to $5,000, and after taking into consideration the tax consequences of postseparation support, ordered defendant to pay $8,300 per month until the equitable distribution issues were resolved.

On 20 August 1997, defendant filed a motion pursuant to Rule 60 for relief from the order and also filed a notice of appeal. In his

motion, defendant alleged that the trial court erred in determining that a monthly payment of $8,300 was necessary in order to meet plaintiff's reasonable monthly needs and expenses of $5,000. The trial court denied defendant's motion.

Defendant contends that the trial court erred when it ordered the payment of postseparation support that was in excess of plaintiff's needs because her tax liability was incorrectly calculated. Plaintiff contends that an order awarding postseparation support is interlocutory and not immediately appealable.

An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but leaves further matters to be judicially determined between the parties at the trial court level. *Veazey v. City of 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). However, an interlocutory order may be appealed by one of two avenues. First, an appeal is permitted if there is an order or judgment which is final as to some but not all of the claims or parties and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). Second, an appeal is permitted if it affects a substantial right that will be lost if not reviewed immediately. *Id.*

Prior to 1995, there was no action in North Carolina for "postseparation support" instead the statute defined support prior to a divorce as "alimony pendente lite." In 1981, this Court held that alimony pendente lite awards were interlocutory and were not immediately appealable because they did not affect a substantial right. *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981). Prior to *Stephenson*, this Court had allowed alimony pendente lite awards to be immediately appealable. However, we noted that due to the increase in the number of appeals to be heard by this Court, a final hearing frequently could be held in the trial court before the case even reached this Court. *Id. at 251, 285 S.E.2d at 282.* It was also noted that some appeals were merely pursued for the purpose of delay rather than to accelerate the determination of a party's rights. *Id.* Therefore, it was determined that in "consideration of fairness to the parties and as a matter of public policy," alimony pendente lite awards would no longer be immediately appealable. *Id.* at 252, 285 S.E.2d at 282.

In 1995, the legislature modified the statutes dealing with domestic issues and replaced alimony pendente lite with postseparation

support. N.C. Gen. Stat. § 50-16.1A (1995) defines postseparation support as "spousal support to be paid until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony." The differences between alimony pendente lite and postseparation support in the statutes are irrelevant to the issue before this Court.

The conditions this Court addressed in *Stephenson* are still valid today. *See Moose v. Nissan of Statesville*, 115 N.C. App. 423, 444 S.E.2d 694 (1994) (citing the same reasoning to eliminate summary judgment of punitive damage claims as immediately appealable). Postseparation support is only intended to be temporary and ceases when an award of alimony is either allowed or denied by the trial court. Therefore, it remains likely that the trial court would make a final determination on alimony before this Court could render an opinion pursuant to an appeal from a postseparation support order.

Therefore, since a postseparation support order is a temporary measure, it is interlocutory, it does not affect a substantial right, and it is not appealable.

Dismissed.

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

RICHARD J. O'BRIEN, PLAINTIFF v. MABEL D. O'BRIEN, DEFENDANT

No. COA97-1484

(Filed 1 December 1998)

1. **Divorce— equitable distribution—commingling of marital and separate property—no transmutation into marital property**

   The mere commingling of marital funds with the wife's separate funds in an investment account did not automatically transmute the separate property into marital property.

2. **Divorce— equitable distribution—investment account—tracing of separate property**

   Defendant wife met her burden of "tracing out" her separate property in an investment account where the initial deposit into the account consisted of her inheritance from her father's estate;

marital funds of $4,550 were later deposited into the account; the sum of $38,658 was thereafter withdrawn from the account for marital purposes; the $4,550 deposit of marital funds was entirely consumed by the subsequent withdrawal; and the only funds remaining in the account were the wife's separate funds.

3. Divorce— equitable distribution—investment account—active or passive appreciation—factors

If either or both of the spouses perform substantial services during the marriage which result in an increase in the value of an investment account, that increase is to be characterized as an active increase and classified as a marital asset. In making the determination of whether the services of a spouse are substantial, the trial court should consider, among other relevant facts and circumstances of the particular case, the following factors: (1) the nature of the investment; (2) the extent to which the investment decisions are made only by the party or parties, made by the party or parties in consultation with their investment broker, or solely made by the investment broker; (3) the frequency of contact between the investment broker and the parties; (4) whether the parties routinely made investment decisions in accordance with the broker's recommendation, and the frequency with which the spouses made investment decisions contrary to the broker's advice; (5) whether the spouses conducted their own research and regularly monitored the investments in their accounts, or whether they primarily relied on information supplied by the investment broker; and (6) whether the decisions or other activities, if any, made solely by the parties directly contributed to the increased value of the investment account.

4. Divorce— equitable distribution—investment account—passive increase

An increase in the value of an investment account established with the wife's separate funds was a passive increase and thus the wife's separate property where the evidence showed that the spouses jointly met with the wife's broker and routinely chose between investment alternatives based on the broker's recommendations.

5. Evidence— corroboration—gifts—donor's intent

In an equitable distribution proceeding in which letters from defendant wife's aunt stating that two $10,000 checks she sent to plaintiff husband were "part of the inheritance that I am leaving

to [the wife]" and testimony about those letters were admitted without objection, testimony by the wife's cousin about conversations she had with the aunt concerning her intention in sending those checks to the husband was not inadmissible hearsay but was admissible to corroborate the previous evidence of the aunt's intent.

6. Divorce— equitable distribution—checks to husband—gifts to wife—wife's separate property

The evidence in an equitable distribution proceeding supported a finding by the trial court that two $10,000 checks sent by defendant wife's aunt to plaintiff husband in consecutive years were in fact gifts to the wife and were her separate property where the aunt also gave two $10,000 checks to the wife, and letters sent with the checks and other testimony tended to show that the aunt intended to make a gift of $40,000 to the wife by taking advantage of the gift tax exclusion.

7. Divorce— equitable distribution—classification of interest in mother's trust—harmless error

Plaintiff husband was not prejudiced by any error in the trial court's classification of the interest in his mother's trust as irrevocable rather than revocable where the trial court did not classify, value or distribute an interest in the trust or consider the trust as a distributional factor.

8. Divorce— equitable distribution—equal division—supported by findings

The trial court did not err by failing to award plaintiff husband a greater share of the marital property and a lesser share of the marital debt and by awarding an equal share of marital property to both parties where the trial court found that plaintiff husband has a larger income, a vested retirement benefit, and a substantial employee savings plan benefit while defendant wife has a large separate property estate; the wife does not have a retirement benefit or expectation of one through her employment; the wife worked and provided homemaking services as a spouse to assist the husband in obtaining his engineering degree and in maintaining his employment as an engineer, and the husband worked and provided homemaking services as a spouse to assist the wife in obtaining her accounting degree and licensing as a CPA; and the increase in value of the wife's separate property investments was due to passive appreciation.

Appeal by plaintiff from judgment entered 2 April 1997 and order entered 16 April 1997 by Judge Michael A. Paul in Beaufort County District Court. Heard in the Court of Appeals 27 August 1998.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell and Cary E. Close, for plaintiff appellant.

Jeffrey L. Miller for defendant appellee.

HORTON, Judge.

Plaintiff-husband and defendant-wife were married on 24 May 1975, separated on 7 August 1995, and divorced on 24 September 1996. No children were born of the marriage. Following their separation, plaintiff instituted this equitable distribution action on 28 December 1995 in which he requested the trial court award him more than an equal share of the marital property and less than an equal share of the marital debt. Defendant answered and counterclaimed, requesting the trial court award an equitable distribution of the martial property and marital debt and determine the parties' separate property. Following a non-jury trial, the trial court entered an Order and Judgment of Equitable Distribution on 2 April 1997 in which it awarded an equal distribution of the marital property and designated certain items to be separate property not subject to distribution. Plaintiff filed a motion on 11 April 1997 to amend the findings, make additional findings and amend the judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b), which was denied by the trial court on 16 April 1997. Plaintiff filed notice of appeal from both the 2 April 1997 order and the 16 April 1997 order. Thereafter, pursuant to the Order and Judgment of Equitable Distribution, a Qualified Domestic Relations Order was entered on 22 October 1997, but is not a subject of appeal in this case.

The evidence before the trial court tends to show that in 1986, after receiving an inheritance from her father of approximately $163,000.00, defendant opened an investment account with Wheat First Securities. She deposited about $158,000.00 of her inheritance, as well as a $10,000.00 gift from her Aunt Mabel Dozier Stone (Aunt Mabel), into this investment account. On the advice of her broker, defendant had the investment account listed in the joint names of the parties, with a right of survivorship. From November 1986 until July 1989, the parties deposited a total of $4,550.00 of marital funds into this investment account, and withdrew $38,658.00 from the investment account for marital purposes. This investment account

remained with Wheat First Securities until July 1989, at which time it was transferred to Interstate Johnson Lane when the parties' investment broker changed firms. At the time of the transfer, the investment account was valued at $138,161.00, or nearly $30,000.00 less than the amount of the initial deposit.

The investment account remained at Interstate Johnson Lane until January 1991, when it again followed the investment broker to his new position at Shearson Lehman. At the time of the transfer to Shearson Lehman, the investment account had depreciated as a result of market forces, and was valued at $119,714.00. Also, during this time Aunt Mabel was in poor health and was attempting to deplete her estate by distributing portions to her intended beneficiaries in order to avoid estate tax consequences. Therefore, Aunt Mabel made gifts to plaintiff and defendant in December 1992 and January 1993 for $10,000.00 each, for a total of $40,000.00. Along with each gift Aunt Mabel included a note describing the purpose of her gifts. The 28 December 1992 note to plaintiff read, in pertinent part, as follows:

> Dear Dick:
>
> I have enclosed a check for $10,000 which is part of the inheritance I am leaving Mabel. Since the law allows only $10,000 per family member, I am sending this gift for her in your name to remove assets from my estate that would otherwise be taxed at a very high rate if left in the estate. Please deposit upon receipt.
>
> . . . .
>
> Mabel D. Stone

Aunt Mabel's 15 January 1993 note contained similar language, stating that she had "enclosed a check for $10,000 which is part of the inheritance that I am leaving to Mabel." Of this $40,000.00 in gifts from Aunt Mabel, $24,990.00 was deposited into the investment account at Shearson Lehman, and $9,970.00 was used to purchase a 1993 Volvo 850 automobile for defendant.

In addition to the $24,990.00 in gift money invested in the investment account, the investment account increased in value by approximately $44,000.00 due to dividends, share reinvestment gains and market value gains. Further, approximately $6,500.00 in management fees were charged against the investment account, and $1,035.00 was withdrawn from the investment account. In May 1994, the Shearson Lehman investment account was valued at $181,452.00. The invest-

ment account remained at Shearson Lehman until May 1994, when it was transferred to Scott & Stringfellow. While the investment account was at Scott & Stringfellow, defendant received an inheritance from Aunt Mabel's estate totaling $62,841.00, of which she deposited $56,851.00 into the investment account. The investment account remained there until the parties' separation in August 1995.

After hearing all of the evidence, the trial court found that the $40,000.00 in gifts from Aunt Mabel were intended to be gifts to defendant in the total amount of $40,000.00, and not gifts to plaintiff. Further, the trial court determined that other than $4,550.00 of marital funds deposited in the investment account when it was with Wheat First Security, all of which was withdrawn and spent for marital purposes, no other marital property or earnings of the parties was ever deposited to or invested in the investment account. Consequently, the trial court determined the investment account to be the separate property of defendant and not subject to distribution. In sum, the trial court found $308,465.12 of the total estate to be the separate property of defendant and $277,578.57 to be marital property. After determining that an equal division of the marital property would be equitable, the trial court awarded plaintiff $158,677.28 of the marital estate, and awarded defendant $118,901.29 of the marital estate. In addition, the trial court ordered plaintiff to pay defendant a distributive award of $19,888.00 in order to equalize the distribution.

On appeal, plaintiff contends the trial court erred by (1) classifying the investment account and the gifts from Aunt Mabel as defendant's separate property rather than the marital property of the couple; (2) admitting hearsay testimony from Aunt Mabel's relatives about her intent in regard to the four gifts of $10,000.00 each to plaintiff and defendant in December 1992 and January 1993; (3) finding that plaintiff was an irrevocable one-third beneficiary of his mother's trust when the express terms of the trust dictate plaintiff's interest was revocable; and (4) failing to award plaintiff an unequal distribution of the marital property and debt.

I.

At the outset, we note that the distribution of marital property is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988) (citation omitted). In order to show an abuse of discretion, a party must show "that the decision was unsupported by

reason and could not have been the result of a competent inquiry." *Id.* As such, the findings of fact are conclusive on appeal if supported by any competent evidence. *Id.*

In an equitable distribution case filed before 1 October 1997, the trial court must undergo a three-step analysis: (1) identify what is marital property and what is separate property; (2) calculate the net value of the marital property; and (3) distribute the marital property in an equitable manner. *Id.* at 63, 367 S.E.2d at 350. In this case, we are concerned with the first step, the classification of the investment account as either marital property or separate property.

The main contention raised by plaintiff's appeal is that the trial court improperly classified the investment account as defendant's separate property. According to plaintiff, although the money used to begin the investment account was part of defendant's inheritance, the investment account should nevertheless be classified as marital property for the following reasons: (1) marital funds were commingled with the inherited funds, thus "transmuting" the investment account from separate property to marital property; (2) defendant has failed to "trace out" the $4,550.00 in marital funds which were deposited into the investment account; and (3) plaintiff actively participated with defendant in managing the investment account by making certain decisions which ultimately led to the increased value of the investment account. For purposes of clarity, we will address each of these points separately.

Before addressing plaintiff's contentions, we note that in order to determine the nature of certain property, it is helpful to consult the definitions of marital property and separate property provided in N.C. Gen. Stat. § 50-20(b), which defines the terms as follows:

> (1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property . . . in accordance with subdivision (2) . . . of this subsection. . . . It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

> (2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. . . . Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.

N.C. Gen. Stat. § 50-20(b) (Cum. Supp. 1997). Furthermore, in cases such as this there are dual burdens of proof. First, the party seeking to classify the investment as marital property must show by the preponderance of the evidence that the property is presently owned, and was acquired by either of the spouses during the course of the marriage and before the date of separation. *Smith v. Smith*, 111 N.C. App. 460, 479, 433 S.E.2d 196, 208, *disc. review denied*, 335 N.C. 177, 438 S.E.2d 202 (1993), *reversed in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). Thereafter, the party seeking to classify the investment account as separate property must show by the preponderance of the evidence that the property falls within the statutory definition of separate property. *Id.* at 480, 433 S.E.2d at 208. If both parties meet their burdens, " 'then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property.' " *Id.* (quoting *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 788 (1991)).

A. "Transmutation" of Separate Property into Marital Property

[1] According to plaintiff, although the initial deposit into the investment account was without question the separate property of defendant, the subsequent actions by the parties of commingling marital funds with separate funds "transmuted" the nature of the investment account from separate property to marital property. The doctrine of transmutation is well developed in Illinois, where it was first adopted by judicial decision and later by legislative enactment. *Wade v. Wade*, 72 N.C. App. 372, 381, 325 S.E.2d 260, 269, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Under this theory, "the affirmative act of augmenting nonmarital property by commingling it with marital property" creates a rebuttable presumption that all the property has

been transmuted into marital property. *In re Marriage of Smith*, 427 N.E.2d 1239, 1245-46 (Ill. 1981).

However, as plaintiff concedes, this Court has expressly rejected the theory of transmutation. *Wade*, 72 N.C. App. at 381, 325 S.E.2d at 269. We find, therefore, that the mere commingling of marital funds with separate funds alone does not automatically transmute the separate property into marital property.

B. "Tracing Out" of Separate Funds

[2] Next, plaintiff contends that regardless of whether the investment account was transmuted into marital property, defendant failed to meet her burden of "tracing out" her separate property. Here, it is clear that the investment account was begun during the marriage and prior to the date of separation. However, it is equally clear that the initial deposit into the investment account was from defendant's separate property, consisting of her inheritance from her father's estate. Therefore, defendant has met her burden of establishing the separate nature of the property.

Despite the fact that defendant has met her burden of proving the separate nature of the investment account, plaintiff contends defendant must also "trace out" her separate property from the $4,550.00 of marital funds which were deposited into the investment account. However, the $4,550.00 of marital funds deposited into the investment account was the only deposit of marital funds into the investment account. Further, soon after this deposit, $38,658.00 was withdrawn from the account.

After considering this evidence, the trial court concluded that the $4,550.00 deposit of marital funds was entirely consumed by the subsequent withdrawal, such that no marital funds remained in the investment account. Since there is competent evidence in the record to support this finding, we are bound by it. *See Beightol*, 90 N.C. App. at 60, 367 S.E.2d at 348. Therefore, after these marital funds were removed, the only funds remaining in the investment account were separate funds. This being the case, we find that defendant has met her burden of "tracing out" her separate property.

C. Active vs. Passive Appreciation of the Investment Account

Finally, plaintiff contends that he actively participated in the management of the investment account, such that the account should be

treated as marital property. It is well recognized that there is a distinction between active and passive appreciation of separate property. Active appreciation refers to financial or managerial contributions of one of the spouses to the separate property during the marriage; whereas, passive appreciation refers to enhancement of the value of separate property due solely to inflation, changing economic conditions or other such circumstances beyond the control of either spouse. *McLeod v. McLeod*, 74 N.C. App. 144, 148, 327 S.E.2d 910, 913, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985); *see also Deffenbaugh v. Deffenbaugh*, 877 S.W.2d 186, 188 (Mo. Ct. App. 1994). Furthermore, the party seeking to establish that any appreciation of separate property is passive bears the burden of proving such by the preponderance of the evidence. *Smith*, 111 N.C. App. at 480, 433 S.E.2d at 208.

The issue of the characterization of the appreciation of investment accounts, mutual funds, and other stocks or securities, as active or passive has not been previously addressed in North Carolina. Most of our cases dealing with the active/passive appreciation of separate property have dealt with closely held corporations. *See, e.g., McLeod*, 74 N.C. App. 144, 327 S.E.2d 910; *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E.2d 57 (1985); *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). Therefore, we will look to other jurisdictions for guidance.

In *Deffenbaugh*, 877 S.W.2d 186, the Missouri Court of Appeals was presented with the question of whether the appreciated value of 425 shares of a mutual fund was marital or separate property. The evidence tended to show that the shares were originally purchased with the wife's separate property. According to the husband, he regularly looked at the quarterly statements, corresponded with and spoke to the investment broker, and regularly gave advice to his wife. *Id.* at 188. However, the court held that these activities "were within the purview of ordinary and usual spousal duties; and as such, did not transform the increased value of the original shares of the mutual fund into [separate] property." *Id.* Further, the Missouri Court of Appeals has repeatedly held that several factors must be shown in order for a spouse to be awarded a proportionate share of the increase in value of the other spouse's separate property, including: (1) a contribution of substantial services; (2) a direct correlation between those services and the increase in value; (3) the amount of the increase in value; (4) the performance of the services during the marriage; and (5) the value of the services, lack of compensation,

or inadequate compensation. *Meservey v. Meservey*, 841 S.W.2d 240, 245-46 (Mo. Ct. App. 1992); *Klaus v. Klaus*, 918 S.W.2d 407, 409 (Mo. Ct. App. 1996).

[3] We believe that the multi-factorial approach of the Missouri Court of Appeals is consistent with the public policy considerations incorporated in our Equitable Distribution Act, and we adopt that approach. We hold, therefore, that if either or both of the spouses perform substantial services during the marriage which result in an increase in the value of an investment account, that increase is to be characterized as an active increase and classified as a marital asset. In making the determination of whether the services of a spouse are substantial, the trial court should consider, among other relevant facts and circumstances of the particular case, the following factors: (1) the nature of the investment; (2) the extent to which the investment decisions are made *only* by the party or parties, made by the party or parties in consultation with their investment broker, or solely made by the investment broker; (3) the frequency of contact between the investment broker and the parties; (4) whether the parties routinely made investment decisions in accordance with the recommendation of the investment broker, and the frequency with which the spouses made investment decisions contrary to the advice of the investment broker; (5) whether the spouses conducted their own research and regularly monitored the investments in their accounts, or whether they primarily relied on information supplied by the investment broker; and (6) whether the decisions or other activities, if any, made solely by the parties directly contributed to the increased value of the investment account.

[4] Here, the trial court did not find that the actions of the spouses in jointly meeting with the wife's broker and routinely choosing between investment alternatives based on the recommendation of the investment broker rose to the level of substantial activity. The trial court determined that the defendant-wife had established by the preponderance of the evidence that any appreciation of the investment account was purely passive. After careful review, we find that the trial court's findings support its conclusions of law. Therefore, we overrule this assignment of error.

II.

[5] Next, plaintiff contends the trial court erred by (1) improperly allowing defendant and her cousin, Wilma Dozier Mario (Cousin Wilma), to testify as to Aunt Mabel's intention with regard to the

two $10,000.00 checks, and (2) classifying the two $10,000.00 checks from Aunt Mabel to plaintiff as defendant's separate property.

With regard to plaintiff's first contention, defendant was allowed to testify, without objection, about certain letters which Aunt Mabel included with the four checks. As previously stated, Aunt Mabel sent plaintiff and defendant each a check for $10,000.00 in December 1992, and then again in January 1993. The purpose of these checks was to reduce the amount of Aunt Mabel's estate in order to relieve the estate tax burden by taking advantage of the $10,000.00 annual exclusion. However, Aunt Mabel specifically stated in her two letters to plaintiff that the $10,000.00 checks were "part of the inheritance that I am leaving to Mabel." These letters were then introduced into evidence without objection.

Thereafter, Cousin Wilma was allowed to testify, over plaintiff's objection, about Aunt Mabel's intent with regard to the four $10,000.00 checks. According to the trial court, this testimony was admissible as corroboration of the previous evidence of Aunt Mabel's intent elicited from defendant. *See Bowden v. Bell*, 116 N.C. App. 64, 446 S.E.2d 816 (1994) (where this Court held that "[i]t is clear that out-of-court statements offered to corroborate the prior testimony of a witness are not hearsay." *Id.* at 70, 446 S.E.2d at 821).

Here, the letters from Aunt Mabel were introduced without objection to show her donative intent with regard to the four $10,000.00 checks. Thereafter, Cousin Wilma corroborated this evidence with her testimony regarding conversations she had with Aunt Mabel. We find that this testimony was not hearsay evidence offered for the truth of the matter asserted, but rather was corroborative evidence of Aunt Mabel's intent. As such, the trial court did not err by allowing this testimony, and we overrule this assignment of error.

[6] Next, plaintiff contends the trial court erred by finding the two $10,000.00 checks written by Aunt Mabel to plaintiff were the separate property of defendant. In its 2 April 1997 order, the trial court made the following findings with regard to Aunt Mabel's intent:

> 14. In December [1992] and January [1993], defendant's Aunt Mabel Dozier Stone was in ill health. [Aunt Mabel] was attempting to distribute a portion of her estate to intended beneficiaries prior to her death in order to avoid estate tax consequences. In December [1992], [Aunt Mabel] wrote two $10,000 checks—one payable to defendant individually and one payable to plaintiff

individually. In January [1993], [Aunt Mabel] wrote two more $10,000 checks—one to plaintiff individually and one to defendant individually. She also wrote a letter to plaintiff describing her intent and design that the checks payable to plaintiff were in fact gifts for the defendant. [Aunt Mabel's] intention in making the $40,000 in payments was to make a gift to defendant in the total amount of $40,000 and not to make any gift to plaintiff of any of said sum. . . . Plaintiff was not an object of [Aunt Mabel's] bounty or gift-giving. He was not the intended recipient of the funds being given. With regard to these checks, plaintiff was merely a conduit for [Aunt Mabel's] gift to defendant.

According to plaintiff, there was no competent evidence in the record to support this finding. Additionally, plaintiff contends that "as a matter of law the aunt's intent is irrelevant given that the aunt *had* to have been making a gift to [plaintiff] in order to comply with federal gift tax law."

In *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987), plaintiff's grandmother wrote separate checks to plaintiff and her husband, the defendant. The trial court held that the checks written to defendant were intended to be gifts to plaintiff only. On appeal, this Court noted that "findings of fact made by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them." *Id.* at 488, 355 S.E.2d at 521. The Court then concluded that "[t]he evidence concerning [the grandmother's] intent adequately supports the finding that the checks written to defendant were gifts to plaintiff only." *Id.*

Similarly, the trial court's findings in this case are adequately supported by the record evidence, and these findings justify its conclusions. It is clear that plaintiff was not the object of Aunt Mabel's bounty, but was a mere conduit for the gift to defendant. As such, we overrule this assignment of error. Further, we find plaintiff's federal estate tax argument to be without merit.

III.

[7] Next, plaintiff contends the trial court erred by classifying the interest in his mother's trust as irrevocable rather than revocable. Specifically, the trial court found that his mother's trust was an "irrevocable living trust" valued at approximately $360,000.00, and that plaintiff was a "named beneficiary of ⅓ of the trust corpus remaining, if any remains, at the time of his mother's death."

However, the trial court also found that "[p]laintiff has no present ownership or property interest of value in [his mother's trust]." The trial court did not classify, value or distribute an interest in the trust to the prejudice of plaintiff. Further, it did not consider the trust as a distributional factor. Therefore, whether the trust was revocable or irrevocable is of no consequence to the trial court's order in this case. Any error by the trial court was harmless, and this assignment of error is overruled.

IV.

[8] Finally, plaintiff contends the trial court erred by failing to award him a greater share of the marital property and a lesser share of the marital debt. In equitable distribution cases, N.C. Gen. Stat. § 50-20(c) provides, in pertinent part:

> (c) There *shall* be an equal division [of the marital property] unless the court determines that an equal division is not equitable. . . . Factors the court shall consider under this subsection are as follows:
>
> (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
>
> . . . .
>
> (3) The duration of the marriage and the age and physical and mental health of both parties;
>
> . . . .
>
> (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property;
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
>
> (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
>
> . . . .

(9) The liquid or nonliquid character of all marital property;

. . . .

(11) The tax consequences to each party;

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such martial property, during the period after separation of the parties and before the time of distribution; and

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c) (Cum. Supp. 1997) (emphasis added). As the language of the statute suggests, the public policy of this State "so strongly favor[s] the equal division of marital property that an equal division is made *mandatory* 'unless the court determines that an equal division is not equitable.' " *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985) (emphasis in original) (quoting N.C. Gen. Stat. § 50-20(c)). Therefore, as the *White* court pointed out:

> The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable.

Id. Thus, if the party requesting an unequal distribution fails to carry its burden of proving by the preponderance of the evidence that an equal distribution would be inequitable, then the trial court must divide the property equally. *Id.* at 776, 324 S.E.2d at 832-33.

Further, in order for the appellate court to properly review the trial court's conclusions for any abuses of discretion, the trial court is required to make specific findings of fact addressing the statutory factors that are sufficient to support its order. *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988). Here, the trial court made exhaustive findings of fact, including the following:

a. . . . Plaintiff has a larger income (double the gross income of defendant), has a vested retirement benefit, and a substantial employee savings plan benefit . . . , while defendant has a large separate property estate;

. . . .

c. . . . Defendant does not have a retirement benefit or expectation of one through her employment, independent of what she might save from her professional earnings. Plaintiff has a retirement benefit which will increase in value based upon his post-separation years of employment and earnings. Plaintiff also has an employee savings plan in which he has a continuing expectation of matching contributions for deposit by his employer;

d. . . . Defendant worked and provided homemaking services as a spouse to assist plaintiff in obtaining his engineering degree and in maintaining his employment as an engineer. Plaintiff worked and provided homemaking services as a spouse to assist defendant in obtaining her accounting degree and licensing as a Certified Public Accountant. Plaintiff met with or talked with defendant's investment broker and made suggestions or gave some advice about investment of defendant's separate property investments. However, defendant maintained final control over her separate property investments, and the increase in value of her separate property was due to passive appreciation[.]

After a careful review, we find the trial court did not abuse its discretion in concluding that each party was entitled to an equal share of the marital property. In fact, the findings indicate the trial court admitted and considered evidence relating to most of the twelve factors enumerated under N.C. Gen. Stat. § 50-20(c). We find no abuse of discretion, and overrule this assignment of error.

In conclusion, we find the able trial court made adequate findings of fact which were supported by the record evidence and that these findings support its conclusions of law. Therefore, the order of the trial court is affirmed.

Affirmed.

Judge McGEE concurs.

Judge WYNN concurred in the result prior to 1 October 1998.

STATE OF NORTH CAROLINA v. BILL EDWARD HALL, DEFENDANT

No. COA97-1560

(Filed 1 December 1998)

1. Indictment and Information— True Bill not checked—no evidence of presentation to court—presumption of validity

Indictments charging defendant with armed robberies were valid where both were signed by the grand jury foreman and clearly indicated the charges against defendant, but neither of the boxes designating "True Bill" or "Not a True Bill" were checked and there was no evidence of the presentation of a true bill to the trial court. An indictment affords the protection guaranteed by the Constitution of North Carolina so long as it charges the criminal offense in a plain, intelligible and explicit manner.

2. Confessions and Incriminating Statements— Miranda warnings— interrogation not custodial

The trial court did not err in an armed robbery prosecution by not suppressing defendant's statement to officers based on a lack of Miranda warnings where there was sufficient evidence in the record to find that defendant was not in custody when he confessed.

3. Confessions and Incriminating Statements— signed transcription—not a second statement

A written statement was not a second "un-Mirandized" statement where a detective transcribed defendant's words and defendant signed the statement. The act of signing the statement merely finalized the confession.

4. Confessions and Incriminating Statements— statement about one offense while discussing another—right to counsel

The trial court did not err in an armed robbery prosecution by admitting a statement about this robbery (the Firehouse robbery) made while defendant was talking about other robberies after asserting his Sixth Amendment right to counsel for the Firehouse robbery. The Sixth Amendment right to counsel is offense specific.

Judge WALKER concurring.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 10 September 1997 by Judge Loto G. Caviness in Gaston County Superior Court. Heard in the Court of Appeals 6 October 1998.

Michael F. Easley, Attorney General, by Joyce S. Rutledge, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

SMITH, Judge.

Defendant was charged with two counts of robbery with a dangerous weapon for the robbery of Anchor Seafood Restaurants, Inc., d/b/a Firehouse Fish-N-Fixins Restaurant (Firehouse) and one of its employees. Defendant pled not guilty to both counts and the cases were consolidated for hearing. The jury found defendant guilty on both counts and defendant was sentenced to a term of imprisonment.

I.

[1] Defendant first assigns as error the grand jury indictments charging him with the crimes. Both indictments were signed by the grand jury foreman and clearly indicated the charges against defendant, but neither of the boxes designating "True Bill" or "Not a True Bill" were marked. Defendant claims this omission renders the indictments fatally defective and thus invalid. We disagree.

Article I, section 22 of the North Carolina Constitution states that "no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. The purposes of this section are not to require adherence to mere technicalities of law, but to provide notice to the defendant of the crime with which he is charged, to protect the defendant from twice being tried for the same offense, to enable the defendant to adequately prepare a defense, and to enable the court to properly pronounce the sentence imposed. *See State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968). So long as the indictment charges " 'in a plain, intelligible and explicit manner,' the criminal offense the accused is 'put to answer,' [then that indictment] affords the protection guaranteed by Art. I, Secs. 11 and 12, Constitution of North Carolina." *State v. Helms*, 247 N.C. 740, 742, 102 S.E.2d 241, 243 (1958) (citations omitted); N.C. Gen. Stat. § 15-153 (1983) (indictment is sufficient in form if it states the charge against the defendant in a "plain, intelligible, and explicit manner"); *see also State v. Lowe*, 295

N.C. 596, 603, 247 S.E.2d 878, 883 (1978) (indictment constitutionally sufficient if it apprizes defendant of charge).

This does not end our inquiry, however, because N.C. Gen. Stat. § 15A-644(a) contains certain requirements for a valid indictment. This section states that an indictment must contain the following:

> (1) The name of the superior court in which it is filed;
>
> (2) The title of the action;
>
> (3) Criminal charges pleaded as provided in Article 49 of this Chapter, Pleadings and Joinder;
>
> (4) The signature of the prosecutor, but its omission is not a fatal defect; and
>
> (5) The signature of the foreman or acting foreman of the grand jury *attesting the concurrence of 12 or more grand jurors in the finding of a true bill of indictment.*

N.C. Gen. Stat. § 15A-644(a) (1997) (emphasis added). Although subsection (a)(5) sounds mandatory, it has been held to be merely directory. *See State v. House*, 295 N.C. 189, 201, 244 S.E.2d 654, 660 (1978); *State v. Midyette*, 45 N.C. App. 87, 262 S.E.2d 353 (1980). Reading the provision as directory "makes substance paramount over form." *Midyette*, 45 N.C. App. at 89, 262 S.E.2d at 354; *see House*, 295 N.C. at 203, 244 S.E.2d at 662 ("to interpret [this provision] as requiring the quashing of a bill of indictment . . . [for failure to attest to concurrence of twelve or more jurors] would be to attribute to the Legislature an intent to paramount mere form over substance"). Finally, with regard to this provision, it is important to note that *State v. McBroom*, 127 N.C. 528, 37 S.E. 193 (1900), which held that the endorsement "a true bill" is essential to the validity of an indictment, was expressly overruled in *State v. Sultan*, 142 N.C. 569, 54 S.E. 841 (1906).

Although the attestation by the foreman is a mere technicality, there must be some evidence in the record that a "true bill" was presented to the court. *See Midyette*, 45 N.C. App. 87, 262 S.E.2d 353; *see also Sultan*, 142 N.C. at 573, 54 S.E. at 842 ("[N]o endorsement by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it."); *State v. Avant*, 202 N.C. 680, 682, 163 S.E. 806, 807 (1932) ("There is no statute in this State requiring that a bill of indictment, which has been duly considered and returned into court by a grand jury shall be endorsed

by the foreman or otherwise, as 'a true bill,' or as 'not a true bill.' "). This Court, in *Midyette*, a case very similar to the one before us, held that "an indictment returned by the grand jury is not defective or insufficient where the foreman failed to mark the box indicating a true bill or not a true bill *where the court minutes show that all bills of indictment were returned true bills.*" *Midyette*, 45 N.C. App. at 90, 262 S.E.2d at 355 (emphasis added). Likewise, the North Carolina Supreme Court has stated,

> It is provided by statute . . . that grand juries shall return all bills of indictment in open court through their acting foreman. . . . No endorsement by the foreman or otherwise is essential to the validity of an indictment, which has been duly returned into court by the grand jury, and entered upon its records. The validity of the indictment is determined by the records of the court, and not by the endorsements, or the absence of endorsements on the bill.

Avant, 202 N.C. at 682-83, 163 S.E. at 807 (citations omitted).

The problem we face in this case is that the parties have provided us with *no evidence whatsoever* of the presentation of the bill of indictment to the trial court, thus rendering us unable to determine from the record the validity of the indictment. We must therefore rely on the presumption of validity of the trial court's decision to go forward with this case. It is the defendant's burden to prove reversible error which prejudiced the outcome of his case. *See State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). Because defendant failed to meet this burden by not providing this Court with evidence that the trial court was unjustified in assuming jurisdiction over this case, we hold that the indictment is valid. However, because this issue was raised for the first time on appeal, this holding is without prejudice to defendant's right to file a motion with the trial court regarding the validity of the bill of indictment.

II.

[2] Defendant next asserts that the trial court erred in not suppressing his 8 January 1997 statement to the police. On this date, detectives found defendant at a friend's home and asked him to accompany them to the police station. Defendant agreed. Detectives offered defendant a ride in the police car, which defendant accepted. They then drove defendant to the station and questioned him about the Firehouse robbery. Defendant was advised that he did not have to stay, but that the officers needed to talk to him. No *Miranda* warn-

ings were given. The questioning lasted approximately one or one and one-half hours, wherein defendant made inculpatory statements regarding his involvement in the robbery. Defendant's counsel objected to the introduction of this statement on the ground that defendant was "in custody" and had not been given his *Miranda* warnings. The trial court, after a lengthy *voir dire* hearing, overruled this objection and allowed the introduction of this statement, stating:

> At this time as to the statement made on January 8th, the Court will find that this statement and the events leading up to it, he had not been arrested at that time. Also, that he had voluntarily gone on request to discuss matters with the law enforcement officers. The Court will further find that it appears that there was nothing extraordinary as to promises or leniency for his assistance. The Court will not suppress the January 8th statement as it so appears.

At the outset, we should note that "[t]he trial court's findings of fact after a *voir dire* hearing concerning the admissibility of the confession are conclusive and binding on the appellate courts when supported by competent evidence." *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 581 (1982) (citing *State v. Jenkins*, 292 N.C. 179, 232 S.E.2d 648 (1977)). The question of whether defendant was in custody, for purposes of *Miranda*, is a question of law, however, and fully reviewable by this Court. Although the trial judge found that defendant "had not been arrested" at the time the statement was made, there was no finding as to whether defendant was in custody. "The absence of such a finding, however, does not prevent this Court from examining the record and determining whether defendant was in custody." *State v. Torres*, 330 N.C. 517, 525, 412 S.E.2d 20, 24 (1992) (citing *Davis*, 305 N.C. at 414-15, 290 S.E.2d at 583).

A person is in custody, for purposes of *Miranda*, when he is "taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). This does not extend to pre-arrest investigative activities. *See State v. Pruitt*, 286 N.C. 442, 448, 212 S.E.2d 92, 96 (1975). The United States Supreme Court has spoken on the issue of whether a defendant is in custody. "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of move-

ment" of the degree associated with a formal arrest.' " *Stansbury v. California*, 511 U.S. 318, 322, 128 L. Ed. 2d 293, 298 (1994) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 1279 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977))). Furthermore, the interrogation at issue "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Rhode Island v. Innis*, 446 U.S. 291, 300, 64 L. Ed. 2d 297, 307 (1980).

The test for determining whether the interrogation was custodial is "whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way," or whether the suspect felt free to leave. *Davis*, 305 N.C. at 410, 290 S.E.2d at 581. This is an objective test, based upon a reasonable person standard, and is "to be applied on a case-by-case basis considering all the facts and circumstances." *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993). A reviewing court may not rely upon the subjective intent of the police (that the suspect would or would not be detained or arrested after questioning) or the subjective belief of the defendant as to his freedom to leave. *See id.*

Thus, we must examine the record as a whole and, applying the reasonable person standard set out above, determine as a matter of law whether defendant was in custody.

First, the record indicates, and defendant concedes, that defendant voluntarily accompanied the detectives to the police station. The detectives "asked [defendant] would he come back to the police department and talk . . . about a robbery." Although, as defendant argues, there was no indication that he was free to refuse the request, likewise there was no indication that he was *not* free to refuse the request.

Second, although the detectives never specifically indicated to defendant that he was not under arrest, they did advise him that "he didn't have to stay there, just that [they] needed him to talk to [them]." Defendant argues in his brief that "[a] reasonable person would perceive what the detective said to mean that . . . defendant could leave only *after* the interrogation." This seems to be adding to an unambiguous statement, and there is no evidence in the record tending to lead a reasonable person to draw such a conclusion. It appears that defendant was free to leave at any time he desired. Our Supreme Court has stated with regard to the ability of a suspect to

leave an interrogation, "*Miranda*'s commandment that questioning cease when a suspect indicates he intends to exercise his Fifth Amendment privilege does not apply . . . in situations such as this where the defendant has available the easier and more effective method of invoking the privilege simply by leaving." *Davis*, 305 N.C. at 418, 290 S.E.2d at 585; *see also State v. Greene*, 332 N.C. 565, 580, 422 S.E.2d 730, 739 (1992) ("By exercising his freedom to leave, the defendant could have terminated these allegedly coercive influences.").

Third, the detectives presented to defendant a statement made by a witness implicating defendant in the robbery. Defendant asserts that by confronting him with this evidence of involvement, a reasonable person in defendant's position would not have felt free to leave. The United States Supreme Court has stated, "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." *Stansbury*, 511 U.S. at 327, 128 L. Ed. 2d at 300.

Fourth, defendant states in support of his argument to suppress that he "was interrogated in a coercive, police-dominated atmosphere." Undoubtedly, any time a police officer interviews a suspect, there will be present coercive aspects. *See State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997). The United States Supreme Court has stated:

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

Mathiason, 429 U.S. at 495, 50 L. Ed. 2d at 719; *see also Minnesota v. Murphy*, 465 U.S. 420, 79 L. Ed. 2d 409, *reh'g denied*, 465 U.S. 420, 79 L. Ed. 2d 409 (1984).

Other evidence in the record shows that defendant was under constant police supervision during the interrogation and that the interrogation lasted between one and two hours. Defendant was alert and sober. He was not restrained in any way, the door to the interrogation room was left open, and there were no threats or shows of violence or promises for leniency. There is no evidence that defendant was offered food or drink, nor is there evidence that he requested food or drink and was refused. During the interview, defendant gave several statements, from which a detective took notes and transcribed. Following the interview the detective went over the contents of the statement with defendant, defendant was given the opportunity to read the statement, and then defendant signed the statement. Although this may be a close case, we agree with the trial court and conclude that there is sufficient evidence in the record to find that defendant was not in custody at the time he confessed to the robbery.

[3] Defendant finally argues that he was certainly in custody after he confessed to the robbery, and thus the written statement (signed after his oral confession) should have been suppressed. The record shows that immediately after making the inculpatory statement, of which the detective had transcribed in his own words, defendant signed the statement affirming its truth and accuracy. The act of signing the statement merely finalized the confession. It was not, as defendant argues, "another un-*Mirandized* statement" subject to suppression.

Examining the evidence and giving appropriate deference to the trial court's findings, we conclude the defendant was not in custody and the trial court did not err in denying defendant's motion to suppress his 8 January 1997 statement.

III.

[4] As his last assignment of error, defendant argues that the trial court erred in allowing a statement he made on 14 January 1997 to come into evidence. The statement in dispute was made following defendant's arrest for the Firehouse robbery. Detectives took defendant from jail in handcuffs and chains to the police department in order to talk with him about other robberies for which he was a suspect. Defendant was advised of his *Miranda* rights, signed a waiver of those rights, and made oral statements implicating himself in several robberies. During the interrogation, defendant made mention of the Firehouse robbery, stating that he had not received any money from "that one." It is this statement that is at issue. Defendant asserts that "[t]he statement was inadmissible because it was taken without coun-

sel present and not initiated by defendant, and was thus taken in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 23 of the North Carolina Constitution."

The Sixth Amendment provides that in all criminal prosecutions, the defendant has a right to the assistance of counsel. This right applies at all critical stages of a criminal prosecution (i.e. after formal charges have been filed). *See Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246 (1964). This right, however, is "offense specific." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 115 L. Ed. 2d 158, 166 (1991). Therefore, even if a defendant invokes his Sixth Amendment right to counsel in one case, officers may still interrogate him in regard to other offenses. *See State v. Pope*, 333 N.C. 106, 113, 423 S.E.2d 740, 744 (1992). This Court has stated,

> invocation of the right to counsel under the Sixth Amendment acts only to prevent subsequent interrogation of a defendant on the *same offense* for which he has invoked his right to counsel. However, it does not work to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached. As a result, under the rule in *McNeil*, any subsequent waiver of the right to counsel during a police-initiated interrogation is invalid *only* as to questioning on the *same offense* for which judicial proceedings have begun and for which the defendant has asserted his right to counsel.

State v. Harris, 111 N.C. App. 58, 65, 431 S.E.2d 792, 796-97 (1993). In this case, defendant had asserted his Sixth Amendment right to counsel for the Firehouse robbery, so any subsequent questioning about that offense outside the presence of defendant's attorney would not have been proper. Questioning about the other offenses, however, was not accorded the same protection and was permissible. Defendant was read his *Miranda* rights, signed a waiver, and made inculpatory statements on his own free will. Therefore, the police-initiated interrogation on 14 January 1997 was not violative of defendant's Sixth Amendment rights.

Nonetheless, defendant maintains that the statement regarding the Firehouse robbery (a charge for which defendant *had* asserted his Sixth Amendment right to counsel) should have been suppressed. Defendant argues that because he made a statement regarding the Firehouse robbery, the interrogation "concerned the pending charges." This argument is without merit. The record indicates that

the detectives were questioning defendant about *other* robberies in which he might have been involved. They never solicited any information regarding the Firehouse robbery. While defendant was discussing other robberies, he volunteered an inculpatory statement regarding the Firehouse robbery. This statement was unsolicited and spontaneous. *See Kuhlmann v. Wilson*, 477 U.S. 436, 91 L. Ed. 2d 364 (1986) (finding no Sixth Amendment violation where defendant was never asked about the pending charges, but nonetheless offered spontaneous and unsolicited statements in that regard).

Defendants claims are without merit. Thus, we affirm the rulings of the trial court.

No Error.

Judge WALKER files a separate concurring opinion.

Judge GREENE dissents.

Judge WALKER concurring.

I concur in the majority opinion that there is a presumption of validity of the indictment. Since defendant did not overcome this presumption by presenting any evidence to the contrary, I find it unnecessary to state "this holding is without prejudice to defendant's right to file a motion with the trial court regarding the validity of the bill of indictment."

Judge GREENE dissenting.

I believe Bill Edward Hall (Defendant) was in custody on 8 January 1997 at the time he gave his statement, and the trial court erred in denying Defendant's motion to suppress that statement.

Defendant was approached at a friend's house by two officers and was extended an unsolicited invitation to accompany the officers to the police department to talk about a robbery. Defendant agreed to go to the police station and was driven there in a police vehicle. Upon arrival at the police station, he was escorted by the two officers through the main police department, through a small door to the Detective Bureau, up a flight of stairs, through a room, down a hallway, to the left down another hallway, and finally into an interview room. Though the door to the interview room remained open, Defendant was under direct police supervision at all times during an

approximately two-hour period of questioning by the two police officers. There is no evidence that Defendant was offered any food and/or water or the use of a bathroom during the two-hour session. At the end of the session, Defendant offered the statement that is the subject of his motion to suppress.

Under these circumstances, a reasonable person would believe that he had been taken into custody and was not free to leave. *See State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 580-81 (1982) (person is "in custody" for purposes of *Miranda* if a reasonable person would believe that he was not free to leave). Defendant, therefore, was "in custody," and was entitled to be advised of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 467-72, 16 L. Ed. 2d 694, 720-22, *reh'g denied sub nom. California v. Stewart*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966). Defendant, in this case, was not advised of his *Miranda* rights prior to the taking of his statement, and it, therefore, must be suppressed. I do not believe a different result is required simply because the officers told Defendant he did not have to stay at the police station. That statement was made in a context that would lead a reasonable person to believe that he was free to leave *only* after Defendant agreed to talk to the police about the robbery they were investigating.

My review of the evidence in this case convinces me that the error was not harmless. Indeed, the State does not even make an argument in its brief to this Court that the admission of the 8 January 1997 statement, if error, was harmless. Once Defendant's 8 January 1997 statement is removed from the evidence, there are only two other pieces of evidence that even suggest that Defendant was involved in the Fish House robbery: (1) the statement of Natasha Jones wherein "she implicate[d]" Defendant in the Fish House robbery; and (2) Defendant's 14 January 1997 statement wherein he "stated that at the Fish House [robbery] Sherome [Wellman] got all the money. Natasha [Jones] and him have not gotten anything from that one." Although these statements *could* support an inference that Defendant committed the Fish House robbery, the State did not meet its burden of showing through overwhelming evidence that the constitutional error of admitting the 8 January 1997 statement was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1997); *see also State v. Autry*, 321 N.C. 392, 399-400, 364 S.E.2d 341, 346 (1988) (presence of overwhelming evidence of guilt may render a constitutional error harmless). The State's evidence in this case is hardly overwhelming.

I therefore would hold that Defendant is entitled to a new trial.

GASTON COUNTY DYEING MACHINE COMPANY, TAX I.D. NO. 56-02-32800, PLAINTIFF v. NORTHFIELD INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, ROSENMUND, INC., ALLENDALE MUTUAL INSURANCE COMPANY, STERLING WINTHROP, INC., AND STERLING PHARMACEUTICALS, INC., AND INTERNATIONAL INSURANCE COMPANY, DEFENDANTS AND UNITED CAPITOL INSURANCE COMPANY, INTERVENOR

No. COA97-1143

(Filed 1 December 1998)

1. **Insurance— general liability policies—products liability—date of occurrence—injury-in-fact rule**

The date of discovery of contamination of a medical diagnostic dye, rather than the earlier date when a pressure vessel ruptured and allowed contamination of the dye by a chemical used in the manufacturing process, was the proper date for determining when property damage occurred for purposes of coverage under occurrence-based commercial general liability policies insuring the manufacturer and designer of the pressure vessel.

2. **Reformation of Instruments— insurance policies—mutual mistake**

Primary and umbrella commercial general liability policies issued to the manufacturer of a pressure vessel were properly reformed on the ground of mutual mistake to provide products liability coverage for the vessel designer where the insurer's claims examiner testified that the phrase "additional insured on certificate without endorsement" as used in the insurer's records referring to the designer meant that the additional insured was entitled to coverage under the policy to the same extent as the named insured, and the insurer's representative and the designer understood that the policies provided products liability coverage for the designer.

3. **Insurance— excess liability policy—product manufacturer—coverage for product designer**

A pressure vessel manufacturer's excess liability policy provided products liability coverage for the vessel designer where

the excess policy followed the form of the primary policy and the primary policy was reformed to provide coverage for the designer.

4. Insurance— general liability policy—product designer—primary rather than excess coverage

A product designer's claims-made general liability policy was primary and not excess over all other insurance available to the designer through occurrence-based policies issued to the product manufacturer where the "Other Insurance" provisions of the policy provided that the coverage was excess only to other insurance that was effective prior to the beginning of the policy period, and the applicable policies issued to the manufacturer were not effective prior to the beginning of the designer's policy period.

Judge GREENE concurring.

Appeal by defendants Liberty Mutual and International Insurance Companies from order entered 3 February 1997 by Judge Julia V. Jones in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 June 1998.

Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., by George A. Vaka and Tracy R. Gunn, and Yeats, McLamb & Weyher, by Barbara B. Weyher, for defendant-appellee Northfield Insurance Company.

Dean & Gibson, by Rodney Dean and Barbara J. Dean, for defendant-appellant Liberty Mutual Insurance Company.

Lustig & Brown, L.L.P., by James J. Duggan and Betty P. Balcomb, and Henson & Henson, L.L.P., by Perry Henson, Jr. and Paul M. Goodson, for defendant-appellant International Insurance Company.

Sedgwick, Detert, Moran & Arnold, by Sidney Rosen, and Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by Harvey L. Cosper, Jr., for intervenor-appellee United Capitol Insurance Company.

TIMMONS-GOODSON, Judge.

This appeal concerns the extent and priority of insurance coverage for products liability claims under primary, umbrella and excess

general liability insurance policies issued to Gaston County Dyeing Machine Company (hereinafter "Gaston") and Rosenmund, Inc. (hereinafter "Rosenmund"). On 17 December 1992, Sterling Winthrop, Inc., Sterling Pharmaceuticals, Inc. and Allendale Mutual Insurance Co. filed an action (hereinafter "the Sterling action" or "the Sterling claims") in Puerto Rico alleging that a diagnostic dye produced by the pharmaceutical company was contaminated due to a leak in a pressure vessel designed by Rosenmund and manufactured by Gaston. In February 1994, Gaston brought this declaratory judgment action against Rosenmund, the Sterling plaintiffs, Liberty Mutual Insurance Company (hereinafter "Liberty"), Northfield Insurance Company (hereinafter "Northfield") and International Insurance Company (hereinafter "International"), seeking a judicial determination of the rights and responsibilities of the various insurance companies with respect to the Sterling claims. United Capitol Insurance Company (hereinafter "UCI") intervened, as an additional liability carrier for Rosenmund. The Sterling action was resolved by settlement agreement, and Gaston and Rosenmund dismissed their claims against the insurers. Thus, only the cross-claims among the several insurance carriers remained to be decided by the trial court. Liberty, International and UCI filed motions for summary judgment, and following a hearing, the trial court entered an order determining the priority of coverage as among the parties. The pertinent facts are as follows.

Sterling Pharmaceuticals utilized pressure vessels designed by Rosenmund and manufactured by Gaston in its process of manufacturing Iohexol, a pharmaceutical contrast dye medium used in medical diagnostic tests. When Sterling increased its operating pressure on 21 June 1992, the pressure vessels ruptured and caused ethylene glycol, a chemical used in the manufacturing process, to leak through the filter plates and contaminate the Iohexol. By the time Sterling discovered the problem on 31 August 1992, over 60 tons of Iohexol had been compromised.

From July 1991 through July 1993, Gaston carried a comprehensive general liability insurance program consisting of the following policies:

Policy Period	Insurer	Policy Number	Limits	Attachment Level
7/1/91-7/1/92	Liberty primary	TB1-151-462594-031	$1 million	$0
	Liberty umbrella	TH1-151-462594-021	$1 million	$1 million
	Northfield excess	XU-10019	$5 million	$2 million
	Int'l excess	531-204589-8	$9 million	$7 million

Policy Period	Insurer	Policy Number	Limits	Attachment Level
7/1/92-7/1/93	Liberty primary	TB1-151-462594-032	$1 million	$0
	Liberty umbrella	TH1-151-462594-022	$1 million	$1 million
	Northfield excess	XU-10058	$9 million	$2 million
	Int'l excess	531-205637-4	$5 million	$11 million

The Liberty primary policies issued to Gaston are "occurrence-based" policies covering, *inter alia*, personal injury or property damage caused by an "occurrence." Under the terms of the policies, an "occurrence" is defined as an "accident, including continuous or repeated exposure to the same general harmful conditions," resulting in personal injury or property damage during the policy period. The Liberty umbrella, Northfield excess and International excess policies "follow the form" of the Liberty primary policies.

The Liberty primary policies for both policy years were endorsed with forms granting liability coverage to Rosenmund as an additional insured. In light of these endorsements, Rosenmund requested Liberty's defense in the Sterling action, and by letter dated 8 July 1993, Liberty advised Rosenmund that it would provide coverage and a defense. However, upon further review by Liberty's "in-house" counsel, Liberty determined that the additional insured endorsements only covered Rosemund for negligent supervision of Gaston's work, not products liability. Therefore, on 23 August 1993, Liberty withdrew its defense of Rosenmund.

Following Liberty's withdrawal, Rosenmund requested that UCI defend it under the terms of UCI's commercial general liability policy, number GLCM 200-15-21, effective 4 October 1991 to 4 October 1992. UCI issued this policy to Rosenmund under a "claims-made" basis, and it applied to claims reported during the policy period for property damage occurring after the policy's retroactive date, which, in this case, was 4 December 1986. UCI assumed Rosenmund's defense concerning the Sterling claims until 26 January 1996, when Liberty resumed Rosenmund's defense pursuant to a settlement agreement granting Rosenmund products liability coverage under the Liberty primary and umbrella policies. The excess carriers, Northfield and International, neither participated in nor approved of this agreement between Liberty and Rosenmund.

In June 1995, the various insurers agreed to fund a pool of settlement proceeds to settle Sterling's action for $11 million. Liberty contributed $2 million, Northfield contributed $5 million, International contributed $2 million and UCI contributed $2 million. Likewise, the

insurers agreed to reserve for judicial determination all remaining issues as to the appropriate trigger theory, the priority of coverage and the allocation of payment for the settlement of Sterling's claims.

By summary judgment motions, the insurers sought varying declarations as to the scope and order of insurance coverage for Gaston and Rosenmund. The relevant issues were (1) whether North Carolina or Puerto Rico law applied; (2) whether there were one or more occurrences involved in Sterling's claims; (3) whether Gaston's first policy year, second policy year or both years were triggered for payment; (4) whether Rosenmund was entitled to products liability coverage under Gaston's policies; and, if so (5) whether Rosenmund's own UCI policy was secondary to or concurrent with the Liberty, Northfield, and International policies. After argument on the summary judgment motions, the trial court entered an order declaring that North Carolina law applied to all of the issues in the present case; that there was a single "occurrence" on 21 June 1992 that triggered the coverage by Gaston's insurers; that the applicable policy period for the Liberty, Northfield and International policies was 1 July 1991 to 1 July 1992; that Gaston's primary and excess policies were "reformed" to afford Rosenmund full coverage with respect to the claims asserted in the Sterling action; and that Rosenmund's UCI policy was excess to all other coverage afforded Rosenmund under Gaston's primary and excess policies. From this order, International and Liberty appeal.

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[1] By its first assignment of error, International argues that the trial court incorrectly applied the "injury-in-fact" theory to determine the event triggering coverage as to Sterling's claims. International contends that pursuant to our decision in *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), the "date-of-discovery" or "manifestation" rule is the law in North Carolina for determining when property damage occurs for insurance purposes. International's contention is correct.

Tufco involved the contamination of Purdue chicken products due to the leakage of floor resurfacing chemicals. Tufco performed floor resurfacing work in certain areas of the Purdue chicken processing facility. While the work was underway, chicken products were being stored in a cooler adjacent to one of the areas being resurfaced. The day after the resurfacing work was completed, Purdue shipped the chicken that had been stored in the cooler to various customers. Upon receipt of the shipment, Purdue's customers notified

Purdue that there was a problem with the smell and taste of the chicken. Subsequent chemical testing revealed that the chicken contained styrene, one of the chemicals used by Tufco in the floor resurfacing work.

Tufco had in effect a commercial liability policy through West American Insurance Company providing coverage for "completed operations," the scope of which included all property damage occurring away from premises owned by the insured and arising out of the insured's work, provided that the work was completed before the property damage occurred. West American took the position that because the contamination of the chicken "occurred," for insurance purposes, before Tufco's work had been completed, the "completed operations" coverage did not extend to Purdue's claim. This Court, however, rejected that argument and expressly adopted the "date of discovery" rule articulated in *Mraz v. Canadian Universal Ins. Co., Ltd.*, 804 F.2d 1325 (4th Cir. 1986), which provides that "for insurance purposes property damage 'occurs' when it is first manifested or discovered." *Tufco*, 104 N.C. App. at 318, 409 S.E.2d at 696. Applying this rule, the Tufco court affirmed the trial court's determination that the damage suffered by Purdue "occurred" two days after the floor resurfacing work was done, when customers informed the company that the chicken had a peculiar smell and taste.

The "date of discovery rule" likewise applies to the facts of the present case, because "[i]n adopting the discovery rule, the *Tufco* decision did not limit its holding to its facts or otherwise restrict its application to situations in which the occurrence date is unknown." *Home Indemnity Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 259, 264, 494 S.E.2d 764, 767, *disc. review denied*, 348 N.C. 71, —— S.E.2d —— (1998). In the complaint filed against Gaston and Rosenmund, Sterling alleged that it increased the operating pressure on 21 June 1992 as part of a change in the manufacturing process. The complaint further alleged that on 31 August 1992, Sterling discovered that ethylene glycol had leaked into one of the pressure vessels and contaminated the Iohexol diagnostic dye. According to Sterling, the contamination began on 21 June 1992, when one of the pressure vessels produced by Rosenmund and Gaston ruptured, and continued until it was discovered on 31 August 1992. As a result, more than 60 tons of Iohexol were damaged.

Under our holding in *Tufco*, 104 N.C. App. 312, 409 S.E.2d 692, property damage "occurs," for insurance purposes, "when it is first

manifested or discovered." *Id.* at 318, 409 S.E.2d at 696. Hence, for purposes of the occurrence-based policies at issue in this case, the damage to the Iohexol "occurred" when Sterling discovered it on 31 August 1992, triggering the policies for the period 1 July 1992 to 1 July 1993. We, therefore, hold that the trial court erred in concluding that the damage to Sterling's property occurred when the pressure vessel ruptured on 21 June 1992 and that the policies for the period 1 July 1992 to 1 July 1993 did not apply. In light of this holding, we need not address International's second assignment of error challenging the trial court's refusal to allocate the latent and continuous property damage over the two consecutive policy years when applying the "injury-in-fact" trigger of coverage theory.

[2] We proceed, then, to International's next assignment of error, whereby it argues that the trial court improperly determined that Rosenmund was an additional insured under the International excess policy, because International did not engage in any conduct that would estop it from denying coverage to Rosenmund. We, however, uphold the trial court's decision, because reformation of the Liberty policies was appropriate under the facts of this case.

" 'Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement.' " *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (quoting *Dettor v. BHI Property Co.*, 91 N.C. App. 93, 95-96, 370 S.E.2d 435, 437 (1988), *rev'd on other grounds*, 324 N.C. 518, 379 S.E.2d 851 (1989)). A mutual mistake is one shared by both parties to the agreement, such that each party operates under a misunderstanding as to the terms of the contract or the provisions of the writing intended to embody the agreement. *Id.* Reformation is appropriate to effectuate the intended terms of the agreement, provided that "clear, cogent, and convincing" evidence was presented to show that the parties intended the terms as reformed. *Id.* (citing *Dettor*, 91 N.C. App. at 96, 370 S.E.2d at 437).

In this case, "clear, cogent, and convincing evidence" existed to support the trial court's conclusion that the Liberty policies as written did not accurately reflect the true intent of the parties regarding the coverage to be afforded Rosenmund. For instance, Linda Mensching, the Claims Examiner who handled the Sterling action, testified that the phrase "additional insured on certificate without

endorsement," as used in Liberty's records to refer to Rosenmund respecting Gaston's general liability coverage policies, meant that the additional insured, although not endorsed onto the policy, was named on a certificate of insurance entitling that entity to coverage under the policy to the same extent as the named insured. Additionally, Brian Kelly, the Liberty representative purported to be the most knowledgeable about Rosenmund's status as an additional insured under the policies, when questioned concerning the coverage Liberty intended to provide Rosenmund, stated that it was his understanding that Rosenmumd was to be insured for products liability and premises liability. This understanding is identical to that of Rosenmund's president, Richard Hoard, who testified that he understood Rosenmund to have products liability coverage as well as $1 million coverage under the umbrella excess policy issued by Liberty to Gaston. In view of these facts, reformation of the Liberty policies to provide Rosenmund with products liability coverage was appropriate, and the trial court's ruling in this regard was not error.

[3] Furthermore, since International's excess policy follows the form of Liberty's primary and umbrella policies, the trial court correctly concluded that Rosenmund is an additional insured under the International policy as well. Liberty's umbrella excess policy pertinently provides as follows with regard to "Who is an Insured":

> Each of the following is also an insured:
>
> . . . (e) any other insured included in or *added in an underlying policy* but not for broader coverage than is available to such insured under the underlying policy. However, if such other insured is so included or *added* pursuant to written agreement to provide insurance, then this policy applies to its scope coverage and limits of insurance required by such written agreement. (emphasis added).

By reformation, Rosenmund has been added as an insured under the Liberty policies. Because International's policy adheres to the provisions of Liberty's policies, the trial court did not err in concluding that Rosenmund is entitled to full coverage under the International excess policies. This assignment of error, therefore, fails.

[4] Next, International and Liberty assign error to the trial court's conclusion that the UCI policy is excess over all other coverage available to Rosenmund. Inasmuch as the terms of the UCI policy, as

applied to the facts of this case, obligate UCI to provide primary insurance coverage to Rosenmund, we conclude that the trial court erred and reverse the order accordingly.

"Under North Carolina law 'the construction and application of the policy provisions to the undisputed facts is a question of law for the court,' " *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 686, 443 S.E.2d 357, 359 (1994) (quoting *Walsh v. National Indemnity Co.*, 80 N.C. App. 643, 647, 343 S.E.2d 430, 432 (1986)), and thus, is reviewable de novo on appeal, *Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 470 S.E.2d 552 (1996). Insurance policies are contracts between the insurer and the insured. *Metropolitan Prop. and Casualty Ins. Co. v. Lindquist*, 120 N.C. App. 847, 851, 463 S.E.2d 574, 576 (1995). As such, the intent of the parties, as expressed in the plain language of the policy, controls in determining the application and construction of its terms. *Id.* "Where the policy language is clear and unambiguous, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written." *Cone*, 114 N.C. App. at 687, 443 S.E.2d at 359.

United Capitol's "Other Insurance" provision pertinently states the following:

> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this insurance, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> b. Excess Insurance
>
> This insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis:
>
> (1) That is effective prior to the beginning of the policy period shown in the Declarations of this insurance and applies to "bodily injury" or "property damage" on other than a claims-made basis, if:
>
> . . .

(b) The other insurance has a policy period which continues after the Retroactive Date shown in the Declarations of this insurance.

. . .

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

There is no dispute in this case that the relevant claims were made during the pendency of the UCI policy. Furthermore, under the express terms of the policy's "Other Insurance" provision, the UCI policy is excess only to other insurance that was "effective prior to the beginning of the policy period shown in the Declarations." As we previously held, the 1 July 1992 to 1 July 1993 Liberty, Northfield and International policies apply to the Sterling claims, and since this "other insurance" was not effective prior to 4 October 1991 (the beginning of United Capitol's policy period), the "Excess Insurance" provision of United Capitol's policy is inapplicable. The trial court, therefore, erred in concluding that the United Capitol policy is excess over all other coverage available to Rosenmund and in ordering Liberty and International, respectively, to reimburse United Capitol for the costs of defending Rosenmund in this action and for the amount of its settlement contribution. Because of our decision in favor of Liberty and International, we need not address their remaining assignments of error.

In sum, we affirm that portion of the trial court's order reforming the primary and excess policies covering Gaston so as to afford Rosenmund full coverage regarding the Sterling claims. We, however, reverse that portion of the order (1) applying the "injury-in-fact" rule, rather than the "date-of-discovery" rule, in determining when the damage to Sterling's property occurred; (2) determining that the applicable policy period for the Liberty, Northfield, and International policies was 1 July 1991 to 1 July 1992, rather than 1 July 1992 to 1

July 1993; and (3) concluding that the UCI policy was excess to all other coverage available to Rosenmund. This case is, therefore, remanded for entry of an order consistent with this opinion.

Reversed in part, affirmed in part, and remanded.

Judge MARTIN, Mark D., concurs.

Judge GREENE concurs in the result with a separate opinion.

Judge GREENE concurring.

The first issue addressed by the majority is whether the policies in issue require the loss to be determined on the date of its discovery or on the date the damage is sustained. The majority holds that this Court has previously answered that question in favor of the "date of discovery" rule, citing *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). I do not read *Tufco* that broadly. I read that case as holding that when the actual date of damage cannot be determined, the loss will be deemed to have occurred on the date of its discovery. Indeed, the primary case relied on in the *Tufco* opinion, *Mraz v. Canadian Universal Ins. Co., Ltd.*, 804 F.2d 1325 (4th Cir. 1986), appears to limit the "date of discovery" rule to those instances where the determination of the date of the damages is "difficult." Furthermore, to read the "date of discovery" rule into every policy of insurance, regardless of the language used in the policy, would be inconsistent with the law requiring that disputes be resolved in accordance with unambiguous contracts freely entered into between the parties. *See Williams v. P.S. Investment Co.*, 101 N.C. App. 707, 709, 401 S.E.2d 79, 80 (1991) ("If the terms of a contract are plain and unambiguous, there is no room for construction and the contract will be enforced according to its terms.").

Nevertheless, this Court has recently given a very broad construction to *Tufco*, appearing to hold that the "date of discovery" rule is to be used in every insurance case to determine when property damage "occurs," regardless of the language of the policy and even in those situations when the date of the loss is known. *Home Indemnity Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 189, —, 494 S.E.2d 764, 767 (1998). I am bound by that holding, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and for that reason join with the majority.

STATE OF NORTH CAROLINA v. SEBERIANO CORIA

No. COA98-24

(Filed 1 December 1998)

1. Evidence— hearsay—excited utterance exception

Statements made by an assault victim to a stranger and an officer concerning an attack upon her by defendant, her father, were admissible under the excited utterance exception to the hearsay rule, although the amount of time between the attack and statements was not shown, where the victim ran through dark woods alone and bleeding and approached the stranger for help; the victim was excited and upset, had obviously been hit about the face, and at times lapsed into her native Spanish language while speaking to the stranger and the officer; and the officer testified that when he spoke with the victim, she was very excited, upset, and almost to the point of hysteria. N.C.G.S. § 8C-1, Rule 803(2).

2. Constitutional Law— double jeopardy—deadly weapon—assault upon officer—assault with intent to kill

Defendant's constitutional right against double jeopardy was not violated by the imposition of separate sentences for the offenses of assault with a deadly weapon upon a law enforcement officer and assault with a deadly weapon with intent to kill, both of which arose from the same act of shooting at a deputy sheriff, since each offense requires proof of specific elements not required by the other. U.S. Const. amend. V; N.C. Const. art. I, § 19.

Appeal by defendant from judgments entered 31 July 1997 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 7 October 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robin P. Pendergraft, for the State.

Jeffrey S. Lisson for defendant-appellant.

MARTIN, John C., Judge.

Defendant appeals from judgments entered upon his conviction of assault with a deadly weapon on a law-enforcement officer, assault

with a deadly weapon with intent to kill, and assault on a female. The evidence presented at trial tended to show that after dark on 14 October 1996, Scott Emerson was sitting on the back deck of his Winston-Salem home which looked out over a wooded ravine. Mr. Emerson heard a noise from out in his yard, and eventually a young Hispanic woman, seventeen-year-old Eneida Coria, approached his house. Ms. Coria appeared visibly upset, scared, and out of breath. Her jeans were wet from traversing the ravine, her hair was full of twigs, and her face was swollen and bruised. Ms. Coria, who at times lapsed into her native language of Spanish, told Mr. Emerson that she needed help and to call the police. Mr. Emerson helped Ms. Coria inside where he cleaned the fresh blood from her lip and nose and applied ice to her face.

Ms. Coria told Mr. Emerson that she and her father, the defendant, had argued over a boyfriend that she was seeing and that defendant began to hit her. Ms. Coria became fearful of defendant and fled the Coria household shortly before she encountered Mr. Emerson. When Deputy Chris Hill arrived at the Emerson residence, Ms. Coria stated that defendant was intoxicated during their argument, that she had attempted to leave and defendant dragged her back to the house and beat her, and that it was only when defendant began to beat her mother that Ms. Coria was able to escape.

Shortly thereafter, four law enforcement officers, including Deputy R.D. Longworth of the Forsyth County Sheriff's Office, arrived at the Coria residence. Defendant was not at the residence. Deputy Longworth and another officer returned to the Coria residence later that night along with Ms. Coria to retrieve some clothing for Ms. Coria. Deputy Longworth returned for a third time that night to the Coria residence upon a report of gunshots in the area. Deputy Longworth testified that he heard what he believed to be yelling and gunshots from within the Coria residence. Deputy Longworth was approaching the house when the garage door opened and defendant stepped outside. Deputy Longworth identified himself as a law enforcement officer, at which time defendant pulled a gun from his belt, pulled the slide back, and pointed it at Deputy Longworth. Deputy Longworth immediately drew his own weapon and repeatedly yelled at defendant to drop the gun. Defendant fired at Deputy Longworth approximately four to six times, and Deputy Longworth returned fire, striking defendant.

After she graduated from high school in June, 1997, Ms. Coria left the Winston-Salem area due to her fear of defendant. The State was

unable to locate her to testify at defendant's trial and notified defendant that her whereabouts were unknown and that the State intended to offer into evidence the statements which she had made to Mr. Emerson and Deputy Hill. Over defendant's objection, the trial court allowed Ms. Coria's statements into evidence under the excited utterance exception to the hearsay rule.

Defendant brings forward in his brief three assignments of error. The assignments of error are directed to the admission into evidence of Ms. Coria's hearsay statements to Mr. Emerson and Deputy Hill, to the trial court's denial of his motion to dismiss the charge of assault on a female, and to the trial court's failure to arrest judgment on one of the assault charges involving Deputy Longworth. His remaining assignments of error are deemed abandoned. N.C.R. App. P. 28(a). We find no error in the trial or judgments.

A.

[1] Defendant first argues that the trial court erred by admitting into evidence statements made by Ms. Coria to Mr. Emerson and Deputy Hill under the excited utterance exception to the hearsay rule. Specifically, defendant contends there was no evidence that Ms. Coria was still under the stress of an exciting event, and no evidence as to the duration of time that passed between the exciting event and Ms. Coria's statements, giving rise to the possibility that Ms. Coria had time to fabricate her statements. We disagree.

G.S. § 8C-1, Rule 803(2) provides that statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" are not excluded by the rule against hearsay. N.C. Gen. Stat. § 8C-1, Rule 803(2). "It is well established that in order for an assertion to come within the parameters of this particular 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. Thomas*, 119 N.C. App. 708, 712-13, 460 S.E.2d 349, 352, *disc. review denied*, 342 N.C. 196, 463 S.E.2d 248 (1995) (citing *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985)). Moreover, "[w]hile the period of time between the event and the statement is without a doubt a relevant factor, the element of time is not always material," and the "modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement." *Id.* (citations omitted).

In the present case, the trial court conducted *voir dire* examinations of both Mr. Emerson and Deputy Hill prior to admitting Ms. Coria's statements. The court made findings that a startling event had occurred, that Ms. Coria thereafter ran through dark woods alone and bleeding, and that she approached a stranger, Mr. Emerson, for help. The trial court further found that Ms. Coria was very excited and upset, had obviously been hit about the face, and at times lapsed into her native tongue while speaking to Mr. Emerson and Deputy Hill. In fact, Deputy Hill testified that when he spoke with Ms. Coria at the Emerson house she was very excited, upset, and almost to the point of hysteria. The trial court's findings are supported by the evidence and, in turn, support the court's ruling that Ms. Coria's statements were made while she was still under the stress of a startling event and that she therefore had no opportunity to reflect on her statements. *See State v. Kerley*, 87 N.C. App. 240, 360 S.E.2d 464 (1987), *disc. review denied*, 321 N.C. 476, 364 S.E.2d 661 (1988) (placing emphasis on declarant's state of excitement while speaking rather than exact amount of time since startling event). This assignment of error is overruled.

Defendant also argues that Ms. Coria's statements provided the only evidence of an assault upon her, so that the trial court should have dismissed the charge of assault on a female. We have determined her statements were properly admitted; they provide plenary evidence of each essential element of the offense. Defendant's motion to dismiss the charge of assault on a female was properly denied.

B.

[2] Defendant next argues that the imposition of separate sentences for the offenses of assault with a deadly weapon upon a law enforcement officer and assault with a deadly weapon with intent to kill, both of which arose from the same act of shooting at Deputy Longworth, violated defendant's constitutional rights against twice being placed in jeopardy for the same offense. A defendant's right to be free from double jeopardy is protected by both the Fifth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution, prohibiting the imposition of multiple punishments for the same offense. *State v. Elliot*, 344 N.C. 242, 475 S.E.2d 202 (1996), *cert. denied*, 137 L.Ed.2d 312 (1997).

In *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986), the defendant argued that his conviction and punishment for both felonious breaking or entering and felonious larceny violated the prohi-

bition against multiple punishments for the same offense, where the felony of breaking or entering was used to elevate the larceny to a felony pursuant to G.S. § 14-72(b)(2). Rejecting his argument, the Supreme Court explained that the question of whether a defendant may receive cumulative punishments for the same conduct which violates two separate statutes is primarily a question of legislative intent, i.e., whether the legislature intended the offenses to be separate and distinct offenses.

> [D]ouble jeopardy does not prohibit multiple punishment for offenses when one is included within the other . . . if both are tried at the same time and if the legislature intended for both offenses to be separately punished.

Id. at 454, 340 S.E.2d at 709 (citing *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed.2d 535 (1983)). "[E]ven if the elements of two statutory crimes are identical and neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended." *Id.* at 455, 340 S.E.2d 709.

Pointing out that felony breaking or entering and felony larceny have historically been considered to be separate and distinct crimes, the Court determined that the legislature intended that a defendant may be separately punished for the crime of felonious breaking or entering and the crime of felonious larceny following that breaking or entering.

In *State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994), the Court concluded, upon a similar analysis, that the legislature intended to authorize separate punishments for the offenses, based upon the same contraband, of trafficking in cocaine by possession and possession of cocaine. Similarly, in *State v. Elliott*, 344 N.C. 242, 475 S.E.2d 202 (1996), the Court held that separate punishments were intended for felony child abuse and first degree murder, even when both offenses arose out of the same conduct by the defendant. The Court noted:

> The legislature's intent to provide for cumulative punishment may also be inferred from the fact that first degree murder and felony child abuse each " 'requires proof of a fact which the other does not' " (citations omitted).

Id. at 278, 475 S.E.2d at 218.

In *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997), the Supreme Court decided that double jeopardy did not preclude separate punishment for first degree murder and first degree kidnaping which was elevated to first-degree based upon the victims having been murdered rather than released in a safe place. The Court held that an examination of legislative intent under *Gardner* was unnecessary because the factual elements necessary to prove the offenses were not the same; each crime contained an element not required to be proved in the other. Applying the Blockburger Test, referring to the decision of the United States Supreme Court in *Blockburger v. U.S.*, 284 U.S. 299, 76 L.Ed. 306 (1932), the Court said:

> If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

Id. at 19, 484 S.E.2d at 361 (quoting *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984)).

In *State v. Woodberry*, 126 N.C. App. 78, 485 S.E.2d 59 (1997), this Court held that the prohibition against double jeopardy was not violated by the imposition of consecutive sentences for one act which violated both G.S. § 14-31, malicious assault and battery in a secret manner, and G.S. § 14-32(a), assault with a deadly weapon with intent to kill inflicting serious injury. We relied upon *State v. Hill*, 287 N.C. 207, 214 S.E.2d 67 (1975), in which our Supreme Court pointed out that although the two offenses shared three common elements, each offense required proof of an element which the other did not.

We are, of course, advertent to the prior decisions of this Court in *State v. Partin*, 48 N.C. App. 274, 269 S.E.2d 250, *disc. review denied*, 301 N.C. 404, 273 S.E.2d 449 (1980); *State v. Byrd*, 50 N.C. App. 736, 275 S.E.2d 522, *disc. review denied*, 303 N.C. 316, 281 S.E.2d 654 (1981); and *State v. Locklear*, 121 N.C. App. 355, 465 S.E.2d 61, *cert. denied*, 342 N.C. 662, 467 S.E.2d 701 (1996). We conclude these cases do not require that either of defendant's sentences in the present case be vacated.

In *State v. Partin, supra*, this Court held that where two offenses each contain separate and distinct elements, double jeopardy does not prohibit charging a defendant with both crimes even where the facts underlying both charges are the same. In *Partin*, as in the case before us, the defendants were charged with assault with a deadly weapon on a law enforcement officer, and assault with a deadly weapon with the intent to kill. We stated,

> Each offense required proof of an element which does not exist in the other charge. Under G.S. 14-34.2, the jury must find that the victim was a law enforcement officer acting in the exercise of his official duty at the time of the assault, which is not an element of G.S. 14-32, while under G.S. 14-32(a) and (c) there must be a finding that the assault was made with an intent to kill, which is not an element of G.S. 14-34.2.

Id. at 279-80, 269 S.E.2d at 254. In *Partin*, however, the defendants were not actually convicted of assault with a deadly weapon with intent to kill, but were convicted of the lesser included offense of assault with a deadly weapon, all of the elements of which are necessarily included within the offense of assault with a deadly weapon on a law enforcement officer. Therefore, the Court held that punishment for both crimes violated principles of double jeopardy. *Id.* at 282, 269 S.E.2d at 255.

In *State v. Byrd*, *supra*, decided a year after *Partin*, defendant was convicted of both assault with a deadly weapon upon a law enforcement officer while in the performance of his duties, in violation of G.S. § 14-34.2, and assault with a deadly weapon inflicting serious injury, in violation of G.S. § 14-32(c), arising out of the defendant's single act of shooting a police officer. Citing *Partin*, the Court held defendant could not be punished separately for the offenses, reasoning that the elements of the assault upon the officer while in the performance of his duties were all included in the offense of assaulting him with a deadly weapon inflicting serious injury. In *Locklear*, this Court followed *Byrd* and arrested judgment upon defendant's conviction for assault with a deadly weapon upon a law enforcement officer "since the elements of [that offense] are included in the offense of assault with a deadly weapon inflicting serious injury." *Locklear* at 357-58, 465 S.E.2d at 63.

A closer examination, however, of both *Byrd* and *Locklear* reveals that, as in *Woodberry*, though the offenses share two common elements, i.e., (1) assault, and (2) with a deadly weapon, each offense required proof of elements not required for the other. For conviction under G.S. § 14-34.2, proof was required that the victim was a law enforcement officer engaged in the performance of his official duties, proof of which was not required for conviction under G.S. § 14-32(c). Likewise, for conviction under G.S. § 14-32(c), proof was required that the victim was seriously injured, which was not required for conviction under G.S. § 14-34.2.

While decisions of one panel of this Court are binding upon subsequent panels unless overturned by a higher court, *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), we also have a responsibility to follow the decisions of our Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 431 S.E.2d 178 (1993); *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 504 S.E.2d 102 (1998). We believe, therefore, that we are bound to follow the reasoning of the Supreme Court in *Gardner*, *Pipkins*, *Elliott*, and *Fernandez*, and of this Court in *Woodberry*, rather than the opinions in *Byrd* and *Locklear*, which appear inconsistent therewith.

Applying such reasoning to the present case, the elements of assault with a deadly weapon with intent to kill include: (1) an assault; (2) with a deadly weapon; (3) with the intent to kill, N.C. Gen. Stat. § 14-32(c), while the elements of assault with a deadly weapon on a law enforcement officer include: (1) an assault; (2) with a deadly weapon; (3) on a law enforcement officer; (4) in performance of his official duties. N.C. Gen. Stat. § 14-34.2. Each offense requires proof of specific elements that the other does not. Following *Fernandez*, and applying the Blockburger Test, an analysis of legislative intent is not required because the offenses are not the same, and cumulative punishment would not offend double jeopardy principles.

Moreover, even an examination of legislative intent under *Gardner* clearly discloses an intent by the General Assembly that violations of G.S. § 14-32(c) and G.S. § 14-34.2 be punished separately. "In determining the intent of the legislature, the fact that each crime for which a defendant is convicted in one trial requires proof of an element the other does not demonstrates the legislature's intent that the defendant may be punished for both crimes." *State v. Swann*, 322 N.C. 666, 677, 370 S.E.2d 533, 539 (1988). We believe the legislative purposes underlying each statute were distinct. Our Supreme Court has held that the essence of G.S. § 14-32.4 "is the legislative intent to give greater protection to the law enforcement officer by proscribing a greater punishment for one who knowingly assaults such an officer." *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985), *disc. review denied*, 326 N.C. 51, 389 S.E.2d 96 (1990); *See also State v. Kirby*, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325, *appeal dismissed*, 281 N.C. 761, 191 S.E.2d 363 (1972) (intent of legislature was "to provide greater punishment for those who place themselves in open defiance of duly constituted authority by assaulting public officers who are on duty"). On the other hand, the stated purpose of G.S. § 14-32(c) is to protect life or limb. *State v. Cass*, 55 N.C. App. 291, 285 S.E.2d

337, *disc. review denied*, 305 N.C. 396, 290 S.E.2d 366 (1982). Thus, there is a clear indication that the legislature intended to authorize cumulative punishments for those who, by a single act, violate both G.S. § 14-32(c) and G.S. § 14-34.2.

No error.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA v. SHAMAR RASHEED HINES AND RODNEY EUGENE LEAK

No. COA97-1399

(Filed 1 December 1998)

Constitutional Law— right of confrontation—unadmitted evidence—inadvertent publication to jury

Defendants' rights of confrontation were violated in a trial for murder and aggravated assault by the inadvertent publication to the jury of portions of the prosecutor's case file which had not been admitted into evidence, including handwritten notes and a typewritten list of statements allegedly made by defendants which implicated both defendants in the crimes and which appeared to state one defendant's record of drug-related convictions. Furthermore, the prejudicial effect of the evidence inadvertently published to the jury was not cured by the trial court's instruction that the jury should disregard such evidence where jurors could not recall what information they retained from these documents and what information they were being asked to exclude; an accomplice was not identified as the source of the information in the documents and it may have appeared to jurors that an unknown witness corroborated the accomplice's trial testimony; and evidence of defendants' guilt was not overwhelming. U.S. Const. amend. VI; N.C. Const. art. I, § 23.

Appeal by defendants from judgments dated 29 October 1996 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 15 September 1998.

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

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

Jay H. Ferguson, for defendant-appellant Rodney Eugene Leak.

GREENE, Judge.

Shamar Rasheed Hines (Hines) and Rodney Eugene Leak (Leak) (collectively, Defendants) appeal from entry of judgments on a jury verdict finding them each guilty of assault with a deadly weapon inflicting serious injury and of first-degree murder.

At trial, Antoinette Atwater (Atwater) testified that she, her two-year-old daughter (Shaquana), Antonio Smith (Smith), and a few others were sitting on the back porch of her apartment building on the evening of 22 October 1994. Atwater and the others had been smoking a marijuana cigarette laced with cocaine "and getting high" when she noticed a "heavy-set dude . . . and another guy" walking toward them. Atwater heard gunshots and testified that "it did look like both men were firing weapons." After the shooting ended, Atwater realized that Shaquana had been wounded. Shaquana was still breathing when the police and medical help arrived, but died within ten to fifteen minutes of her arrival at the emergency room. Shortly after the incident, Atwater picked Tony Johnson (Johnson) out of a photographic line-up and identified him as one of the shooters. A few weeks prior to trial, Atwater identified Leak as the second shooter.

Tora Bostic (Bostic) testified that she was sitting on her porch with two friends when Johnson walked over and asked her if Smith was in the group sitting on a porch farther down the complex. After Bostic replied that it was, Johnson walked back around the corner of her apartment building in the direction in which he had come. Bostic then walked around the building in the same direction to get to the front of her apartment. She saw Johnson, Leak, and Hines standing beside the building as she walked around it. Johnson appeared to be holding a revolver. Bostic testified that the three men did not appear to be conversing with each other. Shortly after she entered her apartment, she heard several shots, and she remained inside until the shoot-out ended.

Smith testified that he sold drugs for a living. Smith stated that Johnson had approached him earlier on the afternoon of 22 October

1994 seeking drugs. Johnson "owed me some money, and he had came up, you know, wanting some more stuff. And I wouldn't give it to him because he ain't paid me my money from the last time, and, you know, we got in a little argument." Smith testified that about an hour or two later, while he was sitting with a group of people, two men began firing in his direction. Smith received three gunshot wounds during the shoot-out. On the way to the hospital, Smith told emergency medical personnel in the ambulance that he did not know who had shot him. Smith subsequently identified Johnson as one of the shooters, but could not identify the second shooter.

Johnson testified for the State that he sold cocaine, heroin, and marijuana for Leak (a.k.a. "Smoke"), that he and Hines (a.k.a. "Rock") had engaged in the use of cocaine, crack, and heroin, and that he had seen both Leak and Hines with guns in the past. Johnson testified that he was stopped by Smith and two other men on the afternoon of 22 October 1994. Smith "put a gun to my head and demanded money and drugs." Johnson stated that he gave Smith "close to $500 and about seven bags of drugs," and that he went to his apartment after the altercation ended. Johnson contacted Hines and Leak, and the three men drove to the vicinity of Johnson's recent encounter with Smith. They stopped on the way and Hines went inside an apartment building and returned with a gun. Leak and Johnson each already had guns with them. When Johnson, Hines, and Leak arrived at the area near Johnson's apartment, Smith was sitting in a group on a nearby porch. Johnson testified that he, Hines, and Leak pulled hoods over their heads and went towards Smith. Smith fired at Johnson, Hines, and Leak, each of whom returned fire several times before fleeing the scene.

Following Johnson's testimony, over forty exhibits which had been admitted into evidence as part of the State's case were published to the jury. Included within these exhibits were portions of the prosecutor's case file which had *not* been admitted into evidence. The evidence reveals, and the trial court found, that the inclusion of these materials with the admitted exhibits was inadvertent. Among the papers inadvertently published to the jury were eight pages of the prosecutor's handwritten notes from his interview with Johnson and two pages of a typewritten transcription of statements Johnson alleged Defendants had made to others. The prosecutor's handwritten notes of the Johnson interview were not labeled or otherwise identified as such, and the typewritten transcription of comments allegedly made by Defendants did not identify Johnson as its source.

The prosecutor's handwritten notes from his interview with Johnson contained the following pertinent notations following Hines' name: " 'Rock' . . . drugs—12 years IV; speed; 15 years II"; "crazy—beat him over $." The prosecutor's notes also contained information about Leak, or "Smoke," as follows: "Smoke didn't want to give money out, would give drugs"; and "Smoke—didn't do drugs—only a little." On the same pages were the following additional notations: "coke party . . . 1/8 kilo —crack & powder"; "Rock came back with .357"; as well as several quotations listed after the initials "RL" (*i.e.*, Leak's initials) and "RH" (*i.e.*, Hines' initials) in the form of a transcript. Attributed to "RL" were comments such as: "Let me have the pistol"; "Dude put girl in front of him"; and "You going to take care of this or I am going to f— you up." Attributed to "RH" were comments such as: "What did he do?" and "page Smoke." The prosecutor's notes contained a diagram drawn by hand labeled "Shoot Out" which placed the initials RH, RL, TJ (*i.e.*, Johnson's initials), and the name Smith at their alleged respective locations between what appear to be representations of buildings. The prosecutor's notes also contained the following circled information: "Other times RL shot"; "he can get people to do things for him"; and "master plan—knows we are all down."

The papers handed to the jury also contained two typewritten sheets, one labeled "Oral Statements Made to Non-Law Enforcement Witness by Rodney Leak," and one labeled "Oral Statements Made to Non-Law Enforcement Witness by Shamar Hines." Typewritten statements attributed to Hines included: "I got a gun"; "What we going to do about this?"; "I'm down for it"; and "We all down." Typewritten quotations attributed to Leak included: "We have pistols"; "You can show him to me, you don't have to shoot anybody"; "We gone take care of this dude"; and "He ain't going to get away with this s—."

Approximately twenty to thirty minutes after the evidence had been published to the jury, the prosecutor noticed that the jury was reviewing materials which had not been admitted into evidence, immediately had a deputy retrieve the documents, and promptly brought the situation to the trial court's attention. Defendants each moved for a mistrial.

The trial court found that "none of these handwritten notes have anything to do with Mr. Leak." Because the trial court found that the notes did refer to Hines, however, the jurors were individually shown the prosecutor's handwritten notes and polled as to whether they had

seen the notes, and, if they had, whether they could put the contents of those notes out of their minds. Several jurors testified that they had not seen the notes. Juror Number One stated that he had tried to read the notes, but could not decipher the prosecutor's handwriting. He stated that he "couldn't understand it," and that he would be able to put it out of his mind. Juror Number Two stated that he had reviewed the prosecutor's handwritten notes. When asked if he retained any information from that document, he stated: "No, it was pretty difficult to read, and with all due respect, it was difficult to read that. But I did read it, and I did not come away with anything." He further stated that he could put it out of his mind. Juror Number Three stated that he "did run through it." When asked whether he retained any information from the prosecutor's notes, he stated: "Not a lot." He further stated that he thought he could put any information he had retained out of his mind. Juror Number Four "remember[ed] seeing that." The trial court then asked if she had retained any information from the prosecutor's notes.

> Juror #4: There was so much of all the other documents, I really—
>
> Court: Yeah, I want to know about this document specifically. Did you retain any information about that document?
>
> Juror #4: Not specifically, no.

Juror Number Four further stated that although she did not specifically retain information from the prosecutor's notes, she could put the notes out of her mind.

The trial court did not poll the jurors as to the typewritten statements allegedly made by Defendants, instead finding that the substance of those statements were testified to by Johnson and thus were already before the jury. The trial court did not make clear to the jurors that Johnson was the source of the prosecutor's handwritten notes and the typewritten statements. The trial court denied Defendants' motions for mistrial.

Hines did not testify or present any evidence. Leak did not testify, but did present evidence tending to show that Johnson had told a fellow inmate that Leak did not participate in the shoot-out, and that Hines did participate. Another inmate testified that Johnson had told him that Leak "was on the other side of the building" when the shoot-out occurred, and that Johnson had said that "if he going down, he's taking all them [(*i.e.*, Leak and Hines)] down with him." In an attempt

to impeach Atwater's identification of him as one of the shooters, Leak also presented evidence that Atwater recognized him based on events unrelated to the shoot-out.

The jury subsequently found both Hines and Leak guilty of the assault with a deadly weapon inflicting serious injury on Smith, and with the first-degree murder of two-year-old Shaquana during the commission of a felony.

The issue is whether the publication to the jury of extrinsic materials was substantially and irreparably prejudicial to Hines and Leak.

The Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution guarantee a criminal defendant's right to confront the witnesses and evidence against him. U.S. Const. amend. VI; N.C. Const. art. I, § 23; *State v. Lyles*, 94 N.C. App. 240, 247, 380 S.E.2d 390, 394-95 (1989). "A fundamental aspect of [this right to confrontation] is that a jury's verdict must be based on *evidence produced at trial*, not on extrinsic evidence which has escaped the rules of evidence, supervision of the court, and other procedural safeguards of a fair trial." *Id.* (citing *Parker v. Gladden*, 385 U.S. 363, 364, 17 L. Ed. 2d 420, 422-23 (1966)).

In this case, it is undisputed that the jury was exposed to extrinsic evidence. The prosecutor's notes and a typewritten list of statements allegedly made by Defendants were inadvertently published to the jury without being admitted by the trial court. These documents contained generally inadmissible information, notably hearsay testimony implicating both Hines and Leak in the shoot-out, *see* N.C.G.S. § 8C-1, Rules 802 through 805 (1992), and what appeared to be Hines' criminal record of drug-related convictions, *see* N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1997); *State v. Foster*, 27 N.C. App. 531, 533, 219 S.E.2d 535, 537 (1975). Defendants' confrontational rights were therefore violated by the publication of these documents to the jury.

Appropriate instructions from the trial court, however, may cure even constitutional errors. "[O]ur system of justice is based upon the assumption that trial jurors are women and men " 'of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so.' " *State v. Hartman*, 344 N.C. 445, 472, 476 S.E.2d 328, 343 (1996) (quoting *State v. Moore*, 276 N.C. 142, 149, 171 S.E.2d 453, 458 (1970)), *cert. denied*, — U.S. —, 137 L. Ed. 2d 708 (1997). Accordingly, our courts have generally held that where inadmissible evidence is published to

the jury, a trial court may cure this error by instructing the jury not to consider that specific evidence. *State v. Smith*, 301 N.C. 695, 697, 272 S.E.2d 852, 854-55 (1981). In some cases, however, "the cautionary admonitions of the trial judge are ineffective to erase from the minds of a jury the effects of prejudicial [errors]." *Foster*, 27 N.C. App. at 533, 219 S.E.2d at 537.

In this case, the instructions of the trial court were insufficient to cure the prejudicial effect of the evidence inadvertently published to the jury. The trial court's questioning of the jurors as to the prosecutor's handwritten notes revealed that some of the jurors had read the notes while reviewing over forty documents, but that they could not specifically recall what information they had retained from the notes. Although the jurors stated that they could exclude inadmissible material from their minds, some jurors could not specifically recall what information they were being asked to exclude, and therefore faced an impossible task. Furthermore, the trial court did not instruct the jury to disregard the typewritten list of statements allegedly made by Leak and Hines which was also inadvertently published to the jury. Finally, it could have appeared to a reasonable juror that at least one unknown witness corroborated Johnson's testimony, because neither the trial court nor the documents themselves indicated that Johnson was the source of the information contained therein. The trial court's admonition to the jurors to exclude any information they may have retained from their review of the prosecutor's handwritten notes was insufficient to cure these errors.

Constitutional errors that have not been cured by the trial court are presumed prejudicial under North Carolina law; however, the State may rebut this presumption by showing that the error was harmless beyond a reasonable doubt. *Lyles*, 94 N.C. App. at 248, 380 S.E.2d at 395; *see* N.C.G.S. § 15A-1443(b) (1997). To do so, the State must show that there is no reasonable possibility that the error complained of contributed to the conviction. *State v. Heard and Jones*, 285 N.C. 167, 172, 203 S.E.2d 826, 829 (1974) (noting that overwhelming evidence of a defendant's guilt may render a constitutional error harmless beyond a reasonable doubt).

In this case, the State has failed to show that the publication to the jury of the prosecutor's notes and the typewritten list of statements allegedly made by Hines and Leak was harmless beyond a reasonable doubt. The jury viewed what appeared to be Hines' arrest record and statements tending to show that Hines had a history of

violence—information which was not otherwise before the jury. The jury also viewed statements and a diagram implicating both Hines and Leak in the shoot-out, and was never made aware that Johnson was the source of this information. Furthermore, there was not overwhelming evidence of the guilt of either Hines or Leak. Although other testimony placed Hines in the vicinity immediately preceding the shoot-out, Johnson's testimony was the only evidence that implicated Hines as an actual participant in the shoot-out (Johnson testified that he, Hines, and Leak returned Smith's fire). Smith, who was shot during the exchange, testified that there were two shooters, and he could only identify Johnson. Atwater, Shaquana's mother, testified that there were two shooters and identified Johnson within days of the shooting. She was unable to identify Leak, however, until approximately two years later. Although neither Hines nor Leak testified, Leak presented evidence that tended to impeach both Johnson's testimony and Atwater's identification. Accordingly, the State has not shown that the inadvertent publication of extrinsic evidence was harmless beyond a reasonable doubt, and has failed to convince this Court that there is no reasonable possibility that the publication to the jury of these documents contributed to the convictions of Hines and Leak. Under these circumstances, Defendants were substantially and irreparably prejudiced by the publication to the jury of extrinsic evidence; it was therefore an abuse of the trial court's discretion to deny Defendants' motions for mistrial. *See* N.C.G.S. § 15A-1061 (1997) (noting that on a defendant's motion, the trial court must declare a mistrial "if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case"); *State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 772 (1992). This error requires that we grant Defendants a new trial; we therefore do not address Defendants' remaining contentions as they may not recur.

New Trial.

Judges TIMMONS-GOODSON and SMITH concur.

STATE OF NORTH CAROLINA v. LLOYD WALTER CHILDERS, JR.

No. COA97-1508

(Filed 1 December 1998)

1. **Evidence— perceptions of lay witness—victim's state of mind**

Testimony by a murder victim's co-worker about the demeanor of the victim in the days before she was shot by defendant, her ex-husband, including testimony that the victim "was upset" and "would hold her stomach crying," was relevant and admissible to show the victim's state of mind before the shooting. N.C.G.S. § 8C-1, Rule 701.

2. **Evidence— hearsay—state of mind exception—victim's statements**

Statements made by a murder victim to several witnesses shortly before she was shot by defendant wherein she stated that she was frightened of defendant and believed he was going to kill her were admissible to show the victim's state of mind and the nature of her relationship with defendant.

3. **Homicide— second-degree murder—self-defense not shown—sufficiency of evidence**

The evidence did not conclusively show that defendant acted in self-defense in shooting the victim so as to require the trial court to dismiss a charge of second-degree murder and lesser-included offenses where it tended to show that, even if the victim initially shot defendant in her house, defendant shot and killed the victim after she fled into the street, the threat of serious or bodily injury or death was no longer imminent, and defendant no longer had cause to protect himself; defendant stood over the victim's body and fired at her while she lay helpless in the road; and defendant shot the victim five times.

Appeal by defendant from judgment entered 23 January 1997 by Judge Russell G. Walker, Jr. in Richmond County Superior Court. Heard in the Court of Appeals 23 September 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Sharpe & Buckner, by Benny S. Sharpe, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Lloyd Walter Childers, Jr. appeals his conviction of second-degree murder in the fatal shooting of his ex-wife, Kathy Delane Bryant ("Bryant"). Primarily, defendant contends that the trial court erroneously admitted testimonial evidence revealing Bryant's fear of defendant. Defendant also challenges the sufficiency of the evidence supporting his conviction. Having carefully reviewed defendant's arguments, we find that the proceedings below were without error.

The State's evidence tended to show that on the morning of 23 November 1994, defendant went to Bryant's house in Rockingham, North Carolina, to visit his 13-year old daughter, Dana. Bryant was at work when defendant arrived, but she returned shortly after 12:00 noon. Upon Bryant's return, defendant instructed his daughter to go into her bedroom, close the door, and turn up the volume on her television set. Dana and her girlfriend, Melissa, who arrived shortly after Bryant returned, went into Dana's bedroom as instructed.

Minutes later, Dana and Melissa heard what sounded like three gunshots. Melissa ran home to call 911, and Dana ran out into the hallway. There, she saw her mother pointing a gun at defendant, who was sitting in the bathroom doorway, approximately six feet away from where Bryant was standing. Defendant was pleading, "Kathy, please don't do this." When Bryant became aware of Dana's presence, she told Dana to "get out of [t]here and call the law." Dana complied. According to Dana, defendant appeared to be wounded, but Bryant did not appear to be injured in any way.

Christopher McFadyn, a 13-year old boy who lived on Cedar Street approximately 50 yards from Bryant's home, testified that on the day of the shooting, he was standing on his back porch and heard what he believed to be a firecracker exploding. He walked around to the side of his house to see what was happening and heard another explosion. He looked toward the direction of the noise and saw Bryant lying face-down in the street in front of her house. Defendant was standing over Bryant's body, firing a gun at her. When defendant spotted Christopher, he ran to his car and drove away.

Dorothy Lee Martin, Bryant's next door neighbor, testified that she heard gunshots on 23 November 1994, but did not see any shots being fired. She stated that when she heard the gunfire, she looked out of her window and saw Bryant lying face-down in the road and

defendant standing approximately two feet away from Bryant's body. Martin further testified that when she turned from the window to dial 911, she heard three more shots.

Dr. John D. Butts, the Chief Medical Examiner for the State of North Carolina, performed the autopsy on Bryant's body. He testified that he found five gunshot wounds on the victim and that he recovered five .25 caliber bullets from her body. Three of the entry wounds were located on the upper left-hand side of Bryant's back, in the shoulder region. The bullets had traveled upward and across to the right-hand side of Bryant's body. One bullet had entered the left side of Bryant's face and had passed through to the other side, fracturing her right jaw. Another bullet wound was located at the front base of the victim's neck. This bullet traveled down through the center of the body—first damaging the aorta and the pulmonary artery, then passing through the heart and down into the abdominal cavity, then traveling through the spleen, and finally coming to rest in the tissues on the left side of the body, just under the skin. It was Dr. Butts' opinion that this wound caused Bryant's death.

Although Dr. Butts would not give an opinion as to the exact position of Bryant's body based only on the appearance of the wounds themselves, he responded to hypothetical questions concerning the likely positions of the shooter and the victim in view of the trajectory of the wounds. With regard to the wounds inflicted to Bryant's left cheek and shoulder, Dr. Butts stated that they were consistent with a shooter standing over her while she was lying flat on her chest with the right side of her face touching the pavement and her left cheek facing upward. As to the fatal shot to the base of Bryant's neck, Dr. Butts stated that this wound could have been inflicted by a shooter who was standing over Bryant while she was crouching or lying flat on the ground with her neck turned sideways and her left cheek up.

Dr. Butts also testified regarding what actions the victim would have been able to perform after sustaining the various wounds. He stated that of the five wounds, the neck wound was the only one that would have rapidly incapacitated Bryant. This wound, although not necessarily immediately incapacitating, would have prevented Bryant from engaging in any purposeful activity within a matter of seconds. Dr. Butts, however, stated that the victim could have traveled some feet before becoming completely disabled.

Officer Aprille Grant Sweatt, a crime scene specialist with the State Bureau of Investigations, responded to the call regarding the

shooting on 23 November 1994. Sweatt testified that she collected three spent .25 auto shell casings from the scene: Two were located on Hunt Street near the victim's body, and another was located on top of a heater in the living room. She did not find any .25 shell casings in the bathroom. Sweatt stated that with a semi-automatic weapon, the shell casing is ejected upward when the bullet is fired. She further testified that with a .38 Rossi revolver, such as the one found in the victim's hand, the shell casings remain in the chamber when the gun is fired. Sweatt reported that all five of the .38 Rossi's rounds had been fired, and the shell casings were left in the cylinder.

At the close of the State's evidence, defendant moved to dismiss the case as to second-degree murder and all lesser-included offenses. The trial court denied the motion, and defendant put on his evidence. Defendant testified that he went to the bathroom shortly after Bryant returned from work on 23 November 1994. When he opened the door to exit the bathroom, Bryant was pointing a .38 Rossi handgun at him, and before he could speak, she started shooting. One bullet struck defendant in the left side of his chest, near his heart, and another struck him in the right forearm. Defendant fell to the floor and, then, dragged himself back into the bathroom, behind a partition. He pulled a semi-automatic .25 caliber Beretta pistol out of his pocket and fired three shots at Bryant when she stepped into the bathroom. Defendant testified that Bryant ran from the house as soon as the shots were fired, but he stated that he did not know whether any of the shots had actually struck her. Defendant then got up and walked to the front door. When he stepped out on the stoop, Bryant shot at him again. Defendant stated that he did not see Bryant, but he fired back in the direction from which the shot came. He then professed that "[t]he next conscious moment . . . that [he had he] was standing in the BP Station [on Highway 74] and asking them to carry [him] to a doctor."

At the close of all of the evidence, defendant renewed his motion to dismiss. The trial court denied the motion and submitted the case to the jury on second-degree murder and all lesser-included offenses. In addition, the trial court instructed the jury on the theories of perfect and imperfect self-defense. The jury returned a verdict finding defendant guilty of second-degree murder. From the judgment entered on the jury's verdict, defendant appeals.

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[1] With his first assignment of error, defendant contends that the trial court improperly admitted the opinion testimony of lay wit-

nesses without any prior foundation. Defendant specifically challenges the testimony of Bryant's co-worker, Doris Wilson, regarding Bryant's demeanor in the days preceding her death.

Rule 701 of the North Carolina Rules of Evidence governs the admissibility of opinion testimony by lay witnesses and provides as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.R. Evid. 701. "The state of a person's health, the emotions [s]he displayed on a given occasion, or other aspects of [her] physical appearance are proper subjects for lay opinion." *Bowden v. Bell*, 116 N.C. App. 64, 71, 446 S.E.2d 816, 821 (1994). Moreover, a lay witness may testify using "shorthand statements of fact." *State v. Eason*, 336 N.C. 730, 747, 445 S.E.2d 917, 927 (1994). These are " '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) (quoting *State v. Skeen*, 182 N.C. 844, 845, 109 S.E.2d 71, 72 (1921)).

In the case at hand, Wilson testified that in the days before the shooting, Bryant "act[ed] like she was trying to get away." Wilson stated that Bryant "was upset," that "[s]ometimes she would hold her stomach crying," and that "[h]er hands was all eat up because of her nerves." Defendant contends that while this testimony may have been rationally based on Wilson's perceptions, it was not helpful to a clear understanding of her testimony or to a determination of a fact in issue. We disagree, as Bryant's demeanor before the shooting was relevant to her state of mind. *See State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990) (holding that victim's state of mind is relevant to show nature of relationship between victim and defendant before murder occurred). Wilson's statements were "helpful to a clear understanding of [her] testimony" regarding Bryant's mental state before the shooting. N.C.R. Evid. 701. Therefore, the statements were properly admitted under Rule 701, and defendant's first assignment of error is overruled.

[2] Defendant's next assignment of error is that the trial court wrongly permitted the State to introduce into evidence hearsay statements by Bryant concerning her fear of defendant. Defendant contends that the testimony of five of the State's witnesses—Doris Wilson, James Hooks, Dianne Brizendine, Kelly Hooks, and Dana Childers—was inadmissible in that it conveyed Bryant's statements that she believed defendant intended to harm her. Wilson, James Hooks, Brizendine, and Kelly Hooks each testified regarding conversations with Bryant shortly before the shooting, wherein she stated that she was frightened of defendant and that she believed he was going to kill her. Dana testified that her mother had purchased the .38 revolver to protect herself.

Defendant contends that the statements relayed by these witnesses were not properly admitted under Rule 804(b)(5) of the Rules of Evidence, because the trial court failed to conduct the six-part inquiry articulated in *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), for determining the admissibility of such hearsay statements. A review of the record, however, indicates that the trial court admitted these statements under the state of mind exception to the hearsay rule. In North Carolina, it is well established "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." *State v. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995) (citing *State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between victim and defendant prior to the murder), *cert. denied*, [511] U.S. [1046], 128 L.Ed.2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818-819 (1990) (defendant's threats to victim shortly before the murder admissible to show victim's then-existing state of mind); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (victim's statements regarding defendant's threats relevant to the issue of her relationship with defendant)). Therefore, we hold that the statements in question were properly admitted to show Bryant's state of mind and the nature of her relationship with defendant. Defendant's assignment of error, then, fails.

[3] Defendant next assigns error to the trial court's denial of his motion to dismiss the charge of second-degree murder and all lesser-included offenses at the close of all of the evidence and upon his motion for appropriate relief. Defendant argues that the evidence in the record conclusively shows that the victim, Bryant, was the aggressor in this incident and that defendant was acting to protect his life.

The law governing the manner by which a trial court must evaluate a motion to dismiss a criminal offense is well-defined.

> "The question for the court in ruling upon defendant's motion for dismissal is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If substantial evidence of both of the above has been presented at trial, the motion is properly denied. . . . In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. . . . Contradictions and discrepancies in the evidence are strictly for the jury to decide."

State v. Huggins, 71 N.C. App. 63, 66, 321 S.E.2d 584, 586 (1984) (quoting *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983) (citations omitted)). Substantial evidence is that amount of evidence necessary for a rational trier of fact to conclude beyond a reasonable doubt that a particular element exists. *State v. Cofield*, 129 N.C. App. 268, 280, 498 S.E.2d 823, 832 (1998).

"Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). Malice is present where the defendant intentionally takes the life of another without excuse, just cause, or justification. *State v. Gish*, 111 N.C. App. 165, 431 S.E.2d 856 (1993). A killing is intentional where the defendant commits an assault against the victim " 'which in itself amounts to a felony *or* is likely to cause death or serious bodily injury.' " *State v. Piche*, 102 N.C. App. 630, 636, 403 S.E.2d 559, 563 (1991) (quoting *State v. Ray*, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980)).

Under the law of perfect self-defense, however, a killing is completely excused if four elements are met:

> "(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)), *quoted in State v. Hayes*, 130 N.C. App. 154, 178-79, 502 S.E.2d 853, 870 (1998). Nevertheless, where elements (1) and (2) are satisfied, but elements (3) and (4) are lacking, the killing is not completely excused, and the defendant has at least committed voluntary manslaughter. *Id.* Such a set of circumstances constitutes imperfect self-defense. *Id.*

In the instant case, the evidence, taken in the light most favorable to the State and allowing the State every reasonable inference and intendment arising therefrom, tends to show that after the initial confrontation had ended, defendant followed Bryant out into the street and killed her. The evidence further tends to show that defendant stood over Bryant's body and fired at her while she lay helpless in the road. The autopsy revealed that Bryant was shot five times: three times in the upper left shoulder, once in the left cheek, and once in the base of her neck. According to the testimony of the medical examiner, Dr. Butts, all of these wounds could have been inflicted by defendant while he was standing over Bryant's fallen body. It is unclear from the evidence at what point during the affray the fatal injury was administered by defendant. However, the absence of spent .25 shell casings in the bathroom supports a conclusion that the events following Bryant's initial shooting of defendant did not unfold as defendant testified. In light of this evidence, a reasonable juror could find beyond a reasonable doubt that defendant shot and killed Bryant after she had fled and, thus, after the threat of serious bodily injury or death was no longer imminent and defendant no longer had cause to protect himself. Therefore, the trial court correctly denied defendant's motion to dismiss the charge of second-degree murder and all lesser-included offenses at the close of all the evidence, and the case was properly submitted to the jury.

By his final assignment of error, defendant contends that the trial court erred in denying his motion to set aside the jury's verdict, because the evidence at trial did not warrant a conviction of second-degree murder.

"The decision to grant or deny a motion to set aside the verdict is within the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion." *State v. Serzan*, 119 N.C. App. 557, 561-62, 459 S.E.2d 297, 301 (1995). When the evidence presented at trial adequately supports the jury's verdict, the trial

court does not abuse its discretion in denying the motion to set aside the verdict. *Id.* Having held that the evidence presented in this case was sufficient to support a conviction of second-degree murder, we likewise conclude that the trial court did not abuse its discretion in denying defendant's motion to set aside the jury's verdict.

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

No error.

Judges MARTIN, John C. and HORTON concur.

ROY O. RODWELL AND COWEE CORPORATION, PLAINTIFFS V.
PAUL C. CHAMBLEE, DEFENDANT

No. COA97-719

(Filed 1 December 1998)

1. Agency— corporation as agent

A corporation may act as an agent, and a stockholder in that corporation may act as the principal.

2. Agency— act of agent as act of principal

If an agency agreement exists, even informally, then the act of an agent within the scope of its authority is in legal effect the act of the principal, and the latter is entitled to all the advantages flowing therefrom.

3. Agency— corporation's payment of partnership debt— agent of partner—genuine issue of material fact

A genuine issue of material fact existed as to whether a corporation wholly owned by plaintiff partner-guarantor made payments on a partnership obligation to a bank as an agent of plaintiff so as to render defendant partner-guarantor liable for indemnification of plaintiff under the terms of the partnership agreement.

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiffs from order dated 19 March 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 17 February 1998.

Sandman & Strickland, P.A., by Nelson G. Harris, for plaintiff appellants.

Bode, Call & Stroupe, L.L.P., by Odes L. Stroupe, Jr. and John V. Hunter, III, for defendant appellee.

GREENE, Judge.

Roy O. Rodwell (Rodwell) and Cowee Corporation (Cowee) (collectively, Plaintiffs) appeal from the trial court's grant of summary judgment dismissing Plaintiffs' claims against Paul C. Chamblee (Defendant).

On or about 25 September 1995, Plaintiffs filed a complaint against Defendant alleging that Creedmoor Associates Limited Partnership (Creedmoor) had borrowed $500,000.00 from First Union National Bank (First Union), and that Rodwell, Defendant, and the remaining Creedmoor partners had "each jointly and severally guaranteed payment to First Union of [Creedmoor's] obligations [to First Union] under the Note, by each executing a separate Unconditional Guaranty . . . ." Plaintiffs alleged that the Creedmoor partnership agreement had been amended (Creedmoor First Amendment) such that any partner who paid in excess of his partnership percentage towards Creedmoor's obligation to First Union would be indemnified by the remaining partners. The Creedmoor First Amendment provided, in relevant part:

> As between themselves, the Partners agree that with respect to the [First Union] Loan, each Partner's liability for repayment of principal and interest on said loan shall be limited to an amount determined by multiplying the amount of unpaid principal and interest on the [First Union] Loan by the respective partnership interest percentage of each Partner. In the event that any Partner is required to pay and pays to First Union with respect to the [First Union] Loan an amount in excess of such Partner's share as determined above ("Excess Payment") the remaining Partners agree to indemnify the Partner making such Excess Payment . . . .
>
> . . . .

> In the event that any Partner . . . is required to pay and makes any Excess Payment, the remaining Partners . . . agree to indemnify such Partner an amount equal to the full Excess Payment, provided, however, the amount of indemnification from any Partner required to indemnify against such Excess Payment shall be limited to an amount determined by multiplying the Excess Payment times the respective percentage interest in the Partnership of each remaining Partner determined without taking into consideration the interest of the Partner to be indemnified . . . .[1]

Plaintiffs further alleged:

> 15. [Creedmoor] did not carry out its obligations [to First Union] under the Note . . . and failed entirely to perform its obligations thereunder. Accordingly, it became necessary for the Guarantors, jointly and severally, to perform the obligations under the Note . . . .
>
> 16. During the period from March 26, 1991 through May 8, 1993, Cowee, [a corporation wholly owned by Rodwell and "used by Rodwell to fund his personal business obligations,"] on behalf of [Rodwell], made various payments to First Union with respect to [Creedmoor's] and the Guarantors' obligations under the Note . . .; said payments totaling $419,534.57, and said payments fully satisfying [Creedmoor's] obligations under the Note . . . .
>
> . . . .
>
> 22. Despite proper demand, Defendant has failed and refused to pay any portion of the sum owing to Rodwell.

In Counts One through Three of Plaintiffs' complaint, Rodwell seeks relief under an agency theory, under an unjust enrichment theory, and pursuant to N.C. Gen. Stat. § 26-5. In Count Four of Plaintiffs' complaint, Cowee seeks relief under the doctrine of *quantum meruit.* Attached to the complaint are copies of Creedmoor's obligation to First Union and the unconditional guaranty signed by Defendant as a joint and several guarantor of that obligation.

On or about 12 December 1995, Defendant admitted in his answer that Creedmoor "did not carry out its obligations under the Note." Defendant "d[id] not deny that [Cowee] apparently made voluntary

1. We note that the Creedmoor First Amendment has a slightly different provision for one of the Creedmoor partners who is not a party to this suit.

payments on the loan to First Union." Defendant further admitted that the Creedmoor First Amendment "provides in paragraph 2.3 that as between themselves, partners must indemnify any other partner who makes excess loan payments to [First Union] for the First Union loan," and that Defendant's "percentage interest liability to a partner is 20% of such excess amounts paid by a partner to [First Union] in satisfaction of the First Union loan." In addition, Defendant admitted that he had "refused to [indemnify Rodwell for] any portion of the sum paid to First Union by [Cowee]." Defendant contended:

> [T]he payments which [Rodwell] seeks to recover in this proceeding were not made by him, but were made by [Cowee], which is not a partner or other entity which Defendant agreed to guaranty payment on behalf of and therefore any payments made by [Cowee] whether on behalf of [Rodwell] or otherwise create no liability in Defendant pursuant to any of the agreements alleged in the Complaint. [Cowee] was a "mere volunteer" with respect to said payments to First Union and therefore neither [Rodwell] nor [Cowee] is entitled to recover for any such payments made by [Cowee].
>
> . . . [I]n the event that Defendant is held to be liable to Plaintiffs for any of the alleged sums owing, which Defendant denies, then and in that event, Plaintiffs' claims against [Defendant] are time barred by the applicable statute of limitations and/or repose, which Defendant hereby asserts as an affirmative defense as a total bar to this litigation.

On 28 February 1996, Plaintiffs filed responses to Defendant's admission requests. Plaintiffs admitted therein that Defendant had no "contractual agreement or written contract with [Cowee] wherein [he] has any liability or obligation to [Cowee]," and that Cowee was not a party to the Creedmoor First Amendment. Plaintiffs further admitted that Cowee "had no contractual liability or indebtedness to First Union which required it to make payments [on the note] to First Union," and that Cowee did not make payments on the obligation under any "mistaken set of facts." Plaintiffs also admitted that Rodwell "utilized [Cowee] for the payment of his obligations for convenience." Plaintiffs denied that Rodwell had utilized Cowee for the payment of his obligations for tax reasons. Plaintiffs "admitted that [Cowee's] payments to First Union were made on behalf of [Rodwell], and were made under [Rodwell's] direction and control," but denied Defendant's contention that Cowee was under "no obligation to anyone" to make the payments to First Union.

On 21 February 1997, Defendant moved for summary judgment "on the grounds that based upon the pleadings and responses to discovery, there is no genuine issue of material fact and that [Defendant] is entitled to judgment as a matter of law." In response to Defendant's motion for summary judgment, Plaintiffs filed the "Affidavit of Roy O. Rodwell" on or about 14 March 1997. In his affidavit, Rodwell swore the following additional facts:

> 5. At all times relevant to this matter, Cowee was acting as the agent and alter ego of Rodwell, completely at his direction and under his control.
>
> . . . .
>
> 35. Rodwell is the sole owner of Cowee, had sole signature authority with respect to Cowee's checking account, and executed each check by which he made payment to First Union.
>
> 36. With respect to all payments made, by Cowee checks to First Union, Rodwell deposited his personal funds in Cowee's account, and those funds were thereafter used to make the payments.

Attached to Rodwell's affidavit, among other items, were copies of several checks made out to First Union which had been drawn on Cowee's account and signed by Rodwell. "Creedmoor Associates" was handwritten on the memorandum line of most of these checks.

On or about 19 March 1997, the trial court granted Defendant's motion for summary judgment based on its finding that "there are no genuine issues of material fact and that Defendant is entitled to summary judgment upon all of Plaintiffs' claims as a matter of law."

Plaintiffs appeal summary judgment for Defendant, contending before this Court only that Rodwell is entitled to indemnification (pursuant to the terms of the Creedmoor First Amendment) under an agency theory. The remaining theories alleged in Plaintiffs' complaint (*i.e.*, unjust enrichment, *quantum meruit*, and N.C. Gen. Stat. § 26-5) are deemed abandoned by Plaintiffs' decision not to pursue them on appeal. *See* N.C.R. App. P. 28(b)(5); *State v. Brothers*, 33 N.C. App. 233, 234-35, 234 S.E.2d 652, 652-53, *disc. review denied*, 293 N.C. 160, 236 S.E.2d 704 (1977). Accordingly, we do not address whether the trial court properly granted summary judgment for Defendant under those theories.

The issue is whether there is evidence that Cowee acted as Rodwell's agent in making payments on Creedmoor's obligation to First Union.

[1] An agency relationship is created by agreement of the principal and the agent. 3 Am. Jur. 2d *Agency* § 17 (1986) (noting that there must be a "meeting of the minds" between the principal and the agent). A corporation may act as an agent, Russell M. Robinson, II, *North Carolina Corporation Law* § 3-5(d) (5th ed. 1995); 3 Am. Jur. 2d *Agency* § 13 (1986); *see Pick v. Hotel Company*, 197 N.C. 110, 112, 147 S.E. 819, 820 (1929), and a stockholder in that corporation may act as the principal, *see* 18A Am. Jur. 2d *Corporations* § 779 (1985) (noting that a dominant stockholder may contract with his corporation provided that close scrutiny of the agreement reveals it to be "fair and for an adequate consideration").

[2] "An agency can be proved 'generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy.' " *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 599, 394 S.E.2d 643, 650 (1990) (quoting *Colony Associates v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 638, 300 S.E.2d 37, 39 (1983)), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991); *see also* 3 Am. Jur. 2d *Agency* § 2 (1986) (noting that "one of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent"). It is not essential that the principal and the agent enter into an actual contract; rather, the agency relationship may be informally created. 3 Am. Jur. 2d *Agency* § 18 (1986). If an agency agreement exists, even informally, then the act of an agent within the scope of its authority "is in legal effect the act of the principal, and the latter is entitled to all the advantages flowing therefrom." *Id.* at § 296.

[3] In this case, our review of the evidence reveals a genuine issue of material fact as to whether Cowee made payments on Creedmoor's obligation to First Union as the agent of Rodwell. *See Hinson v. United Financial Services*, 123 N.C. App. 469, 472, 473 S.E.2d 382, 385 (noting that summary judgment is improper where the evidence, viewed in the light most favorable to the non-moving party, reveals a genuine issue of material fact), *disc. review denied*, 344 N.C. 630, 477 S.E.2d 39 (1996). The evidence in the light most favorable to Plaintiffs reveals that Rodwell, the sole stockholder of Cowee, "utilized

[Cowee] for the payment of his obligations for convenience," and that Cowee made payments on Creedmoor's obligation to First Union "under [Rodwell's] direction and control" and "on behalf of Rodwell." If Cowee acted as Rodwell's agent in making payments on Creedmoor's obligation to First Union, these payments would, "in legal effect," be payments made by Rodwell,[2] and Rodwell would therefore be entitled to indemnity from Defendant under the terms of the Creedmoor First Amendment.

Accordingly, summary judgment entered against Rodwell is reversed; summary judgment against Cowee is affirmed.[3]

Reversed in part, affirmed in part and remanded.

Judge WALKER concurs.

Judge TIMMONS-GOODSON dissents.

Judge TIMMONS-GOODSON dissenting.

I do not agree that a genuine issue of material fact is presented in this case on the question of agency. I would affirm summary judgment for the defendant.

"The term 'agency' means a fiduciary relationship by which a party confides to another the management of some business to be transacted in the former's name or on his account, and by which such other assumes to do the business and render an account of it." 3 Am. Jur. 2d *Agency* § 1 (1986). "[O]ne of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent." 3 Am. Jur. 2d *Agency* § 2 (1986).

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2. We note Defendant's contention that Cowee made payments on the obligation as a "mere volunteer." Defendant is correct that the equitable doctrine of subrogation does not apply "in favor of a volunteer, who, being under no legal or moral obligation and having no right or interest of his own to protect, discharges the debt of another." *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders*, 78 N.C. App. 108, 114, 336 S.E.2d 694, 698 (1985). If Plaintiffs prove that Cowee was Rodwell's agent and made the payments pursuant to that agency agreement, however, then Cowee would have had a legal obligation to make the payments and would not have been a "mere volunteer." In any event, one who makes a payment "at the instance, solicitation, or request of the person whose liability he discharges" is *not* a "mere volunteer." 73 Am. Jur. 2d *Subrogation* § 24 (1974).

3. In his brief before this Court, Defendant argues that Cowee's claims are partially barred by the statute of limitations. Cowee, however, has abandoned its only claim for relief (*i.e.*, *quantum meruit*) by failing to argue it before this Court. Defendant does not contend that Rodwell's claims are time-barred.

In the case at bar, plaintiffs allege that Cowee (a corporation) is the agent of Rodwell (an individual). However, this is not possible under these facts as a corporation is "an artificial being" with its existence and purpose determined by its charter, bylaws and articles of incorporation. 18 Am. Jur. 2d *Corporations* § 1 (1985). While plaintiffs allege that Cowee is "used by Rodwell to fund his personal business obligation," they fail to allege or prove that the stated purpose, as articulated in Cowee's charter, bylaws or articles of incorporation, was to be an agent of Rodwell.

It appears that for his own personal reasons, Rodwell chose to funnel the excess payments on the First Union Loan through the Cowee Corporation. The fact that Rodwell avers that Cowee was acting as his agent and alter ego in making the payments on the First Union Loan, or that Cowee is wholly owned by Rodwell is not enough to give rise to an agency relationship. Indeed, Rodwell has failed to come forth with any evidence that would permit such a determination.

I would affirm the entry of summary judgment for the defendant. In all other respects, I concur with the majority.

SAMUEL J. STROUD, JR., PLAINTIFF-APPELLANT v. PATTIE S. HARRISON, CHIEF JUDGE AND PERSON COUNTY DISTRICT COURT, DEFENDANT-APPELLEES

No. COA98-60

(Filed 1 December 1998)

1. Disabilities— statute of limitations—visually impaired person—exclusion of assistance dog from courtroom—claims against judge and court—ADA—state statute

A visually impaired plaintiff's claim for damages against a district court judge and the district court for violations of the Americans with Disabilities Act (ADA) and N.C.G.S. § 168-4.2 based upon the judge's refusal to allow plaintiff to be accompanied by his assistance dog in the courtroom and the judge's chambers was governed by the 180-day statute of limitations set forth in N.C.G.S. § 168A-12. Therefore, the claim was barred by the statute of limitations where the alleged discriminatory conduct occurred on 15 April 1996 and plaintiff filed his complaint in May 1997.

2. Civil Rights— § 1983 action against judge—monetary damages claim barred

A visually impaired plaintiff was barred from seeking monetary damages against a district court judge in her official capacity under 42 U.S.C. § 1983 for violations of his civil rights by the judge's alleged refusal to allow plaintiff to be accompanied by his assistance dog in the courtroom and the judge's chambers.

3. Constitutional Law— State—direct constitutional claim—adequate statutory remedy

A visually impaired plaintiff had no direct cause of action against a district court judge under N.C. Const. art. I, § 19 based upon the judge's alleged refusal to allow plaintiff to be accompanied by his assistance dog in the courtroom and the judge's chambers since N.C.G.S. Ch. 168A, the Handicapped Persons Protection Act, provided plaintiff with an adequate state remedy.

Appeal by plaintiff from an order entered 9 October 1997 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 17 September 1998.

Hollowell, Peacock & Meyer, P.A., by Deborah N. Meyer and Deborah A. Pople, for plaintiff-appellant.

Attorney General Michael F. Easley, by Robert M. Curran, Assistant Attorney General, for defendant-appellees.

McGEE, Judge.

This case arises from an event that occurred 15 April 1996 before defendant Harrison in her capacity as a Person County District Court judge. Plaintiff, who is visually impaired, was in defendant Harrison's courtroom seeking increased visitation with his minor children. He was accompanied by his assistance dog, who sat at plaintiff's feet.

Plaintiff contends and defendant Harrison does not dispute the following: A court bailiff approached plaintiff and informed plaintiff that he would have to remove his dog from the courtroom. Plaintiff told the bailiff that state and federal laws allow him to take his dog anywhere except operating rooms and zoos. The bailiff told plaintiff that defendant Harrison insisted the dog be removed from the courtroom. The bailiff left but returned and escorted plaintiff to defendant

Harrison's chambers, requiring plaintiff to leave his dog outside the chambers. In her chambers, defendant Harrison explained to plaintiff that she had a dog phobia that dated from her childhood.

With regard to increased visitation, defendant Harrison proposed that plaintiff be allowed to visit his children only if a sighted person was with him, stating by way of explanation that she had a five-year-old nephew whom she knew would not survive a few minutes if he were left without a sighted person to watch him. Defendant Harrison further proposed that plaintiff's daughter not be allowed to be in a moving vehicle with plaintiff's dog and that when plaintiff's children visited him, the dog would have to be tied up and left in another room. Defendant Harrison also proposed that the family participate in therapy to deal with fear of dogs, stating by way of explanation that she would have been helped if she had received such therapy during her childhood.

Plaintiff allegedly left the meeting with defendant Harrison with the impression that her proposals were to be part of a court order. However, defendant Harrison never entered an order addressing plaintiff's petition for additional visitation with his children.

In May 1997, plaintiff filed suit against both defendant Harrison in her official capacity and defendant Person County District Court. He alleges that defendant Harrison violated N.C. Gen. Stat. § 168-4.2 (Cum. Supp. 1997), which states, "Every . . . visually impaired person . . . has the right to be accompanied by an assistance dog . . . and has the right to keep the assistance dog on any premises the person . . . uses." Plaintiff also alleges that defendant Harrison violated the North Carolina Constitution, art. I, § 19, in denying plaintiff due process and equal protection under the law by refusing to allow plaintiff to be accompanied by his assistance dog in defendant Harrison's courtroom and chambers. Plaintiff alleges that defendants Harrison and Person County District Court violated 42 U.S.C. § 12101 and related sections (the Americans with Disabilities Act). Plaintiff specifically asserts that defendant Harrison violated the Americans with Disabilities Act by refusing to allow plaintiff to be accompanied by his assistance dog in her courtroom and chambers. Plaintiff asserts that defendant Person County District Court violated the Americans with Disabilities Act through its employees by refusing to allow plaintiff to be accompanied by his assistance dog in defendant Harrison's courtroom and chambers. Plaintiff asserts that defendant Harrison violated 42 U.S.C. § 1983 (Civil action for deprivation of

rights) by denying his right to be accompanied by his assistance dog without due process or lawful authority.

Defendants moved to dismiss the complaint pursuant to N.C.R. Civ. P. 12(b)(2) and 12 (b)(6) for lack of jurisdiction over the person and failure to state a claim upon which relief could be granted. They also contend that the complaint is barred by the doctrines of sovereign immunity, judicial immunity, qualified immunity and the statute of limitations. The trial court granted defendants' motion to dismiss, and plaintiff appeals.

Plaintiff's lawsuit relies heavily on N.C. Gen. Stat. § 168-4.2, which states that visually impaired individuals have the right to be accompanied by an assistance dog. This statute does not, however, waive sovereign or judicial immunity nor does it set forth a statute of limitations or a civil remedy—factors that are crucial to plaintiff's claim. Plaintiff essentially argues that these deficiencies are covered by the umbrella of the North Carolina Constitution, art. I, § 19; 42 U.S.C. § 12101 and related sections (the Americans with Disabilities Act); and 42 U.S.C. § 1983 (Civil action for deprivation of rights).

[1] We begin with an analysis of 42 U.S.C. § 12101 (the Americans with Disabilities Act) and the statute of limitations issue as it relates to this case. The Americans with Disabilities Act (ADA) does not set forth a statute of limitations, but case law provides guidance on what statute of limitations to apply in cases such as the one before us.

> "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." This process involves a two part analysis. In choosing the applicable statute, the court should first select the state statute "most analogous" to the federal claim. The court should then consider whether application of that limitations period is consistent with the federal statute and its underlying policies.

McCullough v. Branch Banking & Trust Co., 35 F.3d 127, 129 (4th Cir. 1994) (citations omitted), *cert. denied*, 513 U.S. 1151, 130 L. Ed. 2d 1069 (1995). In *McCullough*, the federal district court held that N.C. Gen. Stat. Chapter 168A is the most analogous state statute to the federal Rehabilitation Act of 1973 (29 U.S.C.A. § 794), noting similarities between the Rehabilitation Act and the ADA, and observing that an ADA filing requirement with respect to the Equal Employment

Opportunity Commission acts as a 180-day statute of limitations for many plaintiffs seeking relief under the ADA. *Id.*

Acknowledging *McCullough*, plaintiff argues that "the closest analogous North Carolina statute to the ADA *based on the cause of action* is N.C. Gen. Stat. § 168 and not N.C. Gen. Stat. § 168-A [sic]." (Emphasis by plaintiff.) Defendants argue that Chapter 168A is more analogous.

To determine whether N.C. Gen. Stat. Chapter 168 or Chapter 168A is more analogous to the ADA in the context of this complaint, we examine the complaint itself, the ADA and the two North Carolina statutory chapters.

Plaintiff's complaint is founded in his allegation that defendants' behavior amounted to discrimination. The eight-page complaint uses the word "discriminate" or a derivative of it at least seventeen times. Some form of the word appears in all five counts set out in the complaint.

The ADA includes the following statement of purpose:

> It is the purpose of this chapter—
>
> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C.A. 12101(b) (1995).

N.C. Gen. Stat. Chapter 168, titled "Handicapped Persons," includes the following statement of purpose:

> 168-1. Purpose and definition.
>
> The State shall encourage and enable handicapped persons to participate fully in the social and economic life of the State and

to engage in remunerative employment. The definition of "handicapped persons" shall include those individuals with physical, mental and visual disabilities. For the purposes of this Article the definition of "visually handicapped" in G.S. 111-11 shall apply. (1973, c. 493, s.1.)

N.C. Gen. Stat. § 168-1 (1995).

N.C. Gen. Stat. Chapter 168 then sets out specific "rights," including the right of access to public places, the right to use public conveyances and other accommodations, and the right to be accompanied by an assistance dog. *See* N.C. Gen. Stat. §§ 168-2 (Cum. Supp. 1997), 168-3 (1995) and 168-4.2 (Cum. Supp. 1997). In fact, Article 1 of Chapter 168 is entitled "Rights."

N.C. Gen. Stat. Chapter 168A, entitled the "Handicapped Persons Protection Act," includes the following statement of purpose:

168A-2. Statement of purpose.

(a) The purpose of this Chapter is to encourage and enable all handicapped people to participate fully to the maximum extent of their abilities in the social and economic life of the State, to engage in remunerative employment, to use available public accommodations and public services, and to otherwise pursue their rights and privileges as inhabitants of this State.

(b) The General Assembly finds that: the practice of discrimination based upon a handicapping condition is contrary to the public interest and to the principles of freedom and equality of opportunity; the practice of discrimination on the basis of a handicapping condition threatens the rights and proper privileges of the inhabitants of this State; and such discrimination results in a failure to realize the productive capacity of individuals to their fullest extent. (1985, c. 571, s. 1.)

N.C. Gen. Stat. § 168A-2(a) and (b) (1995).

N.C. Gen. Stat. Chapter 168A also specifically defines discriminatory practices, waives state immunity and provides for civil action for discriminatory practices. *See* N.C. Gen. Stat. §§ 168A-3, 168A-4, 168A-5, 168A-6, 168A-7, 168A-8 and 168A-11 (1995).

A careful reading of the two chapters reveals that Chapter 168 sets out some specific rights while Chapter 168A sets out the procedure for enforcing those rights. Chapter 168A specifically states,

"[T]he practice of discrimination on the basis of a handicapping condition threatens the rights and proper privileges of the inhabitants of this State[.]" N.C. Gen. Stat. § 168A-2(b). Chapter 168A also specifically states that a handicapped person "may bring a civil action to enforce rights granted or protected by this Chapter[.]" N.C. Gen. Stat. § 168A-11(a). We note the use of the words "enforce" and "discrimination" in both the ADA and N.C. Gen. Stat. Chapter 168A.

We conclude that N.C. Gen. Stat. Chapter 168A is more analogous to the ADA for the purposes of the case at issue. We therefore apply the statute of limitations set out in Chapter 168A, which is "180 days after the date on which the aggrieved person became aware . . . of the alleged discriminatory practice or prohibited conduct." N.C. Gen. Stat. § 168A-12 (1995). The plaintiff in this case was subjected on or about 15 April 1996 to the behavior described above. He filed his complaint in May 1997, outside the 180-day statutory period. We must, therefore, affirm the decision of the trial court to the extent that plaintiff relies on the ADA and N.C. Gen. Stat. § 168-4.2.

[2] Plaintiff's complaint also alleges he has a cause of action under 42 U.S.C. § 1983 (Civil action for deprivation of rights) with regard to defendant Harrison. The statute says, in pertinent part:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.A. § 1983 (Cum. Supp. 1998).

Noting that "the interpretation of section 1983 is labyrinthine," our North Carolina Supreme Court specifically addressed § 1983 and claims against state officials in their official capacities in *Corum v. University of North Carolina*, 330 N.C. 761, 770-71, 413 S.E.2d 276, 282-83 (1992). The Court said:

> The text of section 1983 permits actions only against a "person." In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989), the Supreme Court held that when an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacity are "persons" under section 1983 when the remedy sought is monetary damages. *Accord Quern v. Jordan*, 440 U.S. 332, 59 L. Ed. 2d 358 (1979).

Corum at 771, 413 S.E.2d at 282-83 (footnote omitted).

Citing case law from the U.S. Supreme Court, the *Corum* court held that, under § 1983, the plaintiff in that case was barred from seeking damages against state employees in their official capacities. We must apply the same rule in the case before us. Plaintiff has sued defendant Harrison in her official capacity as a district court judge. "Count IV" of plaintiff's complaint specifically cites § 1983 and requests "compensatory damages plus interests[.]" Under § 1983, plaintiff is barred from suing defendant Harrison in her official capacity for monetary damages.

[3] Plaintiff also alleges a violation of the North Carolina Constitution, art. I, § 19, with regard to defendant Harrison. This issue raises the question of whether plaintiff has a direct cause of action under the North Carolina Constitution. Here, too, *Corum* is instructive. "*[I]n the absence of an adequate state remedy*, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum* at 782, 413 S.E.2d at 289 (emphasis added). N.C. Gen. Stat. Chapter 168A provides "an adequate state remedy" for situations such as the one now before us. *Id.* Plaintiff, however, did not use that state remedy and, having failed to do so, cannot now ask this Court to fashion a remedy.

Affirmed.

Judges WYNN and HUNTER concur.

Judge WYNN concurred in the result prior to 1 October 1998.

STATE OF NORTH CAROLINA v. RONNIE SMALL

No. COA97-1607

(Filed 1 December 1998)

1. **Criminal Law— prosecutorial misconduct—exculpatory statement—known to defendant**

The trial court did not err in a robbery and murder prosecution by denying defendant's motion to dismiss for prosecutorial misconduct based on the State's untimely disclosure of exculpatory material where defendant had knowledge of the statement in question before the district attorney, was provided with the written statement many months prior to trial, and was able to fully use the statement and the defense theory it presented during trial.

2. **Evidence— identification testimony—inaccurate as to facts—admissible**

The trial court did not err in a prosecution for robbery and murder by allowing testimony identifying defendant as the perpetrator where the testimony was inaccurate as to the facts. Any uncertainties in the identification go to the weight and not admissibility.

3. **Evidence— impeachment of hearsay declarant—inconsistent hearsay statements—admissible**

The trial court did not err in a prosecution for robbery and murder by allowing the State to introduce hearsay testimony implicating defendant in rebuttal of defendant's introduction of exculpatory hearsay testimony from the same declarant. N.C.G.S. § 8C-1, Rule 806 provides that inconsistent statements of a hearsay declarant are admissible, in effect treating the out-of-court declarant the same as a live witness for purposes of impeachment.

4. **Criminal Law— motion to dismiss—circumstantial evidence**

The trial court did not err in a robbery and murder prosecution by denying defendant's motions to dismiss for insufficient evidence and for appropriate relief. If the evidence presented is purely circumstantial, the question is whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

Appeal by defendant from judgment entered 23 January 1997 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 20 October 1998.

Michael F. Easley, Attorney General, by H. Alan Pell, Special Deputy Attorney General, for the State.

Michael L. Yopp for defendant.

SMITH, Judge.

Defendant was charged with the 12 May 1994 robbery of William Wright, d/b/a Texaco Food Mart in Dunn, North Carolina, and the murder of Wayne Joseph Newbold, the clerk on duty. A duly empaneled jury found defendant guilty on all counts. Defendant appeals.

I.

[1] Defendant first contends the trial court erred in denying defendant's motion to dismiss for prosecutorial misconduct. Defendant argues that the State was in possession of exculpatory evidence that was not disclosed to defendant in a timely manner. After a hearing on the motion, the trial court denied the motion to dismiss, finding no prejudice to defendant.

Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), is the law of the land on the issue of suppression of evidence. In *Brady*, the United States Supreme Court held 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." *Id.* at 87, 10 L. Ed. 2d at 218. Evidence is "material" only when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985). Defendant bears the burden of showing that evidence not disclosed was material and affected the outcome of the trial. *See State v. Smith*, 337 N.C. 658, 664, 447 S.E.2d 376, 379 (1994); *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983).

In this case, the record reveals that the statement in question was not actually given to the district attorney until January 1996, at which time a copy was provided to defendant. Although the State was aware

of the *substance* of the statement as early as July 1994 and did not relay its knowledge of the information to defendant until May 1995, defendant knew of the statement *prior to* the district attorney obtaining the same. Because of this, the trial court found "[t]he failure to provide the information to the defendant[] is not prejudicial to the defendant[] since the [defendant's] attorney[] [was] aware of the information . . . prior to Assistant District Attorney Caron Stewart discovering the information."

Our Supreme Court has held "that due process and *Brady* are satisfied by the disclosure of the evidence at trial, so long as disclosure is made in time for the defendants to make effective use of the evidence." *State v. Taylor*, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996) (citing *State v. Jackson*, 309 N.C. 26, 33, 305 S.E.2d 703, 710 (1983)). In this case, defendant had knowledge of the statement before the district attorney became aware of it, was provided with the written statement many months prior to trial, and was able to fully use the statement and the defense theory it presented during trial. Still, defendant argues that because of the State's delay in providing the information, defendant was unable to investigate the statement, thus leaving possible exculpatory evidence undiscovered. This argument is unpersuasive as it is based on nothing more than mere speculation. Furthermore, defendant was aware of the information prior to the district attorney obtaining the evidence and could have followed up on the statement at that point. The trial court did not err in denying defendant's motion to dismiss. Defendant was not prejudiced by the State's failure to disclose the evidence.

II.

[2] Defendant next argues that the trial court erred in allowing the out-of-court identification by Hector McNeill of defendant as the perpetrator of the crimes in question. Defendant asserts the testimony of McNeill "is so grossly incorrect regarding these facts that it draws into question whether he was actually in a position to observe anything at all."

In this case, McNeill testified that he saw defendant in the Texaco store at approximately 10:30 pm, defendant was carrying a "chrome plated semi-automatic handgun," and as McNeill left the store, he heard three gunshots. The undisputed facts are contrary to McNeill's testimony. The murder occurred sometime after 2:00 am according to register tapes; the murder weapon was a black steel, snub-nose .38 revolver with a brown handle; and only one shot was fired. Because

of the inconsistency between McNeill's statement and the undisputed facts surrounding the murder, defendant argues that "McNeill's . . . testimony at trial [was] so unreliable so as to have no probative weight and therefore inadmissible." We disagree. Any uncertainties in the identification goes to the weight and not the admissibility of the evidence. Thus, the trial court committed no error in allowing the testimony.

III.

[3] In his next assignment of error, defendant argues the trial court erred in overruling defendant's objection to the State's introduction of hearsay evidence during rebuttal. He argues that, by allowing the evidence to come in, defendant's confrontation clause rights were violated as he was unable to cross-examine the declarant.

During trial, defendant filed a Notice of Intent to Offer Statements of Anthony Devon Coxum. In support, defendant showed that Coxum made inculpatory statements regarding his own involvement in the crimes and exculpating defendant of the crimes. The trial court allowed defendant's motion, making the following findings of fact:

> 1. Proper notice had been given of the intent to offer hearsay evidence under G.S. 8C-1, Rules 803(24) and (804)(5) [sic];
>
> 2. The statements of Anthony Devon Coxum were not specifically covered by any of the other hearsay exceptions;
>
> 3. The hearsay statements of Anthony Devon Coxum possessed certain circumstantial guarantees of trustworthiness;
>
> 4. The evidence is material to the case at bar;
>
> 5. The evidence is more probative on an issue than any other evidence procurable through reasonable efforts;
>
> . . .
>
> During the hearings and arguments by the parties on the defendant's motion the State notified the defendant of the State's intention pursuant to G.S. 8C-1, Rule 806, during rebuttal to introduce a contradictory hearsay statement made by Anthony Devon Coxum to a law enforcement officer.

Based on the aforementioned findings, the court concluded "[w]hen a hearsay statement has been admitted into evidence the credibility of

the declarant may be attacked." Accordingly, during trial defendant offered Coxum's hearsay statement through the testimony of Antoine Myles. The State cross-examined Myles regarding Coxum's statements and then called Detective Ronnie Radcliff in rebuttal, who testified that Coxum had made an inconsistent statement to him in which he implicated defendant in the crimes. It is this rebuttal testimony that defendant contends violated his confrontation clause rights. Defendant argues that because the two hearsay statements occurred at different times and to different people, the court should have made new findings regarding the trustworthiness of the State's rebuttal evidence. This argument is unpersuasive.

In *State v. Stalnaker*, 1 N.C. App. 524, 162 S.E.2d 76 (1968) this Court responded to a similar argument. In that case, defendant argued that the state's rebuttal evidence failed to qualify as a dying declaration, and thus should not have been admitted into evidence. This Court stated, "whether the State's evidence of a declaration qualified as a dying declaration is immaterial, because in either event it was admissible to impeach or contradict defendant's evidence of a declaration." *Id.* at 527, 162 S.E.2d at 78. Thereafter, in 1983, the North Carolina legislature enacted Chapter 8C, North Carolina General Statutes, which set forth the North Carolina Rules of Evidence. Rule 806 codified what the courts, such as the *Stalnaker* court, had consistently held—that an out-of-court declarant is subject to impeachment just like any other declarant.

North Carolina Rule of Evidence 806 is unambiguous.

> When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, *by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain.* If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

N.C. Gen. Stat. § 8C-1, Rule 806 (1992) (emphasis added). Rule 806 provides that inconsistent statements of a hearsay declarant are admissible. In effect, this rule treats the out-of-court declarant the same as a live witness for purposes of impeachment. There is no

question that if Coxum had testified as a witness, any inconsistent statements he made would be admissible to attack his credibility. Because the testimony could have come in had Coxum been on the stand, Rule 806 allows its admission to impeach his credibility even in his absence. Thus, regardless of whether the State's evidence was admissible hearsay or not, the evidence was still admissible to impeach or contradict defendant's hearsay evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 806 (1992); *Stalnaker*, 1 N.C. App. 524, 162 S.E.2d 76. Accordingly, defendant's third assignment of error is overruled.

IV.

[4] As defendant's last assignments of error, he argues that the trial court erred in denying defendant's motion to dismiss for insufficiency of the evidence and defendant's motion to set aside the verdict. Defendant states in his brief, "there was insufficient evidence at the close of not only the State's case in chief, but at the close of all the evidence to warrant a dismissal."

With regard to defendant's motion to dismiss for insufficiency of the evidence, the rule has been stated by our Supreme Court.

> [T]here must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. . . . Substantial evidence of guilt is required before the court can send the case to the jury.

State v. Stephens, 244 N.C. 380, 383-84, 93 S.E.2d 431, 433 (1956). When considering such motions, the trial court should concern itself only with the sufficiency of the evidence and not with its weight. *See State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). If the evidence presented is purely circumstantial, "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 actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965). Thus, the trial court must submit the case to the jury if there is substantial evidence of all material elements of the offense charged and that defendant perpetrated the crime. *See State v. Cotten*, 2 N.C. App. 305, 309, 163 S.E.2d 100, 103 (1968). "Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. McCullough*, 79 N.C. App. 541, 544, 340 S.E.2d 132,

135 (citing *Powell*, 299 N.C. 95, 261 S.E.2d 114), *cert. denied*, 316 N.C. 556, 344 S.E.2d 13 (1986).

When measuring the sufficiency of evidence, it is well settled that the trial court "must view all the evidence in the light most favorable to the State, making all reasonable inferences in the State's favor." *McCullough*, 79 N.C. App. at 543-44, 340 S.E.2d at 134. The trial court must consider all evidence admitted by the court, whether competent or incompetent, which is favorable to the state. *See State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986). "This is especially necessary in a case . . . when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt. If a reasonable inference of defendant's guilt can be drawn from a combination of the circumstances, defendant's motion is properly denied." *State v. Thomas*, 296 N.C. 236, 245, 250 S.E.2d 204, 209 (1978).

When a case comes to this Court for review of denial of a motion to dismiss, we apply the same rule as that used in the trial court. That is, "[t]aking the evidence in the light most favorable to the State, if the record here discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this court must affirm the trial court's ruling on the motion." *Stephens*, 244 N.C. at 383, 93 S.E.2d at 433. Thus, considering the evidence presented to us in the record, and viewing it in the light most favorable to the State, we hold that the circumstantial evidence, taken as a whole, was sufficient to submit the case to the jury.

Likewise, defendant filed a motion to set aside the verdict (motion for appropriate relief) pursuant to N.C. Gen. Stat. § 15A-1411 (1997). "A motion for appropriate relief is a *post-verdict* motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial." *State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 160-61 (1990). Such motion is addressed to the trial court's discretion and "its ruling will not be disturbed absent a showing of abuse of discretion." *State v. Gilley*, 306 N.C. 125, 131, 291 S.E.2d 645, 648 (1982), *overruled on other grounds*, *State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989). Defendant has made no showing that the trial court abused its discretion in denying defendant's motion. Therefore, we find defendant's assignment of error to be without merit.

After addressing each of defendant's assignments of error, we conclude

No Error.

Judges GREENE and WALKER concur.

STATE OF NORTH CAROLINA, APPELLEE v. JOHNNY RAY MEWBORN, DEFENDANT

No. COA98-164

(Filed 1 December 1998)

1. Evidence— videotape—store security camera—tape in same condition as day of robbery—admissible

The trial court did not err in an armed robbery prosecution by allowing the jury to view a security camera videotape of one of the robberies where the State offered testimony that the camera, VCR, and monitor were operating properly on the day of the robbery, an officer testified that he watched the tape shortly after his arrival at the crime scene and then showed it to a lieutenant when she arrived, the lieutenant followed standard procedure to safeguard the tape as evidence, and the lieutenant testified on voir dire that the images on the tape had not been altered and were in the same condition as the day of the robbery.

2. Evidence— lay opinion—comparison of video image of shoes and defendant's shoes—admissible

The trial court did not err in an armed robbery prosecution by admitting testimony from a police officer comparing shoes on a security camera videotape of the robbery to defendant's shoes when he was picked up for questioning. This was an appropriate subject for lay opinion because the similarity between markings on shoes in a video image and markings on the actual pair of shoes can be made by merely observing the video and the shoes.

3. Robbery— sufficiency of evidence—endangerment of victims' lives

The trial court did not err in an armed robbery prosecution when it denied defendant's motions to dismiss at the close of all of the evidence based on a contention that the evidence was insufficient to prove that the victims' lives were endangered or threatened. The State presented testimony that on two separate

occasions defendant held a convenience store clerk at knife point with a five- to six-inch blade and defendant offered nothing to controvert this evidence.

4. Indictment and Information— superseding indictment— habitual felon—valid

The trial court did not err by allowing the State to obtain a superseding indictment charging defendant as a violent habitual felon where the court allowed defendant's motion to quash the original indictment for failure to set forth the name of the sovereign against whom the violent felonies were committed and then directed the State to prepare a new superseding indictment. Because the original indictment was quashed, the subsequent indictment did not supersede it, N.C.G.S. § 15A-646 does not apply, and the subsequent indictment replaced the defective indictment. Accordingly, because defendant had not yet been sentenced for the underlying armed robbery conviction and because the original indictment placed him on notice that he was being tried as a violent habitual felon, the subsequent indictment attached to the ongoing armed robbery proceeding and defendant was thus properly tried as a violent habitual felon.

5. Crimes, Other— habitual violent felon—sufficiency of evidence

The trial court did not err by not dismissing a violent habitual felon charge for failure to prove that the felonies were violent where the State placed in evidence certified copies of defendant's three convictions for armed robbery, thereby establishing prima facie evidence of defendant's prior convictions. Defendant offered no evidence in rebuttal.

Appeal by Defendant from judgment entered 23 July 1997 by Judge Jay D. Hockenbury in Lenoir County Superior Court. Heard in the Court of Appeals 26 October 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert T. Hargett, for the State.

William D. Spence, for defendant.

SMITH, Judge.

At trial the evidence presented tended to show that on 8 June 1996 at approximately 4:30 a.m., defendant Mewborn entered the

Kwik Mart in Kinston, North Carolina, purchased orange juice, and left the store. A short time later, he returned, jumped over the counter, pulled a knife, pointed it at the clerk, and demanded money. The clerk opened the register. Mewborn took the money and left the store. At trial, the clerk identified both Mewborn and the knife used in the robbery. At 7:00 a.m. on the same day, Mewborn entered Mallard Food Store. He brought a beer to the counter and asked the clerk to hand him a cigarette lighter. Instead of paying for the items, defendant jumped over the counter, put his arm around the clerk's neck, held a knife to her throat, and demanded that she open the register. The clerk complied. Again Mewborn grabbed cash from the register and escaped with the money, the beer, and the lighter. This robbery was observed by an assistant manager, who watched on a video monitor, and the robbery was also recorded on videotape.

On 10 December 1996, defendant was charged in a proper bill of indictment with two counts of armed robbery and was separately indicted as a violent habitual felon (original indictment). On 14 April 1997, a superseding indictment was returned by the grand jury for the two counts of armed robbery. On 2 June 1997, defendant stood trial for the two counts of armed robbery in the Superior Court of Lenoir County, Judge James D. Llewellyn, presiding. At trial, the trial court admitted the videotape of the robbery as evidence. The jury viewed the tape, the knife, and a pair of Mewborn's shoes which had markings similar to those worn by the perpetrator of the Mallard Food Store robbery as shown on the videotape. Mewborn did not present any evidence and the jury found him guilty on each count. After entry of the guilty verdict in defendant's two charges of armed robbery, the State proceeded to identify and label state's exhibits one and two for the violent habitual felon proceeding. Exhibits one and two were the records of defendant's two prior convictions for violent felonies. *The exhibits were not received in evidence.* Court was then recessed. At the opening of court the next day, defendant's counsel moved to quash the violent habitual felon indictment for failure to set forth "the name of the state or other sovereign against whom the violent felonies were committed." N.C. Gen. Stat. § 14-7.9 (1996). Judge Llewellyn allowed the motion to quash and entered a prayer for judgment continued in the armed robbery cases. He then directed the State to prepare a "new supersedeas indictment" (subsequent indictment) against defendant charging him with being a violent habitual felon. The State did so, and in a subsequent session of superior court, Judge Jay D. Hockenbury presiding, defendant was convicted by a jury of being a violent habitual felon. On 23 July 1997, defendant was

sentenced by Judge Hockenbury to life imprisonment without parole pursuant to N.C. Gen. Stat. § 14-7.12 (1996). Defendant appeals.

Defendant assigns error to the trial court's admission of certain evidence at his trial for armed robbery. He also contends the trial court's failure to dismiss the armed robbery charges for insufficiency of the evidence was reversible error. Defendant further argues that the court committed error by instructing the State to prepare a supersedeas indictment after allowing defendant's motion to quash the original indictment. Defendant's final assignment of error is that the trial court failed to dismiss the violent habitual felon charge at the close of all evidence. We find no prejudicial error.

[1] In his first issue on appeal, defendant questions whether the trial court erred when it allowed the jury to view the videotape of the Mallard Food Store robbery. Defendant argues that the State failed to lay a proper foundation for the video's introduction into evidence. We disagree. Videotapes are admissible in evidence for both substantive and illustrative purposes under N.C. Gen. Stat. § 8-97 (1996). *See State v. Cannon*, 92 N.C. App. 246, 374 S.E.2d 604 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). In *Cannon*, this Court enunciated the requirements for laying a proper foundation for the admission of videotape evidence.

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or video tape fairly and accurately illustrates the events filmed (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape. . ."; (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," (substantive purposes); or (4) "*testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed.'* "

Id. at 254, 374 S.E.2d at 608 (citations omitted) (emphasis added). Defendant argues that there "was no evidence of the 'checking and operation' of the video camera and, further, the chain of custody was broken by the District Attorney's viewing of the tape" on the morning of the trial. We disagree. The state offered testimony from Tonya Jenkins and Sergeant Harrell of the Kinston Police Department that the camera, VCR, and monitor in the Mallard Food Store were oper-

ating properly on the day of the robbery. Sergeant Harrell testified that he watched the tape shortly after his arrival at the crime scene. Realizing that it depicted the robbery, Harrell showed the tape to Lieutenant Boyd of the Kinston Police Department when she arrived at the store. Lieutenant Boyd then followed standard procedures to safeguard the tape as evidence. At trial, during *voir dire* outside the jury's presence, Lieutenant Boyd stated that the images on the tape had not been altered and were in the same condition as when she had first viewed them on the day of the robbery. Because Lieutenant Boyd viewed the tape on both the day of the robbery and at trial and testified that it was in the same condition and had not been edited, there is little or no doubt as to the videotape's authenticity. When taken as a whole, the testimony of Boyd, Harrell, and Jenkins satisfy the test enunciated in *Cannon*. We therefore hold that the trial court committed no error.

[2] The second issue raised by defendant is whether testimony by a police officer comparing shoes on the videotape to the defendant's actual shoes requires qualification of the witness as an expert. At trial, Sergeant Thompson of the Kinston Police Department testified that the markings on the shoes worn by defendant when he was picked up for questioning were "very consistent" with the shoes worn by the perpetrator in the video of the robbery. Defendant argues such a comparison requires expert testimony. We disagree. Lay opinion is admissible if the opinion or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (1996). In *State v. Shaw*, our Supreme Court found no error where a police officer testified that the wear pattern and size of shoes found at a crime scene and those worn by the defendant were similar. 322 N.C. 797, 370 S.E.2d 546 (1988). The Supreme Court stated, "[n]o specialized expertise or training is required for one to determine that two shoes share wear patterns. Such a determination may be made by merely observing each pair." *Id.* at 808-09, 370 S.E.2d at 552-53 (1988). Because the similarity between markings on shoes in a video image and markings on the actual pair of shoes can be made by "merely observing" the video and the shoes, we hold that this is also an appropriate subject for lay opinion. We find no error in the decision of the trial court.

[3] Defendant's third issue on appeal is that the court erred when it denied defendant's motion to dismiss the charges against him at the close of all evidence. Defendant's motion was based on his contention

that the State's evidence was insufficient to prove that the victims' lives were in fact endangered or threatened, an element necessary to prove the crime of armed robbery. Upon a motion to dismiss for insufficiency of the evidence, the trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *See State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987). The trial judge must then decide if there is substantial evidence of each element of the offense charged. *See State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). With regard to armed robbery, the North Carolina Supreme Court has held that,

> [w]hen a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed. Thus where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory.

State v. Joyner, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985) (citations omitted). When determining whether the knife used by defendant is a dangerous weapon, this Court looks at its use or threatened use under all attendant circumstances. *See State v. Norris*, 264 N.C. 470, 141 S.E.2d 869 (1965). The State presented testimony that on two separate occasions defendant held a convenience store clerk at knife point with a five-to-six inch blade. Defendant offered nothing to controvert this evidence. Considering defendant's use of the knife and all the circumstances surrounding the robbery, we conclude that the knife used by defendant is a dangerous weapon. Accordingly, under *Joyner*, a mandatory presumption that the victims' lives were endangered or threatened arises. We therefore find no error.

[4] Defendant's fourth issue on appeal is that the trial court erred when it allowed the State to obtain a superseding indictment charging defendant as a violent habitual felon. Defendant alleges that under N.C. Gen. Stat. § 15A-646 (1996), the trial on the first indictment had commenced, rendering the superseding indictment void, thus offending defendant's due process rights. We disagree. Here, the court allowed defendant's motion to quash the original indictment

because it failed to name the state against whom the violent felonies had been committed. We hold that the initial indictment was therefore not valid except to give defendant notice of his being charged as a violent habitual felon. However, where a motion to quash an indictment is granted, the defendant is not entitled to discharge, but rather is subject to further prosecution on a new indictment. *See State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492, *cert. denied*, 311 N.C. 767, 319 S.E.2d 284 (1984), *appeal dismissed*, 469 U.S. 1101, 83 L. Ed. 2d 766 (1985). For the purposes of our habitual felon laws, until judgment is entered upon the underlying conviction, there remains a pending, uncompleted felony prosecution to which a new habitual felon indictment can be attached. *See State v. Oakes*, 113 N.C. App. 332, 438 S.E.2d 477, *disc. review denied*, 336 N.C. 76, 445 S.E.2d 43 (1994). In the instant case, after the original indictment was quashed, prayer for judgment continued was entered on the convictions for armed robbery. A new indictment was then issued, and defendant stood trial under that indictment as a violent habitual felon. Because the original indictment was quashed, the subsequent indictment did not supersede it. Therefore, section 15A-646 does not apply to this case. Rather, the subsequent indictment replaced the technically defective indictment and therefore falls under the rule in *Oakes*. Accordingly, because defendant had not yet been sentenced for his armed robbery conviction and because the original indictment placed him on notice that he was being tried as a violent habitual felon, the subsequent indictment attached to the ongoing armed robbery proceeding. Thus, defendant was properly tried as a violent habitual felon. We find no error.

[5] Defendant's final issue on appeal is that the trial court erred when it failed to dismiss the violent habitual felon charge at the close of all evidence. Defendant alleges that the State failed to prove that the prior felonies of defendant were in fact violent felonies under N.C. Gen. Stat. § 14-7.7 (1996). This argument is without merit. Section 14-7.10 states,

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

N.C. Gen. Stat. § 14-7.10 (1996). At defendant's trial, the state placed in evidence certified copies of defendant's convictions for armed robbery in 79-CRS-9248, 88-CRS-4951, and 96-CRS-5780. The State thereby established prima facie evidence of defendant's prior convictions. Although he had the opportunity to do so, defendant offered no evidence to rebut the prima facie case against him. We therefore find that the trial court committed no error.

Defendant received a fair trial, free from error.

No Error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

GARY ROBERT ALBRECHT, JANE WHITE ALBRECHT, AND PHILIP FRANCIS ALBRECHT, A MINOR, BY RAYMOND MARSHALL, HIS GUARDIAN AD LITEM, PLAINTIFFS V. MELBA DORSETT, SUBSTITUTED DEFENDANT AND EXECUTRIX OF THE ESTATE OF HARRISON LINDSAY DORSETT, DEFENDANT

No. COA97-1249

(Filed 1 December 1998)

1. Appeal and Error— cross-assignment of error—improper challenge to order

Defendant's challenge to the contents of the trial court's order granting partial summary judgment for plaintiffs on the issue of liability was not properly raised by cross-assignment of error where the judgment from which plaintiffs appealed deals solely with damages; furthermore, the issue was not legitimately before the appellate court as a cross-appeal where defendant did not give notice of appeal from the order. N.C. R. App. P. 10(d).

2. Damages and Remedies— inadequate damages—motion for a new trial denied

The trial court did not err in the denial of plaintiffs' motion for a new trial on the issue of damages because the damages awarded were less than plaintiffs' past medical expenses where plaintiffs presented expert testimony describing the nature and extent of their injuries, but defendant's cross-examination of these expert witnesses severely damaged their credibility.

3. Evidence— speed of vehicle—time of collision—severity of injuries

Testimony pertaining to a driver's speed at the time he struck plaintiffs' van from behind was relevant to the issue of the severity of plaintiffs' injuries in this action to recover damages for those injuries.

4. Evidence— videotape—physical activities—extent of injuries

A surveillance videotape depicting plaintiffs engaging in various physical activities was relevant to the issue of whether and to what extent plaintiffs were disabled by injuries sustained in an automobile accident. N.C.G.S. § 8-97; N.C.G.S. § 8C-1, Rule 401.

Appeal by plaintiffs from judgment entered 17 December 1996 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 3 June 1998.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy III, for plaintiffs-appellants.

Pinto, Coates, Kyre & Brown, P.L.L.C., by Kenneth Kyre, Jr., for defendant-appellee.

TIMMONS-GOODSON, Judge.

Plaintiffs, Dr. Gary Robert Albrecht, Dr. Jane White Albrecht, and their minor son, Philip Francis Albrecht, seek to set aside the jury's verdict in their personal injury action, on the ground that the damages awarded were inadequate as a matter of law. In addition, plaintiffs challenge the trial court's failure to exclude certain testimonial and demonstrative evidence, on the basis that such evidence was inadmissible and highly prejudicial. For the reasons set forth herein, we discern no error.

On 4 April 1993, a vehicle driven by Harrison Lindsay Dorsett, now deceased, struck the rear of plaintiffs' van while it was stopped at an intersection. Plaintiffs filed a negligence action against Dorsett alleging that they were each severely and permanently injured as a result of the automobile collision. On 11 March 1996, plaintiffs moved for partial summary judgment on the issue of liability. The trial court granted the motion and ruled that the case proceed to trial only on the issue of damages. The matter was tried before a jury, and on 25 September 1996, the jury returned a verdict awarding $200 to Dr. Gary

Albrecht, $3,200 to Dr. Jane Albrecht, and $200 to Philip Albrecht. On 3 October 1996, plaintiffs filed a motion for a new trial on the issue of actual damages. The trial court denied the motion, and plaintiffs appeal.

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[1] Before proceeding to our analysis of plaintiffs' arguments, we must address a preliminary procedural matter. In the record, defendant raises a "cross-assignment of error" challenging the contents of the trial court's order granting summary judgment to plaintiffs on the issue of liability. Rule 10(d) of the North Carolina Rules of Appellate Procedure provides that an appellee may cross-assign as error any action or omission of the trial court "which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 10(d). Under Rule 10(d), defendant's challenge is not properly raised by cross-assignment of error, because the judgment from which plaintiffs appeal deals solely with damages, not liability. Therefore, the matter raised by defendant's purported "cross-assignment of error" is more suitably the subject of a cross-appeal.

Rule 3(a) of our Appellate Rules provides as follows:

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

N.C.R. App. P. 3(a). Failure of a party to file a notice of appeal regarding a particular order deprives this Court of jurisdiction over issues arising out of the order. *Smith v. Smith*, 43 N.C. App. 338, 258 S.E.2d 833 (1979). Thus, since defendant did not properly appeal the order of summary judgment, the issue raised in her purported "cross-assignment of error" is not legitimately before this Court. *See* N.C.R. App. P. 10(d) (setting forth the scope of review on appeal); *Brown v. Brown*, 112 N.C. App. 614, 436 S.E.2d 404 (1993) (dismissing plaintiff's cross-assignment of error challenging court's failure to sanction attorney, because such issue was more appropriately the subject of a cross-appeal, and plaintiff failed to appeal from order denying sanctions). Accordingly, we must dismiss defendant's "cross-assignment of error" and strike all other matters pertaining to the order of partial summary judgment, including "Plaintiffs' Reply Brief," "Defendant-Appellee's Motion to Strike and Dismiss Plaintiffs-Appellants' Reply Brief" and "Plaintiffs-Appellants' Response to Defendant-Appellee's

Motion to Strike and Dismiss Plaintiffs-Appellants' Reply Brief." Having disposed of this initial concern, we turn now to the arguments asserted by plaintiffs on appeal.

[2] By their first assignment of error, plaintiffs contend that the trial court erroneously denied their motion for a new trial on the issue of actual damages. Plaintiffs argue that the jury's verdict was inadequate as a matter of law, because the damages awarded were far less than plaintiffs' past medical expenses. Plaintiffs further argue that in rendering its verdict, the jury manifestly disregarded the trial court' instructions. We disagree.

Rule 59 of the North Carolina Rules of Civil Procedure pertinently provides as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . .
>
> (5) Manifest disregard by the jury of the instructions of the court; [and]
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]

N.C.R. Civ. P. 59. Accordingly, the trial court may grant a new trial "where the damages awarded by the jury are inadequate as a matter of law." *Daum v. Lorick Enterprises*, 105 N.C. App. 428, 431, 413 S.E.2d 559, 561 (1992). Whether to grant or deny a motion to set aside a jury verdict is committed to the sound discretion of the trial court. *Coletrane v. Lamb*, 42 N.C. App. 654, 656, 257 S.E.2d 445, 447 (1979). Thus, the trial court's ruling in this regard will not be disturbed "absent 'a manifest abuse of discretion.' " *Id.* (quoting *Scott v. Trogdon*, 268 N.C. 574, 575, 151 S.E.2d 18, 18 (1966)).

"Where there is no stipulation as to damages, testimony of witnesses as to [the] nature of plaintiffs' injuries and extent of [the] damages is simply evidence in [the] case to be considered by [the] jury." *Pelzer v. United Parcel Service*, 126 N.C. App. 305, 311, 484 S.E.2d 849, 853, *disc. review denied*, 346 N.C. 549, 488 S.E.2d 808 (1997). "It is the province of the jury to weigh the evidence and determine questions of fact." *Coletrane*, 42 N.C. App. at 657, 257 S.E.2d at 447. Moreover, as the finder of fact, the jury is "entitled to draw its own conclusions about the credibility of the witnesses and the weight to

accord the evidence." *Smith v. Price*, 315 N.C. 523, 530, 340 S.E.2d 408, 413 (1986). The jury's function as trier of fact "must be given the utmost consideration and deference before a jury's decision is to be set aside." *Coletrane*, 42 N.C. App. at 657, 257 S.E.2d at 447 (citing N.C. Const. art. I, s. 25).

In the case *sub judice*, plaintiffs introduced expert testimony describing the nature and extent of their injuries. Plaintiffs contend that this evidence was undisputed and that the jury's verdict was, therefore, inconsistent with the evidence and contrary to North Carolina law. As support for this argument, plaintiffs cite *Daum*, 105 N.C. App. 428, 413 S.E.2d 559, which involved an employee who prevailed against her employer and supervisor in an action alleging intentional infliction of emotional distress and negligent hiring and/or retention of the supervisor. On appeal, this Court held that the employee was entitled to a new trial on the issue of damages, because the jury arbitrarily ignored evidence of the employee's pain and suffering and her need for future medical expenses.

However, the evidence in the present case regarding plaintiffs' injuries was not unequivocal. Although defendant did not bring forth experts to contradict the testimony of plaintiffs' physicians, defendant contends, and the record confirms, that the cross-examination of plaintiffs' experts yielded responses contradicting their direct testimony. Unlike *Daum*, the evidence brought out on cross-examination severely damaged the credibility of plaintiffs' experts. Since "credibility of the evidence is exclusively for the jury," *Coletrane*, 42 N.C. App. at 658, 257 S.E.2d at 447, it was well within the jury's power to minimize or wholly disregard the testimony given by plaintiffs' medical experts. Furthermore, nothing in the record suggests that the jury improperly deliberated the issue of plaintiffs' damages. Hence, we hold that the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial.

[3] Plaintiffs next assign error to the trial court's decision permitting defendant's counsel to read portions of Dorsett's deposition to the jury. In particular, plaintiffs argue that the portion of Dorsett's testimony pertaining to his speed at the time of impact was irrelevant to the issue of damages and was highly prejudicial. We cannot agree, as such evidence was relevant to the extent of the injuries sustained by plaintiffs.

Generally, all relevant evidence is admissible and that which is not relevant is not admissible. N.C.R. Evid. 402. Rule 401 of the North

Carolina Rules of Evidence defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. The extent of the injuries plaintiffs sustained as a result of the impact was unquestionably a "fact that is of consequence to the determination of th[is] action." *Id.* Since the speed of Dorsett's vehicle when it struck plaintiffs' van bears on the issue of the severity of plaintiffs' injuries, this testimony was relevant and admissible. Nevertheless, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C.R. Evid. 403. While plaintiffs claim that the evidence concerning Dorsett's speed was "highly prejudicial," they have not shown any prejudice, and we can find none. Therefore, we summarily reject this argument as unpersuasive.

[4] With their final assignment of error, plaintiffs contend that the trial court incorrectly allowed defendant to introduce a surveillance videotape as substantive evidence. Plaintiffs argue that the videotape lacked relevance and proved to be highly prejudicial. Again, we must disagree.

Under North Carolina law, videotapes are admissible both as substantive and illustrative evidence. *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 14, 415 S.E.2d 111, 114 (1992). Section 8-97 of our General Statutes provides as follows:

> Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.

N. C. Gen. Stat. 8-97 (1986). Plaintiffs, in the instant case, do not contend that the videotape was not properly authenticated; instead, plaintiffs argue that under Rule 401, the contents of the videotape were not relevant to the issue of plaintiffs' damages. As previously stated, Rule 401 describes relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C.R. Evid. 401. The videotape introduced in this case depicted plaintiffs engaging in various physical activities,

which was probative of whether and to what extent plaintiffs were disabled by the injuries they sustained in the automobile accident. Hence, plaintiffs' argument fails.

However, plaintiffs also argue that the length of the videotape and its repetitious nature were unfairly prejudicial. "Whether evidence should be excluded as unduly prejudicial . . . rests within the sound discretion of the trial court." *Carrier v. Starnes*, 120 N.C. App. 513, 519, 463 S.E.2d 393, 397 (1995). A ruling by the trial court on a discretionary matter will not be reversed unless the decision was arbitrary or " 'lacked any basis in reason.' " *Id.* at 520, 463 S.E.2d at 397 (quoting *Judkins v. Judkins*, 113 N.C. App. 734, 740, 441 S.E.2d 139, 142, *disc. review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994)). Because the videotape was properly admitted under section 8-97 of the General Statutes and Rule 401 of the Rules of Evidence, we hold that the ruling of the trial court admitting the videotape was "neither capricious nor ill-considered," *id.*, and we reject plaintiff's argument to the contrary.

We note that plaintiffs raise two additional assignments of error in the record, but fail to address them in their brief. Therefore, they are deemed to be abandoned. N.C.R. App. P. 28(b)(5).

In light of the foregoing, we conclude that plaintiffs enjoyed a fair trial, free from prejudicial error.

No error.

Judges GREENE and MARTIN, Mark D., concur.

DORIS FRIEND-NOVORSKA, PLAINTIFF v. JAMES C. NOVORSKA, DEFENDANT

No. COA98-84

(Filed 1 December 1998)

Divorce— equitable distribution—creation of joint account from separate funds—expressed intent

The trial court did not err in an equitable distribution action by classifying a joint wealth management account as defendant-husband's separate property and distributing it to him where it was opened with funds inherited by defendant and subse-

quently added to with separate properties in the form of securities. The plain language of N.C.G.S. § 50-20(b)(2) requires that the spouse claiming a joint account as marital property where the account was created with separate funds demonstrate by a preponderance of the evidence that the exchange of separate property was accompanied by an intention that the account be marital property and that such intention was expressly stated in the conveyance.

Appeal by plaintiff from equitable distribution judgment entered 24 July 1997 by Judge Charles T. L. Anderson in Orange County District Court. Heard in the Court of Appeals 21 October 1998.

Plaintiff Doris Friend-Novorska and defendant James C. Novorska were married on 13 February 1982. In March 1989, defendant's mother died. Defendant testified that he knew he was the beneficiary under his mother's will prior to her death, and "had there been any funds left over . . . what I wanted to do was to invest some, and for my own personal use, and to use the remainder for the marriage." On 12 February 1990, defendant deposited $230,000.00 of his inherited funds in a joint savings account with plaintiff. In March 1990 the parties transferred $130,780.00 from their joint savings account into a joint checking account.

After several meetings attended by plaintiff, defendant, and a financial advisor, the following disposition was made of the inherited funds: (1) a $50,000.00 trust fund was established for defendant's son by a prior marriage; (2) a small IRA was established for plaintiff; (3) a small IRA was set up for defendant; (4) a small tax exempt bond fund was set up in the joint names of plaintiff and defendant; and (5) the IDS account which is the subject of this appeal was opened by transferring $79,000.00 from the joint checking account into the joint IDS account on 4 April 1990. The balance of the $230,000.00 inheritance was used by both plaintiff and defendant to buy marital property items. In November 1993, defendant deposited additional separate property in the form of securities valued at $39,000.00 into the IDS account.

The parties separated on 30 June 1995, at which time the IDS Wealth Management account had a net value of $157,496.96. The increase in value of the IDS account was entirely passive. At trial, defendant testified that he never intended to make a gift to plaintiff of any interest in the IDS account. The trial court classified the joint IDS

account as defendant-husband's separate property and distributed it to him. Plaintiff appealed, contending the IDS account should have been classified as marital property and equitably distributed.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler, for plaintiff appellant.

Sharpe & Mackritis, P.L.L.C., by Jimmy D. Sharpe and Lisa M. Dukelow, for defendant appellee.

HORTON, Judge.

In 1981, the North Carolina General Assembly "sought to alleviate the unfairness of the common law [title theory] rule by enacting our Equitable Distribution Act . . . . Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions . . . ." *White v. White*, 312 N.C. 770, 774-75, 324 S.E.2d 829, 831-32 (1985). "[T]he statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* 'unless the court determines that an equal division is not equitable.' N.C.G.S. 50-20(c)." *Id.* at 776, 324 S.E.2d at 832.

The Equitable Distribution Act (the Act) expresses a legislative preference for marital property through a provision creating a presumption that "all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection." N.C. Gen. Stat. § 50-20(b)(1) (Cum. Supp. 1997). The Act then defines separate property in subsection (2) as "all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. § 50-20(b)(2).

The language of this subsection expresses "a clear legislative intent that separate property brought into the marriage or acquired by a spouse during the marriage be returned to that spouse, if possible, upon dissolution of the marriage." *Wade v. Wade*, 72 N.C. App. 372, 381, 325 S.E.2d 260, 269, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). It is clear that a gift received by *a* spouse from a *third party* is the separate property of the receiving spouse. *See Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E.2d 33, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985). Where, however, a spouse makes a gift of separate property to the other spouse during marriage, the property is consid-

ered the separate property of the receiving spouse *only* if "such an intention is stated in the conveyance." N.C. Gen. Stat. § 50-20(b)(2).

Further, where a spouse acquires property in exchange for his or her separate property, the acquired property remains separate "regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance." *Id.* In this case, it is not disputed that defendant exchanged separate funds he inherited from his mother's estate for the investments in the IDS fund. However, plaintiff argues the IDS fund should be classified as marital property because the evidence demonstrates that defendant intended the IDS fund to be held as marital property.

The plain language of the statute requires that in order to classify a joint account created by the deposit of separate funds as marital property, the spouse claiming such a classification must demonstrate by a preponderance of the evidence that the exchange of separate property was accompanied by: (1) an *intention* that the account be marital property; and (2) that such intention was *expressly stated in the conveyance.* N.C. Gen. Stat. § 50-20(b)(2). We have found that in cases involving the exchange of separate property for real property held by the entireties, there is a presumption of gift, rebuttable only by clear, cogent and convincing evidence. *McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E.2d 910, 916, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds*, *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).

However, we have not found an "express statement" of an intent to create marital property in any of our reported cases involving personal property and the creation of joint accounts. Instead, we have, pursuant to the plain language of the "exchange provision" of N.C. Gen. Stat. § 50-20(b)(2), uniformly held that "[t]he deposit of [separate] funds into a joint account, standing alone, is not sufficient evidence to show a gift or an intent to convert the funds from separate property to marital property." *Manes v. Harrison-Manes*, 79 N.C. App. 170, 172, 338 S.E.2d 815, 817 (1986) (although husband added wife's name to bank account and annuity, trial court held not an express contrary intention in conveyance; properly classified as separate property); *Brown v. Brown*, 72 N.C. App. 332, 336, 324 S.E.2d 287, 289 (1985) (husband's actions in depositing funds in joint savings account not sufficient evidence of an express contrary intention in conveyance).

Plaintiff argues she met her burden in this case by producing evidence which demonstrated defendant intended the IDS account to be the property of the marital estate. Plaintiff contends that in addition to the establishment of the joint IDS account, defendant-husband stated even before he received the bequest from his mother that at least part of his inheritance would be used "for the marriage." She also argues that the parties met jointly with an investment advisor before setting up the joint account so the advisor could help them with long-range financial planning for their futures; that the parties spent about $100,000.00 of defendant's inherited funds for marital purposes; and that they met with a financial advisor to discuss investments for their futures. She stresses the inherited funds were first placed in a joint checking account and then in a joint savings account, both of which she had equal access with defendant. Finally, she argues that when defendant added $39,000.00 of separate funds to the account in question, he did so as part of a long-range financial planning for both their futures.

However, plaintiff ignores the plain language of the statute which requires that a "contrary intention [be] expressly stated in the conveyance." N.C. Gen. Stat. § 50-20(b)(2). Although this "exchange provision" has been the subject of scholarly comment, no decisions of this Court answer such questions as whether the "express statement" can be oral, whether such statement must be made contemporaneously with the exchange of property, and whether the "conveyance" must be in writing.

Assuming, *arguendo*, that defendant's statement that he intended to use "part" of his inheritance for marital purposes meets the requirement of an "express statement" of intention, it does not entitle plaintiff to a favorable decision on the issue for at least three reasons. First, defendant's statement is not an express statement of intention that the IDS funds were to be the property of the marital estate. At best, it amounts to a statement of intention that a portion of his inheritance was going to be used for marital purposes and, in fact, more than $100,000.00 was used in that fashion. Second, plaintiff was not able to offer evidence of any express statement by defendant that the IDS funds would be marital property. Third, the statement in question was made about a year prior to defendant's exchanging his separate funds for the IDS account. Due to the passage of time, we do not believe the statement was one made "in the conveyance." Although the focus of the parties' arguments is on the IDS account, we believe the same reasoning would apply to the deposit of the inherited funds in the joint checking and savings accounts.

Further, defendant offered unequivocal testimony that he never intended the IDS funds to be a gift either to plaintiff or the marital estate, and the trial court found his testimony to be credible. After weighing the evidence, the trial court found as a fact that "defendant at no time expressly stated that he intended to make the assets in this account a gift to the marriage or a gift to the plaintiff." In its conclusions of law, the trial court stated the "evidence shows that the defendant at no time during the marriage expressly stated that the funds deposited in the IDS fund were considered by him to be marital property or in any way intended by the defendant to be a gift to the marriage by depositing the funds into joint accounts." The trial court then adjudged the entire IDS account to be the separate property of defendant.

Finally, plaintiff argues the decision of our Supreme Court in *Haywood v. Haywood*, 333 N.C. 342, 425 S.E.2d 696 (1993), and our recent decision in *Holterman v. Holterman*, 127 N.C. App. 109, 488 S.E.2d 265, *disc. review denied*, 347 N.C. 267, 493 S.E.2d 455 (1997) changed the holdings in *Manes*, 79 N.C. App. 170, 338 S.E.2d 815; *Brown*, 72 N.C. App. 332, 324 S.E.2d 287; and other similar decisions of this Court dealing with the deposit of separate funds into joint accounts. Plaintiff claims both *Haywood* and *Holterman* stand for the proposition that "express donative intent could be inferred from depositing the separate funds into jointly held accounts and the parties' subsequent actions in purchasing marital assets." We disagree.

On the date of separation of the *Haywood* parties, 100 gold kruggerands were held in a joint lockbox in Canada. *See Haywood v. Haywood*, 106 N.C. App. 91, 415 S.E.2d 565, *disc. reviews denied*, 331 N.C. 553, 418 S.E.2d 665-66 (1992), *rev'd in part*, 333 N.C. 342, 425 S.E.2d 696 (1993). The trial court held the coins were marital property. The decision of the trial court was reversed by a majority of this Court, with Judge Wynn dissenting. In his dissent, Judge Wynn did recite that the coins were held in a joint lockbox to which the wife had a key, but the crucial statement in the dissent is that "plaintiff [husband] was unable to sufficiently trace the source of the funds with which he contends that he purchased the precious metals." *Id.* at 104, 415 S.E.2d at 573. The decision of this Court was reversed by our Supreme Court "for the reasons stated in the dissent by Judge Wynn . . . ." *See Haywood*, 333 N.C. 342, 425 S.E.2d 696 (1993).

In *Holterman*, 127 N.C. App. 109, 488 S.E.2d 265, the wife's inherited funds had been commingled with marital funds in joint accounts

and used for marital purposes for more than 40 years, so that it was not possible at trial to trace her separate funds. In both *Haywood* and *Holterman* there were serious evidentiary problems, so that the source of funds for the assets in question could neither be clearly identified nor traced. In the instant case, there is no tracing problem and thus neither *Haywood* nor *Holterman* supports plaintiff's position.

We hold the findings of the trial court are supported by competent evidence and the findings of fact, in turn, support its conclusions of law. In light of this disposition, we need not address appellee's cross-assignment of error. N.C.R. App. P. 10(d); *Hanton v. Gilbert*, 126 N.C. App. 561, 572, 486 S.E.2d 432, 439, *disc. review denied*, 347 N.C. 266, 493 S.E.2d 454 (1997). For the foregoing reasons, the decision of the trial court is

Affirmed.

Judges MARTIN, John C. and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. MICHAEL LEON ALSTON

No. COA97-1316

(Filed 1 December 1998)

1. **Evidence— hearsay—statement by child—admissible to explain subsequent conduct of officer**

The trial court did not err in prosecution for the possession of a firearm by a felon by admitting the statement "Daddy's got a gun" made by a child in the car in which defendant was riding. The trial court specifically instructed the jury that the statement was not to be used to prove its truth, but only as it bore on the state of mind of the police officer and to explain his subsequent conduct.

2. **Appeal and Error— appealability—no objection at trial—not addressed as plain error**

The issue of plain error in the introduction of the nature of the prior conviction in a prosecution for the possession of a

firearm by a felon was not reviewed where defendant objected when the State first attempted to introduce the evidence through the testimony of an officer, but did not object when the State brought the prior conviction into evidence through the testimony of a deputy clerk and did not specifically and distinctly address the issue of plain error in his brief.

3. Firearms and Other Weapons— possession of firearm by felon—constructive possession

The trial court erred by denying defendant's motion to dismiss charges of possession of a firearm by a felon where defendant was a passenger in the front seat of his brother's automobile, which was being driven by his wife, and a handgun owned by his wife was found lying on the console. Both defendant and his wife had equal access to the handgun, but there was no evidence otherwise linking the handgun to defendant.

Appeal by defendant from judgment dated 11 April 1997 by Judge W. Douglas Albright in Randolph County Superior Court. Heard in the Court of Appeals 25 August 1998.

Attorney General Michael F. Easley, by Associate Attorney General Stewart L. Johnson, for the State.

James Hill, Jr. for defendant appellant.

GREENE, Judge.

Michael L. Alston (Defendant) appeals from his conviction of Possession of a Firearm by a Felon.

On 26 July 1997, Defendant was riding in an automobile driven by his wife, Krystal Alston (Mrs. Alston), in Asheboro, North Carolina. Three infants were also in the vehicle. Mrs. Alston stopped the vehicle in a nearby parking lot, and Officer Scott Messenger (Officer Messenger) of the Asheboro Police Department approached the vehicle by foot. Officer Messenger alleges that he approached the vehicle because he noticed that the children in the automobile were not properly restrained. As he questioned Mrs. Alston about her driver's license and vehicle registration, one of the children in the vehicle said, "Daddy's got a gun." Officer Messenger walked around to the passenger side where Defendant was sitting, and saw, in plain view, a .22 caliber pistol on the transmission console of the vehicle. He asked Defendant to hand him the gun, and Defendant complied. Shortly

thereafter, Officer Messenger placed Defendant under arrest for Possession of a Firearm by a Felon.

The car in which Defendant was riding was registered to his brother Ricky Alston, and the handgun retrieved by Officer Messenger was purchased by and registered to Mrs. Alston.

At trial, Defendant objected to the introduction of the child's statement into evidence. Upon introduction of the statement into evidence, the trial court specifically instructed the jury that "the declaration of [the] child . . . may not be considered by you as evidence of the truth of what was said on that occasion . . . . You . . . may consider such a statement insofar as you find that it bears upon the state of mind of [Officer Messenger] and explains his later conduct." The trial court further warned the jury to "consider [the statement] for ***no other purposes***." (emphasis added). During its jury charge, the court declined Defendant's request for it to re-instruct the jury regarding the use of the infant's statement.

Defendant also objected to the trial court allowing the jury to hear of his specific previous felony. The State first attempted to present this evidence through Officer Messenger, and Defendant made a timely objection on hearsay grounds. Later in the trial, the State presented Defendant's prior conviction of possession of a controlled substance with intent to manufacture, sell, or deliver through the testimony of the deputy clerk of the Superior Court. Defendant failed to object to this testimony. Because he had stipulated to the authenticity of the conviction, Defendant challenges both the trial court allowing the State to reveal the specific nature of his previous conviction, and also the trial court referring to the conviction in the jury instructions. The trial court's instructions limited the jury's use of Defendant's prior conviction solely to prove the "felon" element of the offense, and clarified the purpose for which the prior conviction evidence was admitted.

At the close of the State's evidence, Defendant moved to dismiss the case, arguing that the State had not offered sufficient evidence to prove that Defendant had constructive possession of the firearm, an essential element of the offense. This motion was denied. At the close of all the evidence, Defendant renewed his motion to dismiss the case, which also was denied. The jury returned a guilty verdict, and Defendant was sentenced to a minimum of four and maximum of five months in prison.

The issues are whether: (I) the infant's statement, "Daddy's got a gun," was inadmissible hearsay; (II) Defendant's underlying prior conviction should have been revealed to the jury; and (III) there was substantial evidence of Defendant's possession, control, or custody of the handgun.

I

[1] Defendant first argues that the trial court's admission of the child's out-of-court statement, "Daddy's got a gun," was error because the statement constitutes hearsay evidence and does not fall within any of the statutory exceptions. We disagree.

We reject Defendant's argument because the evidence was not admitted for the truth of the matter asserted and thus does not constitute hearsay evidence. *State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979) (statement offered for any purpose other than that of proving the truth of the matter asserted is not objectionable as hearsay). The trial court specifically instructed the jury, at the time the statement was offered into evidence, that the statement was not to be used to prove its truth, but to be used only to the extent it would bear on the state of mind of Officer Messenger, and explain his subsequent conduct. Furthermore, the failure of the trial court to again inform the jury in its final instructions of the limited use of the child's statement is not material. *State v. Crews*, 284 N.C. 427, 440, 201 S.E.2d 840, 849 (1974) (when proper limiting instructions are given when the evidence is admitted, the judge is not required to repeat these instructions in the jury charge).

II

[2] Defendant next argues that the trial court erred in allowing the State to reveal, to the jury, the specific nature of his previous conviction of possession of a controlled substance with intent to manufacture, sell, or deliver. We do not address the merits of this argument because the issue has not been preserved properly.

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion stating the specific grounds for the ruling the party desired the court to make . . . ." N.C.R. App. P. 10(b)(1). Additionally, where a party has not preserved a question for review, he must specifically and distinctly allege that the trial court's action amounted to plain error in order to have the error reviewed on appeal. *See* N.C.R. App. P.

10(c)(4); *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983); *State v. Hamilton*, 338 N.C. 193, 449 S.E.2d 402 (1994).

In this case, Defendant promptly objected when the State first attempted to introduce his prior conviction evidence through the testimony of Officer Messenger. Defendant failed to object, however, when the State brought the prior conviction record and judgment into evidence through the testimony of the deputy clerk of the Superior Court. Accordingly, Defendant has waived any objection to this evidence. Furthermore, because Defendant has not specifically and distinctly addressed the issue of plain error in his brief to this Court, we will not review whether the alleged error rises to the level of plain error.

III

[3] Defendant finally argues that there is insufficient evidence of his possession of the handgun, thus requiring the allowance of his motion to dismiss.

A motion to dismiss should be denied if there is substantial evidence to support each essential element of the offense charged. *State v. Roseborough*, 344 N.C. 121, 126, 472 S.E.2d 763, 766 (1996) (quoting *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989)). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). The essential elements of the crime of "possession of a firearm by a felon" are: (1) the purchase, owning, possession, custody, care, or control; (2) of a "handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)"; (3) by any person having a previous conviction of any crime defined in N.C. Gen. Stat. § 14-415.1(b); and (4) provided the owning, possession, *etc.* occurs "within five years from the date of [the previous] conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later." N.C.G.S. § 14-415.1(a) (Supp. 1997).

In this case, Defendant only disputes the evidence relating to the first element of the offense, *i.e.*, his ownership, possession, *etc.* of the handgun, and we therefore only address that issue. There is no evidence that Defendant owned or purchased the handgun; indeed, the evidence is that Defendant's wife purchased and owned the handgun.

The dispositive question is whether Defendant possessed, controlled, or had the handgun in his custody and care.

Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. 28 C.J.S. *Drugs and Narcotics* § 170, at 773 (1996). A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Possession of an item may be either sole or joint, *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 684 (1971); however, joint or shared possession exists only upon a showing of some independent and incriminating circumstance, beyond mere association or presence, linking the person(s) to the item, *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989); 28 C.J.S. *Drugs and Narcotics* § 171, at 778-80 (1996).

In this case, the handgun was found lying on the console (between the passenger and driver's seats) of Defendant's brother's automobile being driven by Defendant's wife. The handgun was purchased and owned by Defendant's wife and Defendant was a passenger in the front seat of the automobile. Both Defendant and his wife had equal access to the handgun, but there is no evidence otherwise linking the handgun to Defendant. *Cf. State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986) (holding that mere presence in a room where drugs are located does not in itself support an inference of constructive possession). Furthermore, we are not persuaded that the purchase and ownership of the handgun by Defendant's wife is sufficient other incriminating evidence linking Defendant to the handgun.[1] Accordingly, there is not substantial evidence in this record that Defendant had the possession, control, or custody of the handgun. Defendant's motion to dismiss, therefore, should have been allowed, and the trial court erred in denying the motion.

Reversed.

Judges TIMMONS-GOODSON and SMITH concur.

1. As discussed earlier, the trial court ruled that the infant's statement, "Daddy's got a gun," only could be used to explain Officer Messenger's conduct. Thus, this statement cannot be used to prove constructive possession.

D. G. MATTHEWS & SON, INC. A NORTH CAROLINA CORPORATION, PETITIONER-APPELLEE v. STATE OF NORTH CAROLINA EX REL., R. WAYNE MCDEVITT, SECRETARY, DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT-APELLANT

No. COA98-279

(Filed 1 December 1998)

Environmental Law— scrap tire disposal—lien on real property

A trial court judgment concluding that the Scrap Tire Disposal Act did not allow the imposition of a lien on the current owner's property irrespective of fault or responsibility of the current owner and that a lien arises only when the owner of the property is identical to the person responsible for the nuisance was affirmed in part, reversed in part, and remanded. DENR must determine the person responsible prior to issuing abatement orders or instituting any civil action to recover the cost of DENR's abatement; once that determination is made, they must pursue the person responsible for the costs and expenses of abatement and can impose a lien on the real property only when that avenue of collection has proven unsuccessful. N.C.G.S. § 130A-309.60(a) and (b).

Appeal by the State from judgment entered 19 December 1997 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 26 October 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Lauren Murphy Clemmons, for the State.

Batts, Batts & Bell, L.L.P., by Jeffrey A. Batts, for appellee.

SMITH, Judge.

This case is one of first impression with respect to proper interpretation of the North Carolina Scrap Tire Disposal Act (the Act). N.C. Gen. Stat. §§ 130A-309.51-63 (1997). Specifically, the issues presented involve the proper construction of subsections (a) and (b) of N.C. Gen. Stat. § 130A-309.60 (1997).

In July 1987, two years prior to enactment of the Act, appellee, D.G. Matthews, Inc. (Matthews), purchased the "Taylor Farm." On the date of purchase approximately twenty-thousand scrap tires were

located on the property. Appellee was aware of these tires, and after buying the land he allowed no further disposal of tires but took no action to remove those existing. On 28 March 1994, appellant, Department of Environment and Natural Resources (DENR), issued Matthews a notice stating that the tires violated Title 15A N.C. Admin Code 13B.1105(a). DENR demanded the tires be removed pursuant to N.C. Gen. Stat. § 130A-309.60. Matthews responded stating that under the statute it was not the "person responsible for the nuisance." On 19 May 1995, DENR delivered a compliance order to Matthews mandating cleanup of the site and threatening a daily, non-compliance penalty of up to five-thousand dollars. After further correspondence regarding the "person responsible for the nuisance," Matthews petitioned DENR for a declaratory ruling interpreting the provisions of N.C. Gen. Stat. § 103A-309.60.

On 5 August 1996, State Health Director, Dr. Ronald H. Levine, issued the declaratory ruling. The ruling specifically did not address the issue of whether Matthews was the "person responsible for the nuisance." It did state, however, that a lien against the real property containing scrap tires may be instituted irrespective of the current owner's fault or responsibility in creating the nuisance. Matthews petitioned the Superior Court for judicial review of the declaratory ruling. On 13 June 1997, Judge Farmer reversed the declaratory ruling and entered judgment for Matthews. On 19 December 1997, Judge Farmer entered an amended judgment striking his previous judgment. In his amended judgment, he found:

> 1. The statute under review, G.S. § 130A-309(b), distinguishes between the "owner of the property" on which a tire site is located and "the person responsible for the nuisance."
>
> 2. The responsibility for remediating [sic] a nuisance pursuant to the statute devolves upon "the person responsible for the nuisance" and not the "owner of the property."
>
> 3. The responsibility for repaying costs incurred by the State pursuant to the statute devolves upon "the person responsible for the nuisance" and not the "owner of the property."

Based on the foregoing findings, Judge Farmer concluded in pertinent part:

> 1. G.S. § 130A-309.60(b) does not allow the imposition of a lien on the owner's property irrespective of fault or responsibility of the current owner of the property for creating the nuisance. The

lien arises only when the "owner of the property" is identical to "the person responsible for the nuisance."

The amended judgment disallowed a lien on Matthews' real property. Respondent appeals.

N.C. Gen. Stat. § 150B-4(a) (1997) permits review of an agency's declaratory ruling in the same manner as that of an order in a contested case. Therefore, the standard of review for DENR's ruling is determined by N.C. Gen. Stat. § 150B-51 (1997). Under section 150B-51, a reviewing court is permitted to reverse or modify the agency's decision if the rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are affected by error of law. Because appellee alleged in his petition for judicial review that appellant erroneously construed section 130A-309.60(b), our standard of review is *de novo*. *See Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 452 S.E.2d 337 (1995). In *de novo* review, an appellate court may substitute its judgment for that of the agency. *See id.* at 567, 452 S.E.2d at 344.

When construing a statute, this Court's primary task is to ensure that the legislative intent is accomplished. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991); *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978). If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary, and the plain meaning of the statute controls. *See Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 250 S.E.2d 250 (1979). 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 apparent or readily indicated by the context in which they are used. *See State v. Koberlein*, 309 N.C. 601, 308 S.E.2d 442 (1983).

Careful examination of N.C. Gen. Stat. § 130A-309.60 leads us to determine that subsections (a) and (b) are unambiguous and that "owner of the property" and "person responsible for the nuisance" are not synonymous. We further conclude that the phrase "person responsible for the nuisance" is obviously intended to refer to the persons causing the tires to be amassed and that DENR must exhaust its remedies against the "person responsible" before imposing a lien against the situs of a scrap tire nuisance.

Subsection (a) of section 130A-309.60 assigns the task of determining whether a tire collection site is a nuisance to DENR. The section also provides the means by which DENR can abate such nuisances. Accordingly, DENR must first request that the "person responsible" for the nuisance abate the nuisance within ninety days. If the nuisance is not abated in that time, DENR is empowered to order the "person responsible" to abate the nuisance. The statute then prescribes, "*if the person responsible for the nuisance is not the owner of the property* on which the tire collection site is located, the Department may order the property owner to permit abatement of the nuisance." N.C. Gen. Stat. § 130A-309.60(a) (1997) (emphasis added). This sentence is free from ambiguity. We see no indication that these phrases have acquired a technical meaning nor is a different meaning apparent or readily indicated by the context of the Act. Accordingly, they must be construed as their common and ordinary meaning directs. *See Koberlein*, 309 N.C. 601, 308 S.E.2d 442. The purpose of the sentence quoted above is to allow DENR or the "person responsible" access to property upon which a nuisance exists in order to abate the nuisance. More importantly, the sentence indicates the intention that "owner of the property" and "person responsible for the nuisance" are not to be used synonymously nor interchangeably. The sentence, however, does *not* preclude a determination that the owner of the property is in fact the person responsible for the nuisance. To the contrary, the language indicates three germane classifications: 1) those who are persons responsible but not owners, 2) those who are owners but not persons responsible, and 3) those who are persons responsible and owners.

Subsection (b) of § 130A-309.60 sets forth the means by which DENR can recover its costs when it has abated a nuisance. DENR may request that a civil suit be initiated by the Attorney General to recover actual costs, administrative costs, and legal expenses from the person responsible for the nuisance, not the owner of the property. Subsection (b), when read in context with the body of section 130A-309.60, establishes that an owner, who is not the "person responsible," is not liable in a civil action by the Attorney General.

As we have stated, the "person responsible" is primarily liable for the costs and expenses of abatement. Recognizing, however, that the person responsible for the nuisance might be unavailable for the recovery of costs, the legislature provided a secondary mechanism by which DENR could recover its *actual costs* of abatement. The last sentence in subsection (b) permits DENR to impose a lien on real

property from which DENR has removed scrap tires. The amount of the lien is limited to the "actual cost" of removal. Furthermore, this provision specifically provides that a lien may be imposed only after nonpayment of actual costs by the "person responsible."

It is our opinion that DENR must determine the "person responsible" prior to issuing abatement orders or instituting any civil action to recover the cost of DENR's abatement. Once that determination is made, they must pursue the "person responsible" for the costs and expenses of abatement. Only when that avenue of collection has proven unsuccessful can DENR impose a lien in the amount of actual costs of abatement on the real property situs of the nuisance. In this case, Dr. Levine's declaratory ruling made no determination whether Matthews was the "person responsible" or not. For this reason, the factual question of whether Matthews is the "person responsible" is not before us. However, we do hold that absent other indicia of responsibility, mere ownership is inadequate to justify such a determination.

Finally, we note that the original judgment entered by Judge Farmer expressed concern for the lack of procedural due process rights afforded by this statute. As his judgment was amended and that concern was not ultimately included, that issue is not before this Court. However, we emphasize this Court's continuing dedication to the preservation of those rights and believe that appellant will take any necessary steps to ensure that procedural due process rights of appellee, if any, are not violated.

In summary, we affirm Judge Farmer's interpretation of subsection (a) of section 130A-309.60 as enumerated in his findings above. However, we reverse his conclusion that under subsection (b) a "lien arises only when the 'owner of the property' is identical to 'the person responsible for the nuisance.' " We thus affirm in part, reverse in part, and remand for further remand to DENR for additional proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded for further remand to DENR.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

SALLY JANE FIELDS, PLAINTIFF-APPELLANT v. GILLES PAUL DERY, JR., DEFENDANT-APPELLEE

No. COA98-71

(Filed 1 December 1998)

1. **Emotional Distress— foreseeability—witnessing mother's death in car crash—not foreseeable**

The trial court did not err by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action for negligent infliction of emotional distress arising from plaintiff witnessing the death of her mother in an automobile accident where the possibility that decedent might have had a child following her in a separate vehicle who might witness the collision and suffer severe emotional distress because of defendant's alleged negligence could not have been reasonably foreseeable to defendant.

2. **Emotional Distress— foreseeability—witnessing mother's death in car crash—chance to depose defendant—insufficient allegations**

The trial court did not err by granting defendant's motion for a 12(b)(6) dismissal in an action for negligent infliction of emotional distress arising from plaintiff witnessing the death of her mother in an automobile collision. Although plaintiff argued that she should have been given an opportunity to depose defendant about what he saw on the day of the collision, the complaint contains no allegations or forecast of evidence that defendant had knowledge of plaintiff's relationship to decedent, nor that defendant knew that plaintiff was subject to suffering severe emotional distress as a result of defendant's conduct.

Appeal by plaintiff from order entered 6 November 1997 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 24 September 1998.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by John W. Ormand III, and Elizabeth V. LaFollette, for plaintiff-appellant.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for defendant-appellee.

Walter K. Burton and James D. Secor, III, for unnamed defendant-appellee Allstate Insurance Company.

McGEE, Judge.

Plaintiff alleged in her complaint that on 21 May 1994 she was following her mother, Ann Fields, home from work while driving south on Davis Mill Road, in Guilford County, North Carolina. Plaintiff followed in her own vehicle, several car lengths back. Defendant was driving east on Steeple Chase road in a truck. He failed to stop at a stop sign at the intersection of Davis Mill and Steeple Chase Roads, and hit plaintiff's mother's vehicle. Plaintiff alleged defendant was traveling approximately forty-five miles per hour, and that her mother's car "rolled approximately three times before coming to a stop on the far shoulder of Davis Mill Road." Plaintiff's mother was thrown from her vehicle onto Davis Mill Road and was killed.

Defendant was convicted of misdemeanor death by vehicle and a stop sign violation. Plaintiff witnessed the collision and was the first person to come to her mother's assistance.

Plaintiff filed suit for negligent infliction of emotional distress against defendant on 20 May 1997. Plaintiff's underinsured motorist insurance carrier, Allstate Insurance Company, was served on 22 May 1997. In her complaint, plaintiff alleged severe emotional distress and mental anguish as a consequence of seeing her mother killed, and sought compensatory damages. Defendant filed a motion to dismiss plaintiff's complaint for failure to state a claim upon which relief may be granted pursuant to North Carolina Rules of Civil Procedure 12(b)(6) on 1 July 1997. Unnamed defendant Allstate Insurance Company filed a notice of appearance and answer in the name of the defendant on 23 June 1997. The trial court granted defendant's 12(b)(6) motion on 6 November 1997. Plaintiff appeals.

I.

[1] Plaintiff argues the trial court erred in dismissing her claim for negligent infliction of emotional distress, contending that her complaint properly alleged all of the elements of the tort. We disagree and find that plaintiff's complaint failed to allege the necessary element of foreseeability.

In order to state a claim for negligent infliction of emotional distress, a plaintiff "must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause plaintiff severe emotional dis-

tress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990) (citations omitted).

In *Ruark*, our Supreme Court addressed the element of foreseeability in cases of negligent infliction of emotional distress. The Court set forth three factors to be considered in determining the issue of foreseeability: (1) the plaintiff's proximity to the negligent act, (2) the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and (3) whether the plaintiff personally observed the negligent act. *Id.* at 305, 395 S.E.2d at 98. Plaintiff's complaint in this case included allegations of all three factors, in that: plaintiff was driving behind her mother's car, she witnessed the collision, and she was first person to reach her mother's side.

However, our Supreme Court has recognized that the *Ruark* factors are not dispositive of all foreseeability issues, and that cases of negligent infliction of emotional distress must be determined on a case-by-case basis, considering all of the relevant facts. *Ruark* at 305, 395 S.E.2d at 98; *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 673, 435 S.E.2d 320, 322 (1993).

In *Wrenn v. Byrd*, 120 N.C. App. 761, 464 S.E.2d 89, *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996), plaintiff took her husband to the hospital where he was diagnosed with gastroenteritis and released. He then developed black spots on his body and was diagnosed with septic shock. Plaintiff's husband had most of both feet and one finger amputated because of the infection. *Id.* at 762, 464 S.E.2d at 90. The trial court granted defendant's summary judgment motion as to plaintiff's negligent infliction of emotional distress claim and our Court reversed, holding that the emotional distress suffered by plaintiff was foreseeable. Plaintiff was with her husband in the hospital; she observed the negligent act of the defendant; and defendant knew that plaintiff and her husband were married. *Id.* at 766, 464 S.E.2d at 93. Plaintiff argues that *Wrenn* controls in the case before us. However, plaintiff did not allege that defendant had any knowledge of plaintiff's relationship to the decedent.

As we noted in *Wrenn*, "our Supreme Court has used language which appears to suggest that absent evidence of the defendant's knowledge of the plaintiff's emotional or mental condition, the plaintiff cannot recover for negligent infliction of emotional distress". *Wrenn at* 766, 464 S.E.2d at 93 (citations omitted). For example, in

Gardner v. Gardner, 334 N.C. 662, 435 S.E.2d 324 (1993), a mother filed a negligent infliction of emotional distress action against her husband who drove his truck into a bridge abutment causing the death of their son. When the plaintiff heard about the accident, she went to the emergency room and saw her son on a stretcher, his body covered except for his hands and feet. He died later that day. The trial court granted the father's motion for summary judgment, holding that the mother was not a foreseeable plaintiff. Our Supreme Court, in upholding the trial court's ruling, stated that:

> Here, there is neither allegation nor forecast of evidence that defendant knew plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition as a result of his negligence and its consequences. Absent such knowledge, such an outcome cannot be held to be reasonably foreseeable, and plaintiff has failed to establish a claim for NIED.

Id. at 667, 435 S.E.2d at 328.

In *Wrenn*, we held that *Gardner* is consistent with other opinions of our Supreme Court which addressed the tort of negligent infliction of emotional distress. We stated that "proof of knowledge by the defendant of the plaintiff's peculiar susceptibility to emotional distress is required *only* if the conduct of the defendant would not have caused injury to an ordinary person." *Wrenn* at 767, 464 S.E.2d at 93.

In *Butz v. Holder*, 113 N.C. App. 156, 159, 437 S.E.2d 672, 674 (1993), this Court followed the language and reasoning of the Supreme Court in *Gardner*. In *Butz*, the parents and brother of a bicyclist killed through the negligence of a motorist sued the motorist for negligent infliction of emotional distress. On rehearing, we upheld the trial court's ruling in favor of the motorist, because we found "neither allegation nor forecast of evidence that the defendant *knew*" of plaintiff's susceptibility to severe emotional distress. *Id.* at 159, 437 S.E.2d at 674 (citation omitted).

A further example of how our Supreme Court views the element of foreseeability in cases of negligent infliction of emotional distress is *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994). In *Andersen*, the plaintiff arrived at the scene of an accident shortly after its occurrence and witnessed his pregnant wife's rescue from the wreckage of her automobile. The couple's baby was stillborn and plaintiff's wife later died from her injuries. Our Supreme Court

granted defendant's motion for summary judgment and held that plaintiff's emotional distress was not foreseeable. The Court stated:

> [N]othing suggests that [defendant] knew of plaintiff's existence. The forecast of evidence is undisputed that at the moment of impact [defendant] did not know who was in the car which her vehicle struck and had never met [plaintiff's wife]. Both *Gardner* and *Sorrells* teach that the family relationship between plaintiff and the injured party for whom plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability. In this case as in *Sorrells* the possibility that the decedent might have a parent or spouse who might live close enough to be brought to the scene of the accident and might be susceptible to suffering a severe emotional or mental disorder as the result of [defendant's] alleged negligent act is entirely too speculative to be reasonably foreseeable.

Andersen at 533, 439 S.E.2d at 140.

Similar to *Andersen*, the possibility in the case before us that decedent might have had a child following her in a separate vehicle, who might witness the collision and suffer severe emotional distress because of defendant's alleged negligence, could not have been reasonably foreseeable to defendant. Similar to *Gardner* and *Butz*, we find no "allegation nor forecast of evidence" in this case "that defendant knew plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition as a result of his negligence and its consequences." *Gardner* at 667, 435 S.E.2d at 328; *Butz* at 159, 437 S.E.2d at 674.

II.

[2] Plaintiff next argues that she should have been given an opportunity to depose defendant about what he saw on the day of the collision, because he "may have known of the presence of [plaintiff] and/or her mother." We disagree. As previously stated, plaintiff's complaint contains no "allegation[s] nor forecast of evidence" that defendant had knowledge of plaintiff's relationship to the decedent, nor that defendant knew plaintiff was subject to suffering severe emotional distress as a result of defendant's conduct.

Because we agree with the trial court concerning the issue of foreseeability, we do not reach plaintiff's argument pertaining to "extreme and outrageous" conduct.

The order of the trial court granting defendant's motion to dismiss is affirmed.

Affirmed.

Judges MARTIN, John C. and MARTIN, Mark D., concur.

PHYLLIS V. COLEMAN AND ROY L. COLEMAN, CO-ADMINISTRATORS OF THE ESTATES OF JAMES ROBERT COLEMAN AND LAURA LEE COLEMAN, DECEASED AND PHYLLIS V. COLEMAN AND ROY L. COLEMAN, INDIVIDUALLY, PLAINTIFFS v. JONAS D. RUDISILL, JR., LARRY C. RUDISILL, KENNETH D. RUDISILL, AND HENRY P. RUDISILL, DEFENDANTS

No. COA98-213

(Filed 1 December 1998)

Negligence— attractive nuisance—intervening negligence

The trial court correctly granted summary judgment for defendants on an attractive nuisance claim where a forty-two-year-old man in the company of five children ignored signs prohibiting trespassing, helped place a boat in the water, and boarded a four-person paddle boat with six passengers having no life preservers. Under these circumstances, the children were not harmed by a hidden artificial condition not apparent to them because of their youth but by the intervening negligent act of the adult.

Appeal by plaintiffs from order entered 8 December 1997 by Judge Loto G. Caviness in Gaston County Superior Court. Heard in the Court of Appeals 21 October 1998.

The Roberts Law Firm, P.A., by Scott W. Roberts and Joseph B. Roberts, III, for plaintiff-appellants.

Stott Hollowell Palmer & Windham, L.L.P., by Martha R. Thompson, for defendant-appellant Henry P. Rudisill.

Burton & Sue, L.L.P., by Walter K. Burton and James D. Secor, III, for defendant-appellants Larry C. Rudisill, Kenneth D. Rudisill, and Jonas D. Rudisill.

MARTIN, John C., Judge.

Plaintiffs brought this action alleging that the wrongful deaths of their minor children, ages five and eight, had been caused by negligence on the part of defendants in maintaining an attractive nuisance. Defendants answered, denying negligence and asserting that the childrens' death had been caused by the negligence of Randy Lee Cook.

Defendants moved for summary judgment. The materials before the trial court disclosed that on 13 May 1995, five children, including decedents, went to a pond on defendants' property to swim. They were accompanied by Randy Lee Cook, a forty-two year old neighbor and family friend. Cook was a deaf mute, but could communicate with the children. Defendants kept a paddle boat at the pond. The boat was not seaworthy and had mechanical problems with the paddles and the steering mechanism, of which defendants were aware. Although the boat had been chained to a tree at an earlier time, it had been left on the bank unsecured for some time before 13 May 1995.

After swimming, the children attempted to push the boat into the pond, but were unable to move it. They asked Cook to help them push the boat to the water, and he did so. Cook and the five children climbed into the boat; none were wearing life preservers. Once in the middle of the lake, the paddle boat began to take on water and capsized. Three of the children and Cook were drowned.

The trial court granted defendants' motion for summary judgment. Plaintiffs appeal.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c); *Toole v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 291, 294, 488 S.E.2d 833, 835 (1997). All of the evidence is viewed in the light most favorable to the non-moving party. *Garner v. Rentenbach Constructors, Inc.*, 129 N.C. App. 624, 501 S.E.2d 83 (1998). "Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). It is the moving party's burden to establish the lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). Once the moving party has met its burden, the nonmoving

party must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Defendants argue that summary judgment was proper because the doctrine of attractive nuisance does not apply to "obvious conditions" like the lake and paddle boat, but even if plaintiffs could establish the existence of an attractive nuisance, defendants contend any negligence on their part was insulated by the negligence of Randy Cook. Because we agree that the negligence of Randy Cook was an intervening independent proximate cause of the deaths of decedents, cutting off any liability which may have resulted from any negligence on defendants' part, we need not consider whether the doctrine of attractive nuisance applies to the facts of this case.

In order for plaintiffs to recover from defendants, they must prove that defendants' negligence in maintaining an attractive nuisance was a proximate cause of the deaths of decedents. If the subsequent acts of Randy Cook intervened to cause the deaths, any negligence on the part of defendants would not be a proximate cause thereof and defendants would not be liable.

> An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote.

Hairston v. Alexander Tank and Equipment Co., 310 N.C. 227, 236, 311 S.E.2d 559, 566 (1984) (quoting *Harton v. Telephone Co.*, 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906)); *Jackson v. Howell's Motor Freight, Inc.*, 126 N.C. App. 477, 485 S.E.2d 895, *disc. review denied*, 347 N.C. 267, 493 S.E.2d 456 (1997). Moreover, "[t]he test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Hairston* at 237, 311 S.E.2d at 567 (quoting *Riddle v. Artis*, 243 N.C. 668, 671, 91 S.E.2d 894, 896-97 (1956)). An independent negligent act will insulate a defendant's liability where "[t]he facts do not constitute a continuous succession of events, so linked together as to make a natural whole," and the "intervening act . . . was not itself a consequence of defendant['s] . . . original negligence, nor under the control of defendant . . ., nor foreseeable by him in the

exercise of reasonable prevision." *Williams v. Smith*, 68 N.C. App. 71, 73, 314 S.E.2d 279, 280, *cert. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984).

Ordinarily, the question of whether a separate negligent act intervened and superseded the defendant's negligence is a question of fact for the jury. *Hairston, supra; Davis v. Jessup*, 257 N.C. 215, 125 S.E.2d 440 (1962); *Williams v. Smith, supra.* However, there are cases where summary judgment is appropriate on the issue of insulating negligence. *Williams v. Smith, supra.* This case is one of those rare cases.

At the heart of land owner liability under the doctrine of attractive nuisance is the duty to protect children of tender years who "because of their youth do not discover the condition or realize the risk." *Broadway v. Blythe Industries, Inc.*, 313 N.C. 150, 154, 326 S.E.2d 266, 269 (1985); *Griffin v. Woodard*, 126 N.C. App. 649, 651-52, 486 S.E.2d 240, 242 (1997). "[T]he attractive nuisance doctrine is designed to protect 'small children' or 'children of tender age.' " *Dean v. Wilson Construction Co.*, 251 N.C. 581, 588, 111 S.E.2d 827, 832 (1960); *Griffin v. Woodard*, 126 N.C. App. 649, 486 S.E.2d 240 (1997); *Hawkins v. Houser*, 91 N.C. App. 266, 371 S.E.2d 297 (1988); *Lanier v. Highway Comm.*, 31 N.C. App. 304, 229 S.E.2d 321 (1976). When children are harmed by the intervening negligent acts of an adult, the harm is not proximately caused by the existence of risks not apparent to them due to their tender years, rather, the children are harmed by the negligent acts of the adult. The intervening adult negligence is not a consequence of the negligent maintenance of a nuisance attractive to children; the scope of the duty created by the doctrine of attractive nuisance is limited by age. The risks created by the intervening negligent act of the adult do not form a "continuous succession of events" with the risks of an attractive nuisance to children of tender years. The land owners are no longer responsible for the risks associated with the attractive nuisance because the children were harmed by the intervening negligence of another adult, not "because of their youth."

In this case, the undisputed facts show that the forty-two year old Cook in the company of the five children ignored signs prohibiting trespassing, helped place the boat in the water, and boarded a four-person paddle boat with six passengers having no life preservers. Under these circumstances the children were not harmed by a hidden artificial condition not apparent to them "because of their

youth"; rather, as a matter of law, they were harmed by the intervening negligent act of the adult, Cook.

The trial court's entry of summary judgment for defendants is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

WILLIAM ARTHUR RUFF, AND WIFE BARBARA ANN RUFF, PETER T. BROWN, AND WIFE MARLEE MURPHY BROWN, JOAN BOZEMAN, ROBERT F. PENTZ, ERNEST L. LIBORIO, AND WIFE LOIS P. LIBORIO, MARY FRANCES DILLON, DON CLARK, AND WIFE PATRICIA A. CLARK, AND ANDREW J. HUTCHINSON, AND WIFE CAROL A. HUTCHINSON, AND MILLER HOMES, INC., F/K/A RUSTIC HOMES OF WILMINGTON, INC., PLAINTIFFS V. PAREX, INC., STO CORP., W. R. BONSAL COMPANY, CONTINENTAL STUCCO PRODUCTS, SENERGY, INC., AND THOMAS WATERPROOF COATINGS CO., DRYVIT SYSTEMS, INC., UNITED STATES GYPSUM CO., AND SHIELDS INDUSTRIES, INC., DEFENDANTS

No. COA98-305

(Filed 1 December 1998)

Parties— motion to add—denied—failure to exercise discretion

An order by the trial court denying defendants' motion to add third parties was reversed and remanded where plaintiffs instituted a class action against the manufacturers of synthetic stucco; defendants contended that plaintiffs' problems were caused by the faulty conduct of various builders, subcontractors, and window manufacturers and sought to add those parties to the class action lawsuit; and the trial court reluctantly denied the motions because it felt it was without authority to undo the prior certification and the addition of parties would make it impractical to try the action as a class action. The trial court thought it was without authority to act and did not exercise its jurisdiction, but the record shows that the trial court failed to consider other methods available under the Rules of Civil Procedure which would render such large additions practical and the case was remanded to give the court the opportunity to exercise its discretion.

RUFF v. PAREX, INC.

[131 N.C. App. 534 (1998)]

Appeal by defendants from order denying their motion to add third parties entered on 2 December 1997 by Special Superior Court Judge for Complex Business Cases Ben F. Tennille. Heard in the Court of Appeals 23 September 1998.

Plaintiffs are homeowners whose residences are clad with Exterior Insulation Finish Systems (EIFS), popularly known as synthetic stucco. Defendants manufacture EIFS or its components. Plaintiffs instituted this class action and contend the EIFS on their homes were defective as manufactured. Plaintiffs further contend defendants were aware of the defects, but nonetheless distributed EIFS to plaintiffs, causing them to be damaged.

Defendants contend their products were not defective, and instead claim that plaintiffs' problems were caused by the faulty conduct of various builders, subcontractors, and window manufacturers. Defendants Parex, Inc., Sto Corp, Senergy, Inc., Dryvit Systems, Inc., and W. R. Bonsal Company, sought to add the parties they considered "responsible" for plaintiffs' damages to the class action lawsuit so that they could seek contribution and indemnity. Defendants contend that if the parties are not added, defendants would likely lose any rights against them due to the bar imposed by the applicable statutes of repose.

The trial court recognized that "substantial rights" of defendants were involved, but considered itself bound by the prior certification of the class action and did not "see any practical way to try this case as a class action if the additional defendants are added." Consequently, the trial court denied defendants' motion, and defendants appeal. Plaintiffs moved to dismiss the appeal as interlocutory and also moved for sanctions. Recognizing that their appeal might be held to be interlocutory, defendants filed a petition for certiorari.

Shipman & Associates, L.L.P., by Gary K. Shipman, for plaintiff appellees.

Womble Carlyle Sandridge & Rice, by Jerry S. Alvis, for defendant appellants.

HORTON, Judge.

Considering the substantial interests involved, we allow in our discretion defendants' refiled petition for certiorari and consider the appeal on its merits pursuant to N.C.R. App. P. 2.

Defendants assign error to the denial of their motions to join third parties and to the conclusion of the trial court that it was bound by the class certification orders previously entered by another trial judge. The first issue on appeal is whether the trial court failed to exercise its discretionary power when it concluded that it was bound by the class certification orders and that it was compelled to impair defendants' substantive rights in order to keep the class action manageable or maintainable in class form. For the reasons stated below, we find the trial court did fail to exercise its discretion.

In wrestling with the "irreconcilable contradictions" presented by the motions to add parties, the trial court found that: (1) there are a number of common issues of fact and law in plaintiffs' claims against the original defendants; (2) plaintiff class members have potential claims against other potential defendants, including those persons that defendants in this case seek to add to this action, but such potential claims do not include many common issues of fact and law; (3) in individual cases, all parties can be joined and all claims resolved; mediation may be helpful in resolving these claims, but the existence of the class action may be a detriment to mediation efforts; 462 plaintiffs have opted out of this class; there are other lawsuits involving EIFS claims against defendants not named in this suit; the North Carolina court system may not be able to handle thousands of individual suits; (4) although mediation has been unsuccessful to date, a class action provides a vehicle for settlement of claims of this sort; and (5) it is inevitable that parties such as builders, subcontractors and architects will be involved in the discovery process and evidentiary presentations at trial, which was a primary reason the federal court denied class action certification in the federal action generally asserting the same claims.

The trial court then made its crucial findings as follows:

> * * * Thus, Defendant EIFS manufacturers argue with some logic that they would be denied substantial rights if they cannot join additional parties to the class action. It may also be true, as Defendants suggest, that the loss of such rights or the requirement to pursue those rights on an individual case by case basis could force some of the defendants into bankruptcy. *There may be no practical way Defendants can preserve their rights if the Court does not grant their motion.*
>
> *Last, but most compelling, the barriers to a fair, effective and timely adjudication of the claims against the Defendants*

in this action are insurmountable if Defendants' motions are granted. The benefits of the class action mechanism for settlement do not extend to trial in cases such as this. This Court simply cannot conceive of a fair, efficient and timely way to try this case to a jury (or without one) if Defendants['] motions are granted. . . . The answers to those questions demonstrate the impossibility of trying such a massive lawsuit. *It cannot be done in a fair, just, effective and timely manner.* The Court has already indicated its intention to try this case beginning in July of 1998. If the motions were granted, discovery would not be over until the next century.

Based on its findings, the trial court then concluded:

> Thus, there exist clear and irreconcilable conflicts between concluding this case as a class action as originally certified and permitting Defendants' exercise of the substantial rights sought in the motions to add additional parties. *This Court is without authority to undo the prior certification and cannot see any practical way to try this case as a class action if the additional defendants are added.* Therefore, it is ORDERED that Defendants' motions are denied.
>
> In light of the unusual nature and significance of this ruling, which this Court finds may deprive the defendants of substantial legal rights, this Court believes *this ruling may be an appropriate circumstance for the Court of Appeals to issue a writ of certiorari* should it decide, in its discretion, to do so pursuant to Rule 21 of the Rules of Appellate Procedure.

(Emphasis added).

Neither party argues the trial court abused its discretion in denying the motion. Instead, defendants contend the trial court failed to exercise its discretion. In the instant case, the trial court reluctantly denied the motions because it felt it was without authority to undo the prior certification and the addition of parties made it "impractical" to try the action as a class action. However, the record shows the trial court failed to consider other methods available under our Rules of Civil Procedure which would render such large additions of parties practical.

For example, N.C. Gen. Stat. § 1A-1, Rule 14 (1990) provides that once a third party has been added, any party may move for a sever-

ance or a separate trial of the third-party claim. In the instant case, the trial court could protect defendants' rights to bring in third-party defendants, as well as keep the class action manageable, by adding the parties and then severing the third-party claims.

"Where a trial court, under a misapprehension of the law, has failed to exercise its discretion regarding a discretionary matter, that failure amounts to error which requires reversal and remand." *Robinson v. General Mills Restaurants*, 110 N.C. App. 633, 637, 430 S.E.2d 696, 699, *disc. reviews allowed*, 334 N.C. 623, 435 S.E.2d 340-41 (1993), *disc. review improvidently allowed*, 335 N.C. 763, 440 S.E.2d 274 (1994). Since the trial court in the instant case thought it was without authority to act and instead invited this Court to act, the trial court did not exercise its discretion. Therefore, this case must be reversed and remanded to give the trial court the opportunity to exercise its discretion.

For the foregoing reasons, the decision of the trial court is

Reversed and remanded.

Judges MARTIN, John C. and TIMMONS-GOODSON concur.

STEPHEN ALWART AND PHYLLIS ALWART, PLAINTIFFS-APPELLANTS v. STATE FARM FIRE AND CASUALTY COMPANY, DEFENDANT-APPELLEE

No.COA98-38

(Filed 1 December 1998)

Insurance— coverage—synthetic stucco damages—ensuing loss

The trial court correctly granted summary judgment for defendant in an action seeking damages for defendant's refusal to provide coverage under a homeowner's policy for synthetic stucco damages. Applying the precedent established in *Smith v. State Farm Fire and Casualty Co.*, 109 N.C. App. 77, and the Court of Appeals' own reading of the policy language, the policy in this case not only excluded the cost of repairing the faulty construction, workmanship and materials, but also the cost of repairing the "ensuing loss," whether direct or indirect, caused by the faulty construction, workmanship, and materials.

Appeal by plaintiffs from an order entered 10 November 1997 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 17 September 1998.

Lea, Clyburn & Rhine, by Joel R. Rhine; Block, Crouch, Keeter & Huffman, L.L.P., by Auley M. Crouch, III; and The McLeod Law Firm, P.A., by Joe McLeod for plaintiffs-appellants.

Bailey, Way & Jerzak, by Jennifer S. Jerzak for defendant-appellee.

HUNTER, Judge.

Plaintiffs purchased a homeowner's policy from State Farm Fire and Casualty Company (State Farm) insuring plaintiffs' dwelling, other structures, personal property, and loss of use. During the period of coverage, plaintiffs discovered damage to their home which manifested itself through buckling, wrinkling, and bulging of the exterior wall surface. The residence was covered with an Exterior Insulation and Finish System (EIFS), also known as "synthetic stucco." Expert opinion, which was not refuted, stated that the damage was caused by contractor error and improper workmanship or products/materials in the installation of the EIFS system. Plaintiffs filed a claim under their policy with State Farm claiming that all "ensuing losses" resulting from the faulty, inadequate, or defective workmanship should be covered by their policy. State Farm denied coverage on the grounds that the damage resulted from causes specifically excluded under the policy. The denial letter relied on policy exclusions in "Section I—Perils Insured Against," subsection 2(f), which states "we do not insure loss caused by . . . settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings" and "Section I—Exclusions," subsection 2(c), which states:

> 2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered . . . .
>
> c. Faulty, inadequate or defective:
>
> 1. planning, zoning, development, surveying, siting;
>
> 2. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

3. materials used in repair, construction, renovation or remodeling; or

4. maintenance[.]

Plaintiffs filed a complaint against defendant on 30 July 1996 seeking damages for defendant's refusal to provide coverage under their homeowner's policy. State Farm's motion for summary judgment was granted and from that order plaintiffs appeal.

At the outset, we note that "[i]n interpreting the relevant provisions of the insurance policy at issue, we are guided by the general rule that in the construction of insurance contracts, any ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company." *Smith v. State Farm Fire and Casualty Co.*, 109 N.C. App. 77, 79, 425 S.E.2d 719, 720 (1993) (citation omitted). However,

> [n]o ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policy holder did not pay.

Id. (citations omitted). This is true even though "[e]xclusionary clauses are not favored and must be narrowly construed." *Id.*

Plaintiffs rely on this Court's rules of policy interpretation outlined in *Smith* to support their contention that although "ensuing losses" resulting directly from defective workmanship are excluded from policy coverage, the "ensuing losses" which are an indirect consequence of defective workmanship are covered. Plaintiffs argue the term "ensuing losses" is either ambiguous with regard to indirect damages and should be liberally construed in their favor, or is unambiguous and should be strictly construed and limited as an exclusion. An example of an indirect loss offered by plaintiffs for clarification is the water damage resulting from the defective flashing which was a direct consequence of faulty workmanship. In plaintiffs' example, the water damage is covered as an indirect loss and the replacement of the defective flashing is not covered.

State Farm's counter position is that faulty workmanship and losses resulting from it are specifically excluded from the policy and

the purpose of the "ensuing loss" clause, also in the section outlining exclusions, is "not to create new coverage but to further define what is covered." State Farm contends that when the policy covers a certain kind of loss the loss will be covered in whatever forms it takes, whether it is a direct or an "ensuing loss." On the other hand, if the loss is "excluded or excepted," as is faulty workmanship, it is never covered, either directly or indirectly. State Farm illustrates a type of "ensuing loss" which is covered by the policy in an example of coverage for losses from fire. While the policy excludes water damage in some instances, the "ensuing loss" clause provides coverage for water damage from putting out the fire. Since loss from fire is covered, "ensuing losses" from the fire are also covered, despite the fact that water damage may be excluded in another form under the policy.

The specific State Farm policy language in question states that "any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered," and is the identical language reviewed by this Court in *Smith*. *Id.* The plaintiffs in *Smith* were having their kitchen tile replaced and, in the process of ripping off the old tile, the workman used a sander to remove residue from the plywood floor. The residue contained asbestos which was spread throughout the house. The plaintiffs filed a claim on their homeowner's policy for the cleanup of their home and stated that the "workmanship" exclusion was inapplicable to their claim "because [they] [were] seeking to recover only for their ensuing losses and not for any loss directly due to the defective workmanship." *Id.* at 80, 425 S.E.2d at 720. State Farm was granted summary judgment and on appeal this Court held that "[a] common sense reading of that [exclusions] language reveals that the first paragraph of the disputed exclusion means that State Farm's policy does not provide coverage for property loss caused by any event listed . . . . However, the policy does provide coverage for any ensuing loss . . . which is not excluded." *Id.* at 81, 425 S.E.2d at 720. The Court also agreed with State Farm's contention that "[t]he exclusion obviously contemplates that the person or company performing the faulty or negligent work should be the ones (sic) responsible for any resulting damages (sic)." *Id.* at 81, 425 S.E.2d at 720-721.

Similarly to the Smiths, the Alwarts claim their damages "were indirect or 'ensuing' losses resulting from the faulty and defective installation of the exterior components on their home." However, plaintiffs claim their case can be differentiated from *Smith* in that damages in *Smith* were direct damages, while plaintiffs' damages are

"ensuing losses" resulting from indirect damages. We find this argument unconvincing as the Court in *Smith* did not limit their holding to "ensuing losses" directly resulting from the faulty workmanship but stated that "the exclusion does not itself make[] a distinction between losses directly due to defective workmanship and those losses ensuing from such defective workmanship . . . ." *Id.* at 82, 425 S.E.2d at 721.

Applying the precedent established in *Smith* and our own reading of the policy language, we hold that the policy in this case not only excluded the cost of repairing the faulty construction, workmanship, and materials, but also the cost of repairing the "ensuing loss," whether direct or indirect, caused by the faulty construction, workmanship, and materials. As noted by the Washington State Supreme Court in a case also interpreting "ensuing loss" coverage, "[g]iven the placement of the ensuing loss clause in a policy exclusion, it is difficult to reasonably interpret the ensuing loss clause contained in the defective construction and materials exclusion to be a grant of coverage." *McDonald v. State Farm Fire and Cas. Co.*, 837 P.2d 1000, 1005 (Wash. 1992). There are parties who can be held responsible for the damage which occurred to plaintiffs' home and, as in *Smith*, plaintiffs may pursue those avenues of recovery.

The trial court's granting of summary judgment in favor of the defendant State Farm is

Affirmed.

Judges McGEE and SMITH concur.

DAVID B. COX, PLAINTIFF v. DINE-A-MATE, INC., ENTERTAINMENT PUBLICATIONS, INC., AND CUC INTERNATIONAL, INC., DEFENDANTS

No. COA97-1572

(Filed 1 December 1998)

Jurisdiction— pending appeal—foreign action—not involved in appeal

The trial court did not lack subject matter jurisdiction to enjoin defendants from proceeding with a separate New York action arising from a covenant not to compete where the propri-

ety of the New York action was not a question involved in the pending appeal of the North Carolina action.

Appeal by defendants from order filed 1 October 1997 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 15 September 1998.

Floyd and Jacobs, L.L.P., by James H. Slaughter and Robert V. Shaver, Jr., for plaintiff appellee.

Parker, Poe, Adams & Berntstein, by Anthony Fox; Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and James C. Adams, II; and Weil, Gotshal & Manges L.L.P., by Scott Martin and Helene D. Jaffe, for defendant appellants.

GREENE, Judge.

Dine-A-Mate, Inc. (Dine-A-Mate), Entertainment Publications, Inc., and CUC International, Inc. (collectively, Defendants) appeal from the trial court's order enjoining Defendants from proceeding with their action (filed in the state of New York) against David B. Cox (Plaintiff).

Plaintiff began working for Dine-A-Mate in 1993 under an oral employment contract. In January of 1996, Plaintiff signed a written employment agreement which included a covenant not to compete. The written employment agreement stated that "[t]he forum for any action hereunder shall be Broome County, New York." Plaintiff was fired by Dine-A-Mate in December of 1996. In April of 1997, he filed suit against Defendants in Guilford County District Court, seeking damages for Defendants' alleged breach of the oral employment contract by failing to pay Plaintiff sums owed pursuant to that oral agreement, and seeking a declaratory judgment that the written employment agreement was void and unenforceable (the North Carolina Action). Defendants moved for dismissal of the North Carolina Action based on the written employment agreement's forum selection clause, and sought a preliminary injunction against Plaintiff prohibiting him from competing against them. On 11 July 1997, the trial court denied Defendants' motion to dismiss Plaintiff's North Carolina Action and refused to grant a preliminary injunction against Plaintiff. Defendants filed notice of appeal to this Court on 17 July 1997. In an opinion filed 16 June 1998, we affirmed the order of the trial court, stating: (1) that the trial court had not abused its discretion

in concluding that the forum selection clause in the written employment contract was unenforceable; (2) that denial of a preliminary injunction against Plaintiff was proper because "enforcement of the covenant [not to compete contained in the written employment agreement] would be in violation of the public policy of this state"; and (3) that Defendants have no trade secrets, because "the information claim[ed] as trade secrets is 'readily ascertainable through independent development.' " *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, ——, 501 S.E.2d 353, 357 (1998) (quoting N.C.G.S. § 66-152(3) (1992)).

Meanwhile, on 8 July 1997, Defendants filed suit in New York seeking injunctive relief and damages for Plaintiff's alleged breach of the written employment agreement (the New York Action). Defendants served Plaintiff with notice of the New York Action on 10 July 1997. On 29 September 1997, Plaintiff moved the Guilford County Superior Court for a temporary restraining order and preliminary injunction enjoining Defendants from proceeding with the New York Action. The trial court entered a preliminary injunction against Defendants on 1 October 1997. Defendants filed notice of appeal from the preliminary injunction with this Court on 7 October 1997.

The single issue raised is whether the trial court lacked subject matter jurisdiction to enjoin Defendants from proceeding with their New York Action.

Once a party appeals from the judgment of the trial court, "all further proceedings in the cause" are suspended in the trial court during the pendency of the appeal, and the trial court "is without power to hear and determine questions involved in [the pending] appeal . . . ." *Lowder v. Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981); N.C.G.S. § 1-294 (1996) (appeal of judgment stays all further proceedings in the trial court "upon the matter embraced therein"). Trial courts are permitted to " 'proceed upon any other matter included in the action and *not affected by the judgment appealed from*' . . . so long as they do not concern the subject matter of the suit." *Woodard v. Local Governmental Employees' Retirement Sys.*, 110 N.C. App. 83, 85-86, 428 S.E.2d 849, 850 (1993); *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422 ("[T]he lower court . . . retains jurisdiction to take action which aids the appeal . . . and to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from."), *disc. review*

denied and appeal dismissed in part, 334 N.C. 162, 432 S.E.2d 358, *and aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993).

In this case, the trial court did not impermissibly proceed on a matter included within the action pending before this Court on appeal. The matters pending before this Court were: (1) the enforceability of the forum selection clause contained within the written employment agreement; (2) the enforceability of the covenant not to compete contained within the written employment agreement; and (3) the existence of trade secrets. It follows that the trial court did not lack subject matter jurisdiction to enjoin Defendants from proceeding with the separate New York Action, as the propriety of the New York Action was not a question involved in the then-pending appeal of the North Carolina Action.

Although Defendants also assigned error to the trial court's injunction on the grounds that Plaintiff had failed to present sufficient evidence that "he was likely to succeed on the merits of his claim" or that "he would suffer irreparable harm if the injunction was not issued," they have abandoned these issues by failing to argue them in their brief before this Court. *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."). Accordingly, we do not address these issues.

Affirmed.

Judges TIMMONS-GOODSON and SMITH concur.

DUKE UNIVERSITY, PLAINTIFF v. KEITH A. BISHOP AND LORRAINE L. LONDON, DEFENDANTS

No. COA98-131

(Filed 1 December 1998)

Appeal and Error— appellate rules—numerous violations—dismissal

An appeal was dismissed for serious and abundant violations of the Rules of Appellate Procedure.

Appeal by defendants from entry of default against defendant London entered 16 January 1997 by Bonnie J. Swanson, Assistant Clerk of Superior Court for Durham County, and judgment entered 15 August 1997 by Judge Lowry M. Betts in Durham County District Court. Heard in the Court of Appeals 20 October 1998.

Moore & Van Allen, PLLC, by Edward L. Embree, III, and Julie A. King, for plaintiff-appellee.

Keith A. Bishop for defendants.

SMITH, Judge.

Defendants appeal from various orders and judgments entered during the civil suit filed by plaintiff Duke University. We do not reach the merits of defendants' arguments, however, because of defendants' disregard for the North Carolina Rules of Appellate Procedure. Because of the seriousness and abundance of rule violations, we dismiss this appeal.

To obtain review of lower court decisions, appellants must adhere to certain mandatory procedural requirements. *See In re Lancaster*, 290 N.C. 410, 424, 226 S.E.2d 371, 380 (1976) ("[O]nly those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions. This can be a strict requirement."). This Court has stated, "[t]he Rules of Appellate Procedure are mandatory. They are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979) (citation omitted).

Our rules require appellants to present complete records, which are in final and proper form. *See* N.C.R. App. P. 9(a)(1)(e), (j) (1997). Appellants' first omission occurs in the record on appeal. Rule 10(c)(1) states unequivocally that "[a] listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal." Thus, "assignments of error are now mandatory to perfect an appeal." *Shook v. County of Buncombe*, 125 N.C. App. 284, 286, 480 S.E.2d 706, 707 (1997). Although the index to the record on appeal provides that a listing of assignments of error is present, a thorough search of the record reveals no such list. Whether the omission be intentional or inadvertent, it is appellants' responsibility to ensure that the record is in its complete and proper form. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983).

One of the most egregious of appellants' violations occurred when they directly violated the Order Settling Record on Appeal. In

this order, the trial judge stated that certain documents, specifically two Memoranda of Law and a letter from defendants to Judge Richard G. Chaney, "should not be included in the Record on Appeal." In an apparent attempt to circumvent the court order, appellants included these documents as an appendix to their brief. This Court has held, "it [is] improper [for a party]. . . to attach a document not in the record and not permitted under N.C.R. App. P. 28(d) in an appendix to its brief." *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996); *see* N.C.R. App. P. 9(a) (stating that review is limited to the record and transcript); N.C.R. App. P. 28(b) (describing proper contents of appellant's brief). Inclusion of this material violated not only the court order but also Rule 28(d).

Defendants' brief also violates other appellate rules. Rule 28(c) enumerates the items that must be included in appellant's brief.

> An appellant's brief in any appeal shall contain . . . in the following order:
>
> (1) A cover page, followed by a table of contents and table of authorities required by Rule 26(g).
>
> (2) A statement of the questions presented for review.
>
> (3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.
>
> (4) A full and complete statement of the facts. . . .
>
> (5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question 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. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.
>
> . . .

N.C.R. App. P. 10(c)(1)-(5). Appellants failed to include a statement of the questions presented for review, thus violating subsection (c)(2), and they failed to include a statement of the procedural history of the case, thus violating subsection (c)(3). Furthermore, they violated

subsection (c)(5) by failing to include, after each question for review, 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." *See Shook*, 125 N.C. App. at 287, 480 S.E.2d at 707.

Finally, we note that appellants also failed to comply with Rule 26(g) in that the point type and spacing used was incorrect. *See Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996). Additionally, the page numbers were improperly formatted and positioned. *See* N.C.R. App. P. 26(g) (stating "[t]he format of all papers presented for filing shall follow the instructions found in the appendixes to these Appellate Rules"); N.C.R. App. P. Appx. B (stating "pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-").

Because of appellants' numerous flagrant violations of our rules, and because "[o]ur rules are mandatory, and in fairness to all who come before this Court, they must be enforced uniformly," *Shook*, 125 N.C. App. at 287, 480 S.E.2d at 708, defendants' appeal is dismissed.

Appeal Dismissed.

Judges GREENE and WALKER concur.

NIECA TIMOUR, PLAINTIFF v. PITT COUNTY MEMORIAL HOSPITAL, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA97-857

(Filed 1 December 1998)

Limitations of Actions— extension of time for filing—notice

The trial court erred by dismissing plaintiff's action as being barred by the statute of limitations where plaintiff was injured in a fall at defendant hospital on 20 July 1993; N.C.G.S. § 1-52 provides a three-year statute of limitations; plaintiff moved on 19 July 1996 to have the statute of limitations extended for 120 days to comply with a recently enacted requirement for review of medical care by an expert witness; plaintiff's motion was granted but defendant was not served with notice; plaintiff served her complaint and summons within the extension; and defendant's motion

to dismiss based on expiration of the three-year statute was granted. A compliant had not been filed, the order extending time for filing did not require service, and the motion to extend time may be heard ex parte. Plaintiff did not subject herself to the notice requirements of Rule 3 by using a Rule 3 form to request a Rule 9 extension; the motion referred exclusively to Rule 9 and requested the applicable 120-day extension.

Appeal by plaintiff from order filed 9 April 1997 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 26 February 1998.

Jeffrey S. Miller for plaintiff-appellant.

Harris, Shields, Creech and Ward, P.A., by R. Brittain Blackerby, Charles E. Simpson, Jr., Bonnie J. Refinski-Knight and Mary V. Ringwalt, for defendant-appellee.

MARTIN, Mark D., Judge.

Plaintiff appeals from order of the trial court dismissing her suit against defendant as being barred by the applicable statute of limitations.

On 20 July 1993, plaintiff was injured in a fall at defendant hospital. N.C. Gen. Stat. § 1-52 (Supp. 1997) provides a three-year statute of limitations for personal injury. On 19 July 1996, plaintiff moved the Superior Court of Pitt County to have the statute of limitations extended for a period of 120 days in order to comply with a recently enacted requirement that it show "the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness . . . and who is willing to testify that the medical care did not comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (Supp. 1997). Plaintiff's motion was granted and the time to file the complaint was extended to 17 November 1996. Defendant was not served with notice of this extension. The applicable three-year statute of limitations expired on 20 July 1996.

On 15 November 1996, plaintiff served her summons and complaint on defendant. Defendant moved to dismiss the action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. sections 1-52 and 1-15, based on expiration of the applicable three-year statute of limitations. On 9 April 1997, the trial court granted defendant's motion. Plaintiff appeals.

The issue on appeal is whether plaintiff's suit was properly dismissed as untimely because she did not serve notice on defendant of her 120-day extension for filing her complaint.

Rule 9(j) of the North Carolina Rules of Civil Procedure provides that

> [u]pon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (Supp. 1997).

As a preliminary matter, we note Rule 9(j) makes no mention of a requirement that defendant be served with notice of the time extension.

Rule 5 of the North Carolina Rules of Civil Procedure states that service is required for "[e]very order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders . . ., [and] every written motion other than one which may be heard *ex parte* . . . ." N.C. Gen. Stat. § 1A-1, Rule 5(a) (Supp. 1997). The trial court's order in the present action did not require service, and a complaint had not yet been filed. In addition, the motion to extend time may be (and was) heard *ex parte*. *See* G. Gray Wilson, North Carolina Civil Procedure § 9-11, at 169 (2d ed. 1995) ("The motion would presumably be *ex parte*, and only the order could direct service on other parties."). Accordingly, plaintiff was not required to serve notice of the filing extension on defendant and consequently, plaintiff's action was timely filed.

Defendant nonetheless asserts that by using a Rule 3 form to request the Rule 9 extension, plaintiff somehow subjected herself to the notice requirements of Rule 3. We disagree.

Plaintiff was not requesting a Rule 3 extension—her motion referred exclusively to Rule 9 and requested the applicable 120-day extension. On the Rule 3 form that plaintiff improperly submitted with her motion, plaintiff specified she was seeking a 120-day extension, rather than the 20-day extension available under Rule 3.

Defendant correctly notes that it would be left subject to suit without notice for an additional 120 days should this Court reverse the trial court's order. It suffices to say, however, that modification of the Rules of Civil Procedure is within the province of the General Assembly. Accordingly, we reverse the trial court's order dismissing plaintiff's suit and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges LEWIS and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. TREMAYNE SAUNDERS

No. COA97-1489

(Filed 1 December 1998)

Sentencing— noncapital—substantial assistance—term less than structured minimum—permissible

A cocaine trafficking case was remanded for resentencing where the court found substantial assistance but stated that it was limited by structured sentencing minimum requirements. The punishment range set out in N.C.G.S. § 15A-1340.17 does not control the minimum sentence when an applicable statute requires or authorizes another minimum sentence. N.C.G.S. § 90-95(h)(5) specifically authorizes the sentencing judge to reduce the fine or impose a less than minimum prison term once the court has made a finding of substantial assistance.

Appeal by defendant from judgment entered 3 April 1997 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 September 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robin P. Pendergraft, for the State.

Aguirre Law Office, by Bridgett Britt Aguirre for defendant-appellant.

HUNTER, Judge.

Defendant was charged with trafficking in four hundred grams or more of cocaine by transportation and by possession and entered a plea of guilty at his arraignment. The State prayed judgment on 3 April 1997 and, after making a finding of substantial assistance, the trial court sentenced defendant to a minimum of 38 months and a maximum of 50 months. The defendant gave notice of appeal on 8 April 1997.

The sole issue on appeal is whether, based on a finding of substantial assistance, the trial court's discretion in departing from minimum sentencing pursuant to N.C. Gen. Stat. § 90-95(h)(5) is limited by the structured sentencing minimum in N.C. Gen. Stat. § 15A-1340.17 for an offense of the same class. The question of whether the defendant provided substantial assistance in this case is not at issue. The State stipulated that substantial assistance was given and the trial court entered a finding to that effect when judgment was rendered.

Based on a finding of substantial assistance, N.C. Gen. Stat. § 90-95(h)(5) provides, in pertinent part, that:

> [t]he sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest or conviction of any accomplices, accessories, co-conspirators, or principles if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

N.C. Gen. Stat. § 90-95 (h)(5) (1997). The statutory language makes clear that the trial court is given broad discretion in sentencing after substantial assistance is found. Whether or not to give a "reduction of the sentence is also in the judge's discretion, even if the judge finds substantial assistance was given." *State v. Wells*, 104 N.C. App. 274, 276-277, 410 S.E.2d 393, 394-395 (1991) (citation omitted). The statutory language does not limit the trial court's discretion to the boundaries of structured sentencing. In fact, language within structured sentencing, N.C. Gen. Stat. § 15A-1340.13(b), states that the range set by its sentencing grid controls the minimum term of imprisonment "unless applicable statutes require or authorize

another minimum sentence of imprisonment." N.C. Gen. Stat. § 15A-1340.13(b) (1997).

At the defendant's sentencing hearing for this case, defense counsel stated that her understanding was "once substantial assistance has been established . . . the Court is free to depart in any manner." The trial court responded:

> I don't agree with that, and I'll tell you why. . . . I think you then have to go back to the grid and you can treat it as a straight structured sentencing case if I find substantial assistance . . . . But I think that's as far as I can go, and what I can do under structured sentencing, I can do, but if I can't do it under structured sentencing, I can't do it.

The punishment range set out in structured sentencing, N.C. Gen. Stat. § 15A-1340.17, does not control the minimum sentence when an applicable statute, such as N.C. Gen. Stat. § 90-95 in this case, requires or authorizes another minimum sentence. N.C. Gen. Stat. § 90-95(h)(5) specifically authorizes "[t]he sentencing judge [to] reduce the fine, or impose a prison term less than the applicable minimum prison term provided by [N.C. Gen. Stat. § 90-95(h)], or suspend the prison term imposed and place a person on probation . . ." once the trial court has made a finding that the defendant has rendered substantial assistance. The trial court made such a finding of substantial assistance in this case and was, therefore, not limited by structured sentencing's minimum sentencing requirements. The case is

Remanded for resentencing.

Judge McGEE concurs.

Judge WYNN concurred in result prior to 1 October 1998.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 NOVEMBER 1998

BROWN v. TERRY No. 97-1206	Durham (96CVS2003)	Affirmed
CLIFTON v. CLIFTON No. 98-10	Johnston (95CVS1279)	Appeal Dismissed
GILL v. PHIFFER No. 97-1243	Wake (96CVS2140)	No Error
IN RE ESTATE OF HODGIN No. 98-720	Guilford (97E802)	Dismissed
IN RE MANLEY No. 98-468	Surry (94J68A) (96J71A)	Affirmed
IN RE WILL OF SIMMONS No. 98-178	Surry (96CVS495)	Affirmed
KEITH v. FRIEND No. 98-318	Johnston (96CVS1821)	Dismissed
MORRIS v. COBLE No. 98-202	Randolph (95CVS596)	Affirmed
MORRIS v. U.S. AIRWAYS, INC. No. 97-1449	Ind. Comm. (364903)	Affirmed
MOSLEY v. BLYTHE EQUIP. CO. No. 98-455	Ind. Comm. (548832)	Affirmed
RUSH v. EMPLOYERS INS. OF WAUSAU No. 97-937	Henderson (97CVS174)	Affirmed
STATE v. BASS No. 98-498	Guilford (97CRS58290)	No Error
STATE v. BROWN No. 98-656	Hertford (96CRS4424)	No Error
STATE v. BROWN No. 98-641	Wake (97CRS41891)	No Error
STATE v. BURGESS No. 97-1463	Forsyth (96CRS41194) (96CRS41277) (97CRS8169)	No Error

STATE v. CANTON No. 98-425	Mecklenburg (95CRS46854) (95CRS46855)	Affirmed
STATE v. CHERRY No. 98-612	Pitt (96CRS14418) (96CRS14460) (96CRS14962) (96CRS16710)	No Error
STATE v. COOK No. 98-477	Mecklenburg (96CRS13607) (96CRS13609)	No Error
STATE v. HARRIS No. 98-502	Onslow (97CRS7867)	Affirmed
STATE v. HOLDEN No. 98-595	Wake (97CRS23858) (97CRS12752)	No Error
STATE v. HOLLOWAY No. 98-666	Rutherford (97CRS8544)	No Error
STATE v. LANEY No. 98-548	Mecklenburg (96CRS54471)	No Error
STATE v. LAWRENCE No. 98-637	Beaufort (97CRS833) (97CRS834) (97CRS836)	Judgment arrested in 97CRS836; Remanded for resentencing in 97CRS833; in all other respects, no error.
STATE v. MEWBORN No. 98-28	Pitt (96CRS22361) (96CRS22362)	Vacated in part
STATE v. PATTON No. 98-578	Wake (97CRS87853)	No Error
STATE v. TAYLOR No. 98-438	Wayne (97CRS4645) (97CRS9835)	No Error
STATE v. WORNEY No. 97-408	Harnett (94CRS4637) (94CRS4638)	No Error
STATE v. WRENN No. 98-613	Guilford (97CRS045898)	No Error
WEBB v. BERRYMAN No. 98-469	Chowan (95CVS290)	Affirmed
WHITAKER v. HARRIS No. 98-434	Edgecombe (95CVS1295)	Affirmed

FILED 1 DECEMBER 1998

ALEJANDRO v. WILLAMETTE INDUS. No. 98-113	Ind. Comm. (545745)	Affirmed
ASHLEY v. BLACK & DECKER CORP. No. 98-655	Ind. Comm. (179455)	Affirmed
BASS v. FAIRCLOTH No. 98-596	Wilson (96CVS775)	No Error
BOWERS v. CITY OF THOMASVILLE No. 97-1391	Davidson (96CVS1673)	Affirmed in part, Reversed in part, and Remanded
BROOKS v. LEWIS No. 97-1610	Wake (95CVS6179)	Affirmed
BUNCOMBE COUNTY DSS v. GUTHRIE No. 97-1592	Buncombe (96CVD5467)	Affirmed
CUTLER v. WINSLOW No. 98-160	Beaufort (96CVS827)	No Error
FEDERAL FINANCIAL CO. v. BRADY No. 98-678	Wake (96CVS11683)	Appeal Dismissed
HARRIS v. NEW HANOVER REG'L. MED. CTR. No. 97-1283	New Hanover (97CVS510)	Affirmed
IN RE DAVIS No. 98-323	Buncombe (96J13)	Affirmed
IN RE HESS No. 98-583	Dare (97J10)	Vacated and Remanded
IN RE TAYLOR No. 98-685	Cabarrus (95J130)	Affirmed
JOHNSON v. LILY TRANSP. CORP. No. 97-1258	Catawba (96CVS1289)	Affirmed
JONES v. COKER No. 98-254	Wake (97CVS07610)	Reversed and Remanded
JUSTICE v. WHALEY No. 97-1593	Onslow (95SP282)	Affirmed
KELLY v. WEYERHAEUSER CO. No. 97-1585	Lee (96CVS920)	Affirmed

LEE v. MOORE No. 97-1556	Bladen (97CVS0197)	Affirmed
ORANGE COUNTY v. EVANS No. 97-1517	Orange (96CVD1567)	Affirmed
PUZIO v. DENNIS BOST CONSTR. CO. No. 97-1286	Ind. Comm. (237572)	Affirmed
SAVAGE v. SAVAGE No. 97-1609	Orange (95CVD1510)	Affirmed
SMITH v. BURLINGTON INDUS. No. 97-1487	Ind. Comm. (434881)	Affirmed
STATE v. ALLEN No. 97-1516	Durham (96CRS5022) (96CRS23487)	Reversed
STATE v. DAWKINS No. 98-70	Richmond (96CRS349)	No Error
STATE v. FARLEY No. 98-729	Forsyth (97CRS29998)	No Error
STATE v. GORDON No. 97-1446	Davidson (96CRS8017) (96CRS8256)	No Error
STATE v. SANTOS No. 97-1466	Rowan (96CRS255)	New Trial
STATE v. SCOTT No. 98-785	Wake (96CRS43804) (96CRS43805) (96CRS43806)	No Error
STATE v. WOODS No. 97-894	Alamance (94CRS32409) (94CRS32410) (94CRS32411) (94CRS32412) (94CRS32413) (94CRS32414) (94CRS32415) (94CRS32419) (95CRS15740) (95CRS15741) (95CRS15742) (95CRS15744) (95CRS15745) (95CRS15747) (95CRS15748) (94CRS32396402)	No error in the convictions of Melissa Woods No error and find them to have no merit. No error in the convictions of Raymond Woods, except that his convictions of acting in concert in obtaining property by false pretenses are vacated in 94CRS32413, 95CRS15740,

	(94CRS32404407) (95CRS15729736) (95CRS15738) (95CRS15739)	95CRS15744 and 95CRS15747.
SWAIN v. C&N EVANS TRUCKING CO. No. 97-1503	Ind. Comm. (143034)	Affirmed in part, Reversed in part and Remanded
TOMLINSON v. BARNES No. 98-272	Pender (96CVD170)	Affirmed in part, Reversed in part and Remanded
TOWN OF ABERDEEN v. TOWN OF ABERDEEN BD. OF ADJUST. No. 98-264	Moore (97CVS819)	Affirmed
TRACY v. GUILFORD COUNTY No. 98-204	Ind. Comm. (203762)	Affirmed

MICHAEL EDWARD KEPHART, BY HIS GUARDIAN AD LITEM, DOLLY TUTWILER, PLAINTIFFS v. JAMES PENDERGRAPH, SHERIFF OF MECKLENBURG COUNTY, THE COUNTY OF MECKLENBURG, AND PEERLESS INSURANCE CO., DEFENDANTS

No. COA97-823

(Filed 15 December 1998)

1. Appeal and Error— appealability—denial of summary judgment—governmental immunity

An appeal of the denial of summary judgment on governmental immunity was interlocutory but immediately appealable.

2. Immunity— governmental—county confinement facilities

The maintenance of confinement facilities within the context of law enforcement services by a county and its officials is within the rubric of governmental functions for governmental immunity.

3. Immunity— governmental—waiver—self-funded loss program

Mecklenburg County's Self-Funded Loss Program did not constitute either insurance or a local government risk pool waiving governmental immunity. A self-funded program has been held not to comprise insurance under N.C.G.S. § 153A-435 and a local government risk pool requires participation of two or more members.

4. Immunity— governmental—waiver—self-funded loss program—insurance coverage above retention—summary judgment

The trial court did not err in a negligence action brought by the family of a prisoner permanently disabled in a suicide attempt by denying defendants' motion for summary judgment based on sovereign immunity where Mecklenburg County had a Self-Funded Loss Program and an insurance policy with a self-insured loss retention (SIR) of $100,000. Sovereign immunity is waived to the extent of insurance coverage and, although the Self-Funded Program did not waive sovereign immunity and defendants contended that the policy did not provide coverage until the SIR had been exhausted, the coverage of the policy by its terms depends on the amount of damages and it cannot be said that plaintiffs would fail to obtain an award greater than the amount of self-insurance less claim expenses.

Appeal by defendants from order filed 20 March 1997 by Judge Ronald K. Payne in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 February 1998.

McNeely, Hefferon and Hefferon, by Paul Hefferon and Thomas J. Hefferon, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, by G. Michael Barnhill and W. Clark Goodman, for defendants-appellants.

JOHN, Judge.

Defendants appeal the trial court's denial of their motion for summary judgment grounded exclusively upon the defense of sovereign immunity. For the reasons set forth herein, we affirm the order of the trial court.

Detailed exposition of the factual background is unnecessary to determination of this appeal. In brief, plaintiff Michael Edward Kephart was arrested 17 April 1995 for violation of probation and taken to the Mecklenburg County Intake Center (the Center). The Center is the initial processing facility for the Mecklenburg County Jail (the Jail). During a prior incarceration at the Jail, plaintiff had attempted suicide and been diagnosed as depressed and suicidal.

After being processed at the Center following his arrest, plaintiff was placed in a holding cell fully dressed and unmonitored. Plaintiff attempted to commit suicide by hanging himself from a ceiling grate by his necktie. He was discovered approximately ten minutes later, having suffered a severe anoxic brain injury. As a result, plaintiff is permanently disabled and will require lifetime medical, nursing and custodial treatment and supervision.

At the time of the foregoing incident, defendant Mecklenburg County (the County) had in place a Self-Funded Loss Program (the Program) and was covered by a Genesis Insurance Company insurance policy (the Policy). Effective 1 July 1993, the County and the Division of Insurance and Risk Management (DIRM) of the City of Charlotte Finance Department entered into an Administration Agreement which established and implemented the Program. The County delegated to DIRM the necessary authority to provide certain risk management services on behalf of the County in conjunction with the Program.

Contained within the Program was a provision that

> [t]he establishment of this Program shall not be deemed to be a waiver of immunity through the purchase of insurance within the meaning of N.C. Gen. Stat. § 153A-435 . . . or the waiver of any defense or rule of governmental or sovereign immunity available to County or to a Member with respect to any Claim asserted against County or a Member. The establishment of this Program shall not constitute the establishment of a Local Government Risk Pool within the meaning of N.C. Gen. Stat. § 58-23-1 et seq.

The Policy, a commercial general liability coverage policy, included the following conditions:

> **4. Other Insurance.**
>
> . . . .
>
> **a. Primary Insurance**
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. . . .
>
> **b. Excess Insurance**
>
> This insurance is excess over any of the other insurance, whether primary, excess, contingent on any other basis:
>
> (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
>
> . . . .

The Policy was further modified by a self-insured retention (SIR) endorsement to the effect that:

> Our obligation is to indemnify the insured for damages to which this insurance applies that the insured becomes legally obligated to pay and that exceed the self-insured retention amount(s) . . . up to but not more than the amounts set forth as Limits of Insurance . . . . The insured may make claim for indemnity under this policy as soon as it is determined that damages exceed the self-insured retention amounts . . . . The insured's obligation to pay shall have been determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and us.

For liability arising out of law enforcement activity, the amount of the County's self-insured retention (SIR) was $100,000.00 paid through the Program, and the Policy limit was $2,900,000.00. A law enforcement liability endorsement further modified the SIR endorsement of the Policy by providing indemnification "when damages together with 'claim expenses' exceed the Self Insured Retention."

On 1 November 1995, plaintiff, through his mother acting as guardian *ad litem*, filed the instant action, alleging his injuries were proximately caused by the negligence of defendants. Defendants responded with an "Answer and Motion to Dismiss," asserting, *inter alia*, the defense of sovereign immunity. On 27 January 1997, defendants moved for summary judgment pursuant to N.C.G.S. § 1A-1, Rule 56 (1990). The motion was not directed at "the underlying merits of the matter," but was confined to the issue of sovereign immunity. Defendants' motion was denied 20 March 1997, and notice of appeal was thereafter timely filed.

[1] Preliminarily, we note that although defendants' appeal of the trial court's order denying summary judgment is interlocutory, this Court has

> held that orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right.

Hedrick v. Rains, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 (1996). Defendants' appeal is thus properly before us to the extent it is based upon the defense of governmental immunity. We do not address, either expressly or impliedly, any other issue.

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). The burden is on the movant to show:

> (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim.

Lyles v. City of Charlotte, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996).

Governmental immunity shields municipalities and the officers or employees thereof sued in their official capacities from suits based on torts committed while performing a governmental function. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994).

It is . . . well-settled that when an action is brought against individual officers in their official capacities the action is one against the state for the purposes of applying the doctrine of sovereign immunity.

Whitaker v. Clark, 109 N.C. App. 379, 381-82, 427 S.E.2d 142, 143-44, *cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993).

[2] The provision of police services, *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), and the erection and operation of prisons and jails, *Pharr v. Garibaldi*, 252 N.C. 803, 810, 115 S.E.2d 18, 22 (1960), have previously been determined to constitute governmental functions. We conclude the actions of a county and its officials in maintaining confinement facilities within the context of law enforcement services are likewise encompassed within the rubric of governmental functions.

[3] A county may waive governmental immunity for torts committed while performing a governmental function by the purchase of liability insurance. N.C.G.S. § 153A-435(a) (1991) provides in pertinent part:

> [a] county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment . . . .
>
> Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 39 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section.
>
> However, a governmental entity
>
> generally retains immunity from civil liability in its governmental capacity to the extent it does not purchase liability insurance or

participate in a local government risk pool pursuant to article 23 of chapter 58 of the General Statutes.

Lyles v. City of Charlotte, 344 N.C. 676, 683, 477 S.E.2d 150, 155 (1996) (Frye, J., dissenting); *see also Dickens v. Thorne*, 110 N.C. App. 39, 43, 429 S.E.2d 176, 179 (1993) (governmental immunity retained for causes of action excluded by insurance policy).

Defendants contend the Program constitutes neither insurance nor a local government risk pool within the meaning of G.S. § 153A-435. In accordance with decisions of our Supreme Court, we conclude this assertion has merit.

A self-funded loss program has been held not to comprise insurance under G.S. § 153A-435. *See Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 322-23, 420 S.E.2d 432, 434-35 (1992) (defendant-city's formation of corporation denominated "Risk Acceptance Management Corporation" to handle claims against city of $1,000,000.00 or less not insurance contract waiving sovereign immunity). Accordingly, the Program does not constitute insurance under the statute for purposes of waiving governmental immunity.

Moreover, a local government risk pool has been determined to require, by definition, participation of two or more members joining together to share risk. *See Lyles*, 344 N.C. at 680, 477 S.E.2d at 153; *see also* N.C.G.S. § 58-23-5 (1994) (setting forth requirements of local government risk pools). The County herein is the sole entity retaining risks and funds under the Program, and the Program thus is not a local government risk pool as contemplated by G.S. § 153A-435.

[4] The ultimate issue herein, therefore, is whether the Policy provides liability coverage for plaintiffs' claims, thereby effecting a waiver of sovereign immunity by defendants. The construction and application of insurance policies to undisputed facts is a question of law for the court. *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 686, 443 S.E.2d 357, 359 (1994). If policy language is clear and unambiguous, the court's sole duty is to "determine the legal effect of the language used and to enforce the agreement as written." *Id.* at 687, 443 S.E.2d at 359. Any ambiguity in the meaning of a particular provision is to be resolved in favor of the insured and against the insurance company. *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." *Id.* The various clauses are to be harmoniously construed, if possible, and every provision given effect. However, if provisions conflict, "the provision favorable to the insured should be held controlling." *Drye v. Nationwide Mut. Ins. Co.*, 126 N.C. App. 811, 814, 487 S.E.2d 148, 150, *disc. review denied*, 347 N.C. 265, 493 S.E.2d 451 (1997).

Defendants first maintain the Policy provides coverage only in excess of the SIR and does not attach until the SIR is exhausted. Defendants cannot be forced to exhaust the SIR through claim expenses, they continue, and summary judgment therefore should have been allowed because no insurance covers plaintiffs' claims and sovereign immunity remains intact.

As support for their contention that the Policy is an excess policy, "bear[ing] typical characteristics of excess coverage," defendants point to a recent analysis:

> Most excess liability insurance contracts are "indemnity" contracts as opposed to "direct pay" contracts. In other words, under most excess contracts the insurer promises to "indemnify" or "reimburse" an insured for sums paid by the insured in excess of the underlying coverage. Generally, indemnity contracts require that the insured's liability be fixed by a judgment against it or by a settlement agreement with the consent of the insured, the insurer and the claimant . . . . In contrast, direct pay contracts obligate the insurer "to pay on behalf of" the insured . . . .
>
> In contrast to the primary insurer, the excess insurer rarely undertakes to defend the insured . . . . Although excess insurance contracts ordinarily do not contain a duty to defend, most excess insurance contracts provide that the excess insurer has the "option" to participate or the right to "associate" in the defense of lawsuits pending against the Insured.

Scott M. Seaman and Charlene Kittredge, *Excess Liability Insurance: Law and Litigation*, 32 Tort & Insurance Law Journal 653, 656, 662-663 (1997).

Reasoning that the Policy "follows these tendencies," defendants argue "[i]t is well-established that excess coverage does not attach unless and until all underlying coverages have been exhausted." It follows, defendants continue, that the Policy

> only indemnifies the County after the County has become legally obligated to exhaust its SIR. Because the County has retained sovereign immunity up to the SIR limit from state tort law claims such as those in this case, it cannot become legally obligated to exhaust the SIR on those claims. The excess coverage of the Genesis policy therefore never attaches to such claims.

Defendants conclude that the Program, in effect the "underlying coverage," *see id.*, in the instant case, cannot be exhausted because of sovereign immunity, and the Policy thus would in no event afford coverage for plaintiffs' claims. As defendants' counsel asserted to the trial court, the Policy attaches only

> once the County is legally obligated to pay the self-insured retention or legally obligated to pay an amount in excess of the self-insured retention. And because the County can't be legally obligated to pay that self-insured retention because of its sovereign immunity, there is no waiver.

In short, defendants' argument at bottom is basically circular, claiming defendants can never be liable on the SIR because of sovereign immunity and that the Policy does not apply until the SIR is exhausted. Plaintiffs aptly respond that the Policy contains no exhaustion requirement and that the word "exhaustion," typical of excess policies, never appears in the Policy.

Defendants retort that their position is not flawed since there are claims to which the Policy would apply which would not be precluded by sovereign immunity, such as civil rights claims. *See, e.g., Corum v. University of North Carolina*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291-92 (defense of sovereign immunity does not apply to state constitutional claims), *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). According to defendants, this was precisely the purpose of the Policy. However, as plaintiffs wryly note, "[i]t is hard to imagine that this amount of premium [$354,357.00] was only intended to insure the risk that defendants might be held liable for civil rights violations." Certainly defendants could achieve the claimed limited coverage by selecting an insurance policy with carefully considered exclusions. *See White v. Mote*, 270 N.C. 544, 556, 155 S.E.2d 75, 83 (1967) ("had it been the intent of the insurer to escape liability . . . the excluded description or use could have and should have been written into the policy").

Perhaps more significantly, defendants fail to address the provision of the Policy declaring its coverage "is primary except when"

certain exceptions apply. The listed exceptions are inapplicable to the facts *sub judice*. Moreover, the SIR endorsement itself provides that it modifies "*SECTION I*—COVERAGES A and B" (emphasis added) of the Policy, and the declaration that the Policy is "primary" is found in *SECTION IV*. Bearing in mind the general rule that in the event of conflicting policy provisions, that favorable to the insured should control, *see Drye*, 126 N.C. App. at 814, 487 S.E.2d at 150, therefore, we believe characterizing the Policy as "primary" or "excess" is not as facile a task as defendants contend.

In addition, plaintiffs interject that whether or not the Genesis Policy provides primary or excess coverage is irrelevant. According to plaintiffs, the plain language of G.S. § 153A-435(a) predicates waiver of sovereign immunity upon *purchase* of insurance. *See* G.S. § 153A-435(a) ("[p]urchase of insurance . . . waives the county's governmental immunity"). In the words of plaintiffs,

> [t[he statute does not say that the waiver occurs upon any other condition, such as attachment of liability of the insurance company, exhaustion of a self insured retention, entry of judgment, or the determination of a legal obligation to pay by either the county or its insurer.

Plaintiffs' reading of G.S. § 153A-435 appears too broad. Although the statute does not correlate exhaustion of a self-insured retention with waiver of sovereign immunity, it does provide that waiver occurs only to the extent of insurance coverage. G.S. § 153A-435(b) ("[t]o the extent of the coverage of insurance purchase . . . governmental immunity may not be a defense").

Nonetheless, plaintiffs properly point out that our case law has consistently considered purchase of limited insurance coverage by a governmental entity to constitute partial waiver of sovereign immunity. *See, e.g., Jones v. Kearns*, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995) ("[b]ecause immunity from suit for damages of $250,000.00 or less had not been waived at the time of the alleged incident, the City is entitled to partial summary judgment in its governmental capacity for damages of $250,000.00 or less"); *Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 464 S.E.2d 299 (1995) (no waiver of governmental immunity by city in being self-insured for claims up to $250,000.00, but immunity waived for amounts in excess thereof because of purchase of liability insurance policies covering such amounts).

Defendants respond by reiterating they cannot be forced to exhaust the SIR through claim expenses. Thus, defendants assert, as the County cannot be legally obligated to pay its SIR because of sovereign immunity, the "obligation to indemnify" never arises since the Policy only "applies . . .[when] the insured becomes legally obligated to pay" by a judgment against insured in excess of the SIR. Furthermore, defendants continue, since "[s]overeign immunity serves to protect public officials and governmental entities not only from liability, but also from the burdens of defending claims," it would be "antithetical to the basic principal of sovereign immunity" to hold otherwise. We do not agree.

First, defendants offer no authority directly in support of the foregoing argument. *See* N.C.R. App. P. 28(b)(5) ("body of the argument shall contain citations of the authorities upon which the appellant relies"; assignments of error "in support of which no . . . authority [is] cited, will be taken as abandoned").

Defendants also fail to account convincingly for the language of G.S. § 153A-435(a) which states that the "[p]urchase of insurance . . . waives the county's governmental immunity, to the extent of insurance coverage." The County thus is not cloaked with immunity for claims when coverage is provided under the Genesis Policy—coverage being the antecedent to waiver of sovereign immunity. As previously indicated, the Policy provides coverage for damages in excess of $100,000.00 and less than $2,900,000.00, and likewise provides indemnification when "damages together with 'claim expenses' exceed the Self Insured Retention."

We note that both counsel for plaintiffs and for defendants at the hearing below responded in the affirmative to the following question of the trial court:

> . . . what you're telling me is the self-insured retention, or retained risk, applies to all costs incurred in the proceedings so that once $100,000 is accrued or incurred for either lawyers, depositions, etcetera, that it then becomes, assuming there's coverage, there becomes insurance available, is that right?

Counsel for defendants responded, "Yes, sir, that's correct, under the law enforcement endorsement."

Significantly, the law enforcement endorsement does not require that the SIR amount have been *paid out* as a prerequisite to insurance coverage. As the trial court stated and defense counsel agreed:

> . . . Your policy says when the damages exceed the self-insured retention amount. It doesn't say and when the insured has paid the self-insured retention amount, does it? It says when they exceed. It says they can make a claim to you for indemnity once it's determined that the amount of damages exceed the $100,000 . . . .

The purport of the provision in G.S. § 153A-435(a) that purchase of insurance waives governmental immunity is that the Policy herein itself determines the County's obligation to pay by providing coverage and waiving sovereign immunity, *see* G.S. § 153A-435(a), again "when damages together with 'claim expenses' exceed the Self Insured Retention." Thus, regardless of whether the County is required to pay out SIR funds, coverage is provided after a claim exceeds $100,000.00, taking into account claim expenses.

Our reading of the Policy is consistent with this Court's previous holding that "evidence of self-insurance . . . serves only to mitigate the amount of damages defendant may incur." *Wilhelm*, 121 N.C. App. at 90, 464 S.E.2d at 301. In *Wilhelm*, this Court vacated summary judgment entered in favor of defendant because the amount of damages is "a question of material fact for the jury, and it cannot be said that plaintiff[s] would fail to obtain an award greater than [the amount of self-insurance] as a matter of law." *Id.*

Citing *Wilhelm* and G.S. § 153A-435, defendants assert as a final argument that

> [r]egardless of whether the Genesis policy could be construed broadly as a waiver of immunity, it is clear from the limits of liability that there is no coverage for damages below $100,000 or in excess of $2,900,000.

Therefore, defendants maintain,

> [e]ven if the Superior Court's denial of summary judgment on the basis of sovereign immunity is affirmed, its denial of partial summary judgment for all claims less than $100,000 or in excess of $2,900,000 should therefore be reversed.

Defendant's concluding argument is unfounded.

Following the reasoning of *Wilhelm*, we do not believe it can be said as a matter of law at this point that the Policy may not provide coverage for some portion, or indeed the entire first $100,000.00, of plaintiffs' damages. Although defendants insist "[i]t is undisputed that

the SIR has not yet been exhausted by claims [sic] expenses," as the instant litigation proceeds attended by the inevitable accumulation of claim expenses, the SIR amount of $100,000.00 might indeed become "exhausted" by claim expenses. Such an event would thereby implicate the Policy provision affording indemnification "when damages *together with* 'claim expenses' exceed the Self Insured Retention" (emphasis added). Accordingly, defendants' argument to the contrary, partial summary judgment in their favor on plaintiffs' claims for damages of "less than $100,000" would likewise have been inappropriate. The trial court was confronted with a genuine issue of material fact as to whether some portion of the SIR up to $100,000.00 might become "exhausted" by "claim expenses," *see id.*; *see also Maddox*, 303 N.C. at 650, 280 S.E.2d at 908 (any ambiguity in meaning of policy provision to be resolved against insurance company), thereby implicating attachment of the indemnification provision of the Policy to the equivalent portion of plaintiff's yet-to-be-determined damages.

In sum, sovereign immunity is waived "to the extent of insurance coverage." *See* G.S. § 153A-435(a),(b). The coverage of the Policy herein is, by its terms, dependent upon the amount of damages awarded to plaintiffs. We thus "cannot [say] that plaintiff[s] would fail to obtain an award greater than [the amount of self-insurance less claim expenses] as a matter of law." *Wilhelm*, 121 N.C. App. at 90, 464 S.E.2d at 301. Therefore, defendants have failed to show the absence of a genuine issue of material fact, *see Lyles*, 120 N.C. App. at 99, 461 S.E.2d at 350, and the trial court did not err in denying defendants' summary judgment motion grounded upon sovereign immunity.

Plaintiffs also argue defendant Sheriff is not accorded sovereign immunity from suit arising out of his alleged violation of statutory standards. In light of the result reached above, it is unnecessary to address this issue. We note, however, defendants' concession for purposes of their motion to dismiss "that Sheriff Pendergraph's sovereign immunity is waived only up to the amount of his bond (defendant Peerless is the surety on the sheriff's bond)."

Affirmed.

Judges WYNN and McGEE concur.

Judge WYNN concurred prior to 1 October 1998.

LUIS ROMAN, DECEASED EMPLOYEE, MAYRA E. ROMAN, ISID E. ROMAN, NOEMI E. ROMAN, OSCAR A. ROMAN, AND JESSICA C. ROMAN, PLAINTIFFS v. SOUTHLAND TRANSPORTATION COMPANY, EMPLOYER; RISCORP OF NORTH CAROLINA, CARRIER, DEFENDANTS

No. COA97-1343

(Filed 15 December 1998)

Workers' Compensation— injuries arising from employment— acting to benefit of third party—truck driver shot while chasing thief

The Industrial Commission erred in a workers' compensation action by awarding benefits to a decedent and his family where the deceased was a long distance truck driver whose company handbook encouraged drivers to foster good public relations in their contacts with the public; the deceased and another truck driver pursued a thief from a truck stop as the register operator screamed for help; and the deceased was fatally wounded when security guards fired at the automobile of the fleeing thief. Deceased's employer received no appreciable benefit from his act in that there is no evidence of any improvement in the public's perception of trucking in general or this company in particular as a result of his acts; the employer and the truckstop were not engaged in a gratuitous reciprocal exchange of assistance when the injury occurred; deceased could not reasonably have believed that helping the truckstop apprehend a criminal was incidental to his employment; and there is no evidence to support the conclusion that deceased's employment put him at increased risk for suffering injury while attempting to apprehend a criminal.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant Southland Transportation Company from Opinion and Award filed 22 July 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 June 1998.

Waggoner, Hamrick, Hasty, Monteith and Kratt, PLLC, by S. Dean Hamrick, for plaintiff appellees.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and Erica B. Lewis, for defendant-appellant Southland Transportation Company.

GREENE, Judge.

Southland Transportation Company (Southland) appeals from the North Carolina Industrial Commission's (Commission) award of workers' compensation benefits to the decedent Luis Roman (Roman), Mayra E. Roman, Isid E. Roman, Noemi E. Roman, Oscar A. Roman, and Jessica C. Roman (collectively, Plaintiffs).

Roman began working as a long distance truck driver for Southland in January of 1994. Pursuant to his employment, he was given Southland's "Driver's Handbook and Safety Manual" (Handbook), which states, in pertinent part:

> Your job, as a driver, depends upon good public relations, as does the future of your company and the trucking industry. . . .
>
> . . . .
>
> Of all involved in the trucking industry, you are in the most strategic spot. You are where the public is. You must meet them on the streets and highways. You drive through their towns, by their homes and businesses. . . . Our job is to do things that will help them like us better. Surely, vehicle operation with an absolute minimum of contacts with the public through accidents is of the utmost importance.

A driver involved in an accident was instructed to "be unfailingly courteous to those involved in the accident, the police and other authorities at the scene, to witnesses and bystanders with whom he may come into contact"; and to "[b]e polite at the accident scene."

On 7 April 1994, Roman was en route to Rocky Mount, North Carolina to make a delivery for Southland. Roman stopped to refuel his truck at the Flying J Truckstop (Flying J) in Gary, Indiana. The Flying J was an "authorized" truck stop; however, Southland had "no specific arrangements with [the Flying J]." Southland drivers could purchase fuel from Flying J stations if they chose to do so. Just after midnight, while Roman was inside the Flying J, various witnesses observed Robert Bankston (Bankston) reach across the Flying J counter into an open cash register drawer, remove a handful of cash, and run to his automobile in the Flying J parking lot. The register operator screamed for help as Bankston took the money and ran outside. Roman and another truck driver ran after Bankston and began "pulling and yanking on the steering wheel" of Bankston's moving automobile as he accelerated. As a result, Bankston's vehicle began

making erratic circles in the Flying J parking lot. Roman was fatally wounded when Flying J security guards fired at Bankston's automobile. Bankston was apprehended by the security guards and other individuals shortly thereafter.

Southland denied the workers' compensation claim filed by Roman's estate. The Commission reviewed the claim without taking live testimony; instead, the Commission based its decision on stipulations, admissions, document production, and answers to interrogatories. The Commission found that "Roman had been dispatched to pick up a load of furniture . . . in Chicago, Illinois, and was en route to . . . Rocky Mount, North Carolina" when his injury occurred. The Commission further found that Roman had stopped to refuel at the Flying J, an authorized truck stop in Gary, Indiana, and that Roman and another truck driver had assisted in apprehending a robber who had attempted to steal cash from the Flying J. Finally, the Commission found that Roman "was shot and killed by one of the security guards while he was positioned inside the window of the [robber's automobile]." Based on these and other findings, the Commission concluded:

> 1. . . . Roman sustained a compensable injury by accident arising out of and in the course of his employment with [Southland] when he was mistakenly shot and killed by a security employee of the [Flying J] while he was responding to [a Flying J] employee's request for assistance in pursuing a fugitive who had robbed the [Flying J]. . . .
>
> 2. Where the duties of his employment place an employee in a position increasing his risk of being in harm's way, the employee's injury or death . . . is compensable . . . .
>
> 3. Where an employee is injured while engaged in the performance of some duty incident to his employment while acting in the course of his employment for the benefit of his employer as well as for the benefit of any third party, the employee's resulting injury or death is compensable . . . .
>
> 4. Where a truck driver takes his employer's vehicle on a long distance assignment and in the course of his employment encounters an emergency situation to which he responds, for the benefit of his employer who had encouraged him to assist members of the public in need of assistance, . . . the employee's resulting injury/death is compensable . . . .

The Commission accordingly awarded workers' compensation benefits to Plaintiffs.

The dispositive issue is whether Roman's injuries arose out of his employment.

"Arising out of employment," in the context of our Workers' Compensation Act (Act), N.C.G.S. ch. 97 (1991 & Supp. 1997), refers to "the origin or cause of the accidental injury." *Roberts v. Burlington Industries*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988) (noting that whether an injury arises out of the employment is a mixed question of law and fact). An employee's injury which occurs while acting for the benefit of a third person arises out of the employment if: (1) the act appreciably benefits the employer, *Roberts*, 321 N.C. at 355, 364 S.E.2d at 421; (2) the accident occurs while the employee and a third party are exchanging "reciprocal courtesies and assistance" for the benefit of the employer, *Guest v. Iron & Metal Co.*, 241 N.C. 448, 453, 85 S.E.2d 596, 600 (1955); *see also Roberts*, 321 N.C. at 356, 364 S.E.2d at 422 (noting that "[t]he exchange of reciprocal assistance was the key to the holding in *Guest*"); (3) the employee has reasonable grounds to believe that the act is incidental to the employment, *Guest*, 241 N.C. at 452, 85 S.E.2d at 599; or (4) the employment places the employee at an increased risk of injury than that to which the general public is exposed outside of the employment, *Roberts*, 321 N.C. at 358, 364 S.E.2d at 422-23.[1]

Appreciable Benefit Test

Applying the appreciable benefit test, this Court has held that an accident which occurs while an employee is offering aid to a third party which "reasonably tends" to retain the employer's business and to promote consummation of specific new business arises out of the employment. *Lewis v. Insurance Co.*, 20 N.C. App. 247, 250-51, 201 S.E.2d 228, 230-31 (1973) (holding that injury arose out of employment where an insurance agent was injured when he stopped by the side of the road to assist one of the policyholders in his assigned territory whose vehicle had run out of gas). Where an employee's aid to a third party is "prompted purely by humanitarian concern, . . . [how-

1. We note that our Supreme Court has specifically refused to apply the "positional risk" test as another alternative ground for showing that an injury arose out of the employment under facts similar to this case. *Roberts*, 321 N.C. at 358, 364 S.E.2d at 423 (noting that under the positional risk test, an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position to be injured).

ever, there is] no conceivable *quid pro quo* of possible benefit to the employer" and the act does not arise out of the employment. *Roberts*, 321 N.C. at 356-57, 364 S.E.2d at 422 (holding that injury did not arise out of employment where an employee returning home from a business trip was injured when he stopped by the side of the road to help an unknown injured pedestrian).

In this case, Southland received no appreciable benefit from Roman's courageous act. There is no evidence in the record of any benefit Southland may have received as a result of Roman's attempt to apprehend a criminal. Although Southland's Handbook suggests that drivers can influence the public's perception of the truck driving industry by behaving in a "courteous" manner, there is absolutely no evidence in the record of any improvement in the public's perception of trucking in general or of Southland in particular as a result of Roman's acts. While the incident presumably was reported by the news media, this alone is not evidence of an appreciable benefit to Southland. *See Roberts*, 321 N.C. at 355-56, 364 S.E.2d at 421 (newspaper articles relating the events surrounding the incident are not evidence of an appreciable benefit to the employer through increased good will).

Reciprocal Exchange of Assistance Test

The reciprocal exchange of assistance test is similar in nature to the appreciable benefits test, because it too entails a benefit to the employer. *See Guest*, 241 N.C. at 453, 85 S.E.2d at 600 (holding that injury arose out of employment where employee was sent by his employer to change a flat tire and, while receiving free air for the tire from a service station operator, helped push a stalled vehicle away from the station pumps at the operator's request and was struck by a moving vehicle). "[W]hen at the time and place of injury mutual aid is being exchanged between the employee [on behalf of the employer] and [a third party], . . . the aid received and the aid given are so closely interwoven that an injury to the employee under such circumstances must be held connected with and incidental to his employment." *Id.* In such cases, the employee has "reasonable grounds to apprehend that his refusal to render the assistance requested of him might well . . . result[] in like refusal by the [third party]" to render the gratuitous benefit to his employer. *Id.*

In this case, Southland and the Flying J were not engaged in a gratuitous reciprocal exchange of assistance when the injury occurred. Roman was not receiving any free benefit from the Flying J for which

he might feel obligated to render assistance to the Flying J on Southland's behalf. Any benefit to be received (*i.e.*, fuel) was not gratuitous; the Flying J would be adequately compensated with either cash or credit. The required compensation was not ambiguous, but was a predetermined amount. Roman could not reasonably have believed that his refusal to apprehend a criminal for the Flying J would result in the Flying J's refusal to supply fuel to Southland.

Incidental to Employment Test

To arise out of the employment, "an injury must come from a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. . . . It must be incidental to the character of the master and servant." *Forsythe v. Inco*, 95 N.C. App. 742, 744, 384 S.E.2d 30, 31 (1989). "Incidental to," as used in this context, may be defined as "[s]omething contingent on or related to" actual employment duties. *See American Heritage College Dictionary* 686 (3d ed. 1993).

In this case, Roman could not reasonably have believed that helping the Flying J apprehend a criminal was incidental to his employment with Southland. Southland's Handbook required its drivers to improve the public's perception of the trucking industry through the avoidance of preventable vehicular accidents and through courteous behavior. The Handbook's emphasis is on the conduct of Southland's employees while they are driving their trucks on the highway with other motorists. In any event, it would be unreasonable for Southland's employees to interpret the requirement to be courteous to include the apprehension of criminals. Southland hired Roman to drive a truck in a safe and courteous manner. The apprehension of criminals is unrelated to courteous truck driving, and accordingly, was not incidental to Roman's employment.

Increased Risk Test

Application of the increased risk test requires a showing that the employment placed the employee at a greater risk of injury than that to which the general public is exposed. *Minter v. Osborne Company*, 127 N.C. App. 134, 137, 487 S.E.2d 835, 837, *disc. review denied*, 347 N.C. 401, 494 S.E.2d 415 (1997); *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 248, 377 S.E.2d 777, 781 (noting that the injury must be one to which the employee would not have been equally exposed apart from the employment), *aff'd per curiam*, 325 N.C. 702, 386 S.E.2d 174 (1989). The injury arises out of the employ-

ment "if a risk to which the employee was exposed because of the nature of the employment was a contributing proximate cause of the injury." *Roberts*, 321 N.C. at 358, 364 S.E.2d at 423. "If the risk is one to which all others in the neighborhood are subject, as distinguished from a hazard peculiar to the employee's work, injury resulting therefrom is not compensable." *Guest*, 241 N.C. at 453, 85 S.E.2d at 600-01.

In this case, the Commission concluded that Roman's employment with Southland put him at an increased risk for suffering injury while attempting to apprehend a criminal. There is, however, simply no evidence in the record to support this conclusion. *See Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456 S.E.2d 847, 850 (1995) (noting that competent evidence must support the Commission's findings of fact, which, in turn, must support its conclusions of law). Roman was not required to stop at the Flying J, but chose to stop there because it was along his route. Roman was at no greater risk of danger from criminal activity due to the necessity of stopping to refuel than is the general public outside of his employment. "[Roman's] decision to render aid created the danger; the risk was not a hazard of the journey." *Roberts*, 321 N.C. at 359, 364 S.E.2d at 423.

The injuries Roman received while risking his own life to apprehend a criminal at the Flying J did not arise out of his employment with Southland. Accordingly, Roman cannot be compensated under the Act, because "[t]o grant compensation here would effectively remove the 'arising out of the employment' requirement from the Act." *Roberts*, 321 N.C. at 360, 364 S.E.2d at 424. Roman's courageous behavior is commendable, and any party who negligently or criminally contributed to his injuries should be held accountable; his employer, however, may not be held accountable under the Act.

Reversed.

Judge MARTIN, Mark D., concurs.

Judge TIMMONS-GOODSON dissents.

Judge TIMMONS-GOODSON dissenting.

I must respectfully dissent from the majority opinion's holding that the fatal injury plaintiff sustained was not compensable under the Workers' Compensation Act.

In the instant case, the Full Commission determined, based upon the holding in *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E.2d 596 (1955), that decedent's death "arose out of" his employment because his actions "benefited [sic] Southland Transportation Company by increasing the employer's goodwill as well as reciprocating assistance for that anticipated from the truck stop employees[.]" According to the majority, however, this conclusion amounted to a "patent legal error" not supported by the evidence in the record. Additionally, the majority finds the holding in *Guest* inapplicable because decedent's altruistic actions were in no way related to his employment, were of no benefit to Southland, and did not command the type of "reciprocal exchange of assistance" required by the court in *Guest*. I disagree.

In *Guest*, the subject accident occurred when the claimant-employee was sent by his employer to the Greensboro Airport to fix a pair of flat tires on his truck. After replacing the tires' inner tubes, he and a fellow employee located a filling station where they asked the operator for some "free air." The operator agreed, but before the employees could finish filling the tires, they were asked by the operator to help push a customer's stalled car. While helping the operator push the car onto the highway, an oncoming car struck the claimant-employee, severely injuring him. In upholding the Commission's award of compensation, our Supreme Court held that the employee's injuries were sustained in the course of his employment because his actions provided an appreciable benefit to his employer. *Id.* at 453, 85 S.E.2d at 600. According to the Court, the employee had reasonable grounds to believe that his refusal to render assistance to the operator may well have resulted in the operator's refusal to give him the "free air" his employer desired. *Id.*

In *Roberts v. Burlington Industries*, 321 N.C. 350, 364 S.E.2d 417 (1988), the decedent-employee was a furniture designer for defendant-employer, Burlington Industries. In this capacity, the employee was not required to have any contact with the general public, other than the occasional visits he would make to retail furniture stores. One evening, while returning home from a business trip, the employee stopped at the scene of an accident to help a pedestrian who had just been struck by an oncoming vehicle. While helping the pedestrian, the employee was himself struck by a vehicle, ultimately resulting in his death. Thereafter, the decedent-employee's family sought workers' compensation benefits from the employer, contending that decedent's "Good Samaritan" acts arose out of his employ-

ment because they benefitted the employer as well as the pedestrian. Finding no merit in this contention, however, the Supreme Court upheld the Commission's denial of benefits, noting that "[t]he exchange of reciprocal assistance was the key to the holding in *Guest*," *id.* at 356, 364 S.E. 2d at 422, and that no such reciprocity occurred in that case as "[d]ecedent's benevolent acts were a pure 'courtesy of the road' and bore no relation to the employer's interest," *id.* at 357, 364 S.E.2d at 422. Accordingly, the Court held "that such purely altruistic actions, with no actual benefits to the employer, [did] not arise out of the [employee's] employment." *Id.* at 357, 364 S.E.2d at 422.

In my opinion, the facts before us today are not only more analogous to those of *Guest* than to those of *Roberts*, but I believe, as the Commission concluded, that in many ways, they present an even stronger case for awarding compensation benefits than did those in *Guest*. To begin, here, as in *Guest*, the decedent was engaged in an activity characteristic of his employment—i.e. that of driving a truck—when the subject accident occurred. In fact, when the robbery took place, decedent had been driving a Southland truck, was in the process of using a Southland credit card to make the necessary purchase and was stopped at a truck stop designated by Southland for the fueling of its trucks.

Moreover, unlike the employee in *Guest* or *Roberts*, the record here indicates that decedent was expressly encouraged, by way of Southland's driver handbook, to assist members of the public whom he might encounter while driving on the highway. Although Southland did not direct decedent to apprehend robbers as he drove the company's truck, it did solicit his help in maintaining a good relationship with those on the road so that ultimately the company could combat the negative perception the public had of truck drivers. Here, decedent was not only helping members of the public at large, he was also assisting individuals who had a special business relationship with his employer. The facts before us are unlike the situation in *Roberts* where the decedent's action was purely for the benefit of a third party and, thus rendered any finding of goodwill to the employer "purely speculative," *id.* at 355-56, 364 S.E.2d at 421. I conclude, therefore, that the assistance decedent attempted to give Flying J employees undoubtedly benefitted the existing special relationship between Southland and Flying J, and also increase the good will Southland expressly sought to promote between itself and the general public. As the Court noted in both *Guest* and *Roberts*, "[i]f the ultimate effect of

claimant's helping others is to advance his own employer's work, . . . it should not matter whether the immediate beneficiary of the helpful activity is a . . . complete stranger." *Id.* at 355, 364 S.E.2d at 421 (quoting *Guest*, 241 N.C. at 452, 85 S.E.2d at 600). Finally, and most significantly, this case is similar to *Guest* in that decedent had not yet received the immediate benefit desired by his employer when he responded to Flying J employees' screaming bequest to "stop" the fleeing robber. Not only did he not receive the receipt Southland required its truckers to obtain when purchasing gas, he was unable to accomplish the very task for which he had stopped—i.e. the refueling of his truck. Thus, although it is true that decedent was to pay for the assistance he was to eventually receive at Flying J, I simply cannot conclude, as did the Court in *Roberts*, that "[his] offer of aid was prompted purely by humanitarian concern [such that] . . . [t]here was no conceivable *quid pro quo* of possible benefit to the employer." *Id.* at 356-57, 364 S.E.2d at 422. Indeed, there is no "patent legal error" in finding an exchange of reciprocal assistance between decedent and Flying J employees where, as here, decedent was driving Southland's truck at the time of the accident, was authorized to stop at the Flying J to fuel his truck, was required to obtain a receipt in order to be reimbursed for the gasoline he ultimately purchased, and was encouraged by Southland to aid members of the public while in the performance of his duties as a truck driver.

Considering the similarities between this case and *Guest*, as well as the rule which constrains us to liberally construe our Workers' Compensation Act in favor of compensation, *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982), I find no error in the Commission's decision to apply the holding in *Guest* to the facts of this case. Furthermore, I note that even if the Commission did err in its application of *Guest*, I believe it still had cause to find decedent's death compensable as it correctly pointed out in its Conclusions of Law that "[w]here the duties of his employment place an employee in a position increasing his risk of being in harm's way, the [e]mployee's injury or death resulting from injury while engaged in the performance of some duty incident to his employment . . . is compensable under the Workers' Compensation Act."

Here, the danger in which decedent was placed at Flying J was due, at least in part, to the fact that he was required by Southland to refuel his truck at designated truck stops which included the Flying J chain. Thus, decedent's decision to render aid in this case cannot be considered a risk wholly unrelated to his employment, but rather, a

risk incidental or peculiar to the performance of his duties as a truck driver for Southland. *Roberts*, 321 N.C. at 358, 364 S.E.2d at 423.

For the foregoing reasons, I dissent from the majority and conclude that the Commission properly determined that decedent's death was compensable.

DESIGN PLUS STORE FIXTURES, INC., PLAINTIFF, v. CITRO CORPORATION AND ANTHONY CITRO, DEFENDANTS, AND CITRO CORPORATION AND ANTHONY CITRO, THIRD PARTY PLAINTIFFS v. DECOLAM, INC. (FORMERLY KNOWN AS WOODTEK, A DIVISION OF CRA-GEN, INC.), THIRD PARTY DEFENDANT

No. COA98-29

(Filed 15 December 1998)

1. Uniform Commercial Code— installment contract—defective goods—acceptance

The trial court did not err in an action arising from a contract to produce display tables by concluding that plaintiff-Design had accepted two installments and awarding defendant-Citro damages in the amount of the contract price for those goods, less an offset for damages sustained by Design by reason of defects, where Design had entered into a contract with Citro to buy display tables in three installments; Citro subcontracted with Decolam, the third-party defendant, to edge-tape and bore holes in parts according to plaintiff's specifications and a pattern approved by Citro; the tables for the first two orders were delivered late and non-conformities made it impossible to assemble the tables; Citro offered no cure and Design eventually re-drilled the holes and assembled the tables; Design consummated the sale to its customer (Springmaid) with the understanding that the tables would ultimately be replaced; Design covered the cost of the replacements and refused to pay Citro for the defective tables; and Design ultimately gave the defective tables to charity and canceled the remaining installment. Repairing the tables and allowing its customer the continued use of the tables were reasonable actions in good faith by Design and did not constitute acceptance of the tables; however, giving the tables to charity without notifying Citro was an act inconsistent with Citro's ownership, so that Design is deemed to have accepted the goods.

2. Uniform Commercial Code— anticipatory repudiation— display tables—defects in two of three shipments—ease of cure of future defects

The trial court erred in an action arising from a contract to produce display tables by concluding that plaintiff breached the whole contract by an anticipatory repudiation where the contract was for three installments; non-conformities individually and cumulatively substantially impaired the contract as a whole; defendant-Citro offered no cure of the defects; and plaintiff-Design bore the expense of repairing the tables in order to meet a deadline known to both parties. The trial court should not have considered the ease of remedying defects of the future installment when determining whether the past installments substantially impaired the contract as a whole.

3. Uniform Commercial Code— subcontractor—contractor's materials and specifications—defective

The trial court erred in an action arising from a contract to produce display tables by concluding that the third-party defendant, Decolam, was liable to Citro, the original defendant and third party plaintiff, where the original plaintiff, Design, had contracted with Citro for the tables, Citro subcontracted with Decolam to edge-tape and bore holes in the parts, and the tables produced were late and could not be assembled. The trial court found that Decolam used materials and specifications provided by the contractor, that the materials and specifications were defective, and that these defects were the proximate cause of the deficiency. Decolam was entitled to the implied warranty that the materials and specifications provided by Citro were free of defects.

Appeal by plaintiff and third party defendant from judgment entered 13 June 1997 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 1998.

Cecil M. Curtis for plaintiff-appellant.

No brief filed for defendant-appellee.

James, McElroy, & Diehl, P.A., by Lawrence W. Hewitt and Fred B. Monroe, for third party defendant-appellant.

MARTIN, John C., Judge.

Plaintiff, Design Plus Store Fixtures, Inc., (Design), entered into a contract with defendant, Citro Corporation (Citro), to buy display tables in three installments to be delivered to Design's primary customer, Springmaid, in Oregon, Kansas, and New Mexico. Citro subcontracted with the third party defendant, Decolam, Inc., (Decolam), to "edge-tape" and bore holes in the parts according to plaintiff's specifications and a pattern approved by Citro.

The tables for the first two orders were delivered late, and a number of non-conformities made the tables impossible to assemble. When Design notified Citro of the defects, Citro offered no cure. Despite the non-conformities, Design eventually re-drilled the holes and assembled the tables. Design consummated the sale to Springmaid with the understanding that the tables would ultimately be replaced. Design covered the cost of the replacement tables, and refused to pay Citro for the defective tables. After Design provided replacement tables to Springmaid, Design gave the defective tables to charity. Design canceled the New Mexico installment after the table parts were cut and before they were bored or taped.

Design sued for expenses incurred due to Citro's breach. Citro counterclaimed for breach of contract and unjust enrichment, and filed a third party complaint against Decolam for breach of warranties and contract. The trial court found that Design had accepted the goods and awarded Citro $19,404.00 as damages for Design's breach of contract, less $18,420.17, which the court offset as Design's damages occasioned by Citro's breach of warranty. The trial court also awarded Citro $9,404.64 as damages for Design's anticipatory repudiation of the New Mexico installment, and awarded Citro $7,407.84 for Decolam's breach of subcontract and breach of warranty. Plaintiff Design and third party defendant Decolam appeal.

I. Plaintiff's Assignments of Error

Design contends it never accepted the Oregon and Kansas orders despite its repair, continued use, and ultimate discarding of the defective tables. In addition, Design argues that the first two nonconforming installments delivered by Citro substantially impaired the value of the whole contract; thus, Design contends it did not anticipatorily repudiate the contract and was entitled to immediately cancel the last installment, the New Mexico order. We reject Design's first contention, but find merit in the second.

A. Acceptance of Oregon and Kansas Installments

[1] Design's transaction with Citro is governed by the Uniform Commercial Code (Code), N.C. Gen. Stat. §§ 25-2-102, 25-2-105 (1995). Specifically, this is an installment contract subject to the provisions of G.S. § 25-2-612(1) (1995) ("An 'installment contract' is one which requires or authorizes the delivery of goods in separate lots to be separately accepted . . . ").

Initially, Design properly rejected the tables by providing reasonable notice of the nonconformity to Citro. Rejection of an installment, under section 2-612, is appropriate only if "the nonconformity substantially impairs the value of that installment . . . ." N.C. Gen. Stat. § 25-2-612(2) (1995). A proper rejection also requires (1) rejection within a reasonable time after delivery or tender, and (2) seasonable notice to seller. N.C. Gen. Stat. § 25-2-602 (1995); *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188 (1974). The trial court found that the non-conformities "made it impossible to properly assemble the table," and that this constituted a substantial impairment, justifying rejection of the installments. The trial court also noted that Design "arguably communicated a valid intent to reject the goods to [Citro]." Design notified Citro of significant nonconformities on 10 November 1993; and after Citro made no offer to cure the defects, Design refused to pay for the defective tables on 21 November 1993. Thus, Design's actions after discovery of the nonconformities were consistent with a rightful rejection of the tables. Nevertheless, the trial court concluded that Design had accepted the tables by actions "inconsistent with [Citro's] ownership," including: consummating the sale of the tables to Springmaid with concessions, and "failure to replace the Oregon tables for eleven months and the Kansas tables for nineteen months, and the Plaintiff's disposal of the tables after their replacement without notifying or attempting to obtain the consent" of Citro.

"Acceptance of goods occurs when the buyer . . . does any act inconsistent with the seller's ownership; but if such act is wrongful against the seller, it is an acceptance only if ratified by him." N.C. Gen. Stat. § 25-2-606(1)(c) (1995). "Acts inconsistent with the seller's ownership" can best be understood in light of the buyer's statutory options and duties with respect to rightfully rejected nonconforming goods. The buyer's options and duties upon rejection are described in G.S. §§ 25-2-602 to -604 (1995). For most buyers, there is a general duty to hold goods with reasonable care "for

a time sufficient to permit the seller to remove them." N.C. Gen. Stat. § 25-2-602(2)(b) (1995). Merchant buyers have a more specific duty when the seller has no agent or place of business in the market of rejection:

> a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily.

N.C. Gen. Stat. § 25-2-603(1) (1995). In this case, Design is a merchant dealing in tables, G.S. § 25-2-104(1) (" 'Merchant' means a person who deals in goods of the kind . . . "); and Citro had no place of business or agent in the markets of rejection, Oregon and Kansas. In addition, the tables are not "perishables" such that "the value of the goods is threatened and the seller's instructions do not arrive in time to prevent serious loss." N.C. Gen. Stat. § 25-2-603(1) Official U.C.C. Comment 1 (1995). Thus Design's duty, upon rejection, was to follow Citro's reasonable instructions with respect to Citro's tables. However, no instructions from Citro were forthcoming.

Absent such instructions, the statute presents three options for a buyer who has given reasonable notification rejecting non-conforming goods: (1) store the rejected goods on the seller's account, (2) reship them to seller, or (3) resell them on the seller's account with reimbursement for expenses incurred in caring for and selling them. N.C. Gen. Stat. § 25-2-604 (1995). These potential courses of action are "intended to be not exhaustive but merely illustrative." N.C. Gen. Stat. § 25-2-604 Official U.C.C. Comment 1 (1995).

> The basic purpose of this section is twofold: on the one hand it aims at reducing the stake in dispute and on the other at avoiding the pinning of a technical "acceptance" on a buyer who has taken steps towards realization on or preservation of the goods in good faith.

N.C. Gen. Stat. § 25-2-604 Official U.C.C. Comment (1995); *see generally, Frank's Maintenance & Engineering, Inc., v. C.A. Roberts Co.*, 86 Ill.App.3d 980, 987, 408 N.E.2d 403, 408 (1980) ("In determining whether a buyer has so wrongfully exercised ownership over goods as to be barred from rejecting them, court must apply rule of reasonableness.")

A merchant buyer in possession of rejected goods, and without instructions from the seller, is in the somewhat difficult position of having a choice of reasonable options but no clear affirmative duties with respect to those goods, G.S. § 25-2-604; yet, the buyer must avoid acts "inconsistent with the seller's ownership" in order to avoid accepting the non-conforming goods. N.C. Gen. Stat. § 25-2-606(1)(c) (1995). The issue is whether Design's actions constitute good faith steps toward "realization on or preservation of the goods," on the one hand, or "acts inconsistent with ownership" on the other. *Compare*, N.C. Gen. Stat. § 25-2-604 Official U.C.C. Comment (1995) and N.C. Gen. Stat. § 25-2-606(1)(c) (1995). Whether actions taken with respect to rejected non-conforming goods, beyond those suggested by statute, are "inconsistent with the seller's ownership," depends on the circumstances and the buyer's steps towards realization on or preservation of the goods in good faith.

The repair and continued use of the non-conforming, rejected goods constitutes a reasonable good faith effort to preserve the goods while mitigating damages. *Accord Hajoca Corp. v. Brooks*, 249 N.C. 10, 15, 105 S.E.2d 123, 127-28 (1958) (retention and use of defective machine by purchaser did not waive rejection because "purchaser does not waive his right to rescind the contract for breach of warranty 'where the retention was at the instance and request of the seller and for the benefit of the seller in his endeavors to remedy the defective machine so that it would properly perform the functions for which it was warranted and sold.' ") (citation omitted); *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 18, 220 S.E.2d 802, 805 (1975), *disc. review denied*, 289 N.C. 613, 223 S.E.2d 391 (1976) ("The fact that plaintiff stayed in the unit after allegedly revoking or rejecting the unit does not alone necessarily vitiate any of the buyer's rights."); *Romy v. Picker Int'l Inc.*, 1992 W.L. 70403, 3 (E.D.Pa. 1992), *affirmed*, 986 F.2d 1409 (3rd Cir. (Pa) 1993) ("use of nonconforming goods, however, does not constitute, per se, a waiver of revocation; . . . [r]ather, a court will annul a revocation and conclude that a re-acceptance has occurred only where the buyer's actions with respect to the goods are deemed 'unreasonable.' "); *Fablok Mills, Inc., v. Cocker Machine & Foundry Co.*, 125 N.J.Super. 251, 257-58, 310 A.2d 491, 494-95, *cert. denied*, 64 N.J. 317, 315 A.2d 405 (1973) ("We conceive that in certain situations continued use of goods by the buyer may be the most appropriate means of achieving mitigation, i.e., where the buyer is unable to purchase a suitable substitute for the goods.").

> Thus it has been frequently held that under certain circumstances a buyer rejecting goods or revoking his acceptance may continue to use the goods . . . particularly where such use is a direct result of the oppressive conduct of the seller . . . or where no prejudice is shown (citations omitted).

Frank's Maintenance & Engineering, Inc., v. C.A. Roberts Co., 86 Ill.App.3d 980, 986-87, 408 N.E.2d 403, 408 (1980).

In this case, Citro entered into the contract with the understanding that manufacturing and delivering the tables in a timely manner was necessary to serve Design's primary customer, Springmaid. Citro delivered the tables late, and the tables were defective. According to the trial court's findings of fact, the plaintiff "performed corrective measures" on the tables, and provided them to Springmaid with the understanding they would be replaced and "replacement of the tables could not affect any of the scheduled store openings;" and, Citro "offered neither explanation nor solution." Design bore the expense of repairing the tables for temporary use by Springmaid. Citro offered no instructions as to the disposal or return of the tables. Under these circumstances, we hold that repairing the tables and allowing Springmaid the continued use of the tables were reasonable actions in good faith and did not constitute acceptance of the tables.

However, after allowing Springmaid the reasonable continued use of the repaired tables, Design gave the nonconforming tables away, contending they had no market value. The trial court concluded, *inter alia*, that "disposal of the tables after their replacement without notifying or attempting to obtain the consent of [Defendant] Corporation constituted acceptance of the goods under the code as acts inconsistent with Defendant's ownership." We agree.

As discussed above, reasonable repair and use of the tables to temporarily satisfy a contract contemplated at the time of the transaction is not inconsistent with ownership; thus those actions did not constitute an acceptance. However, discarding the tables without notifying Citro is an unreasonable act, inconsistent with ownership, where the tables had some salvageable value. Underlying the issue of acceptance, in this context, is the question of whether Design acted inconsistently, by rejecting the goods and then disposing of these goods as an owner. Giving the tables to charity without notifying Citro was such an act of ownership.

There are some circumstances where it might be reasonable to discard rejected goods when there is no salvageable value. N.C. Gen. Stat. § 25-2-608, Official U.C.C. Comment 6 (1995) ("Worthless goods, however, need not be offered back . . . ."); *Askco Engineering Corp., v. Mobil Chemical Corp.*, 535 S.W.2d 893 (Tex. Civ. App. 1976). In this case, however, the court found that the un-bored, un-edged, parts for the New Mexico installment had a salvage value of $15.60 per table; and its finding is supported by the evidence. Plaintiff concedes in its brief that the assembled and used tables of the Kansas and Oregon installments had the same salvage value as the unassembled, un-edged parts of the New Mexico installment; and so these tables were not worthless. Discarding these goods constituted an act inconsistent with Citro's ownership, and so Design is deemed to have accepted the goods. N.C. Gen. Stat. § 25-2-606(1)(c), 25-2-604, Official U.C.C. Comment (1995). We therefore affirm the trial court's conclusion that Design accepted the Kansas and Oregon installments and its award of damages to Citro in the amount of the contract price for those goods, less an offset for damages sustained by Design by reason of the defects. N.C. Gen. Stat. § 25-2-607(1) (1995).

B. Cancellation of New Mexico Installment

[2] Design also argues that cancellation of the New Mexico order was justified, because the defects of the first installments substantially impaired the value of the contract as a whole. The trial court concluded, to the contrary, that "[t]he non-conformities with respect to the Oregon and Kansas tables did not substantially impair the value of the whole contract" because Citro, once notified of the defects, could have easily remedied the final installment. The trial court erred in considering the ease of remedying future installments when determining whether past installments impaired the contract as a whole.

"Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole." N.C. Gen. Stat. § 25-2-612(3) (1995). "Substantial impairment," as explained by the official commentary to section 2-612(2), involves consideration of the quality, quantity, and assortment of goods, as well as the time frame contemplated by the contract. Official U.C.C. Comment 4 (1995). "It must be judged in terms of the normal or specifically known purposes of the contract." *Id.* Once a non-conforming installment substantially impairs the installment contract as a whole, the aggrieved party has no duty to

provide an opportunity to cure the defects of future installments; rather, the buyer has an immediate right to cancel the entire contract.

> Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such non-conformity indicates an intent or that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances and proper future performance but has not an immediate right to cancel the entire contract. It is clear under this Article, however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect "waived."

N.C. Gen. Stat. § 25-2-612(2) & (3) Official U.C.C. Commentary, Comment 6 (1995).

Non-conformities in the Oregon and Kansas installments, individually and cumulatively, substantially impaired the contract as a whole. The tables of the first installments were impossible to assemble and were delivered late. The tables were not usable as delivered to Design. Citro offered no cure of the defects and Design bore the expense of repairing the tables in order to meet a deadline known to both parties. The trial court should not have considered the ease of remedying defects of the future installment when determining whether the past installments substantially impaired the contract as a whole; consequently, the trial court erred in its conclusion of law that plaintiff breached by immediately canceling the whole contract and was liable for damages of $9,404.64 for the anticipatory repudiation. We reverse this portion of the trial court's judgment and remand the case for a determination of damages owed by Citro to Design for breach of contract with respect to the New Mexico installment.

II. Third Party Defendant's Assignments of Error

[3] The trial court found that Citro contracted with Decolam to bore holes and edge tape pre-cut pieces of wood. Design provided specifications to Citro who relayed them to Decolam. Decolam prepared a boring pattern in accordance with these specifications and furnished the pattern to Citro. Citro subcontracted with a non-party, Sumpter Lumber, to cut the pieces, and checked the pieces for "accuracy and squareness in cut, flatness, and measurements" before delivering the precut parts to Decolam at 3:00 p.m. on 5 November 1993. The trial

court found that Decolam worked through the night, and completed the job by 7:00 a.m. on 6 November 1993. Citro was in a rush to complete the parts because they had already missed Design's delivery deadline of 1 November 1993. The trial court found that the pieces were mis-sized when they were delivered to Decolam, in that the top shelf was cut wider than the specifications, and "because of the mis-sized parts, the bored holes did not properly align and the tables could not be properly assembled."

Despite the fact that Citro provided the specifications and the precut parts to Decolam, under a strict time limitation, the trial court concluded that Decolam breached the contract with Citro by failing to perform the work in a workmanlike manner. We disagree. Given the trial court's findings, Decolam, the subcontractor, is not liable for defects when the parts and specifications are provided by the general contractor.

"[A] subcontractor is not liable to his contractor for using the contractor's materials and following the contractor's instructions." *Raynor Steel Erection v. York Const. Co.*, 83 N.C. App. 654, 656, 351 S.E.2d 136, 137-38 (1986); *Bd. of Education v. Construction Corp.*, 50 N.C. App. 238, 241, 273 S.E.2d 504, 506-07 ("[T]he law in general is that where a contractor is required to and does comply with the plans and specifications prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications."), *disc. review improv. granted*, 304 N.C. 187, 282 S.E.2d 778 (1981). The rationale behind this rule is that "there is an implied warranty" by the contractor that the plans, specifications, and materials "are free of defects and that the contractor's compliance with them will ensure a correct result." *Butler & Sidbury, Inc., v. Green Street Baptist Church*, 90 N.C. App. 65, 67, 367 S.E.2d 380, 382 (1988); *City of Charlotte v. Skidmore, Owings, and Merrill*, 103 N.C. App. 667, 407 S.E.2d 571 (1991); *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 328 S.E.2d 849, *disc. review denied*, 314 N.C. 329, 333 S.E.2d 485 (1985); *George v. Veach*, 67 N.C. App. 674, 313 S.E.2d 920 (1984); *Greensboro Housing Authority v. Kirkpatrick & Assoc., Inc.*, 56 N.C. App. 400, 289 S.E.2d 115 (1982); *Bd. of Education v. Construction Corp., supra.*

To take advantage of this implied warranty, the subcontractor must "prove that (i) the plans and specifications were adhered to, (ii) they were defective, and (iii) the defects were the proximate cause of

the deficiency in the completed work." *City of Charlotte v. Skidmore, Owings, and Merrill*, 103 N.C. App. at 679, 407 S.E.2d at 579 (citing *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 362-63, 328 S.E.2d 849, 857 (1985)). In this case the trial court found that the subcontractor, Decolam, used the materials and specifications provided by the contractor, that the materials and specifications were defective, and that these defects were the proximate cause of the deficiency. Therefore, Decolam was entitled to the implied warranty that the materials and specifications provided by Citro were "free of defects and that the [sub]contractor's compliance with them will ensure a correct result." The trial court's conclusion that Decolam is liable to Citro for breach of contract was therefore error.

For the reasons stated above, the trial court's judgment awarding Citro the contract price of $19,404.00 for the tables accepted, less an offset of $18,420.17 as damages by reason of it breach due to the tables' non-conformity to the contract, is affirmed. The judgment awarding Citro $9,404.64 for the anticipatory repudiation of the New Mexico installment is reversed and the case is remanded for a determination of Design's damage claim for replacement costs on this installment. The judgment awarding Citro $7,407.84 for third party defendant Decolam's breach of sub-contract and warranties is reversed.

Affirmed in part, reversed in part, and remanded.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA v. GEORGE ELTON HINNANT

No. COA97-1251

(Filed 15 December 1998)

1. Evidence— hearsay—statements of child sex abuse victim

The trial court did not err in a prosecution for first-degree rape, first-degree sex offense, and taking indecent liberties with a minor by admitting into evidence the hearsay statements of the victim where the court determined that she was unavailable due to her emotional condition and not due to any incompetency. Such a determination is properly within the court's discretion

based on the judge's personal observation of the witness's demeanor and responses to questions on voir dire. Here, an expert witness testified that the five-year-old victim feared defendant and would be traumatized by seeing defendant in the courtroom, and the statements were admitted under the exceptions for excited utterances, existing mental, emotional and physical consideration, and medical diagnosis or treatment. These are firmly rooted exceptions which are deemed inherently trustworthy.

2. Appeal and Error— appealability—motion to dismiss not renewed

Appellate review of the denial of a motion to dismiss a first-degree rape charge was waived where defendant's motion came at the close of the State's case and was not renewed at the close of all of the evidence.

3. Constitutional Law— effective assistance of counsel—failure to renew motion to dismiss

A claim of ineffective assistance of counsel failed where defendant based the claim on the failure of his counsel to renew his motion to dismiss at the close of all of the evidence but could not show that the motion would have been granted.

Judge HUNTER dissenting.

Appeal by defendant from judgment entered 14 March 1997 by Judge Louis B. Meyer in Wake County Superior Court. Heard in the Court of Appeals 21 September 1998.

The defendant, George Elton Hinnant, was tried by a jury at the 10 March 1997 criminal session of Wake County Superior Court for first degree rape, first degree sex offense and taking indecent liberties with a minor. The alleged victim, J, is his 5 year old niece.

The evidence produced at trial tended to show that at the time of the alleged incidents, defendant lived at his mother's home with J, J's mother Theresa Burnett (who is the defendant's sister) and J's sister Jaylan. On 16 December 1995 defendant was drinking malt liquor with some friends at a local "hangout," a store on Poole Road. Sometime early in the afternoon, Ms. Burnett brought J and Jaylan to the store and Burnett began drinking. Upon returning home that evening, defendant went into the kitchen to prepare his dinner while Ms. Burnett sat in the living room and watched television. About 5 to 10

minutes later, J ran into the living room "running and crying and saying that [defendant] had touched her." Ms. Burnett called the police, and Officers J. A. Taylor and Sean R. Woolrich of the Raleigh Police Department responded to the call.

During an interview with the police, J told Officer Taylor that "[m]y uncle touched my butt this morning. When he touched me, it hurt." Officer Taylor also testified that Ms. Burnett had told him that J told her that defendant had touched her on the "butt and pussy." Officer Woolrich testified that Ms. Burnett told him that J had accused defendant of touching her while she played on her bicycle that morning, but that J had also made a statement that defendant had put his hands in her pants when she got out of bed that morning.

J and Ms. Burnett were taken to the police station for further interviews. At the police station, Ms. Burnett denied that defendant had done anything to J. Detective Albert O'Connell testified that J told him that defendant had hurt her and pointed to her crotch and buttocks, and also showed detectives that defendant had hurt her by pointing to the vagina on an anatomically correct doll.

J was taken to Wake Medical Center for an examination. The doctor performing the examination noted no signs of trauma. During a follow-up exam two weeks later on 2 January 1996, J was evaluated by Lauren Roswell-Flick, a clinical psychologist and an expert in child sexual abuse. J told Roswell-Flick that defendant had hurt her and pointed at the vagina on an anatomically correct doll, and described further instances of sexual abuse. Dr. Vivian Everette, a pediatrician at Wake Medical Center, testified that she conducted a thorough examination of J on 2 January 1996. Dr. Everette testified that she noted no trauma, but that "the exam was consistent with the history that [J] gave Ms. Flick, which has a history of genital fondling, digital vaginal penetration and cunnilingus."

Kim Alexander, a clinical social worker for the Wake County Department of Social Services, began treating J 7 May 1996. Alexander was qualified as an expert in child sexual abuse over defendant's objection. Alexander testified that J's conduct was consistent with that of a child who has been sexually abused in that J "expresses fear and anger toward the perpetrator . . . They're also consistent in that she's showed some sexualized behavior. And another aspect of her behavior that's consistent with other sexually abused children is lack of boundaries."

Defendant was arrested on 4 January 1996. On 19 February 1996 defendant was indicted on charges of first degree rape, first degree sex offense and taking indecent liberties with a minor. Defendant's cases came to trial 10 March 1997. At trial, defendant objected to the competency of J testifying because she was too young to know the meaning of the oath. When the court attempted to interview J, she became upset. The trial court determined that J's emotional state made her unavailable to testify. However, the trial court allowed her hearsay statements into evidence over defendant's objection.

On 14 March 1997, a jury found defendant guilty of first degree rape, first degree sexual offense and taking indecent liberties with a minor. Defendant was sentenced to an active prison term of no less than 384 months and no more than 460 months. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General R. Kendrick Cleveland, for the State.

John F. Oates, Jr., for defendant-appellant.

EAGLES, Chief Judge.

[1] We first consider whether the trial court erred in admitting into evidence the hearsay statements of the victim, J. Defendant contends that the trial court, in order to admit the hearsay statements, must make specific findings of fact with respect to the trustworthiness and probative value of the statements. *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 104 L.Ed.2d 1009 (1989). Defendant asserts that the trial court made no such findings. Additionally, defendant argues that even if the trial court had made the required findings of fact, the statements would fail to meet the test of admissibility. First, defendant argues that the statements made by J to Officer Taylor and Ms. Burnett were not specific as to time, place and occurrence. Additionally, defendant contends that J's statements to the officers were inconsistent. Defendant contends that these statements were "contra-indicative of trustworthiness." Second, defendant contends that the testimony of Ms. Roswell-Flick should have been excluded based on *Idaho v. Wright*, 497 U.S. 805, 111 L.Ed.2d 638 (1990) because Roswell-Flicks' interview with J "lacked procedural safeguards" and violated defendant's right to confrontation. Defendant asserts that the trial court violated defendant's right to confrontation because the statements were not reliable enough to justify their admission without any opportunity for cross-examination.

The State first contends that the trial court properly determined that J was unavailable due to her emotional state and not as a result of her incompetency to testify. Second, the State argues that J's statements were not admitted pursuant to the residual exception to the hearsay rule. The State contends that the statements were admitted under firmly rooted exceptions to the hearsay rule; the excited utterance exception and the existing mental, emotional and physical condition exception. Accordingly, the State asserts that no findings regarding the reliability of the statements were required because reliability is presumed under these exceptions. *State v. Rogers*, 109 N.C. App. 491, 499-500, 428 S.E.2d 220, 225, *review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied sub nom. Rogers v. North Carolina*, 511 U.S. 1008, 128 L.Ed.2d 54, *reh'g denied*, 511 U.S. 1102, 128 L.Ed.2d 495 (1994).

After careful consideration of the record, briefs and contentions of both parties, we conclude there was no error. The trial court determined that J was unavailable due to her emotional condition and not due to any incompetency to testify. Such a determination is properly within the court's discretion based on the trial judge's "personal observation of the witness's demeanor and responses to questions on voir dire." *State v. Chandler*, 324 N.C. 172, 180, 376 S.E.2d 728, 734 (1989) (citing *State v. Fearing*, 315 N.C. 167, 337 S.E.2d 551 (1985)). Kim Alexander, a clinical social worker testifying as an expert in child sexual abuse, testified on voir dire that J feared defendant and would be traumatized by seeing defendant in the courtroom. Accordingly, the trial court properly determined that J, a 5 year old child, was unavailable due to her emotional condition.

The statements made by J to Ms. Burnett and Officer Taylor were admitted under Rule 803(2), the excited utterance exception, and Rule 803(3), the existing mental, emotional and physical condition exception to the hearsay rule. The statements made to Ms. Roswell-Flick were admitted under Rule 803(4) as statements made for purposes of medical diagnosis or treatment. These exceptions are firmly rooted exceptions to the hearsay rule. *Rogers*, 109 N.C. App. at 500, 428 S.E.2d at 225. "[S]tatements admissible under a traditional, or 'firmly rooted,' hearsay exception are deemed inherently trustworthy and thus, without further inquiry, satisfy the reliability prong of the Confrontation Clause test." *Id.* at 499, 428 S.E.2d at 225 (quoting *State v. Jones*, 89 N.C. App. 584, 598, 367 S.E.2d 139, 147-48 (1988)). Accordingly, we hold that the statements were properly admitted and that there was no error.

[2] We next consider whether the trial court erred in denying defendant's motion to dismiss the count of first degree rape at the close of the State's evidence. Defendant argues that "the State failed to show any evidence of penetration of the victim's vagina, however slight, and therefore the trial court erred in denying the motion [to dismiss]." Defendant states that even though defendant's counsel at trial failed to renew the motion to dismiss at the close of all the evidence, the sufficiency of the evidence to support a conviction is always a matter that may be reviewed on appeal. G.S. 15A-1446(d)(5). Additionally, defendant argues that should the Court determine that defendant has failed to preserve this issue for appellate review, and that it does not constitute plain error, the court should address the issue of whether defendant's trial counsel rendered ineffective assistance because he failed to move to dismiss at the close of all the evidence. Defendant contends that the error was prejudicial to defendant because he was convicted of first degree rape and "the evidence of penetration was so slight as to justify the granting of the motion to dismiss."

The State first argues that defendant has waived this assignment of error because the defendant's introduction of evidence on his behalf waives his right to appeal denial of a motion to dismiss made at the close of the State's evidence. The State asserts that even if appellate review had not been waived, there was sufficient evidence of penetration to support the conviction. The State points to the testimony of Roswell-Flick, who testified that J told her that defendant had touched her vagina with his penis, and had also told her that he had put his penis inside her vagina. The State also contends that the actions of J mimicking sexual intercourse with a punching bag, and her placement of a male anatomically correct doll face down on top of a female anatomically correct doll, was further evidence of penetration to support defendant's conviction. Finally, the State contends that defendant's ineffective assistance of counsel claim has no merit because defendant cannot show that "but for the error, the result of defendant's trial would have been different."

We hold that defendant has waived appellate review of this issue. Defendant moved to dismiss the charge of first degree rape at the close of the State's case for insufficient evidence. The trial court denied the motion. Defendant did not renew his motion to dismiss at the close of all the evidence. Under these facts our Supreme Court has held that:

> [U]nder Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure, the issue of insufficiency was not preserved for appel-

> late review. N.C.G.S. § 15A-1446(d)(5) provides that questions of insufficiency of the evidence may be the subject of appellate review even when no objection or motion has been made at trial. However, Rule 10(b)(3) provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial. We have specifically held in this regard that: 'To the extent that N.C.G.S. § 15A-1446(d)(5) is inconsistent with N.C. R. App. P. 10(b)(3), the statute must fail.'

State v. Richardson, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995) (quoting *State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987)). Accordingly, appellate review has been waived.

[3] Additionally, the defendant's claim of ineffective assistance of counsel fails. Defendant cannot show that even if his counsel had moved to dismiss at the close of all the evidence, that the motion would have been granted by the trial court. There was trial testimony concerning evidence of penetration by defendant. Accordingly, defendant cannot show that trial counsel's failure to move to dismiss at the close of all the evidence prejudiced his defense. *State v. Braswell*, 312 N.C. 553, 565, 324 S.E.2d 241, 249 (1985). The assignment of error is overruled.

No error.

Judge LEWIS concurs.

Judge HUNTER dissents.

Judge HUNTER dissenting.

I agree with the majority's decision regarding the admissibility of the hearsay statements. Further, I believe the State presented sufficient evidence at trial to convict defendant of the charges of first-degree sex offense and taking indecent liberties with a minor, in violation of N.C. Gen. Stat. § 14-27.4(a)(1) (Cum. Supp. 1997) and N.C. Gen. Stat. § 14-202.1 (1993), respectively. However, I do not believe the State presented sufficient evidence at trial to prove that defendant engaged in vaginal intercourse with the victim, a required element of first-degree rape under N.C. Gen. Stat. § 14-27.2(a)(1) (Cum. Supp. 1997). Therefore, I would reverse the trial court's denial of defendant's motion to dismiss the charge of first-degree rape.

At the outset, I note that the majority is correct in asserting that, pursuant to Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure, defendant failed to properly preserve for review the issue of the sufficiency of the evidence by moving for a dismissal at the close of all the evidence. N.C.R. App. P. Rule 10(b)(3) (1998). Nevertheless, I believe that in order to "prevent manifest injustice" to defendant, this Court has the discretionary authority pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to review the facts of this case to determine whether sufficient evidence existed, regardless of whether defendant moved for a dismissal at the close of all the evidence. N.C.R. App. P. Rule 2 (1998); *see State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987) (where our Supreme Court stated that "[w]hile we thus are not compelled to do so, we have nevertheless reviewed the evidence in our discretion . . . ." *Id.* at 439, 355 S.E.2d at 493 (*citing State v. Fikes*, 270 N.C. 780, 781, 155 S.E.2d 277, 278 (1967)); *see also State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619 (1988).

In ruling on a motion to dismiss, the trial court must determine whether substantial evidence exists as to each essential element of the charged offense and that the defendant is the perpetrator of that offense. *State v. Summers*, 92 N.C. App. 453, 455, 374 S.E.2d 631, 633 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted).

In order for the State to meet its burden of proving defendant guilty of first-degree rape pursuant to N.C. Gen. Stat. § 14-27.2(a)(1), it must demonstrate by substantial evidence that defendant engaged in "vaginal intercourse" with the victim, among other things. *Id.* at 456, 374 S.E.2d at 633. Vaginal intercourse is defined as "the *slightest* penetration of the female sex organ by the male sex organ." *Id.* In this case, contrary to the majority's assertion, I do not feel the State's evidence rose to the level of showing by substantial evidence even the slightest vaginal penetration of the victim by defendant's male sex organ.

At trial, one of the State's witnesses, Ms. Roswell-Flick, a clinical psychologist, related a conversation she had with the four-year-old victim on 2 January 1996, when she was investigating allegations of sexual abuse by defendant. During the course of her discussion with the victim, Ms. Roswell-Flick used anatomically correct male and female dolls to assist the victim in describing exactly what occurred

between she and defendant. However, as the trial court noted, the victim could not distinguish between the two dolls, although she could identify the specific parts of the body.

Ms. Roswell-Flick began asking the four-year-old victim if anyone had ever touched her vagina, at which point the following conversation occurred:

> I said, "Does anyone ever touch you down here?" indicating the vagina of the girl doll, and she said, "Yeah, [defendant] does." . . . I said, "What did he do?" and she said, "He put his hand down there." I said, "Did he put it on the inside or the outside of that part?" and she pointed directly to the vagina. I said, "How did that feel?" and she said, "It hurt." I said, "Did [defendant] kiss you or lick you any place?" and she said, "He licked me." I said, "Where did he lick you?" and she pointed to the vagina of the doll. I said, "Did [defendant] do anything else?" and she said, "No."

Thereafter, Ms. Roswell-Flick asked the victim if defendant had ever touched her with his male sex organ, and the following conversation occurred:

> "Did you ever see [defendant's male sex organ]?" . . . [,] and she said, "Yeah." I said, "What did he do?" [a]nd she said, "He took it off." I said, "Did he ever touch you with that part?" indicating the [male sex organ], and she said, "Yeah." I said, "Where did he put it?" and she pointed directly between her own legs to her vagina. I said, "Did he put it on the inside or the outside?" and she said, "The inside."

Based on this hearsay testimony, the majority states that "[t]here was trial testimony concerning evidence of penetration by defendant." I disagree.

Ms. Roswell-Flick's testimony regarding her conversation with the four-year-old victim indicates that the victim's recollection of the events on or about 16 December 1995 is vague and confused as to the issue of vaginal intercourse. Not only is the testimony hard to follow, but there is also no indication as to when, where or how defendant engaged in vaginal intercourse with the victim. Further, there is absolutely no medical evidence of vaginal intercourse, nor is there any corroborating evidence to support such a conclusion. However, even if a slight inference of defendant's guilt could be gleaned from this testimony, it nevertheless fails to rise to the level of substantial evidence.

In criminal cases of this magnitude, a trial court, or an appellate court, should not infer from this scant hearsay testimony that defendant engaged in vaginal intercourse with the victim. Two considerations should prevent us from drawing such an inference. First, in recognition of the heavy burden placed upon the State in criminal cases, we should not "draw inferences against the accused from what must be characterized as vague and ambiguous testimony"; and second, there is absolutely no other evidence in the record to show that defendant engaged in vaginal intercourse with the victim. *State v. Ferguson*, 450 N.E.2d 265, 271-272 (Ohio 1983).

As to the first consideration, we must remember that it is the State's job to prove by substantial evidence each element of the crime charged, and that the defendant is the perpetrator of the offense. *State v. Summers*, 92 N.C. App. at 455, 374 S.E.2d at 633. Therefore, as the Ohio Supreme Court recognized in *State v. Ferguson*:

> [A]s unpleasant an ordeal as it might be, we must reinforce the need to have the events described with sufficient clarity to establish the offender's guilt beyond a reasonable doubt. To this end, the prosecutor must be aware of the elements necessary to prove the state's case and to elicit testimony as to those elements as tactfully as possible.

Id. at 272 n.6. This being the case, it was the State's duty to elicit testimony from its witnesses that established by substantial evidence that defendant vaginally penetrated the victim with his male sex organ.

In this case, other than Ms. Roswell-Flick's hearsay testimony of the four-year-old victim, there was absolutely no other evidence presented by the State which showed any type of vaginal penetration by the male sex organ, even slight penetration. The victim never mentioned to any of the investigating officers or her mother when she spoke with them on 16 December 1995, or at any other time, that defendant penetrated her vagina with his male sex organ. Further, since she was unable to testify due to her young age, the only evidence offered at trial by the State was the hearsay testimony from the other witnesses.

In addition, there is absolutely no medical evidence of vaginal penetration of the victim by the defendant's male sex organ. Dr. Everett, a pediatrician specializing in child sex abuse cases, testified that an external genital exam was performed on the victim on 16

December 1995, and that no "obvious lesions or signs of trauma" were discovered. Further, she testified that her physical exam of the victim "was consistent with . . . a history of genital fondling, digital [finger] vaginal penetration and cunnilingus," but not of vaginal penetration by the male sex organ.

In summary, the only evidence presented by the State which tended to show defendant engaged in vaginal intercourse with the victim was the hearsay testimony of Ms. Roswell-Flick, in which she described a conversation she had with the four-year-old victim. After a careful review of the record, and given the heavy burden placed upon the State in criminal cases to produce substantial evidence of each element of the crime charged, I believe there was insufficient evidence that defendant engaged in vaginal intercourse with the victim. Therefore, I would reverse defendant's conviction on the charge of first-degree rape.

STATE OF NORTH CAROLINA v. JULIAN SANTANO ROLLINS

No. COA98-140

(Filed 15 December 1998)

1. Sentencing— structured sentencing—nonstatutory aggravating factor—attempting to dispose of evidence

The trial court erred when sentencing defendant under Structured Sentencing for discharging a firearm into an occupied vehicle by finding as a nonstatutory aggravating factor that defendant attempted to dispose of evidence in that he gave the handgun used in the offense to someone else immediately after the offense. No law enforcement officers were present when defendant passed the firearm to another and no investigation had focused on defendant; passing the firearm to the other person lacks the characteristic of affirmative misconduct or active misrepresentation to law enforcement officials previously held to withdraw a nonstatutory factor from the constitutional protections of the right to plead not guilty and the privilege against self-incrimination.

2. Sentencing— structured sentencing—nonstatutory aggravating factors—not specifically requested by the State

In an appeal from a sentence for firing into an occupied vehicle which was reversed on other grounds, the Court of Appeals held that in Structured Sentencing proceedings the trial court may properly find nonstatutory aggravating factors not specifically requested by the State whether the circumstances supporting such factors are presented at trial, if the defendant pleads not guilty, or at the sentencing hearing. However, trial judges are admonished to exercise restraint when considering non-statutory aggravating factors after having found statutory factors.

3. Appeal and Error— sanctions—violations of propriety

The costs of the appeal of a criminal sentence were taxed to defense counsel pursuant to Rules of Appellate Procedure 35(a), 34(a), and 34(b) where defendant's brief was grossly lacking in the requirements of propriety, violated multiple appellate rules, and contained materials outside the record and biased arguments, neither of which provided any meaningful assistance to the Court of Appeals.

Appeal by defendant from judgment entered 30 September 1997 by Judge James M. Webb in the Moore County Superior Court. Heard in the Court of Appeals 22 October 1998.

Attorney General Michael F. Easley, by Assistant Attorney General J. Bruce McKinney, for the State.

Cunningham, Dedmond, Petersen, Smith, by Bruce T. Cunningham, Jr., for defendant-appellant.

JOHN, Judge.

Defendant was tried before a jury during the 23 September 1997 session of Moore County Superior Court on indictments charging murder, discharging a firearm into an occupied vehicle, and assault with a deadly weapon with intent to kill inflicting serious injury. At the close of the State's evidence, the trial court dismissed the murder count and defendant was subsequently convicted of misdemeanor assault with a deadly weapon and the remaining felony. On 30 September 1997, after finding one statutory and two non-statutory factors in aggravation of the felony sentence as well as two statutory mitigating factors, the trial court determined the former outweighed

the latter and sentenced defendant to a minimum term of imprisonment of thirty-six months and a maximum term of fifty-three months on the felony conviction and forty-five days on the misdemeanor conviction.

[1] Defendant maintains the trial court erred in finding the following non-statutory aggravating factor: "Defendant attempted to dispose of evidence in that he gave the 9mm handgun used to commit this offense to James Antonio Murchison immediately after commission of the offense." Notwithstanding defendant's violations of the North Carolina Rules of Appellate Procedure (the Rules) noted below, which violations subject his appeal to dismissal, *see Wiseman v. Wiseman* 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984) ("Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal"), we elect in our discretion to consider the merits thereof, *see* N.C.R. App. P. 2.

Preliminarily, we note defendant's appellate brief includes no argument addressed to assignments of error one, two, five and seven. Accordingly, those assignments of error are deemed abandoned, *see* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in the appellate's brief . . . will be taken as abandoned"), and we do not discuss them.

The felony offense of which defendant was convicted, discharging a firearm into an occupied vehicle in violation of N.C.G.S. § 14-34.1 (1997), was alleged to have occurred 16 October 1995. As such, sentencing for the offense was governed by the Structured Sentencing Act (SSA), found at N.C.G.S. § 15A-1340.10 *et seq.* (1997). G.S. § 15A-1340.10 (SSA applies generally to offenses "that occur[red] on or after October 1, 1994").

Under the SSA, a trial court may vary from the presumptive range of sentences for an offense specified in N.C.G.S. § 15A-1340.17(c)(2) (1997) "[i]f the court finds that aggravating or mitigating factors exist." N.C.G.S. § 15A-1340.16(b) (1997).

> If the court finds that aggravating factors are present and are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4).

G.S. § 15A-1340.16(b).

Statutory aggravating factors are set forth at G.S. § 15A-1340.16(d); in addition to those specified, the trial court may also consider "[a]ny other aggravating factor reasonably related to the purposes of sentencing." G.S. § 15A 1340.16(d)(20). However, the trial court is not permitted to "consider as an aggravating factor the fact that the defendant exercised the right to a jury trial." G.S. § 15A-1340.16(d).

In the case *sub judice*, defendant does not contest that the challenged non-statutory aggravating factor was supported by a preponderance of the evidence, *see* G.S. § 15A-1340.16(a) (State bears burden of proving presence of aggravating factor "by a preponderance of the evidence"), but rather argues vigorously that use of the factor under the instant circumstances violated his Fifth Amendment constitutional right against self-incrimination. While a trial court properly may consider a criminal defendant's refusal to cooperate with law enforcement officials as a sentencing factor, *Roberts v. United States*, 445 U.S. 552, 554-55, 63 L. Ed. 2d 622, 627 (1980), the defendant's responsibility to assist authorities does not attach when "his silence is protected by the privilege against self-incrimination," *id.* at 557-58, 63 L. Ed. 2d at 629.

Moreover, in *State v. Blackwood*, this Court held that consideration under the Fair Sentencing Act (FSA), N.C.G.S. §§ 15A-1340.1 through 15A-1340.7, (repealed by Session Laws 1993, c. 538, s. 14), of the non-statutory factor that the defendant

> did not at any time [offer] assistance to the arresting officers or the District Attorney . . . potentially infringe[d] impermissibly on [the] defendant's right to plead not guilty

and was therefore improper. *State v. Blackwood*, 60 N.C. App. 150, 154, 298 S.E.2d 196, 199-200 (1982). In addition, we noted that "if the court had considered defendant's failure to 'acknowledge any wrongdoing' it would have impermissibly punished defendant for his not-guilty plea." *Id.* As we explained, a defendant has an absolute right to plead not guilty and "should not and cannot be punished for exercising that right." *Id.* at 154, 298 S.E.2d at 199 (quoting *State v. Boone*, 293 N.C. 702, 712-13, 239 S.E.2d 459, 465 (1977)); *see also* G.S. 15A-1340.16(d).

In sentencing a criminal defendant, therefore, the trial court may not consider in aggravation of sentence that the defendant was exercising his right to plead not guilty or asserting his privilege against

self-incrimination. Notwithstanding, "affirmative misconduct," *United States v. Ruminer*, 786 F.2d 381, 385 (10th Cir. 1986), *i.e.*, active misrepresentation to law enforcement officials, has been held properly considered as a non-statutory aggravating factor because in such instance the defendant "was not simply exercising his rights to remain silent or to plead not guilty," *State v. Harrington*, 118 N.C. App. 306, 310, 454 S.E.2d 713, 716 (1995) (proffering false alibi and false name to law enforcement officers proper non-statutory aggravating factor under FSA); *see also Ruminer*, 786 F.2d at 385 (suggesting "false leads [to officials] in a purposeful attempt to hinder the investigation" constitutes "affirmative misconduct" relevant to sentencing); *cf. Blackwood*, 60 N.C. App. at 154, 298 S.E.2d at 199-200 (record contained "no evidence of any affirmative action by defendant to hinder efforts by the arresting officers or the district attorney").

In the case *sub judice*, the record indicates that defendant, moments after commission of the offense of discharging a firearm into an occupied vehicle and near the scene of the shooting, handed the weapon used in the offense to James Antonio Murchison (Murchison). No law enforcement officers were present nor had any investigation focused upon defendant at that point.

Under the foregoing circumstances, defendant's passing of the firearm to Murchison lacks the characteristic of affirmative misconduct or active misrepresentation to law enforcement officials previously held to withdraw a non-statutory factor from the constitutional protections of the right to plead not guilty and the privilege against self-incrimination. In addition, possession by defendant of the weapon at issue would necessarily have "implicat[ed] himself in unlawful activities," *Blackwood*, 60 N.C. App. at 154, 298 S.E.2d at 200, and enhancement of defendant's sentence for in effect remaining silent and not presenting the weapon to authorities thus was impermissible. *See id.* Accordingly, the sentence imposed on the felony of discharging a firearm into an occupied vehicle must be vacated and the charge remanded for resentencing. *See State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983) (under FSA, if trial court has erred in finding aggravating factor and imposing sentence beyond presumptive term, "the case must be remanded for a new sentencing hearing").

Although we grant a new sentencing hearing, we address one of defendant's remaining contentions as likely to recur on resentencing.

[2] In his final assignment of error, defendant contends the trial court erred in finding a non-statutory aggravating factor not requested by the prosecutor. Defendant does not argue that the factor itself was unsupported by the evidence, but rather that the court improperly found a factor in aggravation not sought by the State. Similar contentions have previously been rejected by our courts with reference to the FSA, and we hold defendant's argument as applied to the SSA is without merit.

First, at sentencing under the FSA, the trial court was obligated to "consider all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing . . . ." *State v. Flowe*, 107 N.C. App. 468, 472, 420 S.E.2d 475, 477-78, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 412(1992) (citation omitted). This requirement was held to be mandatory under the FSA regardless of whether the factors were expressly listed under G.S. § 15A-1340.4(a)(1), *see State v. Melton*, 307 N.C. 370, 376, 298 S.E.2d 673, 678 (1983) (upon guilty plea to second degree murder, determination that defendant committed the offense with premeditation and deliberation is reasonably related to purposes of sentencing and transactionally related to the offense, and thus may be properly considered as non-statutory aggravating factor), and "regardless of whether the State specifically request[ed] a finding in this regard," *Flowe*, 107 N.C. App. at 472, 420 S.E.2d at 478; *see also State v. Cameron*, 314 N.C. 516, 520, 335 S.E.2d 9, 11 (1985) (trial court has duty "to examine the evidence to determine if it would support any of the statutory factors even absent a request by counsel").

Under the FSA, moreover, the trial court properly relied upon circumstances brought out at trial in determining the presence of aggravating factors, even though the State did not present evidence of such circumstances at the sentencing hearing. *Flowe*, 107 N.C. App. at 473, 420 S.E.2d at 478. Finally, the trial court was "not required to ignore the facts and evidence of the case," *State v. Morris*, 60 N.C. App. 750, 755, 300 S.E.2d 46, 49 (1983), but rather was to consider uncontradicted and credible evidence of aggravating factors, *State v. Parker*, 315 N.C. 249, 255, 337 S.E.2d 497, 500 (1985), *appeal after remand*, 319 N.C. 444, 355 S.E.2d 489 (1987).

The foregoing general principles enunciated in cases involving sentencing under the FSA are equally applicable to sentencing proceedings under the SSA. *Compare* N.C.G.S. § 15A-1340.12 (1997) *with* former N.C.G.S. § 15A-1340.3 (repealed by Session Laws 1993, c. 538, s. 14) (statutorily designated "purposes of sentencing" identical under

SSA and FSA). We therefore hold that in sentencing proceedings under the SSA, the trial court may properly find non-statutory aggravating factors not specifically requested by the State whether the circumstances supporting such factors are presented at trial, if the defendant pleads not guilty, or at the sentencing hearing.

To summarize, because the trial court impermissibly considered a non-statutory aggravating sentencing factor, the judgment entered on the felony charge of discharging a firearm into an occupied vehicle is vacated and the case remanded for resentencing in accordance with our opinion herein. As defendant was sentenced under the SSA, we take this occasion to reiterate admonitions from this Court in cases concerning implementation of the FSA, *i.e.*, that trial judges "may wish to exercise restraint when considering non-statutory aggravating factors after having found statutory factors." *State v. Baucom*, 66 N.C. App. 298, 302, 311 S.E.2d 73, 75 (1984).

[3] Prior to conclusion, we unfortunately must also address improprieties contained in defendant's appellate brief. In challenging the trial court's finding of the non-statutory aggravating sentencing factor, defendant argued to this Court as follows:

> What happened here, *and what has happened all too often in previous cases with Judge Webb*, is that the Trial Court abandoned its neutrality.
>
> *In [Judge Webb's] search for factors with which to aggravate the sentence* . . . .
>
> Essentially, Judge Webb penalized the Defendant *because [Judge Webb] believed the Defendant attempted to be uncooperative* . . . .

Defendant also set forth in his brief what he asserted to be the transcription of an excerpted exchange between Judge Webb and counsel for the defendant (not the same individual as defendant's counsel herein) in the Robeson County case of *State v. Sinclair*, Robeson County file number 97 CRS 8254. Defendant described the case *sub judice* as similar to that from Robeson County in that Judge Webb in each instance "took it upon himself to find a nonstatutory aggravator." According to defendant, Judge Webb in the Robeson County proceeding based his finding of the non-statutory aggravating factor upon evidence elicited from a witness recalled and questioned by Judge Webb on the court's own motion and over the defendant's objection, which objection "obviously displeased Judge Webb."

Suffice it to state that the official transcript of Robeson County case number 97 CRS 8254 is not contained in the instant record nor in the record of any matter presently or previously before this Court. *See* N.C.R. App. P. 9(a) (appellate review based "solely upon the record on appeal"). We also note that this Court has held that the trial court's calling a witness on its own initiative at a sentencing hearing was specifically authorized by N.C.G.S. § 15A-1334(b) (1997), *State v. Smith*, 41 N.C. App. 600, 602, 255 S.E.2d 210, 212 (1979), a statutory section which remains in effect notwithstanding enactment of the SSA.

While vigorous advocacy is not inappropriate and while hotly contested litigation may occasionally generate frustration, comments such as those cited above have no place in argument to this Court. Moreover, the gratuitous statements of defendant and the extraneous materials placed in his appellate brief have in no way assisted this Court either in understanding or deciding the issues of the instant case. *See* N.C.R. App. P. 28(a) ("function of all briefs . . . is to define clearly the questions presented to the reviewing court").

In addition, Rule 0.1[4] of The Revised Rules of Professional Conduct of the North Carolina State Bar (RRPC) provides, *inter alia*, that a "lawyer should demonstrate respect for the legal system and for those who serve it, including judges . . . ." Further, Comment [8] to RRPC 3.5 states in pertinent part:

> A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate.

N.C.R. App. P. 34(a)(3) authorizes this Court to impose sanctions against a party on its own motion when a

> brief . . . filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

N.C.R. App. P. 34(a)(3). Upon review of the appellate brief of defendant herein, we find it grossly lacking in the requirements of propriety; further, defendant's brief violated multiple appellate rules and contained materials outside the record and biased arguments, neither of which provided any meaningful assistance to this Court.

N.C.R. App. P. 35(a) directs that "if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered." Pursuant to said Rule and N.C.R. App. P. 34(a) and (b), we hereby tax the costs of the instant appeal to defendant, those costs to be paid personally by counsel for defendant. *See Roberts v. First-Citizens Bank and Trust Co.*, 124 N.C. App. 713, 716, 478 S.E.2d 809, 811 (1996) (cost of printing defendant's brief taxed to defendant's counsel).

No error in the trial; remand for resentencing; costs taxed to defendant, to be paid personally by counsel for defendant.

Judges MARTIN, Mark D., and McGEE concur.

DONNA CASSELS CONWAY, PLAINTIFF v. DONALD R. CONWAY, DEFENDANT

No. COA97-1439

(Filed 15 December 1998)

1. Divorce— equitable distribution—distribution factors—fault

The trial court did not err in an equitable distribution action by finding as a distributional factor that defendant had voluntarily and without plaintiff's consent removed himself from the marital home and terminated the relationship after completing his residency and moving to Asheville, but before purchasing a home and establishing his practice. The completion of defendant's residency and the family's move to a new location are relevant to plaintiff's contributions to defendant's career and the fact that defendant opened a private practice and then terminated the marriage before the practice was established is an important consideration in evaluating the distribution of the practice. The description of defendant's termination of the marriage as "voluntary" and "without plaintiff's consent" was merely incidental to the distributional factor as a whole.

2. Divorce— equitable distribution—relative size of marital estate—marital efforts

The trial court did not err in an equitable distribution action resulting in an uneven distribution by considering plaintiff's

marital efforts and the relative size of the marital estate. These were appropriate facts to consider in the context of plaintiff's aid in developing defendant's career potential and her contributions to defendant's medical professional license.

3. Divorce— equitable distribution—award in excess of net value

The trial court did not err in an equitable distribution action by awarding plaintiff property having a value in excess of the net value of the martial estate where the court found that the gross marital assets totaled $82,453.56 and marital debt $74,117.33, distributed 83% of the gross assets to plaintiff and all of the debt to defendant, and ordered defendant to pay plaintiff $61,676.17. Having found sufficient distributional factors to justify an unequal distribution of marital assets to plaintiff and distribution of the entire marital debt to defendant, the trial court acted within its discretion when it distributed the assets and debts independently.

4. Divorce— equitable distribution—distributional factors—medical license not valued

The trial court did not err in an equitable distribution action resulting in an unequal distribution by refusing to assign a value to defendant's professional medical license. The court must consider separate property, including professional licenses, when dividing marital property, but is not required to determine the numeric value of separate property when considering distributional factors.

5. Divorce— equitable distribution—uneven distribution—appreciation of medical license

The trial court did not err in an equitable distribution action resulting in an unequal distribution by not classifying and valuing as marital property the appreciation of defendant's medical license. The evidence tended to show that marital efforts led to the acquisition of the separate property rather than to an active increase in its value.

6. Divorce— equitable distribution—valuation of medical practice goodwill

The trial court erred in an equitable distribution action by accepting certain expert testimony regarding the value of the goodwill in defendant's medical practice. When a professional

practice has not been established for a sufficient period to determine goodwill based upon comparable past earnings, the capitalization of excess earnings method of valuing goodwill should be used.

Appeal by plaintiff and defendant from judgment entered 8 April 1997 by Judge Earl J. Fowler, Jr., in Buncombe County District Court. Heard in the Court of Appeals 26 August 1998.

Morrow, Alexander, Tash, Long & Kurtz, by C.R. "Skip" Long, Jr., for plaintiff-appellant.

Gum & Hillier, P.A., by Howard L. Gum; Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiff and defendant were married 1 September 1979, separated on 21 October 1994, and were divorced on 29 January 1996. Issues of alimony, support of the parties' two minor children, custody, and visitation have apparently been resolved and are not involved in this appeal. Both parties appeal from an equitable distribution judgment entered 8 April 1997.

At the time of the parties' marriage, both of them had undergraduate college degrees and defendant was enrolled in a graduate program for medical illustration. After completion of the requirements for his masters degree, plaintiff continued his education and enrolled in medical school in 1982. He completed medical school in 1986 and was in residency training until June 1994. Defendant obtained a license to practice medicine in North Carolina in the summer of 1994 and the parties moved to Asheville in August 1994, where defendant began a private medical practice as a plastic surgeon. The trial court found the net value of the parties' marital estate to be $8,336.56, consisting of gross marital assets totaling $82,453.89, and marital debt totaling $74,117.33. The trial court distributed 83% of the gross marital assets to plaintiff, all of the marital debt to defendant, and ordered defendant to pay plaintiff a distributive award of $61,676.17.

Defendant's Appeal

Defendant contends the trial court erred by considering improper distributional factors and by making an award to plaintiff in excess of

the total net value of the marital estate. We have carefully considered his arguments and reject them.

A.

[1] First, defendant contends the trial court improperly considered marital fault as a distributional factor. He directs us to the following distributional factor cited by the trial court in its order:

> 12. That evidence was offered concerning the following distributional factors, which the Court will consider in determining the most equitable distribution of the aforesaid marital estate:
>
> . . .
>
> d) That in 1994 the Defendant completed his residency training, and the family moved to Asheville for the purpose of beginning the Defendant's private practice as a plastic surgeon; however, before a home was purchased in Asheville, and before his practice was established, the defendant voluntarily and without Plaintiff's consent removed himself from the marital home and terminated the marriage relationship.

Defendant contends the finding indicates the trial court determined that defendant had abandoned plaintiff and considered the abandonment as a distributional factor justifying an unequal distribution. We disagree.

It is well established that marital misconduct or fault not affecting the marital economy may not be considered by the court in dividing the marital property. *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985); *Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E.2d 161 (1984). However, upon careful consideration of the challenged factor in its entirety, we do not believe the trial court's finding spoke to fault or misconduct; rather the finding includes important distributional facts. The completion of defendant's residency training and the family's move to a new location is relevant to plaintiff's contributions to defendant's professional career potential and development, and to his obtaining a professional license. *See* N.C. Gen. Stat. § 50-20(c)(7) & (8) (1995). Moreover, the short period of time between the opening of defendant's medical practice and the termination of the marriage is relevant to the short amount of marital time in which plaintiff contributed to defendant's medical practice. *See* N.C. Gen. Stat. § 50-20(c)(6) (1995). The fact that defendant opened a private practice and then terminated the

marriage before the practice was established is an important consideration in evaluating how to distribute the medical practice. We consider the court's description of defendant's termination of the marriage as "voluntary" and "without the plaintiff's consent" as merely incidental to the distributional factor as a whole. This assignment of error is overruled.

B.

[2] Defendant also contends the trial court improperly considered plaintiff's marital efforts and the relative size of the marital estate. We disagree. Plaintiff's efforts in the marriage and the relatively small size of the net marital estate were appropriate facts to consider in the context of (1) plaintiff's aid in developing defendant's career potential, *see* N.C. Gen. Stat. § 50-20(c)(7) (1995), (2) her contributions to defendant's medical professional license, *see* N.C. Gen. Stat. § 50-20(c)(8) (1995), and (3) her contributions as homemaker. *See* N.C. Gen. Stat. § 50-20(c)(6) (1995).

C.

[3] Finally, defendant contends the trial court exceeded its authority by awarding plaintiff marital property having a value in excess of the total net value of the marital estate. He argues the court is limited to awarding either party an amount which does not exceed the value of the net marital estate. We disagree.

In distributing marital assets, the trial court is required by G.S. § 50-20 (1995) to (1) classify property as marital, separate, or mixed, (2) determine the net value (fair market value less encumbrances) of the property, and (3) distribute the property equally, unless equity requires an unequal distribution. *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994); *McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988); *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *affirmed and remanded*, 319 N.C. 367, 354 S.E.2d 506 (1987); *Cable v. Cable*, 76 N.C. App. 134, 331 S.E.2d 765 (1985). In valuing an asset, the trial judge finds the fair market value and reduces it by any encumbrances on that property. *Carlson v. Carlson*, 127 N.C. App. 87, 487 S.E.2d 784, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 407 (1997); *Hendricks v. Hendricks*, 96 N.C. App. 462, 386 S.E.2d 84 (1989), *cert. denied*, 326 N.C. 264, 389 S.E.2d 113 (1990) (trial court erred by allocating property based on its gross fair-market value without considering the outstanding credit card balance on the property); *Beightol v. Beightol*, 90 N.C. App. 58, 367 S.E.2d 347, *disc. review denied*, 323

N.C. 171, 373 S.E.2d 104 (1988). Defendant argues that the same valuation process used to value individual marital assets should be applied to the marital estate as a whole.

G.S. § 50-20(c) provides:

> There shall be an equal division by using net value of marital property 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 equitably.

N.C. Gen. Stat. § 50-20(c) (1995). The statute does not limit the scope of the trial court's authority as argued by defendant; indeed, the net market value of *each asset* is determined when marital property is valued, not the marital estate as a whole. "The Act requires the trial court to first determine what constitutes marital property, to then determine the net market value of *that property*, and finally, to distribute it based on the equitable goals of the statute and the specific statutory factors." *Little v. Little*, 74 N.C. App. 12, 16, 327 S.E.2d 283, 287 (1985) (emphasis added). The trial court does not lose its ability to distribute marital assets simply because marital debts equal or exceed the value of those assets. In addition, where marital debts significantly reduce the net marital estate, the trial court still retains the discretion to distribute the individual assets and debts independently. *See Smith v. Smith*, 111 N.C. 460, 433 S.E.2d 196 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994) (distribution of marital debts is matter committed to sound discretion of trial court); *Rawls v. Rawls*, 94 N.C. App. 670, 381 S.E.2d 179 (1989). Otherwise, the trial court would lose its authority to distribute significant assets merely because there are unrelated debts diminishing the net value of the estate. Having found sufficient distributional factors in this case to justify an unequal distribution of the marital assets to plaintiff and distribution of the entire marital debt to defendant, the trial court acted within its discretion when it distributed the assets and debts independently.

Defendant's remaining assignments of error are deemed to have been abandoned. N.C.R. App. P. 28(a).

Plaintiff's Appeal

In her appeal, plaintiff contends the trial court erred and abused its discretion when it (A) failed to assign a value to defendant's professional medical license; (B) failed to find that a portion of the value

of defendant's professional medical license was a result of active appreciation and, therefore, was a marital asset to be distributed; and (C) valued defendant's good will in his medical practice at $3,000. We reject her first two contentions, but find merit in the third.

A.

[4] First, plaintiff argues that the trial court erred in refusing to assign a value to defendant's professional medical license. We disagree. A professional license is separate property. N.C. Gen. Stat. § 50-20(b)(2) (1995). Marital contributions to separate property, such as a professional license, may be considered as a distributional factor. N.C. Gen. Stat. § 50-20(c)(8) (1995). The trial judge must consider separate property, including professional licenses, when dividing marital property. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985); *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). However, there is no requirement that the trial court determine the numeric value of separate property when considering distributional factors. *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993). "There is no language within § 50-20(c) which would indicate that the trial court is required to place a monetary value on any distributional factor and we decline to impose such an unnecessary burden upon the trial court." *Gum v. Gum*, 107 N.C. App. 734, 739, 421 S.E.2d 788, 791 (1992).

The trial court found defendant's medical license to be separate property, that it has a "very significant value," and is "the only significant asset acquired by these parties during the years of their marriage." Having classified the license as separate and considered its "very substantial value," the trial court did not err in refusing to assign it a monetary value.

B.

[5] Plaintiff also contends the trial court erred by failing to classify as marital property, and value, a portion of defendant's professional license as being the result of active appreciation. Again, we disagree.

When marital efforts actively increase the value of separate property, the increase in value is marital property and is subject to distribution. *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993); *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991). To demonstrate active appreciation of separate property, there must be a showing of the (1) value of asset at time of acquisition, (2) value of

asset at date of separation, (3) difference between the two. *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910 (1985), *overruled on other grounds*, *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1987). Any increase is presumptively marital property unless it is shown to be the result of passive appreciation. *See Smith*, 111 N.C. App. 460, 433 S.E.2d 196.

> In light of the remedial nature of the statute and the policies on which it is based, we interpret its provision concerning the classification of the increase in value of separate property as referring only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise by one or both of the spouses.

Wade v. Wade, 72 N.C. App. 372, 379, 325 S.E.2d 260, 268, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). In order for the court to value "active appreciation" of separate property and distribute the increase as marital property, the party seeking distribution of the property must offer credible evidence showing the amount and nature of the increase. *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752, *disc. review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997); *McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

In this case, plaintiff did not show an increase in value of the license between its acquisition in June 1994 and the date of separation in October 1994. The evidence tended to show that marital efforts led to the acquisition of the separate property rather than to an active increase in its value. Therefore, the trial court did not err in refusing to value the active appreciation of the medical license.

The confusion lies in the distinction between appreciation of separate property and the acquisition of marital property:

> If an asset is characterized as separate property that has increased in value during the marriage, the court's focus is on the appreciation occurring during the marriage and whether that appreciation was passive or active. If, on the other hand, an asset is characterized as marital property to which a contribution of separate property was made, in which case it is of a dual nature having a marital and a separate property component, then the primary focus is on *acquisition*, not appreciation.

Smith v. Smith, 111 N.C. App. 460, 475, 433 S.E.2d 196, 205 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

Where there is no statute controlling whether property is marital or separate, this Court has adopted a dynamic rather than a static interpretation of the term "acquired" as used in G.S. § 50-20(b), stating "that acquisition must be recognized as the ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained." *Smith* at 473, 433 S.E.2d at 204 (quoting *Wade v. Wade*, 72 N.C. App. 372, 380, 325 S.E.2d 260, 268-69 (1985)). This flexible notion of acquisition underlies the "source of funds doctrine," treating acquisition "as an ongoing process" and finding that "property may have a dual nature and consist of both marital property and separate property components." *Id.*

Under the source of funds doctrine, the trial court's finding that the medical license "had a very significant value" and represented "the only significant asset acquired by these parties during the years of their marriage," would have led to the conclusion that the license was marital property subject to distribution because it was acquired by marital efforts. However, the statute defining the professional license as separate, controls in this case. N.C. Gen. Stat. § 50-20(b)(2) (1995). Classifying the efforts leading to the acquisition of a professional license as "marital" under the "active appreciation doctrine" would undermine this statutory definition of professional licenses as separate property.

C.

[6] Finally, plaintiff disputes the trial court's valuation of the good will in defendant's medical practice. The trial court valued defendant's good will at $3,000 based upon expert testimony. Plaintiff argues that the expert applied no legitimate method in valuing the good will in the practice. We agree.

"When valuing a professional practice, a court should consider the business' fixed assets, the value of its work in progress and accounts receivable, its goodwill and its liabilities." *Harvey v. Harvey*, 112 N.C. App. 788, 791, 437 S.E.2d 397, 399 (1993).

> On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

Poore v. Poore, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). Several methods

have been approved in valuing good will. These methods focus on past results, not post-marital efforts, and include: (1) the price a willing buyer would pay, (2) capitalization of excess earnings, (3) one year's average gross income of the practice, and (4) evidence of sales of comparable practices. *Id.* at 421-22, 331 S.E.2d at 271-72.

In this case, defendant's expert valued good will in the medical practice at $3,000. This value reflected two months of $1,500 shared expenses. Defendant's expert explained that when a practice has been in existence for a short period of time, the goodwill is measured by the value of having the practice "up and running as opposed to just thinking about it." This is not a legitimate method of computing the goodwill of the practice.

In addition, the trial court should:

> make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied.

McLean v. McLean, 323 N.C. 543, 558, 374 S.E.2d 376, 385 (1988) (quoting *Poore*, at 422, 331 S.E.2d at 272). While the trial court stated the value of the goodwill, it did not "clearly indicate the evidence on which its valuations are based," nor did it note the method of valuation.

When, as in this case, a professional practice has not been established for a sufficient period to determine goodwill based upon comparable past earnings, the capitalization of excess earnings method of valuing goodwill should be used.

> Under this approach, the value of goodwill is based in part on the amount by which the earnings of the professional spouse exceed that which would have been earned by a person with similar education, experience, and skill as an employee in the same general locale.

Poore, at 421-22, 331 S.E.2d at 271-72.

For the reasons set forth herein, we vacate that portion of the equitable distribution order which determines the value of defendant's good will in his medical practice, and remand this case to the district court for a proper determination of such value and recalculation of the amount of any distributive award to which plaintiff

may be entitled as a result of such valuation. Otherwise, the judgment is affirmed.

Affirmed in part, vacated in part, and remanded.

Judges LEWIS and WALKER concur.

STEVEN LILLER, PLAINTIFF v. QUICK STOP FOOD MART, INC., DEFENDANT

No. COA97-686

(Filed 15 December 1998)

Negligence— store security—criminal act of third party—foreseeability—proximate cause

The trial court did not err by granting summary judgment for defendant in a negligence action against the owner of a convenience store arising from an assault at the store. Although plaintiff's forecast of evidence raised a genuine issue of foreseeability in that four previous assaults at this location and two armed robberies are not so different in character from the attack suffered by plaintiff as to make the attack upon him unforeseeable as a matter of law, there was before the trial court no evidence that an act or omission of defendant constituted a proximate cause of the assault upon plaintiff. Plaintiff alleged that defendant was negligent in failing to take adequate security measures, but his expert's risk assessment was of the store generally and not of this incident, there was testimony that plaintiff's assailant appeared to be intoxicated or on drugs, and plaintiff's expert agreed that individuals who are intoxicated or irrational are not reasonably deterred by security precautions.

Plaintiff appeals from summary judgment order filed 6 December 1996 by Judge D. B. Herring, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 28 January 1998.

Hartley & Edwards, by Charlene Edwards, for plaintiff-appellant.

Young, Moore, and Henderson, P.A., by John A. Michaels and Reed N. Fountain, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's grant of defendant's summary judgment motion. We affirm.

Pertinent facts and procedural information include the following: Defendant Quick Stop Food Mart, Inc. is a North Carolina corporation which operates a number of convenience stores throughout the state.

On 20 March 1994, plaintiff drove to defendant's Quick Stop Food Mart in Fayetteville (the store) to purchase beer. At approximately 1:30 a.m., plaintiff was the victim of a shooting by a third person (assailant) not employed by defendant. According to plaintiff, he was approached in the parking lot by assailant who pointed a gun at plaintiff and demanded his gold necklace. Plaintiff responded by running toward the store, but was shot by assailant in the left thigh and right leg as plaintiff grabbed the handle of the door. Plaintiff was transported to the hospital and subsequently underwent surgery for his injuries.

Detective Larry J. Ranew (Ranew) of the Cumberland County Sheriff's Department investigated the incident. Ranew interviewed Huey Peterson (Peterson) who had been robbed of his shoes and jacket by assailant in the store's parking lot immediately prior to the assault on plaintiff. Ranew also took statements from the store clerk and plaintiff, both of whom described assailant as having a "wild" look.

Plaintiff filed the instant action 12 December 1995, asserting he had suffered severe and painful injury as a result of defendant's negligence. Plaintiff alleged defendant

> had a legal duty which it owed the Plaintiff to exercise reasonable care to protect patron from intentional injuries by third persons that were foreseeable.

More specifically, plaintiff claimed defendant was negligent "in that it did not take adequate measures to protect its business invitees from criminal acts of third parties."

Lee Witter (Witter), plaintiff's expert witness in security consulting, performed a security audit of the store. Witter concluded that from 21 April 1991 to 20 March 1994, there were twenty-four criminal incidents at the store and the intersection wherein it was located, including seven violent crimes. Moreover, in Witter's opinion,

> the attack on [plaintiff] came as a direct result of a lack of security which was below the minimal standards as well as that required by a high risk area.

Defendant moved for summary judgment 18 November 1996, which motion was allowed in an order entered 5 December 1996. Plaintiff appeals.

Summary judgment is properly entered when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1990). The burden is on the movant to show:

> (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim.

Lyles v. City of Charlotte, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996).

A *prima facie* case of negligence includes the following elements:

> (1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances.

Lavelle v. Schultz, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715-16 (1996).

Defendant argues the trial court's grant of summary judgment was appropriate by reason of failure of the forecast of evidence on each prong of a negligence claim. *See Lavelle*, 120 N.C. App. at 862, 463 S.E.2d at 571 (summary judgment appropriate in absence of evidence of proximate cause). We conclude defendant's contention has merit with regard to the element of proximate cause.

As to whether defendant owed a duty to plaintiff, it is well settled in this jurisdiction that an individual who enters the premises of a retail establishment during business hours, as did plaintiff herein, is a

business invitee for purposes of evaluating the duty owed by the owner of the premises to that individual. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981). While an owner is not ordinarily liable for injuries to invitees resulting from intentional, criminal acts of third persons, *id.*,

> [i]f an invitee . . . alleges in a complaint that he or she was on the premises of a store owner, during business hours for the purpose of transacting business thereon, and that while he or she was on the premises injuries were sustained from the criminal acts of a third person, which acts were reasonably foreseeable by the store owner, and which could have been prevented by the exercise of ordinary care, then the plaintiff has set forth a cause of action in negligence which, if proved, would entitle that plaintiff to recover damages from the store owner.

Id. at 640, 281 S.E.2d at 39. Thus, determination of an owner's duty with respect to intentional, criminal acts directed at invitees on store premises turns on whether such acts were reasonably foreseeable by the owner.

In *Foster*, plaintiff brought a negligence action seeking to recover damages in consequence of injuries sustained when she was assaulted in defendants' shopping mall. In support of her claim, plaintiff submitted evidence of "thirty-one incidents of criminal activity reported on defendants' premises" in the year prior to her assault. *Id.* at 642, 281 S.E.2d at 40. In reversing the trial court's grant of defendants' summary judgment motion, our Supreme Court stated:

> We cannot hold as a matter of law that the thirty-one criminal incidents . . . occurring on the shopping mall premises within the year preceding the assault on plaintiff were insufficient to charge defendants with knowledge that such injuries were likely to occur. The issue of foreseeability should therefore be determined by the jury[.]

Id.

The quantity and quality of criminal incidents necessary to access the *Foster* rule have been examined on several occasions since that 1981 decision. *See, e.g., Murrow v. Daniels*, 321 N.C. 494, 502, 364 S.E.2d 392, 398 (1988) (evidence of one-hundred incidents of criminal activity in five years at intersection where defendant motel was located held "sufficient to raise a triable issue of fact as to whether

the attack on the plaintiff was reasonably foreseeable"); *Sawyer v. Carter*, 71 N.C. App. 556, 322 S.E.2d 813 (1984), *disc. review denied*, 313 N.C. 509, 329 S.E.2d 393-94 (1985) (evidence of single robbery of convenience store five years earlier, coupled with evidence of occasional robberies of other convenience stores and businesses at unspecified locations over extended period of time, insufficient evidence of foreseeability and duty to survive defendant's summary judgment motion); *Brown v. N.C. Wesleyan College*, 65 N.C. App. 579, 583, 309 S.E.2d 701, 703 (1983) ("scattered incidents of crime through a period beginning in 1959 were not sufficient to raise a triable issue as to whether the abduction and subsequent murder of plaintiff's intestate was reasonably foreseeable" by defendant college); *Urbano v. Days Inn*, 58 N.C. App. 795, 798-99, 295 S.E.2d 240, 242 (1982) (evidence of forty-two episodes of criminal activity taking place on motel premises during three-year period prior to plaintiff's injury, twelve in the three and a half month period immediately prior to incident, raised triable issue of reasonable foreseeability).

In the case *sub judice*, defendant asserts that

> not only does the forecast of evidence fail to set forth a sufficient number of prior criminal acts on defendant's premises, it does not demonstrate that those few criminal acts which did occur at the [premises] over time were the type of crimes that would reasonably put defendant on notice for the potential of a violent shooting.

We do not agree.

The survey of plaintiff's expert indicated that in the period between 21 April 1991 through 20 March 1994, twenty-four incidents, including seven violent crimes, had occurred at the store and in the immediate vicinity thereof. Defendant takes issue with that assessment, but agrees "plaintiff's forecast of evidence show[ed] four assaults and two armed robberies over a three year period." In light of six undisputed violent incidents over a three-year period, we cannot say as a matter of law that the evidence was "insufficient to charge defendant[] with knowledge that . . . injuries [such as that incurred by plaintiff] were likely," *see Foster*, 303 N.C. at 642, 281 S.E.2d at 40, thereby precluding imposition upon defendant of a duty to have exercised ordinary care to prevent plaintiff's injury.

Notwithstanding, relying on *Shepard v. Drucker & Falk*, 63 N.C. App. 667, 306 S.E.2d 199 (1983), defendant further contends

> the *type* of prior crime is important in establishing whether it was sufficiently similar to the crime in question to put the defendant on notice of a particular danger.

Shephard is distinguishable.

In *Shepard*, an apartment complex tenant sued her landlord as the result of personal injuries suffered during a sexual assault at gunpoint in the complex parking lot. Evidence of crimes committed at the same complex wherein a passkey was used to break into apartments was held inadmissible because the burglaries "had nothing to do with this attack in the parking lot." *Id.* at 670, 306 S.E.2d at 202.

We agree that property crimes committed on defendant's property, such as shoplifting and "gas driveoffs", do not likely establish the foreseeability necessary to create a duty in this case. However, four assaults and two armed robberies are not so different in character from the attack suffered by plaintiff as to make the attack upon him unforeseeable as a matter of law. Plaintiff was approached by assailant who was armed and demanded plaintiff's gold necklace before shooting him, a transaction not altogether different from assault and armed robbery. The forecast of evidence thus raised a genuine issue of material fact as to the foreseeability to defendant of the attack upon plaintiff. *See Foster*, 303 N.C. at 642, 281 S.E.2d at 39.

However, the sufficiency of the forecast of evidence of proximate cause, likewise an essential element of negligence, is a different matter.

> Proximate cause is
>
> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). To establish that negligence was a proximate cause of the injury suffered, a plaintiff must establish that the injury would not have occurred but for the defendant's negligence. *See Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985) (concerning legal malpractice).

Notwithstanding allegations in plaintiff's complaint that defendant was negligent in failing to take adequate measures, including the provision of security guards and installation of a security surveillance or burglar alarm system, to protect its customers from the criminal acts of third persons, the forecast of evidence failed to show how the foregoing actions, or any other measures, would have prevented plaintiff's assault.

Plaintiff testified assailant appeared to be intoxicated or high on drugs and "looked mean and wild" and "crazy." According to Ranew's testimony, the store clerk similarly observed a "wild look" on assailant's face. In addition, Ranew stated without objection that Peterson, who had been robbed by assailant immediately prior to the attack on plaintiff, described assailant as "[very] drunk." Substantiating this characterization of assailant was the circumstance that, according to all witnesses, assailant shot plaintiff in front of a well-lighted store and thereupon chased plaintiff into the store to shoot him again, thereby increasing the likelihood of identification and apprehension. Plaintiff's expert agreed that individuals who are irrational or intoxicated as the result of ingestion of drugs or alcohol are not reasonably deterred by security precautions.

Moreover, while plaintiff might seek to rely on Witter's statement that the attack "came as a direct result of a lack of security" as evidence of proximate cause, Witter conceded his risk assessment was "not an analysis of the incident that happened," but rather of the store generally. The expert's deposition likewise revealed a lack of knowledge as to the specifics of the attack on plaintiff.

Taken in context with these latter factors, Witter's conclusory statement without factual support was insufficient to raise a genuine issue of material fact as to the proximate cause element of plaintiff's negligence claim. *See Lavelle*, 120 N.C. App. at 862, 463 S.E.2d at 571 (conclusory statements which "fail[ed] to point to specific facts sufficient to support each element of negligence, particularly . . . proximate cause" were insufficient to withstand summary judgment); *see also Mickles v. Duke Power Co.*, 342 N.C. 103, 111, 463 S.E.2d 206, 212 (1995) (expert's opinion that defendant power company knew decedent lineman's pole strap would fail when using standard work procedures was "inherently incredible" under the circumstances of the case, and did "not suffice to create a genuine issue of material fact for purposes of determining the appropriateness of summary judgment").

Accordingly, there was before the trial court no evidence that an act or omission of defendant constituted a proximate cause of the assault upon plaintiff. *See Braswell v. Braswell*, 330 N.C. 363, 376, 410 S.E.2d 897, 905 (1991) ("[i]t is a sad but certain fact that some individuals commit despicable acts for which neither society at large nor any individual other than those committing the acts should be held legally accountable"). It having been shown that plaintiff was unable to produce evidence to support an essential element of his claim, *Lyles*, 120 N.C. App. at 99, 461 S.E.2d at 350, therefore, the trial court's entry of summary judgment in favor of defendant must be affirmed.

Affirmed.

Judges GREENE and MARTIN, Mark D., concur.

MICHAEL HOWELL, PETITIONER v. RONALD W. MORTON, AREA DIRECTOR, FORSYTH-STOKES MENTAL HEALTH, RESPONDENT

No. COA97-1559

(Filed 15 December 1998)

1. Appeal and Error— brief—characters per line—rules violation

The printing costs of an appeal were taxed personally to petitioner's and respondent's attorneys where both briefs contained in excess of ninety-eight characters per line and violated Appellate Rule 26 (and otherwise would have exceeded the thirty-five page limitation of Rule 28). Rule 26 requires at least 11 point type, a standard met in computer and word processing technology by utilizing no smaller than a size twelve Courier or Courier New font.

2. Administrative Law— recommended decision—not adopted or rejected—remedy

The trial court did not have subject matter jurisdiction over petitioner's appeal where petitioner obtained a recommendation from the State Personnel Commission to the Local Appointing Authority that he be reinstated with payment for lost wages; he filed this action on 19 March seeking judicial review because he was dissatisfied with the action taken by respondent; the Local

Appointing Authority issued its final decision declining to adopt the recommended decision on 9 April; and the court granted respondent's motion to dismiss. The superior court did not have subject matter jurisdiction because petitioner sought judicial review before the Local Hiring Authority had issued its final decision. If petitioner was dissatisfied with the inaction of the Local Appointing Authority, his remedy was to proceed under N.C.G.S. § 150B-44, which provides for a court order compelling agency action.

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 15 September 1998.

Robert Winfrey for petitioner.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr., for respondent.

SMITH, Judge.

Petitioner appeals the trial court's grant of respondent's motion to dismiss for failure to state a claim under N.C. Gen. Stat. 1A-1, Rule 12(b)(6) (1990). Petitioner further avers the court erred by denying his motion to amend his petition for judicial review. We vacate the decision below on the grounds that the superior court did not have subject matter jurisdiction over petitioner's appeal.

Relevant facts and procedural history include the following: In March 1994, petitioner Michael Howell (Howell) was discharged by respondent Robert W. Morton (Morton) from his employment with Forsyth-Stokes Mental Health Center for "just cause" as set forth in N.C. Gen. Stat. § 126-35 (1993). Howell appealed his discharge on 29 April 1994 and the matter was heard by Administrative Law Judge (ALJ) Sammie Chess, Jr. The ALJ issued a recommended decision in favor of Howell on 24 March 1995 concluding, *inter alia*, that petitioner should "be reinstated to his former position . . . be paid for his lost wages . . . and [should receive] payment of his reasonable attorney's fees."

Subsequently, pursuant to N.C. Gen. Stat. § 126-37(a) (1993), the case was heard by the State Personnel Commission (Commission), which issued a recommendation adopting the decision of the ALJ on 18 January 1996. The case was then transferred to Local Appointing Authority (LAA) Morton for a final decision.

On 19 March 1996, petitioner sought judicial review of the Commission's recommended decision in superior court pursuant to N.C. Gen. Stat. § 126-37(b) (1993). Specifically, Howell requested an order "affirming the recommended decision by the [Commission]," because he was "dis-satisfied with the action taken by [respondent] pursuant to the [Commission's] Recommended Decision."

On 9 April 1996, LAA Morton issued his final decision wherein he declined to adopt the recommended decision of either the ALJ or the Commission. Instead Morton "affirm[ed] his decision of March 30, 1994 in dismissing [Howell]."

On 23 April 1996, Howell filed an amended petition for judicial review pursuant to G.S. § 126-37(b) and Chapter 150B, the Administrative Procedure Act (APA). Respondent filed a motion to dismiss petitioner's amended petition pursuant to N.C. R. Civ. P. 12(b)(6) on 15 May 1996. Petitioner moved to file a second amended petition 23 May 1996, and the court denied petitioner's motion 8 November 1996.

On 4 September 1997, the court granted respondent's motion to dismiss, and petitioner filed a timely notice of appeal 1 October 1997.

I.

[1] Preliminarily, we note that petitioner's and respondent's briefs violate Rule 26(g) of the North Carolina Rules of Appellate Procedure. Rule 26 requires "at least 11 point" type; the term "point" referring to the height of a letter, extending from the highest part of any letter, such as "b" to the lowest part, such as "y." *See* N.C. App. P. R. 26(g); *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 147, 468 S.E.2d 269, 273 (1996). Accordingly, a brief submitted in eleven point type will contain not more than sixty-five (65) characters and spaces per line, and no more than twenty-seven (27) lines of double spaced text per page. *See Lewis*, 122 N.C. at 147, 468 S.E.2d at 273.

Although Rule 26 does not speak in terms of characters per inch (cpi), a standard not equivalent to point size, "[t]en characters per inch is . . . the standard we will apply to the briefs filed with this Court." *Id.* This standard is met when a brief is presented in the same type-setting as used by this Court in its slip opinions—Courier 10cpi—which insures no more than sixty-five (65) characters per line and twenty-seven (27) lines per page. Courier 10cpi may be achieved in computer and word processing technology by utilizing no smaller than size twelve (12) Courier or Courier New font.

In the case *sub judice*, both the briefs of petitioner and respondent contain in excess of ninety-eight characters per line and thus violate Rule 26. Absent this violation, both briefs would exceed the thirty-five (35) page limitation set forth in Rule 28.

In light of the steady increase in appeals filed with this Court each year, we are particularly concerned with the concomitant increase in appellate rule violations. Accordingly, we remind our colleagues in the Bar of the importance of adhering to our appellate rules. As stated by Greene, J., writing for this Court in *Lewis*, these rules "prevent unfair advantage to any litigant" and insure a level playing field for all parties on appeal. *Id.*

In the instant case, the violations of the rules by each party subject the appeal to dismissal. *See Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 568 (1984). Nevertheless, we elect pursuant to N.C.R. App. P. 2 to consider the merits of this appeal. However, we also deem it appropriate in our discretion to impose a sanction for these violations of our mandatory appellate rules, and tax one-half of the printing costs personally against petitioner's attorney, and one-half of the printing costs personally against respondent's attorney. N.C.R. App. P. 25(b) (1998).

II.

[2] Although neither party argues the issue in their briefs, we must first consider whether the superior court had subject matter jurisdiction over Howell's petition for judicial review. *See Union Grove Milling and Manufacturing Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478 (1993) (Court may raise the question of subject matter jurisdiction on its own motion, even if it was not argued by the parties in their briefs). We hold the superior court did not have subject matter jurisdiction because petitioner's petition was prematurely filed.

Local appointing authority employees (such as petitioner) are subject to the provisions of the State Personnel Act, codified at N.C. Gen. Stat. §§ 126-1 through 126-88. N.C. Gen. Stat. § 126-5(a)(2) (1995) (listing employees of area mental health, mental retardation, and substance abuse authorities as employees subject to Chapter 126). Article 8 of Chapter 126 concerns "Employee Appeals of Grievances and Disciplinary Action," and in conjunction with the provisions for administrative hearings of "contested cases" under Article 3 of the Administrative Procedure Act (APA), (N.C. Gen. Stat. §§ 150B-22

through 150B-37), entitles certain state employees "aggrieved" by agency or departmental decisions affecting their employment to administrative and judicial review of those decisions. *See* N.C. Gen. Stat. § 150B-43 (1995); *see also Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 342, 389 S.E.2d 35, 38 (1990).

Unlike the jurisdiction of the Office of Administrative Hearings (OAH) over employee appeals, which derives from Chapter 126, *see Batten*, 326 N.C. at 342, 389 S.E.2d at 38, the North Carolina Supreme Court has made clear that the "[j]urisdiction of the superior courts over final decisions of the [agency] derives not from Chapter 126, but from Chapter[] 7A and [from the Administrative Procedure Act (APA), Chapter] 150B." *Harding v. N.C. Dept. of Correction*, 334 N.C. 414, 418, 432 S.E.2d 298, 301 (1993); *cf. Hill v. Morton*, 115 N.C. App. 390, 392, 444 S.E.2d 683, 685 (1994) (Chapter 126 does not create a cause of action but instead refers to judicial review provided by G.S. § 150B-43).

Chapter 7A states in relevant part:

> the superior court division is the proper division, without regard to the amount in controversy, for review by original action or proceeding, *or by appeal, of the decisions of administrative agencies, according to the practice and procedure provided for the particular action, proceeding, or appeal.*

N.C. Gen. Stat. § 7A-250(a) (1995) (emphasis added).

The APA provides:

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

G.S. § 150B-43 (emphasis added).

In the instant case, Howell petitioned for judicial review of the Commission's advisory decision under G.S. § 126-37 before this section was amended effective 1 January 1995. The prior version of Section 126-37 provided in relevant part:

> a) The State Personnel Director or any other person or persons designated by the Commission shall investigate the disciplinary action or alleged discrimination which is appealed to the

> Commission. Appeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B . . . . The State Personnel Commission shall make a final decision in these cases as provided in G.S. 150B-36 [which involve appeals alleging discrimination]. . . . *However, in all other local employee appeals, the decisions of the State Personnel Commission shall be advisory to the local appointing authority.*
>
> b) An action brought in superior court by an employee who is dissatisfied with an advisory decision of the State Personnel Commission or with the action taken by the local appointing authority pursuant to the [Commission's] decision shall be heard upon the record and not as a trial de novo. . . . If superior court affirms the decision of the Commission, the decision of superior court shall be binding on the local appointing authority.

N.C. Gen. Stat. § 126-37(a), (b) (1993) (emphasis added).

Howell's petition did not allege discrimination, and thus, as prescribed in G.S. § 126-37, the Commission's decision was not a final agency decision but was "advisory to the local appointing authority [LAA]." G.S. § 126-37(a). The LAA's final decision in Howell's contested case was issued on 9 April 1996, twenty-one days *after* Howell petitioned the court to "affirm[] the *recommended* decision by the [Commission]." (Emphasis added).

The jurisdiction of the superior court, however, is predicated upon compliance with the requirements of Chapter 150B, *see Harding*, 334 N.C. at 418, 432 S.E.2d at 301, which only permits judicial review for a "person . . . aggrieved by the *final decision* in a contested case." G.S. § 150B-43 (emphasis added). "To obtain judicial review of a final decision under [the APA], the person seeking review must file a petition . . . within 30 days *after* the person is served with a written copy of the decision." N.C. Gen. Stat. § 150B-45 (1995) (emphasis added). Furthermore, a party seeking judicial review must exhaust all available administrative remedies to avoid the " 'interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts [which] would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies.' " *Jackson v. Dept. of Administration*, 127 N.C. App. 434, 436, 490 S.E.2d 248, 249 (1997) (quoting *Elmore v. Lanier, Comr. of Insurance*, 270 N.C. 674, 678, 155 S.E.2d 114, 116 (1967)), *appeal*

dismissed and disc. review denied, 292 N.C. 264, 233 S.E.2d 391 (1977)); *see also* G.S. § 150B-43. Since LAA Morton had not issued a final decision as of the date Howell filed his petition for judicial review, Howell did not adhere to the procedures set out in Chapter 150B to obtain judicial review and the superior court was therefore without jurisdiction to entertain his appeal.

Petitioner argues, however, that G.S. § 126-37(b) provides procedures for one seeking judicial review in two circumstances: 1) when an employee is "dissatisfied with an advisory decision of the [Commission]," or 2) when an employee is dissatisfied with the "action taken by the local appointing authority pursuant to the decision [of the Commission]." *See* G.S. § 126-37(b).

As to the former circumstance, petitioner cannot now assert that he was "dissatisfied with an advisory decision of the [Commission]" because he petitioned "the Court for a decision *affirming* the recommended decision of the [Commission]," stating that he "[wa]s satisfied with the [Commission's] decision." By the clear language of his petition, Howell was not "*dissatisfied*" with the recommended decision of the Commission. G.S. § 126-37(b) (emphasis added). Howell's petition, therefore, does not meet the first circumstance outlined in G.S. § 126-37(b), and judicial review cannot be based upon this ground.

Accordingly, we need not address the statutory conflict between the language of G.S. § 126-37(b) (judicial review of "*advisory*" decisions of the Commission) and the language of G.S. 150B-43 (judicial review for only *final* agency actions). However, we note that the amendment to G.S. § 126-37(b), which took effect 1 January 1995, is in accord with Chapter 150B's requirement of final agency action as a predicate to proper judicial review.

Petitioner further argues, however, that he falls within the second circumstance described in Section 126-37(b) because he was "dis-satisfied with the action taken by [respondent] pursuant to the [Commission's] Recommended Decision." *See* G.S. § 126-37(b). Specifically, petitioner maintains that judicial review of the Commission's recommended decision was proper because after being notified of the Commission's recommended decision on 18 January 1996, the LAA "refused to either implement the recommended decision . . . or otherwise to resolve this matter." Petitioner thereby reads "action taken by the [LAA]" in G.S. § 126-37(b) to include the *inaction or delay* of the LAA. We disagree with petitioner's interpretation.

The term "action" in G.S. § 126-37(b) is not defined in Chapter 126, but can be interpreted either to include the inaction of the LAA, or as only encompassing the LAA's final action, *i.e.* the final decision of the LAA. This ambiguity must be resolved by determining the intent of the legislature; in determining that intent, it is proper to review any amendments to the statute which may reveal or address the ambiguity. *See Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 435, 470 S.E.2d 552, 555, *disc. review denied*, 343 N.C. 749, 473 S.E.2d 609-10 (1996); *see also Cunningham v. Catawba County*, 128 N.C. App. 70, 73, 493 S.E.2d 82, 85 (1997) (interpreting whether the LAA is required to follow section 150B-36 by considering amendment to G.S. § 126-37(b)).

In 1994, the General Assembly amended G.S. § 126-37(b), which now provides in pertinent part:

> b1) . . . the decision of the [Commission] shall be advisory to the [LAA]. . . . The [LAA] shall, within 90 days of receipt of the advisory decision of the [Commission], issue a written, final decision either accepting, rejecting, or modifying the decision of the [Commission].
>
> b2) The final decision is subject to judicial review pursuant to Article 4 of Chapter 150B of the General Statutes. . . .

N.C. Gen. Stat. § 126-37(b1), (b2) (1995).

We have previously stated "that this amendment reflects the intent of the legislature in enacting the original version of section 126-37 and was an effort by the legislature to clarify its original language." *See Cunningham*, 128 N.C. App. at 73, 493 S.E.2d at 85. Since the amended version of section 126-37 requires a "final" decision before judicial review is proper, we believe the term "action" in the pre-amended section is properly read as including only the final decision made by the LAA.

This interpretation is consistent with the requirement of Article 4 of the APA governing judicial review of agency actions. Statutes which are in *pari materia*, *i.e.*, which relate to or are applicable to the same matter or subject, must be construed together in order to ascertain legislative intent, *see Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 566, 452 S.E.2d 337, 344 (1995), and should be reconciled with each other when possible. *See Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 591, 447 S.E.2d 768, 781 (1994).

Notably, G.S. § 126-37 "does not create a cause of action but instead refers to judicial review provided by [G.S. § 150B-43]." *See Hill*, 115 N.C. App. at 392, 444 S.E.2d at 684-85. G.S. § 150B-43 provides that proper judicial review follows only from a "*final* [agency] decision." *See* G.S. § 150B-43 (emphasis added). A person seeking judicial review may only do so "30 days *after* the person is served with a written copy of the [final] decision." G.S. § 150B-45 (emphasis added). Since the jurisdiction of the superior court over agency decisions "derives not from Chapter 126, but from Chapter[] 150B," *see Harding*, 334 N.C. at 418, 432 S.E.2d at 301, we construe G.S. § 126-37(b) in light of G.S. §§ 150B-43 and 150B-45. Accordingly, we hold that "action" refers to the issuance of a final agency decision. If Howell was "dissatisfied" with the inaction of the LAA, his remedy was to proceed under N.C. Gen. Stat. § 150B-44 (1995), (providing for a court order compelling agency action when there has been an "[u]nreasonable delay on the part of any agency"), instead of seeking judicial review of an advisory decision not appealable under Chapter 150B. Therefore, since Howell filed his petition before the LAA's final decision was issued, he does not fall within the latter circumstance of G.S. § 126-37(b) and his petition was prematurely filed.

In conclusion, the jurisdiction of the superior court over appeals from agency action derives from Chapter 150B, *see Harding*, 334 N.C. at 418, 432 S.E.2d at 301, and thus judicial review is only proper "30 days *after*" a person is served with a final agency decision. G.S. § 150B-45 (emphasis added). Because Howell sought judicial review before LAA Morton had issued his final decision, the superior court did not have subject matter jurisdiction over his appeal. As such, any action taken by the superior court is vacated and the matter is remanded for dismissal for the reasons set forth herein.

Vacated and remanded with instructions.

Judges GREENE and TIMMONS-GOODSON concur.

ANNE M. FORTSON, PLAINTIFF-APPELLANT v. ROSS McCLELLAN, DEFENDANT-APPELLEE

No. COA98-158

(Filed 15 December 1998)

Negligence— release—motorcycle training course—public safety interests—release not enforceable

The trial court erred by granting summary judgment for defendant in a negligence action arising from an accident during a motorcycle training course. Although defendant asserted as a bar a waiver and release which plaintiff was required to sign as a condition of receiving instruction, the same interests in public safety addressed by statute and case law are significantly present in motorcycle safety instruction. Having entered into the business of instructing the public in motorcycle safety, the defendant cannot by contract dispense with the duty to instruct with reasonable safety.

Appeal by plaintiff from order entered 24 November 1997 by Judge Richard B. Allsbrook in Wilson County Superior Court. Heard in the Court of Appeals 21 October 1998.

Conner, Bunn, Rogerson & Woodard, P.L.L.C., by James F. Rogerson and Elizabeth B. McKinney, for plaintiff-appellant.

Barber & Associates, P.A., by Timothy C. Barber and James T. Johnson, for defendant-appellee.

MARTIN, John C., Judge.

In November of 1994, plaintiff enrolled in a two day motorcycle safety program conducted at Lenoir Community College; defendant was the instructor for the program. As a condition of receiving instruction, plaintiff was required to sign a waiver form stating that she

> [h]ereby releases, waives, discharges, and covenants not to sue the North Carolina Motorcycle Safety Program . . . the promoters, other participants, operators, officials, any persons in a restricted area . . . whether caused by the negligence of the releasees or otherwise while the undersigned is . . . participating in the course . . . .

During the second day of the program, in which the participants rode motorcycles in a parking lot, defendant assigned plaintiff a motorcycle which, according to plaintiff's allegations, defendant knew had given another participant problems due to difficulties with the throttle. The throttle malfunctioned while plaintiff was riding the motorcycle, causing it to crash, injuring plaintiff's leg and knee. Plaintiff brought this action for damages, alleging defendant's negligence caused her injuries. Defendant answered, denying negligence, alleging plaintiff's contributory negligence, and asserting the waiver and release as a bar to plaintiff's recovery. Defendant's subsequent motion for summary judgment was granted and plaintiff appeals.

Plaintiff contends the trial court erred in granting summary judgment, arguing that the waiver and release was void as against public policy and that there were issues of material fact concerning defendant's negligence. We agree. Accordingly, we reverse the order dismissing plaintiff's claim.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c); *Toole v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 291, 294, 488 S.E.2d 833, 835 (1997). All of the evidence is viewed in the light most favorable to the non-moving party. *Garner v. Rentenbach Constructors Inc.*, 129 N.C. App. 624, 501 S.E.2d 83, 85 (1998). "Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

In North Carolina "[r]eleases which exculpate persons from liability for negligence are not favored by the law." *Johnson v. Dunlap*, 53 N.C. App. 312, 317, 280 S.E.2d 759, 763 (1981), *cert. denied*, 305 N.C. 153, 289 S.E.2d 380 (1982); *Alston v. Monk*, 92 N.C. App. 59, 373 S.E.2d 463 (1988); *Miller's Mut. Fire Ins. Ass'n v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951). Nonetheless, such an exculpatory contract will be enforced unless it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest. *Jordan v. Eastern Transit & Storage Co.*, 266 N.C. 156, 146 S.E.2d 43 (1966); *Hall v. Sinclair Refining Co.*, 242 N.C. 707, 89 S.E.2d 396 (1955) (discussing the general rule that parties may contract to allocate the risk of their own negligence, and the circumstances under

which such contracts will be held void); *Miller's Mut. Fire Ins. Ass'n, supra*; *Brockwell v. Lake Gaston Sales and Service*, 105 N.C. App. 226, 412 S.E.2d 104 (1992).

Plaintiff contends the public policy exception to the general validity of exculpatory contracts applies in this case. "While recognizing the right to contract against liability, our courts have stated 'that a party cannot protect himself by contract[ing] against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved.' " *Alston v. Monk*, 92 N.C. App. 59, 64, 373 S.E.2d 463, 466 (1988), *disc. review denied*, 324 N.C. 246, 378 S.E.2d 420 (1989) (quoting *Hall v. Refining Co.*, 242 N.C. 707, 710, 89 S.E.2d 396, 398 (1955)). An activity falls within the public policy exception when the activity is extensively regulated to protect the public from danger, and it would violate public policy to allow those engaged in such an activity to "absolve themselves from the duty to use reasonable care." *Id.* In *Alston*, this Court found that hair-styling was such an activity: "[t]he practice of cosmetology and the education of students in this field may affect the health of the general public. Accordingly, we hold that the Institute and its employees may not contract with their customers in a manner that would absolve themselves from their duty to use reasonable care." *Id.*

In the present case, defendant's motorcycle safety training program evokes the same, if not greater, important level of public interest as cosmetology. Important public safety interests are present both in the instruction and use of motorcycles because both those receiving instruction in the proper use of motorcycles and the general traveling population are at risk from negligent training in the use of motorcycles. Trainees, unfamiliar with motorcycles, are particularly vulnerable to hazards associated with improper or negligent training.

Even so, defendant argues the public policy exception does not apply because the motorcycle safety training program is more like a sporting event than a public service. Defendant relies on *Bertotti v. Charlotte Motor Speedway, Inc.*, 893 F.Supp. 565, 566 (W.D.N.C. 1995), for the proposition that "exculpatory contracts entered in connection with motor sports events do not violate public policy because such contracts do not involve public interests." Interpreting our decision in *Johnson v. Dunlap*, 53 N.C. App. 312, 280 S.E.2d 759 (1981), *cert. denied*, 305 N.C. 153, 289 S.E.2d 380 (1982), the *Bertotti* Court stated:

> Significantly, the Johnson court did not question that such pre-race releases are enforceable. The court did not characterize the release as an adhesion contract involving unequal bargaining power and did not hold that such contracts involved a public interest. Thus, Johnson strongly implies that when a party has the opportunity to see and read a pre-race exculpatory contract, the agreement is enforceable in North Carolina.

Id. at 567.

We disagree with defendant's characterization of the public interests in this case. There is an enormous difference between the situation of professional race car drivers racing around a course designed for that sport, and an inexperienced member of the public seeking training in the safe use of a motorcycle on the public highway. The public interest in minimizing the risks associated with motorcycle use have been recognized in case law and regulated by statute. When upholding the statute requiring safety helmets on motorcycles, G.S. § 20-140.2(b) (now G.S. § 20-140.4), this Court has stated that:

> Death on the highway can no longer be considered as a personal and individual tragedy alone. The mounting carnage has long since reached proportions of a public disaster. Legislation reasonably designed to reduce the toll may for that reason alone be sufficiently imbued with the public interests to meet the constitutional test required for a valid exercise of the State's police power. However, it is not necessary to invoke so broad a premise in order to find the statute here attacked to be constitutional.

State v. Anderson, 3 N.C. App. 124, 126, 164 S.E.2d 48, 50 (1968), *affirmed*, 275 N.C. 168, 166 S.E.2d 49 (1969). The General Assembly has recognized the special public importance of appropriate motorcycle safety instruction by establishing Motorcycle Safety Instruction Programs. N.C. Gen. Stat. § 115D-72 (1997); *see also* N.C. Gen. Stat. § 20-146.1 (1997) (Operation of Motorcycle); N.C. Gen. Stat. § 20-140.4 (1997) (Special Provisions for Motorcycles and Mopeds). Given the hazards to the public associated with motorcycle instruction, and the extensive regulation of motorcycle use, it would violate public policy to allow instructors in a motorcycle safety instruction course, such as the one operated by defendant, to "absolve themselves from the duty to use reasonable care." *Alston* at 64, 373 S.E.2d at 466.

Despite legislative and judicial statements of public policy concerning motorcycle training and use, defendant still contends the

public policy exception does not apply to this case. Defendant argues that even though motorcycle use is heavily regulated in general, this particular training course was not regulated, and so the circumstances do not infringe upon the public interest. According to his argument, two cases, *Gas House, Inc. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 175, 221 S.E.2d 499 (1976) and *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 144 S.E.2d 393 (1965), establish that even heavily regulated industries may limit their liability under exculpatory clauses regarding activities outside the scope of their regulation. We do not find these cases to be controlling because the public safety interests involved in the motorcycle safety training course are the same public interests recognized by statute and case law; and, *Gibbs* and *Gas House* were interpreting limitations on liability, not complete exemptions from liability.

Gibbs concerned an indemnity agreement whereby a contractor agreed to indemnify the power company for any injuries to contractor's employees not covered by Workers' Compensation laws. The Court found two factors significant when holding that public policy does not bar the enforcement of an otherwise valid indemnification agreement. First, the power company's relation to the contractor "was not in the regular course of its business of furnishing electric current to the public and not in the performance of a duty of public service." *Id.* at 467, 144 S.E.2d at 400. Second, this was an indemnity contract limiting liability, rather than an exculpatory clause completely releasing the power company from all liability.

> There is a distinction between contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts. The contract in the instant case is of the latter class and is more favored in law.

Gibbs, 265 N.C. at 467, 144 S.E.2d at 400 (Indemnity contracts must be considered in light of public policy; "[h]owever, exculpatory clauses, not involving or relating to duties to the public, are not favored and are to be strictly construed."). As in *Gibbs*, the Court in *Gas House* construed a contract provision limiting liability rather than wholly exempting the party from all liability. *Gas House* at 179, 221 S.E.2d at 502. The present case involves a complete release from liability, rather than an indemnification or reasonable limitation on liability, and so the release must be strictly construed.

Both *Gibbs* and *Gas House* were also concerned with the threat to the public posed by a utility's superior bargaining power, not public safety; therefore, the contracts outside the scope of public service do not implicate the same public interests. *Gas House* involved an action by a yellow pages advertiser against a telephone company to recover damages because of improper classification of advertisement. *Gas House* at 179, 221 S.E.2d at 502. Noting that in the normal course of a telephone utility's service "every member of the public is entitled by law to demand such service with full liability at a reasonable rate therefor," the *Gas House* Court also determined that:

> [t]he inequality of bargaining power between the telephone company and the businessman desiring to advertise in the yellow pages of the directory is more apparent than real. It is not different from that which exists in any other case in which a potential seller is the only supplier of the particular article or service desired. There are many other modes of advertising to which the businessman may turn if the contract offered him by the telephone company is not attractive.

Gas House at 184, 221 S.E.2d at 505. The Court's concern in *Gas House* and *Gibbs* regarded the inequality of bargaining power between public utilities and the general public. *Gas House* at 183, 221 S.E.2d at 504; *Gibbs* at 467, 144 S.E.2d at 400. The court would not allow a public utility to use its monopoly power as leverage against the public to obtain a release from all responsibilities connected with the public service. However, when the public utility engaged in "non-public" activity, freedom of contract principles applied, and the public utility's contracts were not limited by public policy. *Gas House, Inc. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 175, 184, 221 S.E.2d 499, 505 (1976) (no violation of public policy where telephone company contracted with respect to a misplaced advertisement, as it "is not part of a telephone company's public utility business."); *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965) (no violation of public policy where power company contracted to limit liability with construction company, as it was "not in the performance of a duty of public service."). The North Carolina Supreme Court subsequently overruled its statement in *Gas House* that "[t]he business of carrying advertisements in the yellow pages of its directory is not part of a telephone company's public utility business." *State, ex rel., Utilities Commission v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541, 547, 299 S.E.2d 763, 766 (1983) ("To the extent

that the language in *Gas House* is inconsistent with our holding in the case *sub judice* that language is overruled.").

In this case, we are faced with a different public interest, i.e., public safety as opposed to inequality of bargaining power, and a complete release from liability. Having entered into the business of instructing the public in motorcycle safety, the defendant cannot, by contract, dispense with the duty to instruct with reasonable safety. *See cf., Jordan v. Eastern Transit & Storage Co.*, 266 N.C. 156, 146 S.E.2d 43 (1966) (holding that having entered into the business of carrying and protecting property, bailees and common carriers cannot arbitrarily limit their liability); *Miller's Mut. Fire Ins. Ass'n v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951); *Brockwell v. Lake Gaston Sales and Service*, 105 N.C. App. 226, 412 S.E.2d 104 (1992). The same interests in public safety addressed by statute and case law are significantly present in motorcycle safety instruction. We hold, under the circumstances of this case, a pre-safety training release of liability for injuries caused by the negligence of the instructor is not enforceable.

Because plaintiff's claim is not barred by the purported waiver, and the pleadings and other materials before the trial court raise genuine questions of material fact with respect to negligence issues, summary judgment was inappropriate. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983); *Easter v. Lexington Memorial Hospital, Inc.*, 303 N.C. 303, 278 S.E.2d 253 (1981); *Vassey v. Birch*, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980) ("[I]t is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man, or other applicable standard of care, must be applied, and ordinarily the jury should apply it under appropriate instructions from the court.") The trial court's order granting summary judgment is reversed and this case is remanded for further proceedings.

Reversed and remanded.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA, EX REL., AUDREY A. FISHER, PLAINTIFF-APPELLANT v. JAMES LUKINOFF, DEFENDANT-APPELLEE

No. COA97-1564

(Filed 15 December 1998)

1. **Child Support, Custody, and Visitation— support—Guidelines—deviation—findings**

The trial court erred in a child support order by deviating from the Guidelines without sufficient findings of fact where it failed to include any findings regarding the child's reasonable needs, including his education, maintenance, or accustomed standard of living; made no findings concerning plaintiff's evidence of actual past expenditures on the child's behalf; and did not indicate that the court considered whether the presumptive amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would otherwise be unjust or inappropriate.

2. **Child Support, Custody, and Visitation— support—from date of complaint—not awarded—findings required**

The trial court erred in a child support action by failing to make findings of fact supporting its decision not to award child support as of the date plaintiff filed her complaint.

3. **Child Support, Custody, and Visitation— support—reimbursement for past expenditures denied—findings required**

The trial court erred in a child support action by not awarding reimbursement for past expenditures without adequate findings. As plaintiff put forth ample evidence of her actual expenditures on the child's behalf, the court may not simply "decline" to award retroactive child support unless its findings support that plaintiff is not so entitled. The court's order contains no findings relating to plaintiff's actual expenditures, the reasonableness thereof, or defendant's ability to pay.

Appeal by plaintiff Audrey A. Fisher from judgment filed 15 August 1997 by Judge James E. Lanning in Mecklenburg County District Court. Heard in the Court of Appeals 15 September 1998.

Michael F. Easley Attorney General, by Robert A. Crabill, Associate Attorney General, for plaintiff-appellant.

Nicholas Street Law Offices, by Edgar Bogle, for defendant-appellee

SMITH, Judge.

Plaintiff Audrey A. Fisher (Fisher) appeals the district court's child support order on the grounds that the court did not make sufficient findings of fact under N.C. Gen. Stat. § 50-13.4 (1997) to support a child support award deviating from the North Carolina Child Support Presumptive Guidelines (Guidelines). Plaintiff also contends the court erred in failing to award child support effective as of the filing date of her complaint, and by declining to award reimbursement for past child support actually expended by plaintiff. For reasons stated below, we reverse the court's order and remand for further findings of fact.

Fisher resides in Mecklenburg County, North Carolina with her only child, Christian Graham Fisher, born 22 December 1985. On behalf of plaintiff, the State of North Carolina filed the instant action 4 January 1996 seeking child support for the minor child, reimbursement for prior expenses and adjudication of paternity. Subsequently, defendant James Lukinoff (Lukinoff) acknowledged he was Christian's father, and an Order of Paternity was entered 30 September 1996. The remaining issues in plaintiff's complaint were heard 13 November 1996.

At the hearing, plaintiff presented testimony about her income and introduced, without objection, a twenty-nine page summary of expenses made on behalf of her minor child. Defendant presented oral testimony as to his income and expenses. Upon consideration of the evidence, the court made the following findings of fact:

> 4. The plaintiff has normally had gross monthly income of $2,270. However, she was recently laid off and presently has as her only income unemployment benefits of $225 per week. She incurs work-related child care expenses of $197.50 per month, of which 75% is $148.12. She also incurs an expense of $78.78 for health insurance for the child.
>
> 5. The defendant has variable income as a truck driver. Based on the most recent income documentation which he submitted, his average gross monthly income is $2,930. He has no other children

but claims as an extraordinary expense the medical expenses related to his wife's treatment for pancreatic cancer, of $200 per month. She has no income other than $506 in disability benefits. His home mortgage payment is $629 per month and he has monthly payments on two 1994 Pontiac Grand Am autos totalling $709 per month.

6. The presumptive amount under the current child support guidelines is approximately $505 per month whether based on the plaintiff's unemployment benefits and no child care expense or based on her normal income of $2,270 with the child care expense, and in neither case considering any extraordinary expenses for the defendant.

7. Based on the condition of the defendant's wife, the court will deviate from the guidelines and finds that $50 per month is a reasonable amount of support.

The court then ordered defendant to pay as ongoing child support the sum of fifty dollars ($50.00) per month commencing 14 November 1996. In addition, the court awarded no child support for the time period between the filing of plaintiff's complaint and the date of trial, and "decline[d] to make any award for reimbursement of past child care expenses incurred by the plaintiff." Plaintiff filed timely notice of appeal 12 September 1997.

[1] Plaintiff first contends that under N.C. Gen Stat. § 50-13.4(c) (1997) the trial court erred in deviating from the child support Guidelines in ordering defendant to pay fifty dollars ($50.00) per month because the court's findings of fact do not support the conclusions of law made in its order. We agree.

A trial court's deviation from the Guidelines is reviewed under an abuse of discretion standard, *see Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980), and its determination as to the proper amount of child support will not be disturbed on appeal absent a clear abuse of discretion, *i.e.* only if "manifestly unsupported by reason." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985) (citations omitted). However, the court must make adequate findings of the specific facts supporting its ultimate decision in a case to enable a reviewing court to determine from the record "whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law." *See Coble*, 300 N.C. at 712, 268 S.E.2d at 189. Thus, to determine whether the trial court abused its discretion in computation of a child

support award deviating from the Guidelines, its findings of fact must show justification for the deviation and a basis for the amount ordered. *See Gowing v. Gowing*, 111 N.C. App. 613, 618-19, 432 S.E.2d 911, 914 (1993).

N.C. Gen. Stat. § 50-13.4(c) provides: "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines." Nevertheless, the trial court may deviate from the presumptive amount if:

> after considering the evidence, the [c]ourt finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate . . . .

N.C. Gen. Stat. § 50-13.4(c).

In finding "the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support," the trial court must consider:

> the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c1). These "factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines." *See Gowing*, 111 N.C. App. at 618, 432 S.E.2d at 914; *see also Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 171-72, 473 S.E.2d 6, 9 (1996); *Coble*, 300 N.C. at 712, 268 S.E.2d at 189 (trial court's conclusions of law "must themselves be based upon factual findings specific enough to indicate to the appellate court that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents") (citations omitted).

In the case *sub judice*, the court's findings lack the specificity necessary to justify its deviation from the presumptive Guidelines. While the trial court made findings relating to child care contributions, health insurance costs, and the relative ability of each party to pay, it failed to include any findings regarding Christian's reasonable needs, including his education, maintenance, or accustomed standard

of living—factors which "should be included in the findings if the trial court is requested to deviate from the [G]uidelines." *See Gowing*, 111 N.C. App. at 618, 432 S.E.2d at 914; *see also* N.C. Gen. Stat. § 50-13.4(c) ("[i]f the court orders an amount other than the amount determined by application of the presumptive [G]uidelines, the court shall make findings of fact as to the criteria that justify varying from the [G]uidelines"). An award other than that set forth in the Guidelines is proper only when the trial court determines that the greater weight of the evidence establishes "the [G]uidelines would not meet or would exceed the *reasonable needs of the child* considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate." N.C. Gen. Stat. § 50-13.4(c) (emphasis added); *see also Easter*, 344 N.C. at 169, 473 S.E.2d at 8.

Furthermore, we note that the court made no findings concerning the evidence introduced by plaintiff of her actual past expenditures made on Christian's behalf, despite the fact that "[e]vidence of actual past expenditures is essential in determining [a child's] present reasonable needs." *Savani v. Savani*, 102 N.C. App. 496, 503, 403 S.E.2d 900, 904 (1991). Instead, the court reasoned that "[b]ased on the condition of defendant's wife, the court will deviate from the [G]uidelines." The findings do not therefore indicate that in electing to deviate from the Guidelines, the court considered whether the presumptive amount of $505 dollars per month "would not meet or would exceed the *reasonable needs of the child* considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate," as explicitly required by N.C. Gen. Stat. § 50-13.4(c). *See* N.C. Gen. Stat. § 50-13.4(c) (emphasis added); *see also Easter*, 344 N.C. at 169-70, 473 S.E.2d at 8; *Atwell v. Atwell*, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985) (An order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount). As such, the trial court erred by failing to make adequate findings of fact to justify deviation from the presumptive Guidelines in its award of prospective child support.

[2] Similarly, we agree with plaintiff's next argument that the trial court erred by failing to make findings of fact supporting its decision not to award child support as of the date plaintiff filed her complaint in this matter.

This Court has held for purposes of computing child support, the portion of the award "representing that period from the time a com-

plaint seeking child support is filed to the date of trial," is "in the nature of prospective child support." *See Taylor v. Taylor*, 118 N.C. App. 356, 361, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996); *see also Tidwell v. Booker*, 290 N.C. 98, 116-17, 225 S.E.2d 816, 827 (1976) (awarding prospective child support from date of filing of complaint forward and retroactive child support for period before filing of complaint); *cf. Hill v. Hill*, 335 N.C. 140, 143-45, 435 S.E.2d 766, 768 (1993) (trial court's order modifying alimony from date the matter was first noticed for hearing is not a retroactive modification). Since prospective child support is to be awarded for the time period between the filing of a complaint for child support and the hearing date, Section 50-13.4(c) applies and requires application of the Guidelines with respect to that period (specifically here, 4 January 1996 to 13 November 1996). *See Shaw v. Cameron*, 125 N.C. App. 522, 527, 481 S.E.2d 365, 368 (1997); *see also Taylor*, 118 N.C. App. at 362, 455 S.E.2d at 446. Thus, the court must make adequate findings to justify deviating from the Guidelines for the time period between the filing of plaintiff's complaint and the hearing date, as it was required to make findings to "justify varying from the guidelines" in its award of child support commencing 14 November 1996. *See* N.C. Gen. Stat. § 50-13.4(c).

As we hold that the trial court did not determine Christian's reasonable needs including his education, maintenance, or accustomed standard of living in deviating from the Guidelines in its award of child support commencing 14 November 1996, the court's failure to provide child support for the time period between plaintiff's filing of her complaint and the trial date is also not adequately justified to support deviation from the Guidelines. We therefore remand to the trial court for findings concerning the "reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c1).

[3] Finally, plaintiff asserts the trial court's findings are inadequate to support the court's conclusion "declining to award reimbursement for any past expenditures" paid by plaintiff on Christian's behalf before she filed her complaint. Again, we agree.

An amount of child support awarded prior to the date a party files a complaint therefor is properly classified as retroactive child support, *see Savini*, 102 N.C. App. at 501-02, 403 S.E.2d at 903, and is not

based on the presumptive Guidelines. *See Lawrence v. Tise*, 107 N.C. App. 140, 151, 419 S.E.2d 176, 183 (1992). Rather, retroactive child support is calculated by considering reasonably necessary expenditures made on behalf of the child by the party seeking support, and the defendant's ability to pay during the period in the past for which retroactive support is sought. *See Savini*, 102 N.C. App. at 501-02, 403 S.E.2d at 903; *see also Tise*, 107 N.C. App. at 151, 419 S.E.2d at 183; *Taylor*, 118 N.C. App. at 361, 455 S.E.2d at 446. The party (here, plaintiff) seeking retroactive child support must present sufficient evidence of actual expenditures made on behalf of the child, and that those expenditures were reasonably necessary. *See Savini*, 102 N.C. App. at 501, 403 S.E.2d at 903.

Once proof of reasonably necessary actual expenditures under N.C. Gen. Stat. § 50-13.4(c) is made, the trial court must reimburse plaintiff for her past expenditures: "(1) to the extent she paid father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before . . . the date she filed her claim for child support." *See Napowsa v. Langston*, 95 N.C. App. 14, 21, 381 S.E.2d 882, 886, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989). In making its reimbursement award for retroactive support, a trial court must make specific factual findings. *See Sloan v. Sloan*, 87 N.C. App. 392, 398, 360 S.E.2d 816, 821 (1987).

In the instant case, the trial court's findings lack any reference to reasonable actual expenditures made by plaintiff over the three-year time period prior to the filing of her complaint, despite the fact that plaintiff submitted to the court a twenty-nine page affidavit summary of expenses made on Christian's behalf from 1 January 1993 through 13 November 1996. The court simply stated that it "declines to make any award for reimbursement of past child care expenses incurred by the plaintiff."

As the plaintiff put forth ample evidence of her actual expenditures on Christian's behalf, the court's findings must support its conclusion that she is, in essence, entitled to no sum of reimbursement. *See Savani*, 102 N.C. App. at 502, 403 S.E.2d at 904; *McCullough v. Johnson*, 118 N.C. App. 171, 172, 454 S.E.2d 697, 698 (1995) ("[f]indings in support of an award of retroactive child support must include the actual expenditures made on behalf of the child"); *cf. Tise*, 107 N.C. App. at 152, 419 S.E.2d at 184 ("In determining the non-custodial parent's share of the custodial parent's reasonable actual expenditures in a retroactive support action, the trial court should consider

the relative abilities of the parents to pay support (considering the estates, earnings, and the reasonable expenses of the parents) and any 'indirect support' made by either parent for the child during the period in question") (citations omitted). The trial court may not simply "decline" to award plaintiff retroactive child support unless its findings support that plaintiff is not so entitled. *See Rawls v. Rawls*, 94 N.C. App. 670, 675, 381 S.E.2d 179, 182 (1989) ("[r]etroactive child support payments are recoverable for amounts actually expended on the child's behalf"). As the court's order contains no findings relating to plaintiff's actual expenditures, to the reasonableness thereof, or to the defendant's ability to pay during the three-year period at issue (including the extent to which plaintiff paid defendant's share), its findings are insufficient to support its conclusion that plaintiff should receive no amount of reimbursement from defendant. We therefore remand to the trial court for further findings relating to retroactive child support.

In sum, the trial court's order contains insufficient findings to support its conclusions of law concerning the amount of both prospective and retroactive child support plaintiff may be entitled to receive from defendant.

Reversed and remanded.

Judges GREENE and TIMMONS-GOODSON concur.

SUZANNE BAILEY, EMPLOYEE/PLAINTIFF v. SEARS ROEBUCK & COMPANY, EMPLOYER/DEFENDANT, AND LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER/DEFENDANT

No. COA97-1573

(Filed 15 December 1998)

1. Workers' Compensation— findings—recitation of testimony

There was sufficient competent evidence in the record to support each of the Industrial Commission's findings in a workers' compensation action arising from a foot injury where the Court of Appeals reluctantly accepted the Commission's recitations of testimony as findings of fact.

2. Workers' Compensation— sufficiency of evidence—aggravation of existing cerebral palsy

There was sufficient competent evidence in a workers' compensation action to support the Industrial Commission's determination that plaintiff's 1993 injury did not aggravate her cerebral palsy or in any way cause her 1995 foot condition.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 25 August 1997. Heard in the Court of Appeals 15 September 1998.

Robert A. Lauver, P.A., by Robert A. Lauver, for plaintiff-appellant.

Orbock Bowden Ruark & Dillard, P.C., by Barbara E. Ruark, for defendant-appellee.

SMITH, Judge.

Pertinent facts and procedural information include the following: During a 12 April 1996 Industrial Commission Hearing concerning plaintiff's request for additional workers' compensation benefits, plaintiff testified to her pre-existing cerebral palsy condition to refute contentions that her cerebral palsy caused her recent 1995 foot problems. Plaintiff testified, in part, that she had suffered from cerebral palsy since birth and at age four underwent bilateral heel cord lengthening. She also testified she had not been treated or had problems with her cerebral palsy since age ten. Plaintiff maintained that her 1995 foot problems were caused by her 1993 work-related foot injury and not caused by her cerebral palsy.

On 13 July 1993, plaintiff injured her left foot (the 1993 injury) while at work. Pursuant to a Form 21 Agreement entered 30 July 1993, defendants agreed the accident was a compensable injury arising in the course of plaintiff's employment. Defendants paid plaintiff compensation at a rate of $146.35 per week beginning 21 July 1993, which continued until the end of August when she returned to work. Dr. Edward Weller (Dr. Weller), treated plaintiff for the compensable injury from 14 July 1993 through 6 September 1993, when he released her from treatment. On 8 September 1993, Dr. Weller rated plaintiff as having a 5% percent permanent partial disability to her left foot. Upon receiving this rating report defendants entered into a Form 26 Agreement admitting liability and agreeing to pay for the disability. Plaintiff received her final disability payment on 12 November 1993.

Plaintiff testified that after the accident she had difficulty placing weight on her left foot and was forced to use a walker at work due to pain. Plaintiff testified her mobility and level of activity decreased due to the increase in pain and restrictive casts placed on her foot.

After her September 1993 release, plaintiff did not see Dr. Weller with regard to foot pain until 8 February 1995, when she visited him complaining of tightness, pain and swelling on the top of her left foot near her fourth and fifth toes. This area was the site of her 13 July 1993 fracture. In June 1995, Dr. Weller noted that plaintiff's Achilles tendon had become "incredibly tight" compared to his findings in July and August of 1993. However, Weller testified that such tightening is a natural process that occurs when an individual has cerebral palsy. To rebut that contention plaintiff testified she had not suffered any similar problems with her right foot. On 25 July 1995, plaintiff underwent surgery similar to that performed at age four, to lengthen her left Achilles tendon. Plaintiff was unable to work from 25 July 1995 to 16 January 1996, when she returned to her regular duties.

Dr. Robert Teasdall (Dr. Teasdall), a board certified orthopaedic surgeon specializing in foot and ankle treatment, examined plaintiff on 10 October 1995. Dr. Teasdall opined that plaintiff's cerebral palsy would be a more likely explanation of how the problems with her heel cord had developed. He also indicated, based on plaintiff's previous medical history, the problems in her foot were not related to the fracture she sustained in July 1993 but were the direct result of her cerebral palsy.

On 23 October 1995, plaintiff filed a Form 33 Request for Hearing seeking additional benefits pursuant to N.C. Gen. Stat. § 97-47 (1991) due to an alleged change in the condition of her left foot. In an Opinion and Award filed 18 February 1997 denying plaintiff's claim, the Deputy Commissioner found that plaintiff did not suffer a compensable change in condition. Pursuant to plaintiff's appeal from that judgment the Full Commission filed an Opinion and Award 25 August 1997, modifying and affirming the Deputy Commissioner's judgment. The Full Commission made the following pertinent findings of fact:

> 4. Plaintiff returned to work at the end of August 1993 and she was able to perform her job. Plaintiff was released by Dr. Weller on September 6, 1993.
>
> 5. Plaintiff did not see Dr. Weller again until February 8, 1995, at which point she was complaining of pain and swelling in her left

foot. Plaintiff had not contacted Dr. Weller between September 6, 1993 and February 8, 1995 concerning any problems with her left foot.

6. Plaintiff was next seen by Dr. Weller in June 1995, when plaintiff was complaining of tightness in her left ankle.

7. Plaintiff has cerebral palsy and it causes the body's motor system to become very tight, and in plaintiff's case somewhat spastic.

8. In July 1995, Dr. Weller performed a surgical release of plaintiff's left Achilles tendon. This release was performed because it had tightened to the point that plaintiff was not able to place her foot flat upon the floor.

. . . .

12. The tightened Achilles tendon for which plaintiff underwent treatment beginning February 1993 was not proven by the greater weight of the medical evidence to have been a direct and natural result of her injury at work on July 13, 1993. Consequently, plaintiff did not sustain a material change for the worse in the condition she suffered as a result of that injury.

Based on these findings, the Commission concluded:

1. Plaintiff did not suffer a material change of condition as to her original injury of July 13, 1993. N.C. Gen. Stat. § 97-47.

2. Plaintiff has failed to prove by the greater weight of the evidence that the tightened Achilles tendon for which she underwent treatment beginning February 1995 was a natural consequence of her injury of July 13, 1993. N.C. Gen. Stat. § 97-2.

Plaintiff filed timely notice of appeal to this Court.

Our standard of review on an appeal of an award by the Industrial Commission is "whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856 (1997) (citing *Sidney v. Raleigh Paving & Patching, Inc.*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993)). The Commission's findings of fact are "conclusive on appeal if supported by competent evidence," *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 463, 470 S.E.2d 357, 358 (1996), even when there is "evidence to support a con-

trary finding." *Hedrick*, 126 N.C. App. at 357, 484 S.E.2d at 856. Furthermore, the Commission is the sole judge of the credibility of the witnesses as well as how much weight their testimony should be given. *Id.*

[1] Plaintiff contends the Commission failed to consider all the relevant evidence in making its findings of fact. Specifically, plaintiff argues the Commission erred in not determining: (1) whether plaintiff complained of mid-foot pain in 1995, and (2) whether an injury to the foot can aggravate plaintiff's pre-existing cerebral palsy. We disagree.

"The Work[er]'s Compensation Act . . . vests the Industrial Commission with full authority to find essential facts," *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 433, 144 S.E.2d 272, 274 (1965), and we "may set aside findings of fact only upon the ground they lack evidentiary support." *Id.* at 434, 144 S.E.2d at 274. The Commission chooses what findings to make based on its consideration of the evidence. This court is not at liberty to supplement the Commission's findings, but is limited to determining if those findings are supported by competent evidence. Furthermore, the Commission expressly referred to plaintiff's testimony and Dr. Weller's and Dr. Teasdall's depositions in it's findings of fact, indicating its consideration of all the evidence presented.

Plaintiff further contends findings of fact numbers 6, 8, 9, 10, 11, and 12 are not supported by competent evidence. We disagree. The Commission's number 6 finding of fact, that plaintiff complained of tightness in her left ankle in June 1995, was supported by Dr. Weller's deposition concerning plaintiff's June 1995 visit. Dr. Weller stated "the reason [plaintiff] was having trouble getting around is because her [left] ankle was becoming plantar-flexed" and "stiffer." This finding, as well as finding number 8, was supported by competent evidence in the record.

Findings of fact 9, 10, and 11, are not findings at all, but mere recitals of Dr. Weller's and Dr. Teasdall's medical testimonies. "[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* . . . because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984). Our Supreme Court stated that the "Industrial Commission frequently couches its findings of fact in the form of recitations of testimony without declaring

whether it finds the testimony to be a fact." *Peoples v. Cone Mills Corporation*, 316 N.C. 426, 442 n.7, 342 S.E.2d 798, 808 n.7 (1986). The Court noted it's practice has been to "interpret the Commission's . . . recit[ation of] testimony to mean that [the Commission] does find the recited testimony to be a fact," but the Court strongly suggested that in the future the Commission make its findings in the form of declarations of fact rather than recitations of testimony. *Id.* We reluctantly accept the Commission's recitations as findings of fact and hold there is sufficient competent evidence in the record to support each finding.

[2] Plaintiff also contends the Commission's finding that plaintiff's 1995 condition was not proven to be a direct and natural result of her 1993 compensable injury was not supported by the evidence. Plaintiff argues she provided sufficient medical evidence to establish that her change in condition was causally related to the 1993 injury and not solely caused by her cerebral palsy. She contends the medical evidence established that the 1993 work injury aggravated her pre-existing cerebral palsy condition.

A change of condition for purposes of N.C. Gen. Stat. § 97-47, is a substantial change in physical capacity to earn wages, occurring after a final award of compensation, that is different from that existing when the award was made. *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 722, 115 S.E.2d 27, 33-34 (1960). To recover compensation for changed conditions caused by aggravation of an injury, plaintiff must prove by the greater weight of the evidence that her change in condition was a natural consequence of the 1993 injury. N.C. Gen. Stat. § 97-2(6) (1997) and N.C. Gen. Stat. § 97-47.

Plaintiff contends the 1993 injury decreased her mobility and activity level, thereby aggravating and in turn activating the tightness and stiffness associated with cerebral palsy. Plaintiff claims her changed condition in 1995 resulted from that aggravation of her pre-existing cerebral palsy.

There is competent evidence in both physicians' depositions to support the Commission's finding that plaintiff did not prove a clear causal connection between the 1993 injury and her 1995 problems. Both Dr. Weller and Dr. Teasdall refused to state with medical certainty that plaintiff's 1995 problems resulted directly from her 1993 injury. Rather, both agreed it was more likely that plaintiff's 1995 condition resulted from her cerebral palsy, known to cause such stiffness.

"It is for the Commission, not for this Court, to weigh this evidence and to assess its credibility," *Hoyle*, 122 N.C. App. at 467, 470 S.E.2d at 360, so when conflicting evidence is presented, "the Commission's finding of causal connection between the accident and the disability is conclusive," *Anderson*, 265 N.C. at 434, 144 S.E.2d at 275. There is sufficient evidence to support the Commission's determination that the 1993 injury did not aggravate plaintiff's cerebral palsy or in any way cause her 1995 foot condition.

Based on the foregoing analysis, we affirm.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

JUANITA J. TERRELL, PLAINTIFF v. LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA, DEFENDANT

No. COA97-1012

(Filed 15 December 1998)

1. Attorneys— attorney malpractice—settlement—action against insurer

The trial court was unable to dismiss plaintiff's complaint based solely on N.C.G.S. § 1A-1, Rule 12(b)(6) where an attorney had settled a malpractice claim and the client, plaintiff here, agreed to execute only against the attorney's insurance policy. Liberally construing the complaint, it cannot be said that plaintiff is unable to prove sufficient facts to support any of her allegations and entitle her to relief; for example, an action arising out of contract can be assigned and the assignee may bring a breach of contract action.

2. Civil Procedure— judgment on the pleadings—settlement—action against insurance policy—policy attached to answer—no third party interest

The trial court did not err by dismissing plaintiff's claims under N.C.G.S. § 1A-1, Rule 12(c) where plaintiff had filed a malpractice claim against her attorney, settled with the attorney, agreed to execute only against his insurance policy, and filed this

action accordingly. A copy of the policy was attached to the amended answer as an exhibit and became part of the pleadings; the attorney's interest in the policy and any coverage or benefits are not assignable under the terms of the policy. Moreover, the allegations of bad faith in the present action make any tort claim personal to the attorney and unassignable, and plaintiff lacks standing to seek a declaratory judgment in that she sought to have the court construe a contract to which she was not a party. Also, the confession of judgment obtained by plaintiff against the attorney is not a judgment that defendant-insurer is legally obligated to pay under the policy because the insurer's liability is derived from the insured, who is protected by a covenant not to execute. Finally, defendant's obligations under policy do not extend to the settlement and confession of judgment because it was not a party to the settlement and the obligation was not determined at an actual trial.

Appeal by plaintiff from order filed 20 May 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 30 March 1998.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Johnny M. Loper and Christine Sandez, for defendant-appellee.

SMITH, Judge.

Plaintiff appeals from the trial court's order dismissing her complaint.

On 9 May 1995, plaintiff brought suit against attorney Mark D. Hockman (Hockman), asserting legal malpractice in his handling of her medical malpractice claim. At that time, Hockman had a professional liability insurance policy (policy) with defendant Lawyers Mutual Liability Insurance Company of North Carolina.

On 22 July 1996, defendant withdrew Hockman's liability coverage and terminated the defense for "Hockman's failure to perform a condition precedent to continued coverage under the policy." Thereafter, Hockman and plaintiff entered into a memorandum of settlement in which Hockman agreed to confess judgment in the amount of $75,000, and plaintiff agreed to execute such judgment only against

the policy. Additionally, Hockman assigned any rights he had against defendant under the policy or under tort law to plaintiff. On 25 September 1996, the confession of judgment was entered against Hockman in the amount of $75,000.

On 30 January 1997, plaintiff filed suit against defendant alleging that, as Hockman's assignee, she was entitled to recover against defendant for defendant's alleged breach of contract with Hockman or for any tort rights that Hockman had against defendant. In addition, plaintiff also sought a declaratory judgment declaring that "a valid and enforceable contract of liability insurance existed between the defendant and Mark D. Hockman for which to pay the settlement and Judgment of the plaintiff."

Defendant filed its amended answer on 15 April 1997, denying the material allegations of the complaint and setting forth affirmative defenses. Defendant attached to the amended answer, as an exhibit, a copy of the insurance policy issued to Hockman. Also, on 15 April 1997, defendant filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

After a hearing on defendant's motion, the trial court dismissed plaintiff's complaint in an order filed 20 May 1997. Specifically, the trial court held that defendant was entitled to a dismissal of plaintiff's claims pursuant to Rule 12(b)(6)

> or alternatively, to the extent that in reaching its determination on Lawyers Mutual's motion the Court considered the policy of insurance attached as Exhibit A to the Amended Answer of Lawyers Mutual and the Court determined, in its discretion, to treat Lawyers Mutual's motion as one for judgment on the pleadings, Lawyers Mutual is entitled to judgment on the pleadings under North Carolina Rules of Civil Procedure 12(c) and 10(c).

On appeal, plaintiff contends the trial court erred by dismissing plaintiff's complaint under Rule 12(b)(6) or alternatively, in the trial court's discretion, under Rule 12(c).

We first note plaintiff failed to refer to the assignments of error following the statement of the questions presented as required by Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure and, therefore, these assignments of error may be deemed abandoned. N.C.R. App. P. 28(b)(5); *see Hines v. Arnold*, 103 N.C. App. 31, 37, 404 S.E.2d 179, 183 (1991). However, "[t]o prevent manifest injus-

tice," we deem it appropriate, pursuant to Rule 2, to dispose of the appeal on the merits. N.C.R. App. P. 2.

[1] Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990), the trial court may dismiss a claim for "[f]ailure to state a claim upon which relief can be granted." A complaint, however, should not be dismissed unless the party is not entitled to any relief under any state of facts that could be presented in support of the claim. *See Newton v. Insurance Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 300 (1976). "In analyzing the sufficiency of the complaint, the complaint must be liberally construed." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

In the present case, the trial court was unable to dismiss plaintiff's complaint based solely on Rule 12(b)(6) because the complaint, when liberally construed, did not fail to state "a claim upon which relief [could] be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). Specifically, plaintiff claimed in her complaint that she was "the assignee of Mark D. Hockman under any rights which Mark D. Hockman [had] against Lawyers Mutual Insurance Company." Plaintiff further maintained these rights included "the right[] to compel Lawyers Mutual Insurance Company to pay a Confession of Judgment, or settlement, in the amount of $75,000."

> As the assignee of Mark D. Hockman . . ., the plaintiff allege[d] . . .
>
> (a) Defendant Lawyers Mutual Insurance Company owe[d] a contractual duty to pay the settlement reached at mediation [between Hockman and plaintiff], and subsequent Confession of Judgment in the amount of $75,000 plus costs and interest, to [plaintiff];
>
> (b) The defendant Lawyers Mutual Insurance Company acted in bad faith towards Mark D. Hockman by defending 95 CvS 2757 in bad faith, thereby creating a deductible which he was required to pay but could not currently pay;
>
> (c) By providing legal representation and insurance coverage from and to July 22, 1996, just prior to the scheduled trial date, and then abruptly withdrawing legal representation and insurance coverage on a pretext that Mark D. Hockman could not, or would not, pay the deductible in the insurance contract between defendant and Mark D. Hockman, the defendant acted in bad faith;

(d) That Mark D. Hockman has insurance coverage from Lawyers Mutual for the settlement and Judgment in 95 CvS 2757 under its contract of insurance, and plaintiff hereby requests that the Court declare such insurance in force, valid, and payable to the plaintiff in the amount of the Judgment and settlement.

Additionally, plaintiff claimed that Lawyers Mutual's conduct was "unreasonable, willful, and outrageous" and "entitl[ed] the plaintiff to an award of punitive damages through the contractual and tort rights of Mark D. Hockman which [were] assigned to the plaintiff."

Based on these allegations and the facts in the case, plaintiff requested the trial court to find that "she . . . recover judgment against the defendant for compensatory and punitive damages . . ., declare that a valid and enforceable contract of liability insurance existed between defendant and Mark D. Hockman and that the plaintiff's settlement and Judgment against defendant is payable in the full amount . . . ."

Liberally construing the complaint pursuant to Rule 12(b)(6), we cannot say that plaintiff is unable to prove sufficient facts to support any of her allegations and entitle her to some relief from defendants. For example, "[a]n action 'arising out of contract' generally can be assigned[]" and the assignee may bring a breach of contract action. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (quoting N.C. Gen. Stat. § 1-57 (1983)), *disc. review denied*, 343 N.C. 511, 472 S.E.2d 8 (1996).

[2] The trial court, however, under Rule 12(c) of the North Carolina Rules of Civil Procedure, may consider the formal pleadings in a case and " 'dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit.' " *Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 460, 261 S.E.2d 260, 261 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 136-37, 209 S.E.2d 494, 499 (1974)), *disc. appeal dismissed*, 300 N.C. 202, 282 S.E.2d 228 (1980). Judgment on the pleadings, pursuant to Rule 12(c), is appropriate " 'when all the material allegations of fact are admitted in the pleadings and only questions of law remain.' " *Id.* (quoting *Ragsdale*, 286 N.C. at 136-37, 209 S.E.2d at 499). The trial court must " 'view the facts and permissible inferences in the light most favorable to the non-moving party[],' " taking all well-pleaded factual allegations in the non-moving party's pleadings as true. *Id.* at 461, 261 S.E.2d at 262 (quoting *Ragsdale*, 286 N.C. at 136-37, 209 S.E.2d at 499).

When ruling on a motion for judgment on the pleadings, the trial court "is to consider only the pleadings and any attached exhibits, which become part of the pleadings." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984). Pursuant to Rule 10(c) of the North Carolina Rules of Civil Procedure, "any written instrument which is an exhibit to a pleading" is part of the pleadings in the case for all purposes. N.C. Gen. Stat. § 1A-1, Rule 10(c) (1990); *see Sale v. Johnson, Commissioner of Revenue*, 258 N.C. 749, 758, 129 S.E.2d 465, 471 (1963) (holding that an exhibit "attached to the answer, and made a part thereof, may be considered in passing upon a judgment on the pleadings").

At the outset, we note the parties stipulate in their briefs that defendant "urged [the trial court] to consider dismissal of the case under Rule 12(c) . . . ." Plaintiff cannot claim she was prejudiced by the trial court's decision to dismiss the action because she received the pleadings, which included defendant's answer and the insurance policy issued to Hockman, two weeks prior to the hearing and the trial court could have applied Rule 12(c) *sua sponte*. *See Nationwide Mutual Ins. Co. v. Silverman*, 104 N.C. App. 783, 787, 411 S.E.2d 152, 155 (1991), *overruled on other grounds*, 332 N.C. 633, 423 S.E.2d 68 (1992).

Viewing the facts and permissible inferences under Rule 12(c) in the light most favorable to plaintiff and taking plaintiff's factual allegations as true, plaintiff's claims against defendant arising out of contract are barred because any rights of Hockman under the policy cannot be assigned. The insurance policy in the instant action states, "The interest of any Insured in this policy is not assignable." Under the terms of the policy, Hockman's interest in the policy and any coverage or benefits that otherwise might exist are not assignable.

Likewise, plaintiff's tortious bad faith claim is barred. "[A]ssignments of personal tort claims are void as against public policy . . . ." *Horton*, 122 N.C. App. at 268, 468 S.E.2d at 858. The allegations of bad faith in the present action make any tort claim personal to Hockman. *See id.* As a result, any tort claims by Hockman against defendant are unassignable.

Plaintiff also lacks standing to seek a declaratory judgment. One who seeks to have a written contract construed by way of declaratory judgment must first have an interest thereunder. *See* N.C. Gen. Stat. § 1-254 (1996); *Town of Nags Head v. Tillett*, 68 N.C. App. 554, 557,

315 S.E.2d 740, 742 (1984), *affirmed in part and rev'd in part on other grounds*, 314 N.C. 627, 336 S.E.2d 394 (1985). Absent an enforceable contract right, an action for declaratory relief to construe or apply a contract will not lie. *See* 26 C.J.S. *Declaratory Judgments* § 54, at 151 (1956); *Farthing v. Farthing*, 235 N.C. 634, 635, 70 S.E.2d 664, 665 (1952) (maintaining the "Declaratory Judgment Act . . . is designed to provide an expeditious method of procuring a judicial decree construing . . . written instruments and declaring the rights and liabilities of parties thereunder").

In the instant action, plaintiff sought to have the trial court construe a contract to which she was not a party. Because the policy cannot be assigned, plaintiff is not a person who is or can be "interested . . . under [the] contract." N.C. Gen. Stat. § 1-254 (1996).

Even if plaintiff had standing to seek a declaratory judgment, plaintiff's claim nonetheless fails because the confession of judgment obtained by plaintiff against Hockman is not a judgment that defendant is "legally obligated to pay" under the terms of the policy. The obligation of defendant is to pay "all sums which [the] insured shall become legally obligated to pay." Because an insurance company's liability is derivative in nature, "its liability depends on whether or not its insured is liable to the plaintiff." *Lida Manufacturing Co. v. U.S. Fire Ins. Co.*, 116 N.C. App. 592, 595, 448 S.E.2d 854, 856 (1994). As a result, "when an insurance policy contains language such as 'legally obligated to pay,' an insurer has no obligation to an injured party where the insured is protected by a covenant not to execute." *Id.* at 596, 448 S.E.2d at 857.

In the instant case, plaintiff agreed to execute her judgment against the policy rather than against the insured, Hockman. Therefore, plaintiff's claim is barred because Hockman is not "legally obligated to pay" plaintiff for any damages based on breach of contract or otherwise. Defendant's obligations under the policy were extinguished by the execution of the Memorandum of Settlement, if not before.

In addition, in reviewing the policy, we note it provides "[n]o action shall lie against the Company . . . until the amount of the Insured's obligation to pay shall have been finally determined either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant *and the Company*." (Emphasis added.) Because Hockman's obligation to plaintiff was not determined after an actual trial and defendants were not a party to the

memorandum of settlement in which Hockman agreed to execute a confession of judgment, defendants are not "legally obligated to pay" plaintiff any damages. Put simply, defendant's obligations under the policy do not extend to the execution of the memorandum of settlement and the subsequent confession of judgment. Accordingly, plaintiff's contentions are without merit.

After carefully reviewing plaintiff's remaining assignments of error, we determine they are without merit.

Affirmed.

Judges WALKER and McGEE concur.

TELLEASE B. STAMEY, EMPLOYEE, PLAINTIFF v. N.C. SELF-INSURANCE GUARANTY ASSOCIATION FOR NOW INSOLVENT SCT YARNS, INC., EMPLOYER; CARRIER; DEFENDANT

No. COA97-1553

(Filed 15 December 1998)

Workers' Compensation— disability—created position—trial offer—declined

The Industrial Commission erred by denying a workers' compensation claim for additional temporary total disability benefits and additional medical treatment where plaintiff developed impingement syndrome while working for plaintiff in 1990 and was awarded compensation; she returned to work but stopped due to pain and her physician testified that she was not capable of using her arm in a repetitive fashion and could not do a job causing repetitive flexion or abduction beyond 60 degrees; plaintiff was placed on medical leave, then offered a temporary position as a modified roller picker, which was created by removing certain duties and which was to be temporary to see if it worked; and plaintiff did not return to work. Once disability is established, the employee has the presumption of disability and the employer may not rebut the presumption by showing that the employee could earn pre-injury wages in a temporary position or by creating a position not ordinarily available in the competitive job market.

Appeal by plaintiff from Opinion and Award filed 4 August 1997 and from Order filed 10 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 1998.

Lewis & Shuford, P.A., by Robert C. Lewis, for plaintiff appellant.

Stuart Law Firm, PLLC, by Lee J. Van De Carr, Jr., for defendant appellee.

GREENE, Judge.

Tellease B. Stamey (Plaintiff) appeals from the Opinion and Award of the North Carolina Industrial Commission (Commission) denying additional temporary total disability benefits and additional medical treatment and from the Commission's "Order Denying Plaintiff's Motion to Reconsider."

On 3 January 1992, Deputy Commissioner Roger L. Dillard, Jr. determined that, during August of 1990, while working for SCT Yarns, Inc. (SCT),[1] Plaintiff had developed impingement syndrome (a "significant aggravation of a pre-existing injury to her [right] shoulder") constituting an occupational disease. Plaintiff was awarded compensation from 1 October 1990 until 24 October 1990 and "for such periods subsequent to that date which [P]laintiff may have missed from work as a result of her impingement syndrome and continuing until such time as [P]laintiff returns to work or until further orders of the [Commission]." The Full Commission affirmed the deputy commissioner's award following SCT's appeal. Plaintiff returned to work for SCT in a light-duty position on 25 October 1990, and returned to her regular-duty job as a spinner by December of 1990. Plaintiff continued to work through 28 February 1991, when she was out of work for approximately six weeks following unrelated surgery. Plaintiff again returned to her regular-duty job as a spinner on 15 April 1991. On 10 July 1991, Plaintiff stopped work due to pain in her right shoulder and saw her treating orthopaedist, C. Michael Nicks, M.D. (Dr. Nicks) later that day. Dr. Nicks, the only physician who testified, stated that his diagnosis in July of 1991 was that Plaintiff's current problems were "all directly related to [the] impingement [diagnosed in August of 1990]." He felt that "the etiology of [her] pain was basically the

1. SCT, which was self-insured, became insolvent during the proceedings before the Commission, and the North Carolina Self-Insurance Guaranty Association became obligated for all of SCT's "covered claims." N.C.G.S. § 97-131(a) (Supp. 1997).

same" as it had been in August of 1990. Dr. Nicks also testified that Plaintiff's "case is indeed very difficult," and that she was not "capable of using her arm in a repetitive fashion, a strenuous fashion, and I do not think that she could have done a job causing repetitive flexion or abduction beyond 60 degrees." Dr. Nicks testified that Plaintiff's impingement syndrome, diagnosed by him in August of 1990, currently remained "a large portion of why she cannot work." He further testified that her work activities were a significant contributing factor of her impingement syndrome. Dr. Nicks restricted Plaintiff from performing heavy lifting and overhead work involving "right-side humeral flexion of greater than sixty degrees at the shoulder." Work within these restrictions was not available, so Plaintiff was placed on medical leave beginning 11 July 1991 and received company-funded short term disability benefits (not workers' compensation benefits) during the next thirteen weeks. On 13 January 1992, SCT offered Plaintiff a temporary position as a modified roller picker. SCT removed certain duties from the regular-duty spinner position to create the modified roller picker job. The evidence reveals that the modified roller picker position "started out as temporary until we saw if it was going to work."[2] The modified roller picker position would allow Plaintiff to use only her left arm and would not require her to lift her right arm higher than sixty degrees. Plaintiff would have been able to obtain assistance to perform the tasks involved in the job which were outside her restrictions. Plaintiff was told by SCT that "since the [modified] roller picker position was within the restrictions set forth by Dr. Nicks, the company expected her to return to work [on 17 January 1992]." Plaintiff did not return to work and, pursuant to company policy, SCT considered her failure to return to work as a voluntary resignation. In July of 1993, Plaintiff requested a hearing before the Commission, alleging that "[SCT] has not paid [P]laintiff compensation for the work [P]laintiff missed [after 11 July 1991] as a result of her impingement syndrome as previously ordered [on 3 January 1992]." SCT countered that Plaintiff's "current alleged disability is unrelated to her compensable impingement syndrome and [P]laintiff refused an offer of appropriate light duty work." Accordingly, a hearing was held on 18 April 1994, and was affirmed by the Full Commission on 4 August 1997.

Plaintiff testified at the hearing that the modified roller picker position was not a "real" position found in the marketplace, but the

2. The modified roller picker position became a permanent position at SCT in September of 1992.

Commission found that her testimony was not credible "since the evidence adduced . . . revealed that the *modified* roller picker job is both an important and necessary position in SCT's spinning room." The Commission concluded that the modified roller picker job was within Plaintiff's restrictions, and that Plaintiff could perform the modified roller picker job. In addition, the Commission concluded:

> The full-time job of *modified* roller picker which SCT offered to [P]laintiff is an important and necessary position in SCT's spinning room. Such job is a real position which exists in the marketplace and is not "made work." Plaintiff did not present evidence to rebut the presumption that this job was generally available in the competitive labor market. Saums v. Raleigh Community Hospital, 124 N.C. App. 219, 476 S.E.2d 372 (1996).

The Commission further concluded that "[s]ince [P]laintiff unreasonably refused to perform the *modified* roller picker job on 13 January 1991, [P]laintiff is not entitled to additional compensation and medical care during the continuance of such refusal to accept suitable employment." Accordingly, the Commission denied Plaintiff's claim for additional temporary total disability benefits and additional medical treatment "during the continuance of her unjustified refusal of suitable work." Plaintiff's "Motion to Reconsider Decision," filed 12 August 1997, was denied by the Commission.

The dispositive issue is whether SCT rebutted Plaintiff's presumption of continuing disability.

Initially, the injured employee has the burden of establishing the existence and extent of her disability. *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 446 (1997). "Disability" is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (Supp. 1997). Once disability has been established, the employee is "cloaked in the presumption of disability, and the burden [is] on the employer to rebut that presumption." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). The employer may rebut the presumption of continuing disability "through medical and other evidence," *In re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 368 (1997); *Harrington v. Adams-Robinson Enterprises*, 349 N.C. 218, 504 S.E.2d 786 (1998) (*per curiam*), including evidence "that suitable jobs are available to the employee and 'that the [employee] is capable of

getting one,' taking into account the employee's 'age, education, physical limitations, vocational skills, and experience,' " *Smith*, 127 N.C. App. at 361, 489 S.E.2d at 447 (quoting *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996)). "[M]ere proof of a return to work is insufficient to rebut the . . . presumption," because "*capacity to earn* is the benchmark test of disability." *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). Furthermore, the employer may *not* rebut the presumption of continuing disability by showing that the employee is capable of earning pre-injury wages in a temporary position, *Daughtry v. Metric Construction Co.*, 115 N.C. App. 354, 358, 446 S.E.2d 590, 593, *disc. review denied*, 338 N.C. 515, 452 S.E.2d 808 (1994), or by creating a position within the employer's own company which is "not ordinarily available in the competitive job market," *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986), because such positions do not accurately reflect the employee's *capacity to earn* wages. "The Workers' Compensation Act does not permit [defendants] to avoid [their] duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which [defendants] could terminate at will or . . . for reasons beyond [their] control." *Id.* at 439, 342 S.E.2d at 806; *Saums*, 346 N.C. at 765, 487 S.E.2d at 750 (reversing because there was "no evidence that employers, other than defendant, would hire plaintiff to do a similar job at a comparable wage"); *Smith*, 127 N.C. App. at 362, 489 S.E.2d at 447 (noting that "the employer must come forward with evidence that others would hire the employee 'to do a similar job at a comparable wage' ").

In this case, the Commission determined that Plaintiff was entitled to compensation for the "significant aggravation of [her] preexisting injury to her shoulder" from 1 October 1990 until 24 October 1990, "and for such periods subsequent to that date which [P]laintiff may have missed from work as a result of her impingement syndrome and continuing until such time as [P]laintiff returns to work or until further orders of the [Commission]." Plaintiff was therefore entitled to a presumption of continuing disability. Plaintiff attempted to return to work with SCT on 25 October 1990 and continued working for approximately five months. Plaintiff was then out of work for six weeks due to an unrelated medical matter, but subsequently returned to work on 15 April 1991 and continued working for SCT for an additional three months. Plaintiff was unable to work after 11 July 1991

due to continuing shoulder pain related to her August 1990 occupational disease. Plaintiff's temporary, and ultimately unsuccessful, return to work is insufficient to rebut the presumption of continuing disability in her favor. *See* N.C.G.S. § 97-32.1 (Supp. 1997) (providing that "an employee may attempt a trial return to work for a period not to exceed nine months" without losing her right to continuing compensation);[3] *Kisiah*, 124 N.C. App. at 81, 476 S.E.2d at 439 (holding that proof of a return to work is insufficient to rebut the presumption of continuing disability). The evidence offered by SCT also revealed that the modified roller picker position offered to Plaintiff was offered as a temporary position, and evidence that an employee is capable of earning pre-injury wages in a temporary position is likewise insufficient to rebut the presumption of continuing disability. In addition, the only medical evidence in the record supports Plaintiff's claims of continuing shoulder pain. Finally, although the evidence showed that SCT offered Plaintiff a position as a modified roller picker, the record is devoid of any evidence which would support the Commission's finding of fact that the modified roller picker position is "a real position which exists in the marketplace and is not 'made work.' " *See Peoples*, 316 N.C. at 432-33, 342 S.E.2d at 803 (noting that competent evidence must support the Commission's findings of fact). SCT has therefore failed to rebut Plaintiff's presumption of continuing disability with medical evidence or with evidence that Plaintiff is capable of obtaining a suitable job in the competitive marketplace.[4] It follows from the foregoing that Plaintiff justifiably refused to accept the modified roller picker position. *See* N.C.G.S. § 97-32 (1991); *Peoples*, 316 N.C. at 444, 342 S.E.2d at 810.

Reversed and remanded.

Judges SMITH and TIMMONS-GOODSON concur.

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3. The legislature made section 97-32.1 applicable to "claims pending on" 1 October 1994. 1993 N.C. Sess. Laws ch. 679, § 11.1(a). We note that an employee is now required to file a Form 28U to reinstate compensation if her trial return to work is unsuccessful, Workers' Comp. R. N.C. Indus. Comm'n 404A(2), 1998 Ann. R. N.C. 650; however, at the time Plaintiff attempted her return to work with SCT, this requirement did not exist, *see* Workers' Comp. R. N.C. Indus. Comm'n 404A(8), 1998 Ann. R. N.C. 652 (noting that Rule 404A is applicable to any employee who leaves work on or after 15 February 1995).

4. The Full Commission, in its "Order Denying Plaintiff's Motion to Reconsider," found that "[f]ormer Deputy Commissioner Dillard did not base his decision upon Saums, as the Court of Appeals had not rendered its decision when the former [d]eputy [c]ommissioner filed his Opinion and Award in this matter 31 May 1995." The Full

MARJORIE K. CHUSED, PLAINTIFF v. ANDREW M. CHUSED, DEFENDANT

No. COA98-91

(Filed 15 December 1998)

1. Child Support, Custody, and Visitation— support—earning capacity—findings required

The trial court erred in ruling on a motion to reduce child support by using defendant's earning capacity rather than the Guidelines in determining his obligation when there was no finding that defendant acted in bad faith by deliberately depressing his income.

2. Child Support, Custody, and Visitation— support—amount outside Guidelines—no request by either party

The trial court did not err in a child support action by setting support outside the Guidelines without a request from either party where both parties presented without objection evidence of the needs of the children and the parties' relative abilities to provide support.

3. Child Support, Custody, and Visitation— support—contempt for unilateral reduction—means to comply

The trial court did not err in a child support action by finding defendant in contempt for unilaterally reducing his court ordered payments where defendant contended that the record did not establish that he had the means or ability to comply but the court

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Commission further found that the deputy commissioner's decision was based on the finding that "[P]laintiff unjustifiably refused suitable employment which was generally available in the competitive labor market." As noted above, however, there was no evidence before the Commission to support this finding; it therefore cannot stand. In any event, the Full Commission clearly relied on the now-reversed Court of Appeals opinion in *Saums* in upholding the deputy commissioner's award, stating that "Plaintiff did not present evidence to rebut the presumption that this job was generally available in the competitive labor market. Saums v. Raleigh Community Hospital, 124 N.C. App. 219, 476 S.E.2d 372 (1996)." *Saums* was subsequently reversed by our Supreme Court on this ground. The law is now clear that Plaintiff was not required to present any evidence until SCT successfully rebutted the presumption of her continuing disability. *See Saums*, 346 N.C. at 763-64, 487 S.E.2d at 749 ("The employee need not present evidence at the hearing unless and until the employer, 'claim[ing] that the plaintiff is capable of earning wages, . . . come[s] forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.' " (quoting *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990))).

ordered that he pay $14,575 and the record reveals that he had an estate of at least $900,000.

4. Child Support, Custody, and Visitation— support—attorney fee—findings

The trial court erred in a child support action by awarding attorney's fees to plaintiff without entering findings on the issue of whether payment of the fees by plaintiff would unreasonably deplete her estate.

Appeal by defendant from order filed 16 July 1997 by Judge David A. Leech in Pitt County District Court. Heard in the Court of Appeals 20 October 1998.

J. Randal Hunter, for plaintiff appellee.

White & Allen, P.A., by David J. Fillippeli, Jr., for defendant appellant.

GREENE, Judge.

Andrew Chused (Defendant) appeals from the trial court's order reducing his child support obligation; finding him in civil contempt for failing to pay child support; and ordering him to pay the attorney's fees of Marjorie Chused (Plaintiff).

Plaintiff and Defendant were married (1974), separated (1991), and divorced (1993). During their marriage, they had three children, born 8 February 1978, 3 October 1979, and 20 April 1982.

On 23 July 1992, a consent order was signed by the parties resolving issues of alimony, child custody, child support, and attorney's fees. This order directed Defendant to pay child support in the initial sum of $4,000.00 per month until the oldest child reached age eighteen or completed high school; $3,200.00 monthly until the middle child reached age eighteen or completed high school; and $2,500.00 per month until the youngest child reached age eighteen or completed high school. At the time of the consent decree, Defendant was earning $142,000.00 annually. In October of 1995, Defendant was terminated involuntarily from his employment and, because of a severance package, continued to receive his full salary through July of 1996. Defendant began practicing as a certified public accountant in early 1997.

On 17 July 1996, Defendant filed for a reduction in his child support obligation claiming that he had no income from employment. In September of 1996, Defendant unilaterally reduced his child support payment to $1,050.00 per month.

Evidence at the hearing of Defendant's modification request revealed that, as of the date of the hearing, Defendant had an estate worth approximately $975,000.00 (consisting primarily of stock and real estate) and Plaintiff had an estate valuing approximately $380,000.00 (consisting primarily of stock and real estate). The evidence further revealed that Defendant was not yet earning any income from his new accounting business, his current occupation, but was receiving approximately $8,000.00 annually from his investments. Plaintiff was employed and earning $22,464.00 annually. Each of the three children had respective trusts for their benefit valued at approximately $300,000.00. At the time of the hearing, the oldest child was in college.

The trial court signed an order on 9 July 1997 reducing Defendant's child support obligation from $3,200.00 to $2,375.00, commencing 1 September 1996; adjudicating Defendant in civil contempt of court; and ordering him to pay $14,575.00 to purge himself of this contempt. In support of the order, the trial court entered pertinent findings of fact and conclusions of law. In summary, the trial court found: (1) Defendant has the "present capacity to earn no less than $55,000.00"; (2) Defendant owns assets "having a net value exceeding $900,000.00"; (3) Plaintiff is employed and earning "$12.00 per hour and works approximately 36 hours per week"; (4) the increased needs of the children will be offset by the income from their trust; (5) "the needs of the children are at least $2,375.00 per month in order to maintain them in the style of living to which they [have become] accustomed"; (6) in "light of . . . [Defendant's] assets, income, and earning capacity, and considering the needs of the children and [Plaintiff's] income, the court finds that [Defendant] is entitled to a present reduction in his child support obligation in the amount of $825.00"; (7) the new amount of child support "is consistent with the North Carolina Child Support Guidelines"; (8) Defendant has, since September 1996, reduced the amount of child support he has paid to $1,050.00; (9) Defendant has had the ability to pay the sum due of $2,375.00 since 1 September 1996; (10) Defendant has "willfully and intentionally failed and refused to comply" with the terms of the consent decree; (11) Defendant "has the ability to pay the arrearage [of $14,575.00] existing at the time this order is signed . . . within 60

days therefrom"; (12) Plaintiff has been represented by Randall Hunter in these proceedings and the reasonable value of his services is no less than $3,651.00; and (13) Plaintiff "does not have the ability to pay these [attorney's] fees" and Defendant "does have the ability to pay [them] within 60 days from the entry of this order." The trial court concluded that: (1) there had been a substantial change in circumstances; (2) Defendant had willfully and intentionally violated the consent decree; (3) Defendant was in civil contempt of court; and (4) Plaintiff was entitled to an award of attorney's fees in the amount of $3,651.00.

The issues are whether: (I) earning capacity may be considered in setting child support absent a finding of bad faith; (II) the trial court may deviate from the North Carolina Child Support Guidelines Schedule only upon a timely request from either party; (III) there is evidence to support the trial court's finding that Defendant had the ability to pay $14,575.00; and (IV) the trial court properly considered the relative estates of the parties in awarding attorney's fees.

I

[1] In this case, Defendant seeks a reduction of his child support obligation pursuant to N.C. Gen. Stat. § 50-13.7. This statute requires that he first show that there has been a "changed circumstance" since the entry of the consent decree. N.C.G.S. § 50-13.7 (1995). It is not disputed in this case that the reduction in Defendant's income constituted a "changed circumstance." *See McGee v. McGee*, 118 N.C. App. 19, 27, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995) (involuntary decrease in obligor's income satisfies the change in circumstances requirement of section 50-13.7). Once the change of circumstance has been shown, a new child support amount is to be determined consistent with the North Carolina Child Support Guidelines. *Id.* at 26, 453 S.E.2d at 535-36. The support is to be determined based on the parties' actual income. *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). If, however, there is a showing that a party has acted "in bad faith by deliberately depressing [his] income or otherwise disregarding the obligation to pay child support," that party's earning capacity can be used to determine his child support obligation. *Schroader v. Schroader*, 120 N.C. App. 790, 794, 463 S.E.2d 790, 792 (1995).

In this case, the trial court used Defendant's earning capacity in determining his child support obligation. There is no finding in this record that the trial court determined that Defendant was "acting in

bad faith by deliberately depressing [his] income." Because the trial court erred, the child support award is reversed, and that matter is remanded to that court for redetermination of the child support amount.

II

[2] Upon findings that "the application of the [G]uidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support," a trial court may vary from the Guidelines in setting a child support amount, but only if a timely request (10 days written notice) is made by either party, or if evidence "relating to the reasonable needs of the child for support and the relative ability of each parent to provide support" is presented without objection. N.C.G.S. § 50-13.4(c) (Supp. 1997); *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740-41 (1991).

In this case, although the trial court indicated that it set child support "consistent" with the Guidelines, it is undisputed that the Guidelines Schedule was not used in setting the child support amount. Instead, the trial court attempted to set support utilizing the needs of the children and the relative abilities of the parents. Defendant contends this was error because neither party requested a variance from the Guidelines. Indeed this record does not reflect such a request, but the record does show that both parties presented, without objection, evidence of the needs of the children and the parties' relative abilities to provide support. Accordingly, the trial court did not err in setting support outside the Guidelines Schedule.

III

[3] Defendant unilaterally reduced his child support payments in September of 1996. A supporting parent "has no authority to unilaterally modify the amount of the [court ordered] child support payment. The supporting parent must [first] apply to the trial court for modification." *Craig v. Craig*, 103 N.C. App. 615, 618, 406 S.E.2d 656, 658 (1991). The trial court then has the authority to enter a modification of court ordered child support, retroactive to the filing of the petition of modification. *Mackins v. Mackins*, 114 N.C. App. 538, 546-47, 442 S.E.2d 352, 357, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994); N.C.G.S. § 50-13.10 (1995) (child support is vested and normally may not be modified retroactively).

If a person unilaterally reduces his court ordered child support payments, he subjects himself to contempt. Before a person may be held in civil contempt of court, there must be evidence that he "is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order." N.C.G.S. § 5A-21(a)(3) (1986); *Blair v. Blair*, 8 N.C. App. 61, 63, 173 S.E.2d 513, 514 (1970).

Defendant contends the evidence in this record does not establish that he had the means or ability to comply with the order of the trial court that he pay $14,575.00. We disagree. The record reveals that Defendant has an estate of at least $900,000.00 and that evidence clearly shows his ability to comply or take reasonable measures to comply with the order of the trial court. Accordingly, the trial court committed no error in its order of contempt.

IV

[4] Before attorney's fees can be taxed in an action for child support, the trial court must find as fact that the party seeking the award: (1) is an interested party acting in good faith; (2) has insufficient means to defray the expense of the suit; and (3) the party ordered to pay counsel fees has refused to provide adequate support. N.C.G.S. § 50-13.6 (1995); *Taylor v. Taylor*, 343 N.C. 50, 53-54, 468 S.E.2d 33, 35, *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996).

In determining whether a party has insufficient means to defray the cost of the suit, the trial court may compare the relative estates of the parties in some instances. *Van Every v. McGuire*, 348 N.C. 58, 60-62, 497 S.E.2d 689, 690-92 (1998). For example, although a party may have assets sufficient to pay his attorney, if such payment would deplete his estate unreasonably, the trial court is free to compare his estate with the other party's estate in determining if he has insufficient means to defray the expenses of the suit. *Id.*

In this case, Plaintiff has an estate of approximately $380,000.00 and Defendant has an estate of about $975,000.00. The attorney's fees in question equal $3,651.00. Clearly there are assets from which Plaintiff can pay her attorney's fees. Would that payment, however, unreasonably deplete her estate? That is for the trial court to determine, and in this case, the trial court entered no findings addressing that issue. *See id.* (suggesting that the trial court should make findings as to whether payment would deplete a party's estate). Accordingly, the attorney's fees award is reversed and remanded to the trial court for the entry of a new order on attorney's fees.

Affirmed in part; reversed in part and remanded.

Judges WALKER and SMITH concur.

STAR FINANCIAL CORPORATION, PLAINTIFF v. HOWARD NANCE COMPANY, DEFENDANT

No. COA98-286

(Filed 15 December 1998)

Vendor and Purchaser— sales contract—recovery of earnest money

The trial court did not err by granting summary judgment for defendant in an action to recover earnest money paid as a part of a failed contract to purchase real property. Plaintiff buyer, having breached the real estate sales contract, was not entitled to recover the amounts paid prior to its breach.

Judge GREENE dissenting.

Appeal by plaintiff from judgment entered 3 December 1997 by Judge James L. Baker, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 1998.

On 4 October 1995, seller Howard Nance Company (Nance) and purchaser Star Financial Corporation (Star) entered into a contract for the purchase of a lot and house under construction in Charlotte, North Carolina. The original purchase price of the property under the contract was $535,275.00, but the price was increased to $558,792.52 after adding all change orders submitted by Star. Closing and transfer of the title were to occur within seven days of the issuance of a certificate of occupancy.

The contract was written on the North Carolina Bar Association/North Carolina Association of Realtors, Inc., form, but the parties modified it for this sale. Section 3 of the contract was stricken by the parties, except for the line setting out the purchase price of $535,275.00. The stricken portion set out the manner in which the purchase price would be paid, including the amount of any earnest money. No amount was specified as earnest money.

However, Section 1 of the standard provisions in the contract entitled "EARNEST MONEY" still remained and provided, in part, that:

> In the event this offer is not accepted, or in the event that any of the conditions hereto are not satisfied, or in the event of a breach of this contract by Seller, then the earnest money shall be returned to Buyer, but such return shall not affect any other remedies available to Buyer for such breach. In the event this offer is accepted and Buyer breaches this contract, then the earnest money shall be forfeited, but such forfeiture shall not affect any other remedies available to Seller for such breach.

Addendum A was added to the contract and provided that the purchase price of $535,275.00 would be paid in the following manner: $50,000.00 to seller when the contract was delivered and $50,000.00 to seller on 1 November 1995, with both amounts to be applied to the purchase price. The remaining balance was to be paid at closing.

Star paid the first two payments, totaling $100,000.00. Thereafter, the closing date for the house was pushed back several times, including from 15 December 1995, to 19 December 1995, to 12 January 1996, to 1 February 1996, to 13 February 1996. Nance advised Star that if Star did not close on the property on 13 February 1996, Nance would place the property back on the market.

Nance received no response from Star by 13 February 1996, so Nance declared Star to be in breach of the contract and put the property on the market. Several months later, a third-party purchaser signed a contract to purchase the property for $550,000.00, and the closing was held on 28 June 1996.

Nance retained the $100,000.00 paid by Star, and Star filed this action on 15 August 1996 to recover that sum. Both parties filed a summary judgment motion. On 3 December 1997, the trial court denied plaintiff's motion and granted defendant's motion, finding that defendant was entitled to keep the $100,000.00 paid by plaintiff pursuant to the real estate contract. Plaintiff appealed.

John E. Hodge, Jr., for plaintiff appellant.

Perry, Patrick, Farmer & Michaux, P.A., by John H. Carmichael, for defendant appellee.

HORTON, Judge.

The issue on appeal is whether the buyer under a contract to purchase real estate, who does not comply with the terms of the contract, may recover the amounts paid to the seller prior to the buyer's breach. North Carolina follows the common law rule, which is the majority American view, that a defaulting buyer may not recover any portion of consideration paid prior to his breach.

> It is settled law that where a party agrees to purchase real estate and pays a part of the consideration therefor and then refuses or becomes unable to comply with the terms of his contract, he is not entitled to recover the amount theretofore paid pursuant to its terms.

Scott v. Foppe, 247 N.C. 67, 70, 100 S.E.2d 238, 240 (1957).

In *Walker v. Weaver*, 23 N.C. App. 654, 209 S.E.2d 537 (1974), this Court applied the holding of *Scott* and held that the trial court was correct in awarding the seller a $500.00 "part payment on the purchase price" made by the buyer under a contract to purchase real estate where the buyer had defaulted under the contract. We note that there was no forfeiture provision in the real estate contracts involved in *Scott* and *Walker*, nor were the amounts paid in those cases referred to as either earnest money or liquidated damages. In both cases, as in the case *sub judice*, the amounts paid were to be applied to the total purchase price. Thus, in the present case, the trial court correctly entered summary judgment for the seller. Plaintiff buyer, having breached the real estate sales contract, was not entitled to recover the amounts paid prior to its breach.

We are aware that the common law rule has been criticized in some jurisdictions as being inequitable where the amount forfeited is more than the seller's actual damages resulting from the breach. *See Walker*, 23 N.C. App. at 656, 209 S.E.2d at 539. That may be the situation in the instant case. However, it is not for this Court to depart from a rule that our Supreme Court has described as "settled law."

For the foregoing reasons, the decision of the trial court is

Affirmed.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority that the law in North Carolina provides that every person under a contract to purchase real estate, who defaults under the contract, forfeits to the seller any monies paid pursuant to the contract prior to the default, absent a specific agreement to the contrary.

The general rule provides that in a contract for purchase and sale, the vendor, upon breach by the purchaser, may either sue for the difference between the agreed price and the fair market value, or for damages which have been occasioned by the purchaser's failure to comply with his contract. *See, generally*, 77 Am. Jur. 2d *Vendor and Purchaser* § 577-79 (1997). The parties, however, are free to expressly provide "that a certain sum will be paid by the purchaser as liquidated damages if the purchaser fails to perform, and such a provision will be given effect unless the situation of the parties and the surrounding circumstances show that, notwithstanding the words used, a penalty was intended." *Id.* at § 581.

> [A] stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach.[1]

Knutton v. Cofield, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968); 22 Am. Jur. 2d *Damages* § 701 (1988) (provisions fixing damages "in an amount grossly disproportionate to the harm actually sustained or likely to be sustained . . . is an agreement to pay a penalty"). Liquidated damages are collectable, but penalties are not enforceable. *Id.*

In this case, the parties did not stipulate a sum that would be forfeited upon the purchaser's breach. Indeed, the provision that the $100,000.00 paid by the purchaser would be "earnest" money forfeited upon default by the purchaser was deleted from the contract. This deletion evidences the parties' intent to have no forfeiture clause, thus relegating the seller to an action for damages in the event of the purchaser's default.

1. The fixing of unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty. Restatement (Second) of Contracts § 356(1) (1981).

In any event, to the extent the contract could be read to provide that the $100,000.00 would be forfeited upon the purchaser's breach, that amount constitutes a penalty because it is so large as to be out of proportion to the probable loss of the seller and does not represent a fair estimate of the damages actually sustained.[2] I would therefore hold that summary judgment for Nance was error, that Nance was not entitled to retain the $100,000.00 as a forfeiture, and that the case must be remanded for a determination of Nance's actual damages arising from Star's default.

I do not believe that *Scott v. Foppe*, 247 N.C. 67, 100 S.E.2d 238 (1957), and *Walker v. Weaver*, 23 N.C. 654, 209 S.E.2d 537 (1974), require that we reach a different conclusion. In *Scott*, the Court was careful to note that the seller was under no obligation "under the facts" of that case to refund to the defaulting purchaser the consideration paid pursuant to the contract. *Scott*, 247 N.C. at 72, 100 S.E.2d at 241. In *Walker*, this Court found it unnecessary to deviate from the general rule enunciated in *Scott* because application of that rule to the facts presented in *Walker* "produced no harsh result." *Walker*, 23 N.C. App. at 656, 209 S.E.2d at 539. Even if we read these cases as holding that in the absence of a forfeiture clause, one will be implied, it does not follow that in each instance it will be treated as a liquidated damages clause, as opposed to a penalty clause. That, however, is the construction placed on these cases by the majority and it is a construction with which I disagree.

I would reverse summary judgment and remand.

STATE OF NORTH CAROLINA v. JOSEPH WENDELL JORDAN

No. COA98-137

(Filed 15 December 1998)

Criminal Law— mistrial—denied—newspaper article during trial

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a rape prosecution where defendant left the courtroom during a break in jury selection, telling his

2. If there is "a doubt whether a sum is in fact a penalty or liquidated damages, courts are inclined to hold that it is a penalty." 22 Am. Jur. 2d *Damages* § 691 (1988). That determination presents a question of law, not a question of fact. *Id.* at § 692.

attorney he was going to telephone his mother, and did not return; the judge proceeded and ultimately examined the jurors regarding defendant's absence; a newspaper article during the trial described defendant as a fugitive; the court conducted an inquiry and excused two of the seven jurors who had read the article; and defendant was subsequently apprehended and returned to the courtroom. The inquiry conducted by the court and its repeated admonition concerning the State's burden of proof were adequate to insure that no prejudice resulted to defendant from five of the remaining jurors having read the article, and, given the jurors' responses, the court was justified in concluding that they had not formed an opinion as a result of reading the article and that they were able to render a verdict based solely on the evidence.

Appeal by defendant from judgments entered 11 July 1997 by Judge Richard B. Allsbrook in Halifax County Superior Court. Heard in the Court of Appeals 16 November 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Virginia A. Gibbons, for the State.

Ronnie C. Reaves, P.A., by Lynn Pierce, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Joseph Wendell Jordan was convicted of first-degree statutory rape and first-degree statutory sexual offense at the 11 July 1997 Criminal Session of Halifax County Superior Court. Defendant appeals his convictions on the ground that the trial court erred in denying his motion for a mistrial. For the reasons hereinafter stated, we find no error in the trial court's decision.

Jury selection in the trial of defendant began 8 July 1997. During a break in the proceedings, defendant left the courtroom after telling his attorney that he was going to telephone his mother. When the proceedings resumed later that afternoon, defendant did not return, but the trial court elected to proceed with the trial in defendant's absence. As the process of jury selection progressed, one of the prospective jurors asked defendant's attorney why defendant was not present in the courtroom, so the trial court interrupted the proceedings to address the matter of defendant's absence. In doing so, the court did not inform the jurors that defendant had fled. Instead, the court instructed the panel that the State bore the burden of proving

defendant's guilt beyond a reasonable doubt and further explained that defendant was presumed innocent and carried no burden of proof. The court then asked the selected and prospective jurors if they could disregard defendant's absence and render a fair and impartial verdict based solely upon the evidence. Each juror answered affirmatively.

Defendant remained at large throughout the jury selection process and the presentation of the State's case. The evidence for the State tended to show that the fourteen-year-old victim was drying off after taking a shower at a friend's house, when defendant, who had come to the house to use the telephone, forced open the bathroom door. Closing the door behind him, defendant removed the girl's towel, kissed her, performed oral sex on her, and then engaged in sexual intercourse with her. Dr. Ted Westover, the emergency room physician who treated the victim after the incident, testified that there were small fissures or tears in the victim's vulvar and perineal area. The State concluded its case on 9 July 1997.

That evening, an article describing defendant as a fugitive appeared on the front page of the local newspaper, "The Daily Herald," with a caption that read, "Defendant Walks Away." The article itself was not made a part of the record on appeal. However, the contents of the article, as summarized by defendant's attorney, appear in the transcript of the proceedings as follows:

> [The article] contains statements from the Halifax County Sheriff's Office that "Defendant Jordan was charged with two counts of rape of [sic] child and had been free on a $40,000 bond pending his trial. Fraser said that at 11:05 Tuesday morning, a morning recess was taken by the Court. When everyone returned at 11:25, Jordan's attorney, Sam Barnes, told the Court that his client had gone to use the phone and never returned. Fraser said at the time the resident superior court judge, Richard Allsbrook, issued two orders for arrest without bond on Jordan. However, the trial is proceeding in the absence of the accused, Fraser said. Jordan has relatives in Brooklyn, New York, and his current address is not known, Fraser said. He has been entered into a national crime information system as a wanted person, Fraser added."

Defendant's attorney brought the article to the court's attention on the morning of 10 July 1997 and requested that the court inquire as

to whether any of the jurors had read the article or were otherwise familiar with its contents. Upon discovering that seven jurors had read the article, the court reminded the jury of the State's burden on the issue of guilt and asked each of the seven jurors whether reading the article had impaired his or her ability to be fair and impartial. Two jurors stated that the article had affected their ability to render an impartial decision and were excused. Another juror, Laura Peterson, initially said that the article might affect her ability to be impartial but later stated that if defendant reappeared, she could be fair and impartial. The court did not excuse Peterson, because defendant had been apprehended and was expected to be present in the courtroom later that afternoon. Nonetheless, defendant's counsel moved for a mistrial on the ground that the article prejudiced defendant's right to a trial by a fair and impartial jury. The trial court denied the motion.

Defendant returned to the courtroom on the afternoon of 10 July 1997. The defense put on no evidence, and the jury found defendant guilty of first-degree statutory rape and first-degree statutory sexual offense. From the judgments entered on these convictions, defendant appeals.

Defendant's sole argument on appeal is that the trial court abused its discretion by denying defendant's motion for a mistrial. Defendant contends that the article's description of him as a fugitive caused the jurors who had read the article to believe that defendant had a guilty state of mind, and thus, rendered them unable to arrive at a fair and impartial verdict based upon the evidence. We are not persuaded by defendant's reasoning.

In pertinent part, section 15A-1061 of the North Carolina General Statutes states that "[t]he judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (1997). A mistrial is appropriate only where such gross improprieties exist that it is impossible for the defendant to receive a fair and impartial verdict under the law. *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990). Whether to grant or deny a mistrial, pursuant to section 15A-1061, is a matter committed to the sound discretion of the trial court. *State v. Degree*, 114 N.C. App. 385, 391, 442 S.E.2d 323, 327 (1994). As such, the court's decision concerning a motion for a mistrial will not be reversed, unless the defendant shows that the deci-

sion amounted to a manifest abuse of discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991).

It is a fundamental principle of due process that a defendant is entitled to a fair and impartial panel of jurors. *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984). To that end, the trial court is responsible for insuring that the jurors remain neutral and uninfluenced by external factors. *Id.* Whether outside forces have impaired a particular juror's ability to render an impartial decision is a discretionary determination for the trial court. *Id.* Unless the decision is clearly erroneous, this Court will not second-guess the trial court's judgment as to whether external influences have affected a juror's neutrality, since the trial court is in a better position to examine the jurors and observe their demeanor. *Id.*

In the instant case, upon learning that seven of the jurors had read the newspaper article describing defendant as a fugitive, the trial court questioned each juror individually to determine what, if any, impact the newspaper article had on the juror's ability to be impartial. Four of the seven jurors indicated that they could remain neutral, despite having read the article, and declared that they would render a verdict uninfluenced by defendant's absence or his status as a fugitive. Two of the jurors stated that having read the article, they could no longer be impartial; thus, they were excused. One juror, although initially expressing some doubt about her ability to be impartial after reading the article, later stated that she could render a fair and impartial decision if defendant reappeared at trial. The court did not excuse the juror, because defendant had been apprehended and was due to return to the proceedings.

From our review of the record, we are satisfied that the inquiry conducted by the trial court and its repeated admonition concerning the State's burden of proof were adequate to insure that no prejudice resulted to defendant from the fact that five of the jurors remaining on the panel had read the newspaper article. Given the jurors' responses, the court was justified in concluding that they had not formed an opinion as a result of reading the article and that they were able to render a verdict based solely on the evidence presented at trial. We, therefore, hold that the decision denying defendant's motion for a mistrial was an appropriate exercise of the trial court's discretion.

Defendant's remaining assignments of error are deemed abandoned, as defendant declined to address them in his brief. *See* N.C.R. App. P. 28(b)(5).

In light of the foregoing, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge SMITH concur.

MARLENE H. CATO, PLAINTIFF v. CROWN FINANCIAL, LTD. (FORMERLY CATO FINANCIAL LTD.), DEFENDANT, AND ARNOLD EUGENE WALSER AND SHIRLEY TURNER WALSER, INTERVENING/DEFENDANTS

No. COA98-121

(Filed 15 December 1998)

Judgments— default judgment—receiver's report—review by jury

The trial court erred by holding a trial pursuant to the intervening defendants' exceptions to a receiver's report where plaintiff had obtained a default judgment, the court had denied the intervening defendants' motion to set aside the default judgment, and the intervening defendants did not pursue an appeal. That judgment is final and is the law of the case; the right granted to intervenor to file pleadings was necessarily limited to issues not related to the amount or validity of the unappealed-from judgment. The receiver could not properly reduce the amount of plaintiff's judgment and the intervenor could not seek review of the judgment by a jury.

Appeal by plaintiff from judgment entered 22 October 1997 by Judge Charles C. Lamm, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 16 November 1998.

Plaintiff Marlene H. Cato is president, sole shareholder and a judgment creditor of defendant Crown Financial, Ltd. ("Crown Financial"), a corporation that is in receivership. Intervening defendants Arnold Eugene Walser and Shirley Turner Walser are competing judgment creditors of Crown Financial.

In the 1970's, plaintiff and her husband, Harlan Cato, invested in and operated an apartment complex, the Woodbridge Apartments ("Woodbridge"), as a joint venture with the Walsers and others. In

May 1980, the Walsers owned a 10% interest and the Catos owned an 86% interest in Woodbridge. That same year, Crown Financial was formed and purchased Woodbridge from the Walsers and the Catos in exchange for promissory notes. Crown Financial issued a promissory note for $1,689,600.00 to the Catos and a note for $192,000.00 to the Walsers.

In 1980, Crown Financial began depositing money into a bank account maintained by the joint venture, monetary transfers the parties have referred to as "indirect transfers." From 1984 to 1988, the Catos and the Walsers received checks from the joint venture account. Beginning in 1989, Crown Financial began sending checks directly to the Walsers and the Catos. The parties refer to these payments as "direct transfers."

On 10 May 1993 the Walsers sued Crown on their $192,000.00 note, arguing that the indirect transfers did not count as payments on their promissory note. After a trial, the Guilford County Superior Court accepted the Walsers' arguments and awarded the Walsers $245,235.99 plus interest. This Court affirmed that award by unpublished opinion. *Walser v. Crown Financial, Ltd.*, 122 N.C. App. 581, 475 S.E.2d 259 (1995).

On 28 November 1994 plaintiff filed this lawsuit seeking payment on her promissory note. On 2 January 1995, following the Walsers' attempt to collect on their judgment, plaintiff filed a bankruptcy petition on behalf of Crown Financial. Plaintiff claimed that Crown did not have sufficient assets to pay both plaintiff's note and the Walsers' judgment. On 3 April 1995 the bankruptcy court entered an order dismissing Crown Financial's petition for bad faith filing.

On 7 April 1995 plaintiff moved for a default judgment against Crown Financial and was awarded a recovery of $3,723,583.00. On 10 April 1995 plaintiff petitioned the trial court pursuant to G.S. 1-507.1 *et seq.* to appoint a receiver and the court appointed E. Jackson Harrington, Jr. On 20 April 1995 the Walsers filed a Motion to Intervene and Set Aside Judgment by Default Final and Order Appointing Receiver. The trial court granted defendants' motion to intervene but denied their request to set aside the default judgment and declined to revoke the appointment of the receiver. The Walsers did not appeal.

Mr. Harrington rendered his report on 22 April 1996 and determined that Crown Financial owed plaintiff $2,903,425.56 on her note

and the Walsers $260,047.21 on their note and ordered that Crown Financial's assets be allocated to these debts pro rata. Both parties excepted, but plaintiff later withdrew her exception. On 29 April 1997 a trial was held pursuant to G.S. 1-507.7 based on the Walsers' exceptions. The jury found that Crown Financial owed plaintiff only $250,000.00 on her note. The trial court denied plaintiff's motions for new trial and judgment notwithstanding the verdict and entered judgment on 22 October 1997. Plaintiff appeals.

Smith Helms Mulliss & Moore, by James G. Exum, Jr. and Matthew Sawchak, for plaintiff-appellant.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by Amiel J. Rossabi and J. Scott Hale, for defendant-appellees.

EAGLES, Chief Judge.

We first consider whether the trial court erred in retrying this case de novo. Plaintiff first argues that the Walsers' "broadside exception" to the receiver's report was too vague to justify review and should be treated as having waived the right to review. Second, plaintiff argues that the trial should not have been de novo and that the receiver's report should have been accorded deference. Plaintiff contends that the trial court should have interpreted G.S. 1-507.7 "in a way that serves the statute's purpose." Plaintiff asserts that "[p]aying for the work of an expert receiver, then throwing that work away, disserves the statutory purpose." Plaintiff contends that the standard of review should be the "substantial evidence" test that courts apply to agencies' findings. Third, plaintiff contends that by retrying the case de novo, the trial court overruled another superior court judge's decision not to set aside the default judgment, violating the rule "that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *McArdle Corp. v. Patterson*, 115 N.C. App. 528, 531, 445 S.E.2d 604, 606 (1994), *aff'd per curiam*, 340 N.C. 356, 457 S.E.2d 596 (1995). Finally, plaintiff argues that the Walsers should not be allowed to "bootstrap their mere presence into a trial de novo."

Defendants first assert that the plain meaning of the statute requires de novo review. Defendants next argue G.S. 1-507.7 does not set forth any particular requirements for exceptions to the receiver's report. Defendants contend that their exceptions to the receiver's report were sufficient to provide plaintiff with notice of the scope of the trial, and plaintiff was not prejudiced by the form of the excep-

tion. Third, defendants argue that "requiring the jury to determine if the receiver's report is supported by 'substantial evidence' would add a provision not imposed by the language of N.C. Gen. Stat. §1-507.7 and would conflict with the express requirement that the trial court judge submit the issue to a jury." Additionally, defendants contend that requiring the jury to give deference to the receiver's findings "would conflict with the jury's duty to act as the sole finder of fact." Also, defendant asserts that "the question of whether the receiver's report is supported by substantial evidence is a question of law that is not properly within the province of the jury as fact finder." Finally, defendants argue that "[h]ad Judge Lamm refused to hold a trial pursuant to N.C. Gen. Stat. §1-507.7, he would have overruled that portion of Judge Allen's order that granted the Walsers the status of intervenor-defendants, because the Walsers would not have received the same rights all other parties receive under N.C. Gen. Stat. §1-507.7." Defendants argue that by allowing the Walsers to intervene and the receivership to proceed, the Walsers and the Catos were both given a full and fair opportunity to be heard.

After careful consideration of the record, briefs and contentions of both parties, we reverse. The record reveals that plaintiff has a default judgment against Crown Financial for $3,723,583.00. The trial court denied the Walser's motion to set aside the default judgment, and the Walser's did not pursue an appeal. That judgment is final and is the law of the case; any further ruling purporting to deny the existence or amount of that judgment is void. Although the trial court granted the Walsers the right to file pleadings, that right was necessarily limited to issues not related to the amount or validity of the unappealed from judgment. Accordingly, the receiver could not properly reduce Ms. Cato's judgment, and the Walsers could not seek review of the Cato's judgment by a jury.

Because of our determination of the first issue, we need not address the remaining issue on appeal. We reverse and remand to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

Judges TIMMONS-GOODSON and SMITH concur.

BURKE v. WILKINS

[131 N.C. App. 687 (1998)]

JEFFREY L. BURKE; AND, CLAUDIA K. BURKE, PLAINTIFFS v. STEVE WILKINS, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF WEBSURF, INC.; AND, WEBSURF, INC. A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA98-188

(Filed 15 December 1998)

1. **Arbitration and Mediation— order denying—interlocutory—immediately appealable**

   An order denying arbitration, though interlocutory, is immediately appealable.

2. **Arbitration and Mediation— order denying—no determination of valid agreement**

   The trial court erred by denying a motion to compel arbitration without deciding whether a valid agreement to arbitrate existed between the parties. N.C.G.S. § 1-567.3.

Appeal by defendants from order entered 10 November 1997 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 October 1998.

The Banks Law Firm, P.A., by Bryan E. Wardell, for plaintiffs-appellees.

Allen and Pinnix, P.A., by Michael L. Weisel and Noel L. Allen, for defendants-appellants

TIMMONS-GOODSON, Judge.

Defendants appeal from an order of the trial court denying their Motion to Compel Arbitration and Stay Proceedings. After careful review, we reverse the court's order and remand for further proceedings.

In July of 1996, defendants Steve Wilkins and Websurf, Inc. placed an advertisement in the Business Opportunities section of the Raleigh News & Observer soliciting "partners" in a regional joint venture and licensing program to market their Internet access software. Jeffrey L. Burke and Claudia K. Burke (collectively, "plaintiffs") responded to defendants' advertisement and ultimately entered into a Regional Joint Venture Agreement, a Websurf Licensing Agreement, and a Transfer of Area License and Joint Venture Partnership Agreement with defendants. Each of these agreements contained the following provision:

> The parties expressly agree that all disputes arising under or related to this agreement shall be submitted and finally settled by arbitration. This arbitration shall be conducted in accordance with the rules of arbitration of the American Arbitration Association then in effect. The arbitration shall be conducted in Raleigh, NC, and judgment upon the arbitration award may be entered in any court having jurisdiction.

On 11 July 1997, plaintiffs instituted an action against defendants in Wake County Superior Court alleging violations of the North Carolina Business Opportunity Sales Act ("BOSA"), fraud, unfair and deceptive trade practices, and breach of contract. On 5 September 1997, defendants filed a Motion to Compel Arbitration and to Stay Proceeding Pending Arbitration. The trial court heard arguments on the motion on 23 October 1997. Defendants argued that under the terms of the parties' agreements, all claims asserted in plaintiffs' complaint must be submitted to arbitration. Plaintiffs, on the other hand, argued that due to defendants' numerous BOSA violations, the agreements between the parties are void and, thus, no valid arbitration agreement exists. After reviewing the arguments of the parties and the record before it, the trial court entered an order on 10 November 1997 denying the motion to compel arbitration with respect to the BOSA, fraud, and unfair and deceptive trade practices claims. From this order, defendants appeal.

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[1] On appeal, defendants bring forth but one assignment of error alleging that the trial court improperly denied their motion to stay the proceedings and compel arbitration. Initially, we point out that an "order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991).

[2] The record indicates that defendants' motion to compel arbitration was made pursuant to the North Carolina Uniform Arbitration Act, North Carolina General Statutes section 1-567, et seq. Section 1-567.3, in relevant part, states the following:

> (a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the

> issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.
>
> (b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

N.C. Gen. Stat. § 1-567.3 (1996). This Court has held that when a party disputes the existence of a valid arbitration agreement, section 1-567.3 expressly requires the trial judge "to summarily determine whether, as a matter of law, a valid arbitration agreement exists," and failure to comply with this mandate is reversible error. *Routh v. Snap-On Tools Corp.*, 101 N.C. App. 703, 706, 400 S.E.2d 755, 757 (1991); *compare O'Neal Construction, Inc. v. Leonard S. Gibbs Grading, Inc.*, 121 N.C. App. 577, 468 S.E.2d 248 (1996) (stating that because case was not one where opposing party denied existence of arbitration agreement, trial court did not err in failing to determine whether valid agreement to arbitrate existed). The trial court's order in the present case pertinently provides as follows:

> **AND IT APPEARING TO THE COURT THAT** the Plaintiffs have brought an action alleging various violations of the Business Opportunities Act, Fraud, Unfair and Deceptive Trade Practices and Breach of Contract;
>
> **AND IT FURTHER APPEARING TO THE COURT THAT** the Plaintiffs' Business Opportunities Act, Fraud and Unfair and Deceptive Trade practices claims are not proper for arbitration in the instant action;
>
> . . .
>
> **NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED THAT** the Defendants' Motion to Compel Arbitration of the Plaintiffs' Business Opportunities Act, Fraud and Unfair and Deceptive Trade Practices claims is DENIED[.]

In failing to summarily decide whether a valid agreement to arbitrate exists between the parties as required by section 1-567.3 of our General Statutes, the trial court erred. Therefore, we reverse the order denying defendants' motion to compel arbitration and stay pro-

ceedings, and we remand this matter to the Superior Court with directions to proceed summarily to a determination of whether a valid arbitration agreement exists between the parties.

For the foregoing reasons, the order of the trial court is

Reversed and remanded.

Judges MARTIN, John C. and HORTON concur.

NORTH CAROLINA TRUST COMPANY AND WILLIAM G. McNAIRY, TRUSTEES UNDER THE JOHN R. TAYLOR, JR. TRUST, PLAINTIFF-APPELLEES v. ELIZA P. TAYLOR AND AMANDA L. TAYLOR AND VIRGINIA BELL VANSTORY, DEFENDANT-APPELLEES v. JONATHAN R. HARKAVY, GUARDIAN *AD LITEM* FOR LINEAL DESCENDANTS OF ELIZA P. TAYLOR AND AMANDA L. TAYLOR, AND WILLIAM E. WHEELER, GUARDIAN *AD LITEM* FOR LINEAL DESCENDANTS OF REID S. TAYLOR, SR., DEFENDANT-APPELLANTS

No. COA98-291

(Filed 15 December 1998)

1. **Trusts— settlement of action to construe agreement— court approval not required**

An appeal from a declaratory judgment relating to handwritten changes to a trust agreement by the testator was dismissed where the parties settled before trial and asked the trial court to approve the settlement, the court entered judgment resolving all issues precisely as requested in the complaint, and defendants appealed. Although appellants argued that courts have inherent authority over the property of infants and that the contract of settlement should receive appellate approval under *Sternberger Foundation v. Tannenbaum*, 273 N.C. 685, this case is distinguishable in that no charitable trust is involved and the issues involve purely private interests; moreover, the settlement here merely determined the validity of handwritten changes to the trust agreement and did not alter the express terms of the testator's will, as in Sternberger.

2. **Appeal and Error— assignments of error—deemed abandoned—mere request to review lower court**

Assignments of error were deemed abandoned in an appeal from a declaratory judgment relating to a trust agreement where

the appellants asked the Court of Appeals to "examine" and "review" the decision of the court below but discussed no grounds to substantiate their assignments of error.

3. Appeal and Error— parties aggrieved—settlement—argument a pretext to obtain appellate approval

An appeal was dismissed where a declaratory judgment action was filed relating to a trust agreement, the parties settled, the trial court entered judgment resolving all issues precisely as requested in the trustees' complaint, and defendants appealed. Appellants' briefs indicate that the argument that the judgment was not supported by the findings and conclusions is a pretext designed to obtain appellate approval of the settlement agreement rather than a determination that the trial court erred. The failure to demonstrate any injury resulting from the decision of the trial court compels the determination that appellants are not parties aggrieved.

Appeal by defendant from judgment entered 16 December 1997 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 26 October 1998.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Hubert Humphrey; and Schell, Bray, Aycock, Abel & Livingston, P.L.L.C., by Michael R. Abel, for plaintiff-appellees.

Patterson, Harkavy & Lawrence, L.L.P., by Jonathan R. Harkavy, for defendant-appellant, guardian ad litem for the lineal descendants of Eliza P. Taylor and Amanda L. Taylor.

Wyatt, Early, Harris & Wheeler, L.L.P., by William E. Wheeler and Scott F. Wyatt, for defendant-appellant, guardian ad litem for the lineal descendants of Reid S. Taylor.

Hill, Evans, Duncan, Jordan & Davis, P.L.L.C., by Thomas C. Duncan and Everett B. Saslow, Jr., for defendant-appellee, Virginia Bell Vanstory.

Adams, Kleemeier, Hagan, Hannah & Fouts, P.L.L.C., by Daniel W. Fouts, for defendant-appellees, Eliza P. Taylor and Amanda L. Taylor.

Turner, Enochs & Lloyd, P.A., by Herman G. Enochs, Jr., for defendant-appellee, Reid S. Taylor, Sr.

SMITH, Judge.

On 31 March 1997, North Carolina Trust Company and William G. McNairy, as trustees under the John R. Taylor, Jr. revocable trust agreement (the agreement), filed a complaint seeking a declaratory judgment relating to the validity and construction of the agreement. On 1 April 1997, the court appointed appellants Wheeler and Harkavy as guardians *ad litem* for the lineal descendants of Reid S. Taylor (Wheeler's wards), Eliza P. Taylor, and Amanda L. Taylor (Harkavy's wards). This case was designated an exceptional case pursuant to Rule 2.1 of the General Rules of Practice and assigned to Judge Ross. Before trial began, the parties agreed on terms for settlement. The parties asked Judge Ross to approve the settlement's resolution of validity and construction issues. On 10 November 1997, after a hearing, Judge Ross allowed both guardians *ad litem* to submit written analyses of the issues before him. On 19 December 1997, Judge Ross entered judgment resolving all issues precisely as requested in the trustees' complaint. Defendants appeal.

Each appellant assigns error claiming that the trial court's judgment is not supported by its findings of fact and conclusions of law as adduced from the evidence presented. Appellants make *no* argument in support of their respective assignments of error. Furthermore, based on their briefs, we conclude that appellants are not parties aggrieved. Thus, we dismiss the appeal.

[1] In their briefs, appellants argue that courts in this State "have inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests." *Sternberger Foundation v. Tannenbaum*, 273 N.C. 658, 674, 161 S.E.2d 116, 128 (1968) (where our Supreme Court reviewed a judgment approving a contract of settlement, which altered the express provisions of the residuary clause in the testator's will). In *Sternberger*, our Supreme Court held that "[b]ecause of the extreme importance of this matter to the parties *and to the public generally* [sic] the contract of settlement should receive the approval of this Court." *Id.* at 678, 161 S.E.2d at 131 (emphasis added). However, the instant case is distinguishable from *Sternberger*. Here, the issues decided regard purely private interests. There is no charitable trust involved. Therefore, the public policy considerations present in *Sternberger* are absent. In addition, the settlement in *Sternberger*, altered the express terms of the testator's will. Here, however, the trial court merely determined the validity of handwrit-

ten changes to the trust agreement and construed the instrument incorporating these changes. Appellants do not contend that the settlement varied the terms of the Trust. Rather, they assert that the settlement is in the best interests of their respective wards. Thus, we are not bound by *Sternberger* to review the decision of the trial court.

[2] Additionally, Rule 28(b)(5) of the Rules of Appellate Procedure limits our review to questions that are supported by the arguments made in the brief. *See State v. Cohen*, 301 N.C. 220, 270 S.E.2d 416 (1980). Rule 28 requires that "assignments of error be *brought forward and discussed* in the brief in order to properly present questions for review on appeal." *State v. Samuels*, 298 N.C. 783, 785, 260 S.E.2d 427, 429 (1979) (emphasis added). Where an appellant brings forth no argument or authority in their briefs in support of an assignment of error, the assignment of error is deemed abandoned. *See Taylor v. Nationsbank Corp.*, 125 N.C. App. 515, 481 S.E.2d 358, *disc. review allowed*, 346 N.C. 288, 487 S.E.2d 570, *disc. review denied as improvidently granted*, 347 N.C. 388, 493 S.E.2d 57 (1997). Here, appellants ask this Court to "examine" and "review" the decision of the court below but discuss no grounds to substantiate their assignments of error. As appellants have not brought forth and discussed their assignments of error, they are deemed abandoned.

[3] Furthermore, we hold that appellants in this case are not parties aggrieved by the decision of the trial court. North Carolina law has long reflected the principle that only parties aggrieved by the action of the lower court can appeal. *See Yadkin County v. High Point*, 219 N.C. 94, 13 S.E.2d 71 (1941). This concept has been codified in section 1-271, which states that "any party aggrieved may appeal." N.C. Gen. Stat. § 1-271 (1996). A party is aggrieved when its "rights have been *directly and injuriously affected* by the action of the court" and can therefore appeal from an order or judgment of the trial division. *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (emphasis added). Here, appellants claim that the trial court's judgment is not supported by its findings and conclusions. Appellants' briefs, however, indicate that this argument is a pretext, designed to obtain appellate approval of the settlement agreement rather than a determination that the trial court erred. In his brief, appellant Harkavy states that this Court should *affirm* the trial court's judgment, which he feels is in the best interest of his wards. From his apparent satisfaction with the judgment, we conclude that appellant Harkavy is not a party aggrieved by the trial court's decision. Similarly, appellant Wheeler fails to argue that his ward's interests

were directly and injuriously affected. Rather, he seeks "to put future potential litigation to rest and to provide a final adjudication of the issues raised," (validity and construction). Appellants' failure to demonstrate any injury resulting from the decision of the trial court compels us to determine that they are not parties aggrieved. Consequently, we dismiss their appeal.

Appeal dismissed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

ALTA W. McGOWAN, AS SUCCESSOR IN INTEREST TO JOE S. JOHNSON AND SOUTHERN ATLANTIC CORPORATION, A NORTH CAROLINA CORPORATION, PLAINTIFFS v. ARGO TRAVEL, INC., A NORTH CAROLINA CORPORATION; RODAFI, INC., A NORTH CAROLINA CORPORATION, D/B/A CAPITAL CENTRE DEVELOPMENT, LTD.; RDFP, A NORTH CAROLINA GENERAL PARTNERSHIP; COWEE CORPORATION, A NORTH CAROLINA CORPORATION; R.E.D., INC., A NORTH CAROLINA CORPORATION; ROY O. RODWELL; JOHN D. FIFE, JR.; AND JOHN K. PIROTTE, DEFENDANTS

No. COA98-215

(Filed 15 December 1998)

Appeal and Error— frivolous appeal—same issues and parties as prior cases—remanded for sanctions

An appeal was dismissed as frivolous with a remand for sanctions where the case was one in a long progeny of cases involving real estate brokerage commissions between the parties and presented the same issues between the same parties or their privies as were finally decided in prior cases.

Appeal by Joe S. Johnson, a substitute plaintiff, and plaintiff Alta W. McGowan from judgment filed 21 February 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 17 November 1998.

Joe S. Johnson, substitute plaintiff appellant, pro se.

Michael W. Strickland & Associates, P.A., by Michael W. Strickland, Nelson G. Harris, and Walter M. Dennis, for defendant appellees.

GREENE, Judge.

Alta W. McGowan and Joe S. Johnson (collectively, Plaintiffs) appeal from the entry of summary judgment for Argo Travel, *et al.* (collectively, Defendants).

This case is one in a long progeny of cases surrounding real estate broker's commissions and introductory fees allegedly owed to Plaintiffs by Defendants. The same dispute has been the subject of the following cases: *Southern Atlantic Corporation v. Rodafi, Inc.* (Wake County File No. 89 CVS 6022); *Enterprise Bank, N.A. v. Southern Atlantic Corporation et al.* (Wake County File No. 90 CVD 6212); *Southern Atlantic Corporation v. R.E.D., Inc. et al.* (Wake County File No. 92 CVS 2943); *Southern Atlantic Corporation v. R.E.D., Inc. et al.* (Wake County File No. 92 CVS 11745); and *Joe S. Johnson v. Rodafi, Inc.* (Wake County File No. 95 CVS 1265) (collectively, the Prior Cases).

Under the doctrine of res judicata, "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them" if all relevant and material matters, in the exercise of reasonable diligence of the parties, could and should have been brought forward. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986); *see also Northwestern Financial Group v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 693, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993).

The companion doctrine of collateral estoppel similarly "prevents [the] relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *McInnis*, 318 N.C. at 428, 349 S.E.2d at 557.

Because this case presents the same issues between the same parties or their privies as were finally decided in the Prior Cases, the appeal is "not well grounded in fact and warranted by existing law," and thus is frivolous. N.C.R. App. P. 34(a)(1). Accordingly, we dismiss the appeal, N.C.R. App. P. 34(b)(1), and remand the matter to the trial court for the determination of an appropriate sanction within the scope of Rule 34(b)(2)&(3) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 34(c).

Dismissed and remanded.

Judges LEWIS and HORTON concur.

WATER TOWER OFFICE ASSOCIATES, PETITIONER v. TOWN OF CARY BOARD OF ADJUSTMENT, RESPONDENT

No. COA98-345

(Filed 15 December 1998)

Zoning— appeal from zoning enforcement officer—not timely

The trial court properly dismissed a petition for a writ of certiorari seeking review by the trial court of a decision of the Cary Board of Adjustment where petitioner received a letter from a zoning enforcement officer on 11 October 1996 informing petitioner that a tract which petitioner had thought was zoned commercial was zoned for residential use; petitioner wrote a letter to the planning director on 18 October asking for advice and help in correcting the problem; a planner with the Town responded on 30 October by sending petitioner an application for an appeal of the decision that the property is zoned residential; petitioner filed the appeal on 17 February; the Board of Adjustment affirmed the decision; petitioner filed for a writ of certiorari seeking review of the Board of Adjustment decision; and the court allowed a motion to dismiss because the appeal from the administrative decision had not been timely. Petitioner is presumed to know the law even if the limitation was not mentioned in the letter from the planner and the thirty-day limitations period began running at the latest on receipt of the 11 October letter. The 18 October letter did not fulfill the statutory requirement for an appeal and it is irrelevant that the Board of Adjustment heard the appeal.

Appeal by petitioner from order filed 30 June 1997 by Judge Jack A. Thompson in Wake County Superior Court. Heard in the Court of Appeals 27 October 1998.

Holt & York, LLP, by Barbara A. Jackson, for petitioner appellant.

The Brough Law Firm, by William C. Morgan, Jr., for respondent appellee.

GREENE, Judge.

Water Tower Office Associates (WTOA) appeals from the trial court's order dismissing its petition for writ of certiorari.

In 1987, WTOA purchased two tracts of property in the Town of Cary, which it contends was zoned for commercial use. On 11 October 1996, WTOA received a letter from a Town of Cary zoning code enforcement officer, Tracy Roberts (Roberts), informing WTOA that these two tracts are zoned for residential use. On 18 October 1996, WTOA mailed a letter to the Town of Cary's planning director, Jeff Ulma (Ulma), "asking for [Ulma's] assistance in advising as well as participating with us in correcting this potentially costly error. Please let me know what is the next step to be taken." There is no evidence in the record that WTOA mailed copies of this letter to anyone other than Ulma. J.W. Shearin (Shearin), a planner for the Town of Cary, responded to WTOA's letter on 30 October 1996, stating:

> Please find attached an application for an Administrative Appeal to the Board of Adjustment in response to your letter of October 18, 1996, concerning the "next step" for addressing the issue of zoning on [your property].
>
> This application would be reviewed by the Cary Board of Adjustment to appeal staff's decision for zoning of your property. I have also included a calendar for the Town of Cary Board of Adjustment.
>
> . . . .
>
> Upon your review, please contact me at 469-4080 for additional information or assistance.

WTOA filed its appeal of Roberts' administrative decision that its property is zoned for residential use on 17 February 1997. The Board of Adjustment subsequently heard WTOA's appeal and affirmed Roberts' decision. WTOA filed a petition for writ of certiorari with the trial court seeking review of the decision of the Board of Adjustment. The Board of Adjustment made a motion to dismiss the petition because WTOA's appeal from Roberts' decision had not been timely filed with the Board of Adjustment. The trial court allowed the Board of Adjustment's motion on 30 June 1997, dismissing WTOA's petition for writ of certiorari with prejudice. From this order of the trial court, WTOA appeals.

The issue is whether WTOA failed to timely appeal from Roberts' adverse decision.

Appeal to the Board of Adjustment from the decision of a zoning enforcement officer "shall be taken within the times prescribed by the [B]oard of [A]djustment by general rule." N.C.G.S. § 160A-388(b) (1994). The Town of Cary's ordinances provide that appeal from a zoning officer's decision "shall be filed no later than 30 days after the date of the contested action." Cary, N.C., Code of Ordinances § 6.2.4(b) (Supp. 1998). "The established rules of the Board [of Adjustment] are binding on the Board itself, as well as on the public." *Town and Country Civic Organization v. Winston-Salem Bd. of Adjustment*, 83 N.C. App. 516, 518, 350 S.E.2d 893, 895 (1986), *dismissal allowed and disc. review denied*, 319 N.C. 410, 354 S.E.2d 729 (1987); *Jackson v. Board of Adjustment*, 2 N.C. App. 408, 418-19, 163 S.E.2d 265, 272 (1968) (noting that the Board of Adjustment must abide by local ordinances enacted in accordance with state zoning law), *aff'd*, 275 N.C. 155, 177 S.E.2d 78 (1969). Failure to take appeal within the time period set forth deprives the Board of Adjustment of subject matter jurisdiction to hear the appeal. *Town and Country Civic Organization*, 83 N.C. App. at 518, 350 S.E.2d at 895.

In this case, the thirty-day limitations period for filing an appeal began to run, at the latest, on WTOA's receipt of Roberts' 11 October 1996 letter notifying WTOA that its property is zoned for residential use. *See Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 618-19, 397 S.E.2d 657, 660 (1990) (noting that the time for taking appeal "begins to run when a party has actual or constructive notice of the zoning decision"). WTOA did not appeal Roberts' decision to the Board of Adjustment, however, until 17 February 1997. Because more than thirty days had elapsed since WTOA had received notice of the zoning decision, the Board of Adjustment did not have subject matter jurisdiction to hear the appeal. Despite WTOA's contentions to the contrary, it is irrelevant that the Board of Adjustment heard WTOA's appeal. *See Town and Country Civic Organization*, 83 N.C. App. at 517, 350 S.E.2d at 894; *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993) ("[L]ack of subject matter jurisdiction cannot be waived and can be raised at any time, including for the first time on appeal to this Court.").

WTOA contends that it should not be held to the thirty-day limit for filing appeal since the letter from Shearin did not inform WTOA of this limitation. WTOA, however, is presumed to know the law. *See*,

e.g., *In re Forestry Foundation, Inc.*, 296 N.C. 330, 342, 250 S.E.2d 236, 244 (1979); *Teer Co. v. Highway Commission*, 265 N.C. 1, 10, 143 S.E.2d 247, 254 (1965). Accordingly, the thirty-day limitation set forth in the Town of Cary's ordinances is binding on WTOA.

WTOA alternatively contends that its letter of 18 October 1996 to Ulma, which was mailed within thirty days of Roberts' decision, should be construed as an appeal of that decision. Appeal is taken, however, "by filing with the officer from whom the appeal is taken and with the [B]oard of [A]djustment a notice of appeal." N.C.G.S. § 160A-388(b). WTOA's letter to Ulma does not fulfill this statutory requirement.

Accordingly, the trial court properly dismissed WTOA's petition for writ of certiorari.

Affirmed.

Judges LEWIS and HORTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 DECEMBER 1998

BARRETT v. MILLER No. 97-1183	Davidson (95CVD1821)	Reversed and Remanded
CARROLL v. SEARS ROEBUCK & CO. No. 98-513	Ind. Comm. (519739)	Affirmed and Remanded
CROSS v. CROSS No. 97-1578	Rockingham (93CVD706)	Reversed and Remanded
DINKINS v. MATTHEWS No. 98-703	Yadkin (96CVD580)	Dismissed
EQUIP. SERV. OF STANTONSBURG v. CARGILL No. 98-430	Wilson (96CVS925)	Affirmed
GREEN v. HINDRE No. 98-141	Forsyth (95CVS7696)	No Error
HIATT v. CITY OF WINSTON-SALEM No. 98-575	Ind. Comm. (510382)	Affirmed
HOFFER v. HOFFER No. 97-1591	Guilford (96CVD8392)	Dismissed
IN RE HARGROVE No. 98-293	Orange (94SPC786)	Affirmed
IN RE LITTLE No. 98-829	Buncombe (96J61)	Affirmed
IN RE MORROW No. 97-821	Rutherford (96J28)	Affirmed
KELLEY v. DJ'S TRUCKING No. 98-561	Ind. Comm. (252733)	Affirmed
KORNEGAY v. TYSON FOODS, INC. No. 98-549	Ind. Comm. (325186)	Affirmed
LESTER v. TRAMZ HOTEL, INC. No. 98-299	Mecklenburg (96CVS11475)	Affirmed
MORRISON v. NILES No. 97-595	Wake (96CVS4521)	Affirmed

MUNN v. CERTAIN-TEED CORP. No. 98-82	Granville (97CVS526)	Affirmed
PFOUTS v. HENLY'S DISCOUNT FURNITURE No. 98-713	Durham (97CVD602)	Appeal Dismissed
ROBINSON v. ROBINSON No. 98-321	Gaston (97CVS2852)	Affirmed
SELCKMANN v. DIXON No. 98-372	Dare (97CVS307)	Dismissed
SHADRICK v. MEZZANOTTE No. 97-680	Davidson (94CVS701)	Affirmed
STATE v. ARMSTRONG No. 98-766	Martin (97CRS465)	No Error
STATE v. ASTROP No. 98-278	Forsyth (96CRS41468)	No Error
STATE v. BOSTIC No. 98-519	Mecklenburg (96CRS24084)	No Error
STATE v. BRADLEY No. 98-582	Mecklenburg (97CRS118323) (97CRS118324) (97CRS118326)	Remanded for entry of a corrected judgment; in all other respects, No error
STATE v. BROWN No. 97-1558	Pitt (96CRS11686) (96CRS12099)	No Error
STATE v. BUNCH No. 98-103	Bertie (97CRS652) (97CRS653) (97CRS654) (97CRS655)	No Error
STATE v. DAVIS No. 98-774	Wayne (96CRS9052) (96CRS9053)	No Error
STATE v. DREW No. 98-638	Craven (97CRS8347)	No Error
STATE v. EARWOOD No. 98-826	Davidson (97CRS17354)	No Error
STATE v. ELDER No. 98-511	Forsyth (96CRS36802)	No Error

STATE v. FEARRINGTON No. 98-617	Orange (97CRS791) (97CRS793)	Dismissed
STATE v. FULP No. 97-1305	Forsyth (97CRS8488) (97CRS41767)	Vacated and Remanded
STATE v. HARRELL No. 97-1420	Cumberland (96CRS18080)	No Error
STATE v. HAZEL No. 98-738	Forsyth (97CRS16289) (97CRS42789)	No Error
STATE v. HOLLINGSWORTH No. 98-391	Wake (97CRS28211)	No Error
STATE v. JARMAN No. 98-559	Craven (97CRS7585)	No Error
STATE v. JARVIS No. 98-696	Wake (97CRS972)	Appeal Dismissed
STATE v. JOHNSON No. 98-594	Alamance (96CRS27318) (96CRS25820) (96CRS25821) (96CRS25822) (96CRS25823) (96CRS25824) (97CRS867) (97CRS868) (97CRS869)	Affirmed
STATE v. JONES No. 98-830	Guilford (97CRS69226)	No Error
STATE v. KHAALIQ No. 98-857	Mecklenburg (96CRS19433)	Appeal Dismissed
STATE v. KIRKLAND No. 97-1285	Gaston (96CRS1114) (96CRS1115)	No Error
STATE v. MALINZAK No. 98-34	Forsyth (96CRS36407) (96CRS36408)	No Error
STATE v. McCOY No. 98-793	Forsyth (96CRS34945) (96CRS34948)	No Error

STATE v. McLAUGHLIN No. 98-521	Cumberland (95CRS33742) (95CRS33745)	No Error
STATE v. MOORE No. 98-508	Forsyth (97CRS18507)	No Error
STATE v. ODOM No. 98-652	Mecklenburg (97CRS17586)	No Error
STATE v. RANKIN No. 98-741	Rowan (96CRS10195)	No Error
STATE v. SCOTT No. 98-711	Halifax (96CRS10702)	Affirmed
STATE v. SIMMONS No. 98-798	Surry (97CRS9773) (98CRS3486)	No Error
STATE v. SINCLAIR No. 97-1410	Robeson (97CRS08254)	No Error
STATE v. SMITH No. 98-449	Forsyth (97CRS6593) (97CRS6594)	No Error
STATE v. SPOONER No. 98-542	Craven (97CRS16871) (97CRS16890) (97CRS16891) (97CRS16892) (97CRS16893) (97CRS16894) (97CRS17254)	No Error
STATE v. STRAIN No. 98-856	Harnett (97CRS9205) (97CRS9206)	Dismissed
STATE v. SUMNER No. 98-462	Alamance (97CRS05324)	No Error
STATE v. VANHOOK No. 98-618	Orange (97CRS7802)	No Error
STATE v. WILLIAMS No. 97-1467	Beaufort (95CRS7210) (95CRS7211) (95CRS7212) (95CRS7213) (95CRS7214)	No Error. The trial court's order denying defendant's motion for appropriate relief is affirmed
STATE v. WILLIAMS No. 98-417	Union (96CRS13444)	No Error

THORN v. SCHERRER No. 97-477	Orange (93CVS1535)	Affirmed
WINBORNE v. PERDUE FARMS, INC. No. 98-311	Ind. Comm. (502850)	Affirmed

CONSTANCE A. CHAMBERLAIN, PLAINTIFF-APPELLEE v. TROY RANDALL THAMES, DEFENDANT-APPELLANT

No. COA97-943

(Filed 29 December 1998)

1. Evidence— hearsay—medical treatment—opinion of nontestifying physician

In an action for damages arising from an automobile accident in which negligence was stipulated, the trial court did not err by admitting the testimony of a treating physician regarding the findings and opinions of a nontestifying treating physician. Although defendant contended that the testifying physician had completed his treatment of plaintiff prior to receiving medical records from the other physician, N.C.G.S. § 8C-1, Rule 703 does not prevent an expert from using the findings and opinions of other experts in forming an opinion of his own. Furthermore, defendant's cross-examination was far broader than the matters brought out on direct examination and he thus waived any objection to the use of the records. Lastly, the trial court gave a limiting instruction.

2. Evidence— expert—not formally tendered

The trial court did not err in an action for damages arising from an automobile accident in which negligence was stipulated by admitting testimony from a treating physician who was not formally tendered as an expert. His qualifications were elicited for the record by plaintiff, he was further questioned by defendant on cross-examination about his background, and defendant did not object to the doctor's credentials and waived any objection to the doctor testifying as an expert.

3. Evidence— hearsay—nontestifying physician's course of treatment and statements

The trial court did not err in an action for damages arising from an automobile accident by admitting plaintiff's testimony as to a nontestifying physician's course of treatment and statements to her about her condition and its causation. The testimony was both cumulative and corroborative and was not offered to prove the truth of the matters asserted; moreover, even assuming error, it was harmless under the facts of the case.

4. Evidence— hearsay—redirect examination—opening door

The trial court did not err in an action for damages arising from an automobile accident by admitting on redirect plaintiff's testimony regarding discussions with a nontestifying treating physician. Defendant opened the door to such inquiry on his cross-examination of plaintiff.

5. Evidence— hearsay—medical records

The trial court did not err in an action for damages arising from an automobile accident by admitting medical records where defendant contended that the records were not inherently trustworthy because they were not made at or near the time of the accident. It is not necessary that notes, records, or memoranda be made at or near the time of the accident, but that they be made at or near the time of the treatment rendered to plaintiff. The records in question here were sent to the trial court by registered mail accompanied by an affidavit which satisfied the requirements of N.C.G.S. § 8C-1, Rule 803(6).

6. Evidence— hearsay—medical charges

The trial court did not err in an action for damages arising from an automobile accident by admitting medical bills where plaintiff testified pursuant to N.C.G.S. § 8-58.1 as to the charges at Duke for medical services and a physician testified, by way of corroboration, that he agreed with the diagnosis and opinions of the doctor at Duke and that the treatment was necessary for conditions related to the accident. Moreover, the court gave the jury a limiting instruction stating that the second doctor's testimony was for corroboration.

7. Appeal and Error— record—time for filing

Although it determined that defendant had received a fair trial free from prejudicial error, the Court of Appeals noted for the sake of clarity that it no longer adhered to the previous decision in this case, being bound by the earlier decision in *Lockert v. Lockert*, 116 N.C. App. 73.

Judge GREENE dissenting.

Appeal by defendant from judgments dated 5 September 1996 and 9 December 1996, by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 1 April 1998. Defendant's appeal was dismissed for violations of the Rules of

Appellate Procedure by opinion filed 21 July 1998. *Chamberlain v. Thames*, 130 N.C. App. 324, 502 S.E.2d 631 (1998). Defendant moved for reconsideration, which was allowed by this Court on 15 August 1998. Heard on reconsideration 17 November 1998.

On 25 December 1991, Troy Randall Thames (defendant) drove his automobile into the truck driven by Constance A. Chamberlain (plaintiff). As a result, plaintiff's truck collided with another vehicle. Following the accident, plaintiff was seen at the Durham County General Hospital emergency room with complaints of neck pain. The emergency room doctor diagnosed cervical strain and released plaintiff to follow up with an orthopedic surgeon. Plaintiff consulted instead with Dr. Walter J. Loehr (Dr. Loehr), a general surgeon working in private practice in Durham, on 31 December 1991.

Dr. Loehr testified that plaintiff, on her first visit, "had a great deal of tenderness and spasm and swelling of the trapezius muscle, the muscle in the posterior part of the neck." He placed her in a cervical collar device to allow the neck muscles to rest and to help alleviate pain and also prescribed a medication which was a muscle relaxant and a mild pain pill. Dr. Loehr saw plaintiff a total of ten times. During each visit plaintiff complained of left shoulder pain, left foot pain, and spasms and pain in the left trapezius area. The left shoulder pain was eventually resolved but Dr. Loehr was not able to relate the left foot pain to the accident. Dr. Loehr referred plaintiff to a rheumatologist.

On 11 December 1992, plaintiff was seen at Duke University Medical Center (Duke) where she had a full examination, including MRIs, x-rays, and blood tests. Plaintiff was subsequently seen at Duke on 11 March 1993 and 10 March 1994. When plaintiff last consulted with Dr. Loehr on 14 April 1993, she stated that she continued to have some intermittent pains and had been seen by a rheumatologist at Duke. Plaintiff told Dr. Loehr that the Duke physician had put her on another type of muscle relaxant as well as an antidepressant medication which can sometimes help spasms. On 14 April 1993, Dr. Loehr formed an opinion that plaintiff had a "chronic, permanent problem" and that she could not return to her former job.

Defendant stipulated negligence and plaintiff brought this action for damages. The jury answered the damages issue in the amount of $68,989.16, and the trial court entered a judgment in that amount together with interest and costs. Defendant moved for a new trial, but this motion was denied on 9 December 1996. Defendant appealed on

8 January 1997, and filed a contract with the court reporter on 17 January 1997 for preparation of a transcript.

On 3 April 1997, the court reporter orally requested an extension of time within which to complete the transcript, and her motion was granted by the trial court on 3 April 1997. The order of the trial court provided that the "time for preparation of the transcript is extended for 30 additional days and the transcript will be due on May 3, 1997." The court reporter completed the transcript within the allotted time and filed a certificate stating that the transcript was served on defendant's attorney by mail 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, on the grounds that the time for serving the proposed record on appeal had expired. The motion was denied by the trial court on 14 July 1997. On 22 July 1997, plaintiff cross-assigned error to the denial of its motion to dismiss the appeal.

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.

HORTON, Judge.

Defendant contends that the trial court erred in the admission of hearsay evidence by (I) allowing a medical expert to testify about the findings and opinions of a non-testifying medical expert; (II) allowing plaintiff to testify to what she was told by her non-testifying physician; (III) allowing the admission of certain medical bills and records; and (IV) denying his motion for a new trial.

I

At trial, Dr. Loehr testified by videotaped deposition about his course of treatment for plaintiff. He also testified over objection about the findings of Dr. Donna Maneice (Dr. Maneice), a Duke physician who did not testify at trial. Defendant assigns error to the admission of the findings and opinions of Dr. Maneice. The parties stipulated prior to Dr. Loehr's videotaped deposition that "[o]bjections to questions and motions to strike answers need not be made during the taking of this deposition, but may be made for the first time during the progress of the trial of this cause, or at any pretrial hearing held before any judge for the purpose of ruling thereon . . . ."

Pursuant to that stipulation, defendant objected prior to trial to the following excerpts from the testimony of Dr. Loehr:

> Q. All right. And did you—were you able to ascertain from the Duke medical records what the diagnosis was from Dr. Donna Maneice at Duke?
>
> A. The diagnosis was fibromyalgia.
>
> Q. All right. And did you review any conclusions that she made about the cause of that fibromyalgia?
>
> A. Her records indicated she felt it was related to the injury she had sustained on December 25, 1991.
>
> MR. LANDAUER: Objection.

Defendant also objected to the following excerpt from the redirect examination of Dr. Loehr:

> Q. I want to direct your attention—Mr. Landauer asked you about a letter that was written by Dr. Maneice. I want to direct your attention to a memo or a letter that was written on a Duke University Medical Center all-purpose form by Dr. Maneice, dated December 11, 1992. Have you reviewed that?
>
> A. Yes, I have.
>
> Q. And does she express an opinion regarding the causation of Ms. Chamberlain's problems in that letter?
>
> A. Yes, she does.
>
> Q. And what does she relate them to?
>
> MR. LANDAUER: Objection.
>
> A. She believes that the patient's problems are a result of her initial injury on December 25, 1991.
>
> Q. All right. And does she give a provisional diagnosis in her December 11, 1992, letter?
>
> A. Yes. A provisional diagnosis of fibromyalgia and supraspinatus tendonitis.

Defendant argues that the testimony of Dr. Loehr regarding the findings and opinions of Dr. Maneice were inadmissible hearsay so

prejudicial to defendant's case that he is entitled to a new trial. Defendant agrees that pursuant to Rule 703 of the North Carolina Rules of Evidence, a testifying expert may reasonably rely on the opinion of a non-testifying expert in formulating opinions, but argues that (A) Dr. Loehr had completed his treatment of plaintiff and formulated his opinions before plaintiff was treated by Dr. Maneice and there is no evidence that Dr. Loehr relied on the opinions of Dr. Maneice in his testimony; and (B) that Dr. Loehr was never tendered or qualified as an expert witness. We disagree.

A

[1] Dr. Loehr treated plaintiff from a time shortly after the 25 December 1991 automobile accident until 14 April 1993 when he last saw her. He recommended that plaintiff see a specialist in rheumatology at Duke, and plaintiff saw Dr. Maneice in December 1992. Prior to his deposition testimony being taken, Dr. Loehr had received records from Dr. Maneice which set out her findings and opinions about plaintiff. Those records, which were in Dr. Loehr's file, were marked as "Plaintiff's Exhibit 8" and introduced into evidence at the trial without objection. Dr. Loehr also had medical records in his file from the emergency room at Durham County General Hospital and from a physical therapist who had treated plaintiff. After stating his qualifications, Dr. Loehr was specifically asked if he was "prepared to give . . . an opinion about [plaintiff's] condition based on [his] examination of her *and review of her medical records.*" (Emphasis added.) He replied that he was prepared to do this.

Dr. Loehr also testified that he had reviewed some of the records of plaintiff from Duke. Moreover, when Dr. Loehr was asked whether he talked with plaintiff when he last saw her in April 1993 regarding any permanent disability she might have, he answered that "[b]ased on the symptoms which she still described to me, *the medications that the specialist at Duke had placed her on,* I told her that I felt she was going to have a chronic, permanent problem." (Emphasis added.) This evidence indicates that Dr. Loehr's opinion testimony was based, at least in part, on his review of the findings and opinions of other medical experts, including Dr. Maneice. That is permissible under the provisions of Rule 703.

Defendant's contention that Dr. Loehr had completed his treatment of plaintiff prior to receiving the medical records from Duke, and therefore could not have relied on them in forming his opinion, is unpersuasive. Although Dr. Loehr had completed his active treatment

of plaintiff as defendant suggests, he expressed his opinion as to plaintiff's functional capacity in a form he completed when he saw plaintiff for an office visit on 14 April 1993. This form was introduced into evidence without objection as "Plaintiff's Exhibit 2." Further, Dr. Loehr testified in the videotaped deposition and expressed his expert opinion that plaintiff has a "chronic, permanent problem." Rule 703 does not prevent an expert from using the findings and opinions of other experts in forming an opinion of his own.

We further note that on cross-examination of Dr. Loehr, defendant questioned him extensively about matters contained in the Duke medical records. Defendant's cross-examination was far broader than the matters brought out by plaintiff on Dr. Loehr's direct examination, and thus he waived any objection to the use of the Duke records by Dr. Loehr in his testimony. *State v. Adams*, 331 N.C. 317, 328, 416 S.E.2d 380, 386 (1992).

Lastly, the trial court gave a limiting instruction to the jury following Dr. Loehr's videotaped testimony stating that his "testimony was allowed into evidence for a limited purpose of corroborating information contained in the Duke medical records. You are instructed that you are to consider the testimony regarding Dr. Maneice's opinions only to the extent that you find that the testimony corroborates the information contained in the Duke medical records." Therefore, even if error had occurred, it was cured.

B

[2] Defendant also complains that Dr. Loehr was not tendered or qualified as an expert. Although Dr. Loehr was not formally tendered as an expert, we note that his qualifications were elicited for the record by plaintiff and he was further questioned by defendant on cross-examination about his background. This evidence tends to show that Dr. Loehr is an orthopedic surgeon, graduated from medical school, and completed an internship and residency program in surgery. He has been a general surgeon in North Carolina since 1972 and has clinical surgery appointments at both Duke University and the University of North Carolina.

Defendant did not object to Dr. Loehr's credentials either at the time of the deposition or at the pretrial hearing where defendant objected to several portions of the deposition on hearsay grounds. He did not object at that time, however, that the doctor was unqualified to express opinions. Defendant has waived any objection to Dr.

Loehr's testifying as an expert, and this assignment of error is overruled. *See State v. Westall*, 116 N.C. App. 534, 542-43, 449 S.E.2d 24, 29, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

II

[3] Defendant next assigns error to the trial court allowing plaintiff to testify to Dr. Maneice's course of treatment and to what Dr. Maneice told her (plaintiff) about her condition and its causation. Defendant specifically objects to the following testimony by plaintiff on direct examination:

Q. All right. Did you receive treatment from the physicians at Duke?

A. Yes.

Q. And why were you going to Duke?

A. Well, my swelling and the pain in my back and neck was back and forth. Coming back and forth so much and the tenderness in my muscles, so, that's what I went there for. They told me they did the MRI—

MR. KINCAID: Objection.

THE WITNESS: Because I had a knot on the side the day I went to get the MRI.

THE COURT: Overruled. Go ahead.

THE WITNESS: That's the reason I thought I was having the MRI. That's what they explained to me.

Q. Did Dr. Maneice ever make a diagnosis of your medical condition?

MR. KINCAID: Objection.

THE COURT: Overruled.

THE WITNESS: She told me that I had fibromyalgia and explained what that was.

MR. KINCAID: Objection, motion to strike.

THE COURT: Motion denied. Go ahead.

BY MR. MILLS:

Q. Just tell us what you understand fibromyalgia to be?

MR. KINCAID: Objection.

THE COURT: Overruled.

THE WITNESS: It is a—it has got to do with the fibers and tendons of your muscles and it is like arthritis in your muscles.

Prior to the above testimony by plaintiff, the jury had heard the testimony of Dr. Loehr by means of his videotaped deposition. During that testimony, Dr. Loehr was allowed to testify about the diagnosis made by Dr. Maneice and stated that he agreed with the diagnosis. Further, the Duke records relied upon by Dr. Loehr were admitted into evidence as an exhibit. Those records contained information as to the MRI performed on plaintiff at Duke and the diagnosis of Dr. Maneice. Thus, plaintiff's testimony is both cumulative and corroborative and was not offered to prove the truth of the matters asserted. *See State v. Robertson*, 115 N.C. App. 249, 258, 444 S.E.2d 643, 648 (1994) (evidence which cannot be admitted for substantive purposes may be admitted for corroborative purposes). Finally, even assuming there was error in the admission of the testimony, it was harmless under the facts of this case. *See, e.g., Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 428 S.E.2d 238 (1993) (harmless error occurs when inadmissible evidence is admitted if same or similar evidence was properly admitted elsewhere).

[4] Defendant also complains that the following testimony of plaintiff on redirect examination was hearsay and should have been excluded:

Q. During the period that you were seen at Duke, Mr. Kincaid talked with you about your discussions with Dr. Maneice. Did Dr. Maneice tell you what she believed to be the reason for your fibromyalgia?

MR. KINCAID: Objection.

THE COURT: Overruled.

THE WITNESS: She told me that it was correct. I had some kind of trauma.

BY MR. MILLS:

Q. Okay. And did she go in and describe for you what fibromyalgia is?

A. She told me that it was the tissue in my muscles and tendons that was causing the swelling and pain.

Q. Did she talk with you about anything about the relationship between having such an injury and depression?

A. Yes.

Q. And what do you remember about that?

MR. KINCAID: Objection.

THE COURT: Overruled.

THE WITNESS: It was, well, I was upset because I was unable to go back to work. And she said, Well, that was normal to be upset about that. And she asked me questions about, you know, what my thoughts were during the day, what I did all day and on like that. You know, she was the first one that told me that I was depressed.

* * * *

BY MR. MILLS:

Q. Mr. Kincaid read one of the letters that Dr. Maneice wrote you. Did she write something on your behalf on December 11th, 1992?

A. Yes.

Q. And would you just read that to the ladies and gentlemen of the jury.

A. It says, "To whom it may concern, Miss C. Chamberlain was seen by me today in care of the Duke Arthritis Center. We are in the process of investigating her neck pain further. One personal diagnosis"—I can't really read her writing. It says "fibromyalgia, which is a result of her initial injury on 12/25/91, sporadic tendonitis left shoulder. At this time she is advised by me not to do any heaving [*sic*] lifting to avoid further aggravating her symptoms. Donna Maneice."

Q. And after writing that letter and after doing all of her tests, did she ever indicate to you that she had changed her mind about the cause of your condition?

A. No.

MR. KINCAID: Objection.

THE COURT: Overruled.

Although defendant complains about the admission of the testimony, defendant opened the door to such inquiry on his cross-examination of plaintiff. On cross-examination, plaintiff was thoroughly questioned about aspects of her treatment at Duke which were not the subject of her direct examination. The cross-examination was focused in part on attempting to show that plaintiff's ongoing problems might be the result of depression and spousal abuse. On redirect examination, it was proper for plaintiff to respond to that line of questioning by stating what she had been told by her doctor at Duke about the relationship between her condition and depression. Further, plaintiff was asked on cross-examination to read a letter sent to her from Dr. Maneice. Having done so, defendant may not now complain that plaintiff read another letter from Dr. Maneice to her on redirect examination.

Defendant's reliance on our decision in *Graves v. Harrington*, 6 N.C. App. 717, 171 S.E.2d 218 (1969), is misplaced. The plaintiff in *Graves* testified over objection that her doctors had "cut the ends of [her] jawbone off to relieve some of the pressure." *Id.* at 721, 171 S.E.2d at 221. In that case, this Court stated there was not "a scintilla of medical evidence to relate the necessity for such an operation to the March 1966 accident," *id.*, and held that it was prejudicial error to allow the testimony without "proper connection and foundation." *Id.* at 722, 171 S.E.2d at 221. In the case *sub judice*, however, Dr. Loehr testified that plaintiff's treatment at Duke by Dr. Maneice was related to the automobile accident caused by defendant, and that such treatment was reasonable and necessary in his opinion. That evidence supplies the "connection and foundation" not present in *Graves*. This assignment of error is overruled.

III

Defendant next argues that admission of the Duke medical records and bills was reversible error because there was no expert medical evidence establishing the necessary connection between the automobile accident in question and the conditions for which she was subsequently treated at Duke. Specifically, defendant contends that the medical records from Duke, which were marked as an exhibit and introduced into evidence over objection of defendant, were not inherently "trustworthy" within the meaning of Rule 803(6) because they

were not made at or near the time of the automobile accident involved herein. We disagree.

A

Medical Records

[5] Rule 803(6) states that "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge . . ." is an exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(6) (1992). It is not necessary that the notes, records or memoranda be made at or near the time of the accident, but that they be made at or near the time of the treatment rendered to plaintiff. A contrary result would vitiate much of Rule 803(6), because only those medical records rendered near the time of the accident, such as ambulance, emergency room, x-rays, and so forth, would be admissible and records resulting from necessary and pertinent subsequent or follow-up treatment would be excluded. Indeed, our Supreme Court has stated that a custodian of records must testify that the " 'entries were made at or near to the time of the act, condition or event recorded . . . .' " *Donavant v. Hudspeth*, 318 N.C. 1, 6, 347 S.E.2d 797, 801 (1986) (quoting *Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E.2d 326, 329 (1962)).

Furthermore, Rule 803(6) itself states that items which may be the subject of such records include "acts, events, conditions, opinions, or diagnoses . . . ." N.C. Gen. Stat. § 8C-1, Rule 803(6). The records in question were sent to the trial court by registered mail pursuant to Rule 45(c) of the North Carolina Rules of Civil Procedure. The affidavit of Barbara E. Woolley, MBA, RRA, Director of Medical Record Services, which accompanied the records, reads as follows:

Barbara E. Woolley, being first duly sworn, deposes and says:

1. That your affiant is the Director of Medical Record Services, Duke University Medical Center, Durham, North Carolina.

2. That on 3rd day of March, 1995, your affiant received a subpoena to produce medical records, captioned Constance Chamberlain W03 341.

3. That in lieu of a personal appearance to produce the medical records, your affiant will send the medical records by registered mail.

4. That your affiant certifies that the attached medical records are the ones so requested in the subpoena and are authentic copies.

5. That your affiant certifies that the attached medical records are true and correct copies, made in regular course of business at or near the time of the acts, conditions or events recorded.

6. That your affiant certifies to the best of [her] knowledge that the medical records were made by persons having knowledge of the information set forth.

This affidavit satisfied the requirements of Rule 803(6).

B

Medical Charges

[6] N.C. Gen. Stat. § 8-58.1 (1986) states that, when an issue of medical or hospital charges arises, the injured party "is competent to given evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges." Therefore, in order to collect damages for medical bills, the treatment for which charges are incurred must be reasonably necessary, and the charges must be reasonable in amount. *Jacobsen v. McMillan*, 124 N.C. App. 128, 134-35, 476 S.E.2d 368, 371-72 (1996). In this case, plaintiff testified pursuant to § 8-58.1 as to the charges at Duke for medical services and Dr. Loehr testified, by way of corroboration, that he agreed with the diagnoses and opinions of Dr. Maneice in that the treatment was necessary for conditions related to the accident. Moreover, as discussed earlier, the trial court gave the jury a limiting instruction stating that Dr. Loehr's testimony was for corroboration. The limiting instruction was repeated in the charge to the jury. This assignment of error, therefore, is also overruled.

IV

Finally, defendant contends that the trial court erred in denying his motion for a new trial. We disagree. A motion for a new trial is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Fenz v. Davis*, 128 N.C. App. 621, 624, 495 S.E.2d 748, 751 (1998). There has been no showing of an abuse of discretion by the trial court in this case.

[7] Because we have concluded that defendant received a fair trial, free from prejudicial error, we need not reach the cross-assignment of error by plaintiff that the trial court erred in failing to dismiss the appeal of defendant for failure to file the record in apt time. We must note, however, for the sake of clarity, that we no longer adhere to our previous decision in this case, reported at 130 N.C. App. 324 502 S.E.2d 631 (1998). Although we continue to believe that our prior decision in this case was a proper interpretation and application of Rule 7 of the Rules of Appellate Procedure, we are bound by the earlier decision of this Court in *Lockert v. Lockert*, 116 N.C. App. 73, 446 S.E.2d 606 (1994). *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989) (one Court of Appeals panel may not overrule another).

No error.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not believe we should reach the merits of this case, because defendant failed to follow the North Carolina Rules of Appellate Procedure (Rules). *See Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984) ("The Rules of Appellate Procedure are mandatory and failure to follow the [R]ules subjects an appeal to dismissal."). Accordingly, I would dismiss defendant's appeal.

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

1. I 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; I 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).

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. It follows 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 delivered by 18 March 1997, but instead was delivered on 26 April 1997 (thirty-nine days beyond the time frame allowed in Rule 7). Accordingly, plaintiff's motion to dismiss defendant's appeal should have been granted by the trial court. *See* N.C.R. App. P. 25(a).

Although I agree with the majority that we are bound by published decisions of this Court, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989), I disagree that dismissal of this case would overrule our decision in *Lockert v. Lockert*, 116 N.C. App. 73, 446 S.E.2d 606, *disc. review allowed and supersedeas allowed*, 338 N.C. 311, 450 S.E.2d 490 (1994). In *Lockert*, we stated:

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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.

> [I]f the court reporter fails to certify that the transcript has been delivered within the sixty-day period permitted by Appellate Rule 7(b), the thirty-five day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript. To hold otherwise would allow a delay by a court reporter, whether with or without good excuse, to determine the rights of litigants to appellate review.

Lockert, 116 N.C. App. at 81, 446 S.E.2d at 610. This Court has since construed *Lockert* as holding that the "literal meaning of [a] rule of appellate procedure should not be followed where delay by [the] court reporter would deprive [a] litigant of appellate review." *Anuforo*, 119 N.C. App. at 363, 458 S.E.2d at 526. In *Anuforo*, this Court also stated that "noncompliance with the 60-day deadline under Rule 7 may appropriately provide the basis for dismissal of an appeal." *Id.* at 363, 458 S.E.2d at 526. I believe that we are bound by *Anuforo* and its interpretation of *Lockert*. *See Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 36.

In dismissing this case due to defendant's noncompliance with Rule 7's sixty-day deadline, we would not be allowing the court reporter to deprive defendant of appellate review. Defendant should have moved the trial court for an extension of time when it became apparent that additional time was needed, *see* N.C.R. App. P. 7(b)(1), and, if necessary, should have requested additional extensions from this Court, *see* N.C.R. App. P. 27(c). Accordingly, it follows that the court reporter's actions have not deprived defendant of his right to appellate review; rather, defendant's own failure to supervise the process of his appeal has deprived him of this right and requires that this appeal be dismissed for violation of Rule 7(b)(1).[7]

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7. I 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). Defendant may not rely on Rule 27(c) as a basis for the trial court's extension, because Rule 27(c) expressly gives only the appellate courts the authority to grant additional extensions of time for transcript delivery. N.C.R. App. P. 27(c).

RICHARD EDWARD REIS, PLAINTIFF-APPELLANT v. AMELIA WILSON HOOTS, DEFENDANT-APPELLEE

No. COA98-20

(Filed 29 December 1998)

1. Evidence— relevance—conveyance of marital residence

The trial court did not err in an action arising from a separation agreement which had both a no molestation clause and a marital residence transfer clause by admitting evidence regarding transfers of plaintiff's interest in the marital residence to and from a third party and the third party's actions in attempting to eject defendant from the property. The evidence at issue was presented to prove defendant's counterclaim of harassment and, although circumstantial, was relevant to determine the underlying issue in the case.

2. Evidence— not unduly prejudicial—separation agreement—harassment

The trial court did not abuse its discretion in an action arising from a separation agreement with a no molestation clause and a marital residence transfer clause by admitting evidence concerning plaintiff's transfer of his interest in the residence to a third party who attempted to eject defendant. Although plaintiff contends that the probative value of the evidence is substantially outweighed by the danger of undue prejudice, the trial judge gave a limiting instruction, which indicates that he recognized the potential for prejudice and exercised his discretion.

3. Evidence— relevance—marital harassment—relationship with children

The trial court did not err in a counterclaim under the no molestation clause of a separation agreement by admitting evidence regarding plaintiff's relationship with his children where defendant sought damages for mental anguish and had to prove the emotional effect of plaintiff's harassment. The evidence was relevant in that having to cope with the pain and emotional distresses of the minor children would be almost certain to cause defendant emotional turmoil. Moreover, while the evidence was necessarily prejudicial to plaintiff, it was not unduly prejudicial.

4. Evidence— hearsay—identification—marital harassment

There was no prejudicial error in a harassment counterclaim under a separation agreement where defendant, who alleged problems with lost mail, testified that a postmaster had identified a photograph of plaintiff. The evidence is classic hearsay; however, it was not prejudicial due to other sufficient evidence of plaintiff tampering with defendant's mail, including a guilty plea to a federal charge of mail fraud.

5. Damages and Remedies— contract—separation agreement—cost of lawsuit—mental suffering

The trial court did not err by denying plaintiff's motions for directed verdict and judgment n.o.v. in a harassment counterclaim arising from a separation agreement where plaintiff contended that defendant's evidence was insufficient to prove damages, but defendant testified as to monies expended on defending the multitude of lawsuits filed against her and testified as to the mental anguish she had suffered directly or indirectly.

Judge GREENE concurring.

Appeal by plaintiff from judgment entered 2 July 1997 by Judge Raymond A. Warren in Henderson County Superior Court. Heard in the Court of Appeals 20 October 1998.

Prince, Youngblood & Massagee, by Sharon B. Alexander, for plaintiff-appellant.

No brief for defendant-appellee.

SMITH, Judge.

The parties to this appeal were married on 15 November 1977, separated on 13 January 1990, and divorced on 19 February 1991. Pursuant to the parties' separation, they entered into a Contract of Separation and Property Settlement Agreement (Agreement). This Agreement reads, in pertinent part,

> NO MOLESTATION. That each party shall be free from interference and control, direct or indirect, by the other. Neither party shall molest or harass the other, and further, that neither shall attempt by word or act to influence the life of the other, nor com-

pel or attempt to compel the other, to associate, cohabit or dwell with the other for any reason whatsoever.

. . . .

CHILD SUPPORT. That the Husband shall pay One-Hundred Ten Dollars ($110.00) per week in child support payments, to be allocated as follows . . . with the understanding that these support payments will be reduced pro rata as each child reaches eighteen . . . . In addition, as part of his child support payments, Husband agrees to make each and every house payment due on the former marital home until the youngest minor child reaches the age of eighteen, on April 1, 2000. . . .

REAL PROPERTY. That the Husband and Wife own a house and tract of land, formerly the marital residence . . . . That the Husband and Wife each agree that the Wife may reside in the former marital home until the youngest child turns eighteen years old, on April 1, 2000. That the Husband agrees that he will make the full house payment each and every month until April 1, 2000. At that time, three written appraisals shall be obtained . . . to determine the fair market value of the marital home. At that time the marital home shall be listed with a multiple listing service . . . at a price which shall not be less than the average of the three real estate appraisals. . . .

Wife acknowledges that the Husband paid Ten-Thousand Four-Hundred Dollars ($10,400.00) toward the purchase of said home prior to their marriage, and therefore the first Ten-Thousand Four-Hundred Dollars ($10,400.00) of the net proceeds of the sale of the marital home shall go to the Husband individually; the remaining net proceeds shall be divided equally between Husband and Wife.

. . . .

In the event Wife moves a male companion into the home, then at the election of Husband, the home may be sold immediately under the condition set forth above.

During the time the Wife occupies the marital home, Wife agrees not to cause waste to said marital home. Both Husband and Wife agree to maintain the marital home in its present condition, and to share equally in any maintenance expenses. . . .

. . . .

> LEGAL FEES. That if either party breaches any of the terms of this agreement, the breaching party shall be required to pay reasonable attorney fees for the party whose rights were violated as a result of said breach.

Following the parties' divorce, defendant remarried and her new husband moved into the marital home. Plaintiff filed several civil actions against defendant to construe the terms of the Agreement, namely whether defendant's new husband was considered a "male companion," thus rendering the house subject to sale at plaintiff's election. Each action was dismissed by plaintiff. Plaintiff then conveyed his interest in the home to a third party, who subsequently harassed defendant, demanding that she and her family vacate the premises, even going so far as filing a criminal trespass action and an ejectment action, both of which were dismissed. When the third party's attempts proved unsuccessful, he reconveyed the interest to plaintiff. On 8 February 1993, plaintiff obtained an order from the district court, which construed the language of the Agreement to encompass new husbands within the meaning of "male companion" and directed that the residence be sold pursuant to the Agreement.

The residence was sold and the proceeds held by the Clerk's office for determination of distribution.

On 14 February 1995, plaintiff filed a complaint against defendant alleging breach of the Agreement (by delaying or interfering with the sale of the residence prior to the court order directing the sale) and waste with regard to the parties' former marital residence. Defendant answered and counterclaimed alleging, among other things, breach of the "No Molestation" clause of the Agreement. Specifically, defendant claimed that plaintiff breached the provision of the Agreement by: (a) causing a warrant to be issued for defendant's arrest; (b) filing numerous lawsuits against defendant, most of which were dismissed prior to disposition; and (c) intercepting her mail and disrupting the delivery of the same. Defendant sought recovery for monies expended on attorney's fees defending the multiple lawsuits filed against her and for mental anguish. All claims and counterclaims were dismissed prior to trial except for defendant's breach of Agreement claim. This issue was tried by jury during the 2 June 1997 civil session of Henderson County Superior Court. The jury returned a verdict finding that plaintiff had breached the Agreement and awarded defendant damages in the amount of $30,000. The judge entered judgment in accordance therewith and awarded

defendant attorney's fees in the sum of $8,351,50 in accordance with the Agreement. Plaintiff appeals.

I.

Plaintiff, in three separate assignments of error, argues that certain evidence, which was admitted over objection during trial, should have been excluded as irrelevant and that the trial judge's failure to exclude such evidence amounted to prejudicial error.

The evidentiary rule of relevance is quite broad. Rule 401 states, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). The Federal Advisory Committee's Note to the federal rule, which is identical to the North Carolina rule, provides some clarification:

> Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence . . . .
>
> . . .
>
> Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? . . .
>
> . . .
>
> The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." . . . The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action . . . .

Our courts have followed this interpretation and apply the rule of relevance broadly. *See, e.g., Farmers Federation, Inc. v. Morris*, 223 N.C. 467, 468, 27 S.E.2d 80, 81 (1943) (pre-rule case stating that evidence need not bear directly on the question in issue to be admissible; it is competent if it relates to one of the circumstances sur-

rounding the parties and necessary to be known to properly understand the issues or to weigh the reasonableness of their contentions); *State v. Wallace*, 104 N.C. App 498, 502, 410 S.E.2d 226, 228 (1991) (this standard gives the trial judge broad discretion to admit evidence); *State v. Hall*, 99 N.C. App. 1, 8, 390 S.E.2d 169, 173 (1990) (evidence is relevant so long as it assists the jury in understanding the evidence).

Thus, according to the Rules of Evidence, "[a]ll relevant evidence is admissible, except as otherwise provided . . . ." N.C. Gen. Stat. § 8C-1, Rule 402 (1992). The Rules then set forth a number of exceptions to admissibility. Most importantly, for the arguments set forth in this case, is Rule 403, which states, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (1992).

[1] The first admission of evidence that plaintiff assigns as error relates to the conveyance of the marital residence to Mr. Henry Clay Ritter. He asserts that defendant's testimony regarding the transfers of the marital residence to and from Mr. Ritter and Mr. Ritter's actions in attempting to eject defendant from the property was irrelevant and inadmissible. Because the rule of relevance is so broad, we only consider whether this testimony " 'is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.' " *Farmers Federation*, 223 N.C. at 469, 27 S.E.2d at 81 (quoting *Bank v. Stack*, 179 N.C. 514, 516, 103 S.E. 6, 7 (1920)). Defendant's counterclaim relating to plaintiff's breach of the Agreement was based upon allegations of harassment by plaintiff. Among other things, defendant presented evidence of plaintiff's relationship with Mr. Ritter. Plaintiff's mother and Mr. Ritter and his wife had been "close family friends" for upwards of twenty years. Furthermore, plaintiff had known Mr. Ritter for approximately ten years. Defendant also presented evidence that the transfers to and from Mr. Ritter were for little or no consideration. Excise tax paid on the transfer to Mr. Ritter was ten dollars, and none was paid on the transfer back to plaintiff. Defendant's assertion at trial was that Mr. Ritter was acting on plaintiff's behalf and under plaintiff's control. Plaintiff made general objections to the admission of the evidence, which were overruled.

The evidence at issue was presented to prove defendant's counterclaim of harassment. Although circumstantial, it was relevant to determine the underlying issue in the case; that is, whether plaintiff breached the Agreement by molesting or harassing defendant. This assignment of error is overruled.

[2] With regard to this evidence, appellant contends, in the alternative, that if relevant, its probative value is substantially outweighed by the danger of undue prejudice. Whether to exclude evidence on this ground is within "the sound discretion of the trial court." *Pittman v. Barker*, 117 N.C. App. 580, 588, 452 S.E.2d 326, 331 (1995). In determining whether to exclude evidence on the grounds of undue prejudice, the trial court should consider "the probable effectiveness or lack of effectiveness of a limiting instruction." Fed. R. Evid. 403, Advisory Committee's Note. In this case, the trial judge instructed the jury as follows:

> You cannot hold the plaintiff, Mr. Reis, responsible for the actions of Mr. Ritter, no matter what such actions might have been, unless you find by the greater weight of the evidence that Mr. Ritter was acting in concert with, as the agent of or under the direction of Mr. Reis[.]
>
> So, if you find . . . that Mr. Henry Clay Ritter was acting under the direction of, in concert with or as the agent of Mr. Reis, you are permitted but not required to find the actions violated the terms of the contract between the parties. It is for you to decide if such actions constituted a violation of the terms of the separation contract.

Because the trial judge gave a limiting instruction with regard to the evidence in dispute, it follows that he recognized the potential for prejudice and exercised his discretion in permitting its introduction. This Court will not intervene where the trial court properly appraises the probative and prejudicial values of evidence under Rule 403. *See State v. Cotton*, 99 N.C. App. 615, 622, 394 S.E.2d 456, 459 (1990) (discussing expert testimony), *aff'd*, 329 N.C. 764, 407 S.E.2d 514 (1991). "It is only 'where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision' that the trial judge's ruling will be overturned on appeal." *State v. Mlo*, 335 N.C. 353, 374, 440 S.E.2d 98, 108 (1994) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)); *see also State v. Jordan*, 128 N.C. App. 469, 475, 495 S.E.2d 732, 736 (1998) (stating that trial court's evidentiary ruling "will only

be reversed on appeal upon a showing that the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision"). Plaintiff has not demonstrated any abuse of discretion, and therefore, the trial court's ruling will not be disturbed on appeal.

[3] Next, plaintiff argues that evidence admitted regarding his relationship with his children was irrelevant and should have been excluded. The evidence at issue on this assignment of error is as follows:

> Q: After the separation, did Mr. Reis have difficulty with his relationship with his three children?
>
> A: Yes.
>
> MR. REDDEN: Objection.
>
> THE COURT: Overruled.
>
> A: Yes, my 18 year old especially. At the time he was about 12 and Mr. Reis wouldn't even let him go and visit at his house. He would take the other two on weekends at first and he picked them up at day camp and one incident in particular he would pick all three of them up at day camp and he would drop Drew off where I was working and he dropped the kid off about half a mile from where I worked in a pouring down rain thunder storm and even that Christmas, Drew called his father and ask [sic] him if he couldn't at least come over at Christmas time. He said "don't worry about it, I'll send you a present."
>
> MR. REDDEN: Objection and motion to strike.
>
> THE COURT: Objection is overruled but I think we're losing the relevance of this.
>
> Q: Had the continued lawsuits and the problems you've testified about in this Courtroom had any effect on your health?
>
> A: Yes, and it has on my children as well.
>
> MR. REDDEN: Objection, may it please the Court. She's asking did it effect [sic] her health, yes and also effected [sic] my children.
>
> THE COURT: Objection is overruled.

A: My 16 year old was hospitalized in 1995 because of acute colitis. The Doctor said it was caused from—

MR. REDDEN: Objection.

—extreme stress.

THE COURT: Overruled. Go ahead.

The issue before the jury was whether plaintiff breached the provision in the separation agreement that prohibited him from molesting or harassing defendant. To receive damages for mental anguish, defendant had to prove the emotional effect that plaintiff's harassment had on defendant. The evidence presented, while directly relating to the effect plaintiff's alleged conduct had on the parties' children, was relevant circumstantial evidence of the emotional effect plaintiff's harassment caused defendant. Having to cope with the pain and emotional distresses of her minor children would be almost certain to cause defendant emotional turmoil. Defendant's attorney elicited testimony regarding the parties' children's pain in order to prove the impact that plaintiff's conduct had on defendant.

Appellant contends, in the alternative, that if the evidence was relevant, its probative value was substantially outweighed by the danger for unfair prejudice. He argues that "this testimony would naturally cause the jury to be prejudiced against the Appellant simply because he was a 'bad' father." This argument is without merit. The evidence goes straight to the heart of the damages issue, i.e., the emotional strain placed on defendant due to plaintiff's alleged harassment. Although its admission would prejudice plaintiff, any evidence that is favorable to defendant will necessarily be prejudicial to plaintiff. *See State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). The question is whether the evidence is unduly prejudicial. We hold that it is not.

II.

[4] In appellant's next assignment of error, he argues that an out-of-court identification of him was inadmissible hearsay. We agree. During defendant's introduction of evidence, she sought to introduce evidence of plaintiff's interference with defendant's mail. She allegedly had multiple problems with "lost" mail, about which she complained to the postmaster. While on direct examination, defendant testified:

A. I talked with the Postmaster and as a result of that conversation, I went home and got a picture of Mr. Reis and she identified him—

MR. REDDEN: Objection.

THE COURT: Overruled.

A.—as someone she had seen sitting in the parking lot everyday at lunch time and she saw him going into the Post Office as she would leave for lunch. It's a small Post Office and she's the only one that [sic] works in there.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1992). In this case, the out-of-court declarant is the postmaster, and the statement is offered not for impeachment or corroboration purposes, but to prove that plaintiff was the person seen by declarant. The evidence is classic hearsay prohibited by Rule 802, *see* N.C. Gen. Stat. § 8C-1, Rule 802 (1992), and does not fall within any of the statutorily defined exceptions, *see* N.C. Gen. Stat. § 8C-1, Rules 803, 804 (1992). No evidence was offered regarding the unavailability of the postmaster, nor did defendant offer any other basis for qualification of this testimony under any exception to the hearsay rule. Admission of this testimony was error.

This does not end our inquiry, however, for the appellant bears the burden to show error sufficient to enable the court to see that he was prejudiced or that the evidence probably influenced the verdict of the jury. *See Collins v. Lamb*, 215 N.C. 719, 2 S.E.2d 863 (1939); *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (1981). In this case, appellant has failed to prove that admission of this testimony prejudiced the outcome of this case. Looking to the facts of the case, even without this testimony, there is sufficient evidence of plaintiff tampering with defendant's mail. In fact, evidence was admitted showing (1) that plaintiff, although he had a primary post office box at another location, acquired a different box nearly adjacent to plaintiff's; (2) that a local detective caught plaintiff in the act of tampering with defendant's mail; and (3) that plaintiff was federally charged and tried for mail fraud, a charge to which he pled guilty. Therefore, it cannot be said that the inadmissible hearsay testimony prejudiced the outcome of the case. This assignment of error is overruled.

III.

[5] Finally, appellant argues that the trial court erred in denying plaintiff's motions for directed verdict and judgment notwithstanding the verdict with regard to damages. He argues that defendant's evidence was "insufficient to prove that Appellee suffered any compensable damage as a result of those actions which could serve as a basis of a breach of contract." We disagree. To recover damages, defendant must prove that she suffered special damages as a result of the breach of contract. *See Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 673, 464 S.E.2d 47, 63 (1995). Such damages must have been within the contemplation of the parties. *See Troitino v. Goodman*, 225 N.C. 406, 412, 35 S.E.2d 277, 281 (1945). Furthermore, defendant must prove the amount of her special damages with a reasonable degree of certainty. *See Stanback v. Stanback*, 37 N.C. App. 324, 327, 246 S.E.2d 74, 78 (1978). In this case, defendant testified as to the monies expended on defending the multitude of lawsuits filed against her by either plaintiff or Mr. Ritter. Because defendant's claim was that plaintiff harassed her, thus breaching the Agreement, the costs related to such harassment are certainly compensable.

Additionally, appellant argues that defendant's evidence regarding her mental suffering was speculative at best. To recover damages for mental anguish in a breach of contract action, the claimant must show:

> "First, that the contract was not one concerned with trade and commerce with concomitant elements of profit involved. Second, that the contract was one in which the benefits contracted for were other than pecuniary, *i.e.*, one in which pecuniary interests were not the dominant motivating factor in the decision to contract. And third, the contract must be one in which the benefits contracted for relate *directly* to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which *directly* involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected."

Johnson v. Ruark Obstetrics, 327 N.C. 283, 301, 395 S.E.2d 85, 96 (1990) (quoting *Stanback*, 297 N.C. at 194, 254 S.E.2d at 620)). No physical injury or impact must be shown. *See id.* This is the law and the jury was so instructed. Defendant testified as to the stress, both financial and emotional, caused by the numerous lawsuits and mail tampering. She testified as to the mental anguish she had suffered

either directly or indirectly (by having to cope with the pain and turmoil plaintiff's actions caused the parties' children). Her testimony constituted sufficient evidence of damages to submit the case to the jury. The jury received and weighed the evidence and rendered a verdict and damage award in accordance therewith. Accordingly, the trial court did not err in denying plaintiff's motions and we find no prejudicial error.

No error.

Judges WALKER concurs.

Judge GREENE concurs in separate opinion.

Judge GREENE concurring.

I concur with the majority opinion, but write separately on the issue of damages in order to emphasize that it is rarely the case that damages for mental anguish are recoverable under a breach of contract theory. *See, e.g., Lamm v. Shingleton*, 231 N.C. 10, 14, 55 S.E.2d 810, 813 (1949). This is so because "contracts are usually commercial in nature," *id.*, and "*[p]ecuniary interests are paramount*," *Stanback v. Stanback*, 297 N.C. 181, 192, 254 S.E.2d 611, 619 (1979), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981) (disapproving *Stanback's* statements regarding requirements for the tort of intentional infliction of emotional distress). But where the contract is not one for profit and the matters contracted for directly relate to "matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed," and the contract directly involves interests "recognized by all as involving great probability of resulting mental anguish if not respected, . . . [then] mental anguish damages are a natural and probable consequence of breach, and it can reasonably be said that such damages were within the contemplation of the parties at the time they contracted." *Stanback*, 297 N.C. at 194, 254 S.E.2d at 620. It is also important to note that expert medical testimony is not always necessary to prove mental anguish. *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 454, 358 S.E.2d 107, 109 (1987) (noting that evidence that plaintiff was "shocked" and "upset" following defendant's actions was sufficient to show emotional distress, but expert medical testimony is necessary if the injury claimed is "an unusual emotional state, not within the common knowledge and experience of laymen,

that in itself requires medical diagnosis"); *Lamm*, 231 N.C. at 12, 55 S.E.2d at 811 (noting that plaintiff's testimony that defendants' breach of contract "caused her considerable shock and made her extremely nervous as a result of which she became a nervous wreck . . . [and that it] made her so nervous she could hardly stand up" was sufficient to show emotional distress); *McDaniel v. Bass-Smith Funeral Home, Inc.*, 80 N.C. App. 629, 633, 343 S.E.2d 228, 231 (1986) (noting that directed verdict should not have been granted dismissing plaintiff's claim for emotional distress where she testified that as a result of defendant's breach of contract she "became extremely upset . . . nervous and distraught . . . [and] physically ill").

In this case, the separation agreement entered by the parties contained a clause which stated:

> NO MOLESTATION. That each party shall be free from interference and control, direct or indirect, by the other. Neither party shall molest or harass the other, and further, that neither shall attempt by word or act to influence the life of the other, nor compel or attempt to compel the other, to associate, cohabit or dwell with the other for any reason whatsoever.

This agreement is not one concerned with trade, commerce, or profit; the benefits conferred pursuant to this section of the separation agreement are "other than pecuniary"; and the benefits contracted for in this section of the agreement "relate *directly* to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed" which directly involve "interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected." *See Johnson v. Ruark Obstetrics*, 327 N.C. 283, 301, 395 S.E.2d 85, 96 (quoting *Stanback*, 297 N.C. at 194, 254 S.E.2d at 620), *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). The non-molestation clause of the parties' separation agreement is therefore one of those rare contracts which allows recovery for mental anguish.

Defendant's testimony presented evidence from which the jury could find that plaintiff had breached the non-molestation clause of the separation agreement by repeatedly having lawsuits filed against defendant for the purpose of harassing her and by having defendant arrested for criminal trespass of the marital residence (which charge was later dismissed). Defendant's children were present at the time of her arrest, and "were crying, . . . were very upset . . . [and were] embarrassed." Defendant testified that plaintiff schemed to success-

fully delay her receipt of her share of the proceeds from the subsequent sale of the marital home for approximately two years. Defendant also presented evidence from which the jury could find that plaintiff had stolen her mail for a period of over eighteen months following their separation. An investigator who testified that he had caught plaintiff stealing defendant's mail stated that defendant was "irate and upset" over the situation. Defendant further testified that plaintiff's breach of the non-molestation clause "was upsetting me and tearing the kids up." Defendant testified that the effect of plaintiff's breach of the non-molestation clause had caused "constant litigation, turmoil and upset since he and I separated." She further testified that "[t]he children have been upset. It's been one day to the next wondering what is he going to pull next, what is he going to do next, what is he going to put us through next and it's been that way for seven years." Defendant testified that plaintiff's breach of the separation agreement had affected her health, and the health of her children, resulting in the hospitalization of one child for acute colitis caused by extreme stress. This evidence is sufficient to show that defendant suffered mental anguish as a result of plaintiff's breach of the non-molestation clause of the parties' separation agreement. Accordingly, the trial court properly denied plaintiff's motion for directed verdict.

STATE OF NORTH CAROLINA v. HENRY JEROME WHITE

No. COA98-97

(Filed 29 December 1998)

1. Jury— individual voir dire and sequestration—denied

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion for individual voir dire and sequestration of prospective jurors where defendant contended that individual voir dire was necessary to prevent prospective jurors from giving dishonest answers to sensitive and potentially embarrassing questions concerning racial prejudices. Lack of candor is a danger that is present in every case and the trial court here stated that it would reconsider the matter if defendant believed that collective voir dire was inhibiting jurors' candor as jury selection proceeded.

2. Jury— peremptory challenges—racial basis

There was no clear error in a first-degree murder prosecution in the trial court failing to find intentional discrimination in the prosecutor's exercise of peremptory strikes where the prosecutor's articulated bases for challenging two of the prospective jurors were supported by the record and were factually valid, and, although it was apparent from the prosecutor's statements that race was a predominant factor in his decision to strike two other prospective jurors, defense counsel failed to raise the issue of pretext and there were additional reasons given by the prosecutor. The Court of Appeals was bound by the tremendous deference accorded to the trial court's determination regarding racial neutrality and purposeful discrimination.

3. Accomplices and Accessories— accessory before the fact to capital murder—instruction denied—no error

The trial court did not err in a first-degree murder prosecution by declining to instruct the jury on the offense of accessory before the fact to capital murder where, even if the jury believed defendant's testimony, it would have had to find that defendant was at least constructively present. If a defendant is constructively present when the crime is committed, he cannot be convicted as an accessory before the fact.

4. Evidence— hearsay—prior statement by defendant—admissible

The trial court did not err in a first-degree murder prosecution by admitting defendant's statement that "he was going to have to cap someone" if his employer did not stop garnishing his wages. If anything, this was a hearsay statement admissible under N.C.G.S. § 8C-1, Rule 801(b) as an admission or statement of a party opponent.

5. Evidence— hearsay—defendant's statement—admission of party opponent—evidence of motive

The trial court did not err in a first-degree murder prosecution by admitting defendant's statement that he sold drugs to make ends meet or by instructing the jury that it could consider this evidence for the purpose of finding motive. The statement constituted a statement by a party opponent admissible under N.C.G.S. § 8C-1, Rule 801(d) and the testimony that defendant was in such dire need of money that he sold drugs tended to make

it more probable that his need for money motivated him to rob and kill this victim.

Appeal by defendant from judgment entered 18 April 1997 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 21 October 1998.

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

Robert K. Leonard and Teresa L. Hier for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Henry Jerome White was convicted of murder in the first degree and was sentenced to a term of life imprisonment during the 18 April 1997 Criminal Session of Forsyth County Superior Court. Defendant appeals his conviction and requests a new trial on the ground that the trial court erred in declining his motion for sequestration and individual *voir dire* of the jurors. Defendant further contends that the court erred in failing to find that the State exercised its peremptory challenges in a manner violating the Equal Protection Clause. For the reasons hereinafter stated, we find no error at trial.

The State presented evidence tending to show that on the morning of 17 February 1996, the body of Carl Marshburn was found lying on the floor of an Earl Schieb Paint and Body Shop ("the paint shop") in Winston-Salem, North Carolina. Marshburn, an employee of the paint shop, had been shot twice during an apparent robbery.

On the previous evening, defendant and his cousin, Harry Beaufort, drove from Greensboro to the paint shop to pick up Beaufort's paycheck. Beaufort testified that when he and defendant arrived at the paint shop, he waited in the car while defendant went inside to get the check from Marshburn. Beaufort stated that while he was waiting, he heard two gunshots fired inside the paint shop. He further stated that during the drive back to Greensboro, defendant admitted that he had shot Marshburn and had stolen a "couple hundred dollars" from his shirt pocket.

Defendant's version of the incident was quite different. He testified that before leaving work on 16 February 1996, he gave Beaufort a 9 mm handgun for safekeeping. According to defendant, Beaufort still had the gun in his possession when they arrived at the paint shop later that evening. Defendant claimed that he stopped at a

nearby gas station and let Beaufort out of the car before he proceeded to the paint shop to collect Beaufort's check. Defendant stated that after receiving the check, he left Marshburn in the paint shop alone and unharmed. Then, he drove to a nearby parking lot and waited for Beaufort to return to the car. When Beaufort returned, he told defendant that he had shot and robbed Marshburn, and on the way back to Greensboro, Beaufort gave defendant some of the stolen money. Defendant maintained that although he knew Beaufort intended to rob Marshburn, he did not know that Beaufort was going to kill him.

After considering all of the evidence, the jury found defendant guilty of first-degree murder and recommended a sentence of life imprisonment. From the trial court's judgment sentencing defendant to life in prison without parole, defendant appeals.

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[1] Defendant's first assignment of error on appeal is that the trial court improperly denied his motion for individual *voir dire* and sequestration of the prospective jurors. Section 15A-1214(j) of the North Carolina General Statutes provides that "[i]n capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State." N.C. Gen. Stat. § 15A-1214(j) (1997). The statute further provides that "[t]hese jurors may be sequestered before and after selection." *Id.* Whether to permit sequestration and individual examination of prospective jurors in a capital case is a matter addressed to the sound discretion of the trial court. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). This Court will not disturb the trial court's exercise of that discretion, absent a showing that such discretion was clearly abused. *Id.*

Defendant contends that in the present case, individual *voir dire* was necessary to prevent the prospective jurors from giving dishonest answers to sensitive and potentially embarrassing questions exploring their racial prejudices or biases. However, as our Supreme Court has observed, lack of candor is a "danger [that] is present in every case in which sequestration and individual *voir dire* is not allowed." *State v. Moseley*, 336 N.C. 710, 724, 445 S.E.2d 906, 914 (1994). Furthermore, after denying defendant's motion, the trial court stated that as jury selection proceeded, should defendant believe that collective *void dire* was inhibiting the jurors' candor, defendant could renew his motion, and the trial court would reconsider the matter. Therefore, we hold that the trial court did not abuse

its discretion in denying defendant's motion, and this assignment of error is overruled.

[2] Defendant next contends that the trial court erred in failing to find that the prosecutor exercised four of its peremptory challenges to exclude African-American jurors based solely upon their race, in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the use of peremptory challenges as a means to strike jurors from the venire because of their race. *Id.* Article I, Section 26 of the North Carolina Constitution likewise forbids the use of peremptory strikes for racially discriminatory purposes. *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998). In *Batson*, the United States Supreme Court outlined a three-step process for determining whether the State has impermissibly exercised its peremptory challenges to remove prospective jurors by reason of their race. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88. First, the defendant must make out a prima facie case of purposeful discrimination in the State's use of peremptory strikes. *State v. Cofield*, 129 N.C. App. 268, 276, 498 S.E.2d 823, 828 (1998). Second, once the requisite showing has been made, the burden shifts to the State to come forward with race-neutral reasons for exercising the challenges. *Id.* at 277, 498 S.E.2d at 828. Finally, if the State successfully rebuts the defendant's prima facie case with race-neutral explanations, the defendant may offer evidence showing that the explanations are merely pretextual. *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563, 575 (1998), *petition for cert. filed*, —— U.S.L.W. —— (U.S. Nov. 23, 1998) (No. 98-6972).

The State's explanation for using the peremptory strike in question "must be clear, reasonably specific, and related to the particular case to be tried." *Locklear*, 349 N.C. at ——, 505 S.E.2d at 288. Still, it " 'need not rise to the level justifying exercise of a challenge for cause,' " *State v. Robinson*, 336 N.C. 78, 93, 443 S.E.2d 306, 312 (1994) (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). Whether an explanation is, indeed, neutral depends upon whether, accepting the proffered reason as true, the challenge constitutes purposeful discrimination as a matter of law. *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395 (1991). The issue for the trial court is the facial validity of the stated reason, and "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 360, 114 L. Ed. 2d at 406. The trial court's findings on the issue of discriminatory intent are accorded great def-

erence, because the findings " 'largely turn on evaluation of credibility.' " *State v. Thomas*, 329 N.C. 423, 432, 407 S.E.2d 141, 147-48 (1991) (quoting *Hernandez*, 500 U.S. at 365, 114 L. Ed. 2d at 409). Thus, an appellate court will uphold the trial court's findings as to intentional discrimination, unless the " 'reviewing court on the entire evidence [is] left with the definite and firm conviction that a mistake ha[s] been committed.' " *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 766 (1948)).

Where, as in the instant case, the prosecutor defended his use of the peremptory strikes defendant challenges on appeal, the issue of whether defendant met his initial burden of establishing discrimination is moot, and we may proceed with our analysis as though a prima face case of discrimination had been made. *State v. Harden*, 344 N.C. 542, 557, 476 S.E.2d 658, 665 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 483 (1997). Defendant contends that the prosecutor's purported reasons for challenging four African-American jurors—Roderick Conrad, Caryl Reynolds, Sonya Jeter, and Brenda Gwyn—were pretexts and that the trial court committed reversible error in failing to rule accordingly.

The prosecutor stated that his reasons for excusing Roderick Conrad were his criminal record, body language, failure to make eye contact, and lack of candor. With respect to Brenda Gwyn, the prosecutor explained that he challenged her because she appeared confused and addled, she did not believe that being beaten by her husband was a serious crime, she had an uncle who was incarcerated for a serious assault, and she failed to fill out all three questionaire forms as instructed. The prosecutor's articulated bases for challenging Conrad and Gwyn were supported by the record and were facially valid. Because defendant failed to show that the reasons were pretextual, we uphold the court's decision accepting the peremptory challenges in question.

The prosecutor gave the following reasons for striking Sonya Jeter and Caryl Reynolds from the jury pool:

> Both black females, both 27 years old, old enough. Almost the same age as the defendant. Sonya was personally opposed to the death penalty. Carolyn [sic] Reynolds is living with her mother, doesn't have a stake in the community. She's single, has an illegitimate child, health care provider. State thinks that people who want to save lives don't want to take lives. And she didn't think

> having her purse stolen was a serious crime. . . . And judge, on Miss Jeter, her cousin was convicted by Detective Rowe. Again, she's another health care provider.

While race was certainly a factor in the prosecutor's reasons for challenging Reynolds and Jeter, our courts, in applying the *Batson* decision, have required more to establish an equal protection violation, i.e., that the challenge be based *solely* upon race. *See e.g.*, *Locklear*, 349 N.C. at ——, 505 S.E.2d at 287 (noting that the United States and North Carolina constitutions "prohibit[] the exercise of peremptory strikes *solely* on the basis of race") (emphasis added); *Cofield*, 129 N.C. App. at 276, 498 S.E.2d at 829 (stating that to establish prima facie case of racial discrimination, defendant must show that circumstances raise inference that State "used peremptory challenges to remove potential jurors *solely* because of their race") (emphasis added); *State v. Quick*, 341 N.C. 141, 143, 462 S.E.2d 186, 188 (1995) (stating that *Batson* holding "prohibits prosecutors from peremptorily challenging jurors *solely* on the basis of race") (emphasis added).

Given the overt reference to race in the prosecutor's purported explanation, we are confounded by defense counsel's failure to challenge the explanation as pretextual. From the prosecutor's statements, it is apparent that race was a predominant factor in his decision to strike Jeter and Reynolds from the venire. It could be argued that the most telling evidence of the prosecutor's intent is the fact that the first words from his mouth as he addressed his reasons for striking Jeter and Reynolds was "[b]oth black females," not "both health care providers" or "both 27 years of age." The explanation, on its face, belies racial neutrality and manifests an intent to exclude these individual jurors based upon their membership in a distinct class. Defense counsel's failure to raise the issue of pretext, however, has stymied our inquiry, and we are left with the narrow question of whether the trial court was patently wrong in finding that the prosecutor articulated a legitimate basis for striking the jurors.

In addressing this question, we are bound by the tremendous deference accorded the trial court's determination regarding racial neutrality and purposeful discrimination. Indeed, "[b]ecause the trial court is in the best position to assess the prosecutor's credibility," a reviewing court will not overturn the trial court's finding as to intentional discrimination absent manifest error. *State v. Cummings*, 346 N.C. 291, 309, 488 S.E.2d 550, 561 (1997), *cert. denied*, —— U.S. —— , 139 L. Ed. 2d 873 (1998). Given the additional statements by the pros-

ecutor that Jeter "was personally opposed to the death penalty" and that Reynolds had a "cousin [who] was convicted by [a detective expected to give testimony in the case]," we cannot conclude that the trial court clearly erred in failing to find intentional discrimination in the prosecutor's exercise of peremptory strikes. Therefore, defendant's assignment of error must fail.

[3] By his next assignment of error, defendant contends that the trial court erred in denying his request for an instruction on the charge of accessory before the fact to capital murder. The relevant statute provides as follows:

> All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. However, if a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B2 felony.

N.C. Gen. Stat. § 14-5.2 (Cum. Supp. 1997). Defendant contends that there was evidence from which a jury could find that he was an accessory before the fact to the murder of Marshburn and that the evidence against him consisted only of the uncorroborated testimony of Harry Beaufort, whom defendant alleges was the principal in this case. We cannot agree.

Our Supreme Court articulated the following definition of an accessory before the fact:

> "An accessory before the fact is one who is absent from the scene when the crime was committed but who participated in the planning or contemplation of the crime in such a way as to 'counsel, procure, or command' the principal(s) to commit it. Thus, the primary distinction between a principal in the second degree and an accessory before the fact is that the latter was not actually or constructively present when the crime was in fact committed.

State v. Willis, 332 N.C. 151, 176-77, 420 S.E.2d 158, 170 (1992) (quoting *State v. Small*, 301 N.C. 407, 413, 272 S.E.2d 128, 132 (1980)). Since accessory before the fact to first-degree murder is a lesser included offense, the trial court must instruct on accessory before the

fact if there is evidence establishing its commission. *Id.* However, "[i]f all the evidence shows the commission of the greater offense, the court should not charge on the lesser included offense simply because the jury might not believe some of the evidence." *Id.* at 176-77, 420 S.E.2d at 170.

Defendant argues that according to his testimony, he was not present in the paint shop when Beaufort murdered Marshburn; therefore, the trial court was required to submit the instruction of accessory before the fact to first-degree murder. However, if a defendant is constructively present when the crime is committed, he cannot be convicted as an accessory before the fact, and an instruction on that offense would be erroneous. *State v. Maynard*, 65 N.C. App. 612, 309 S.E.2d 581 (1983). "Constructive presence occurs when the defendant accompanies the actual perpetrator to the vicinity of the crime and stays there with the purpose of aiding the actual perpetrator, if needed, in committing the offense or escaping thereafter." *Id.* at 613, 309 S.E.2d at 582.

In the present case, defendant testified that when he and Beaufort arrived in Winston-Salem, he stopped at a gas station near the paint shop and let Beaufort out of the car before proceeding to the paint shop to pick up Beaufort's check. Then, he drove to a nearby parking lot and waited for Beaufort to return to the car. When Beaufort returned, he told defendant that he had shot and robbed Marshburn, and he gave defendant half of the stolen money. Defendant stated that he knew Beaufort was going to rob Marshburn, but he had no knowledge of Beaufort's plan to kill him. Even if the jury believed defendant's testimony, it would have to find that he was at least constructively present, because he "accompanie[d] the actual perpetrator to the vicinity of the crime and stay[ed] there with the purpose of aiding the actual perpetrator, if needed, in . . . escaping thereafter." *Id.* We, therefore, hold that the trial court did not err in declining to instruct the jury on the offense of accessory before the fact to capital murder, and defendant's assignment of error fails.

Defendant's final argument is that the trial court erred in permitting Terry Oliver to testify regarding statements made by defendant "tending to show 'prior bad acts' and 'extrinsic conduct.' " The first statement at issue is one made by defendant to Oliver, wherein defendant explained that he had to sell drugs in order to "stay afloat" and to meet his financial obligations. The second statement is one that Oliver overheard while defendant was on the telephone. Oliver

testified that defendant told the other party that "if Earl Scheib didn't quit f***ing him around on his money, . . . he was going to have to cap someone." Defendant objected to both of these statements under Rules 404 and 403 of the North Carolina Rules of Evidence.

Rule 404(b) states 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." N.C.R. Evid. 404(b). The rule further provides that such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Under Rule 403, evidence which is determined to be relevant and admissible may, nonetheless, be excluded if its probative value is outweighed by the danger of unfair prejudice. N.C.R. Evid. 403. Whether to exclude evidence under Rule 403 is within the trial court's discretion, and the court's ruling in this respect will not be disturbed absent a showing that the ruling was arbitrary or manifestly unsupported by reason. *State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998).

[4] First, we note that defendant's statement that "he was going to have to cap someone" if Scheib did not stop garnishing his wages does not constitute a prior bad act under Rule 404. If anything, it is a hearsay statement offered to prove the truth of the matter asserted. Nevertheless, this statement would be admissible under recognized exceptions to the general rule prohibiting the admission of hearsay testimony. Defendant's statement that "he was going to have to cap someone" was admissible under Rule 801(d) of the North Carolina Rules of Evidence as an admission or statement of a party opponent. N.C.R. Evid. 801(d); *see also State v. Workman*, 344 N.C. 482, 503, 476 S.E.2d 301, 312 (1996) (concluding that defendant's statement that "we'll just have to rob somebody" properly admitted under Rule 801(d) as statement by party opponent). Under Rule 801(d), a hearsay statement is admissible " 'if it is offered against a party and it is . . . his own statement.' " *Id.* (quoting N.C.R. Evid. 801(d)). The challenged statement meets these requirements; therefore, the trial court did not err in admitting this statement into evidence.

[5] With respect to defendant's statement that he sold drugs to make ends meet, we hold, based upon the preceding discussion, that this too constitutes a statement by a party opponent, which is admissible under Rule 801(d). Still, defendant argues that this evidence does not establish a motive for the crime charged and, thus, the trial court

erred in instructing the jury that they could consider this evidence for the limited purpose of finding motive. Again, we must disagree.

The State's evidence tended to show that before the robbery and murder of Marshburn, defendant was experiencing significant financial problems due to the fact that Schieb was garnishing his pay to compensate for a prior shortage. Under Rule 401 of the Rules of Evidence, relevant evidence is that which has any tendency to prove the existence of a material fact. N.C.R. Evid. 401. Oliver's testimony that defendant was in such dire need of money that he sold drugs tended to make it more probable that defendant's need for money motivated him to rob and kill Marshburn. Furthermore, we reject defendant's argument that the trial court abused its discretion in admitting the evidence, as we find no gross improprieties in the trial court's determination that the probative value of the evidence outweighed its prejudicial nature. Therefore, defendant's assignment of error is overruled.

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

No error.

Judges MARTIN, John C. and HORTON concur.

SAMMY E. ESTRIDGE, III, PLAINTIFF-APPELLEE v. HOUSECALLS HEALTHCARE GROUP, INC.; TERRY JUDSON WARD; CAROL WARD; AND CHRISTINE STEWART, DEFENDANTS-APPELLANTS

No. COA97-1534

(Filed 29 December 1998)

1. Malicious Prosecution— *co-employee and owner's wife not liable*

Plaintiff former employee's co-employee could not be held liable to plaintiff for malicious prosecution, although she reported to her employer that she believed that plaintiff was holding the employer's cellular telephone and pager hostage until he received his final paycheck, where she reported plaintiff's conduct to the magistrate at the employer's direction, she had no knowledge that the phone and pager had been returned, and the

magistrate issued a warrant charging plaintiff with conversion by a bailee. Nor could the wife of the employer's owner be liable to plaintiff for malicious prosecution where there was no evidence that she had any part in the initiation of the criminal proceeding against plaintiff.

2. Malicious Prosecution— action against former employer and owner—sufficient evidence

Plaintiff's evidence was sufficient to be submitted to the jury in an action against his former employer and the employer's owner for malicious prosecution of charges against plaintiff for conversion by a bailee of a cellular phone and a pager.

3. Damages and Remedies— compensatory damages—lump sum—new trial for two defendants

A new trial must be awarded as to defendant employer and defendant owner on the damages issue in plaintiff former employee's malicious prosecution action where the jury returned a compensatory damages verdict of $30,000 against all four defendants for malicious prosecution and abuse of process; the evidence was insufficient against all defendants on the abuse of process claim and against the other two defendants on the malicious prosecution claim; and it cannot be determined what portion of the damages was attributable to the malicious prosecution by defendant employer and defendant owner.

4. Abuse of Process— insufficient evidence

Plaintiff's evidence was insufficient to support his claim of abuse of process against his former employer's owner and the owner's wife (the Wards) where it tended to show only that, after an assistant district attorney stated that a charge against plaintiff for conversion by a bailee of a cellular telephone and a pager would be dismissed because the property had been returned to the employer, Mrs. Ward stated that "that's not the point" and both of the Wards sought to have the assistant district attorney proceed with the trial, since there was no evidence of any improper use of the legal process after the issuance of the criminal summons.

5. Evidence— employer's Medicaid over-billing—irrelevancy to unpaid wages, malicious prosecution, abuse of process

Evidence of defendant employer's alleged over-billing practices with respect to Medicaid and an investigation by the State of

those practices was not relevant to plaintiff former employee's claims for unpaid wages, abuse of process and malicious prosecution of a charge of conversion of a cellular phone and a pager owned by the employer where plaintiff offered no evidence to connect his information about the over-billing practices with the actions of defendants in causing a warrant to be issued against him for conversion of the employer's property. Furthermore, the prejudicial effect of this evidence on the jury far outweighed its slight probative value. N.C.G.S. § 8C-1, Rule 403.

6. Evidence— corroboration—testimony beyond that corroborated—inadmissibility

An expert's testimony was inadmissible to corroborate plaintiff's testimony concerning defendant employer's alleged over-billing practices for Medicaid because his testimony about over-billing by submitting multiple bills for the same services and doubling up in subsequent billings and the total amount of the alleged over-billing went far beyond plaintiff's testimony that defendant submitted multiple bills for the same services.

Chief Judge EAGLES dissenting.

Appeal by defendants from judgment entered by Judge Peter M. McHugh on 23 May 1997 in Guilford County Superior Court. Heard in the Court of Appeals 24 August 1998.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., and Robert C. Cone for plaintiff appellee.

Smith Helms Mulliss & Moore, L.L.P., by J. Donald Cowan, Jr., James G. Exum, Jr., and Paul K. Sun, Jr., for defendant appellants.

HORTON, Judge.

Sammy E. Estridge, III (plaintiff), is a Certified Public Accountant and a Certified Internal Auditor. Plaintiff instituted this action on 27 October 1995 against Housecalls Healthcare Group, Inc. (Housecalls), Terry Ward (Mr. Ward), Carol Ward (Mrs. Ward), and Christine Stewart (Ms. Stewart) (collectively defendants), seeking damages for unpaid wages, malicious prosecution, and abuse of process.

The facts in this case are as follows: Plaintiff was employed by Housecalls Home Health Care, a wholly owned subsidiary of

Housecalls, in March 1995 as Assistant Controller. Several months later, he was promoted to Controller. Housecalls is a statewide provider of in-home health care services and primarily provides services for Medicaid-eligible patients utilizing part-time nurses. Housecalls pays the nurses and then bills Medicaid for reimbursement.

At trial, plaintiff testified that Housecalls did not have an adequate accounting system so there was no assurance that receipts would be correctly recorded nor a system to prevent the possibility of double billing. Plaintiff made suggestions for improving the system but contends his suggestions were largely ignored. Mr. Ward, on the other hand, stated that many of the recommendations were implemented.

On Saturday, 2 September 1995, Mr. Ward, the owner of Housecalls, required plaintiff to attend a meeting at the office and then remain at the office to complete a project. Later that afternoon, plaintiff and his wife discussed his employment with Housecalls, and plaintiff decided to resign. Plaintiff prepared a letter of resignation citing problems with the accounting system which caused him "multiple ethical dilemmas" and posted several copies of the letter in the office building. Plaintiff stated his resignation was effective immediately but offered to act as an independent consultant for an additional ten business days.

According to plaintiff, Mr. Ward paged plaintiff the following morning and left a message on his voice mail directing plaintiff to return the company keys. Mr. Ward testified, however, that he also directed plaintiff to return any other property of Housecalls at once. Plaintiff testified that he returned Mr. Ward's call and stated that he would bring the keys to Housecalls on Tuesday morning while Mr. Ward testified that plaintiff did not say anything about returning the company property.

According to plaintiff, on the following Tuesday morning, he turned his keys over to Ms. Stewart. Plaintiff testified that he told Ms. Stewart that he would bring the pager and cell phone back on Friday when he received his paycheck, or earlier if they were needed. Plaintiff left a note with the keys requesting that he be informed whether he would be needed during the ensuing ten-day period and when he was to bring the equipment back. Ms. Stewart testified that plaintiff told her that he would not return the cell phone and pager

until he received his final paycheck, and she believed that he was therefore holding the property hostage.

Mr. Ward then instructed Ms. Stewart to go to a magistrate on that same Tuesday morning, 5 September 1995, and explain the situation. The magistrate issued a warrant charging conversion by a bailee of the pager and cell phone in violation of N.C. Gen. Stat. § 14-168.1 (1993). On Tuesday evening, plaintiff went to the Housecalls office and turned in all the equipment to Lisa Saunders and obtained a receipt from her. He was not aware of the warrant which had been issued at that time and did not learn about the warrant until 16 September 1995.

When the criminal case came on for trial, Mr. Ward's wife was present and discussed the case with the prosecutor. The Assistant District Attorney Mary Hedrick (Ms. Hedrick) dismissed the case because the property had been returned. Mrs. Ward testified that she did not want the case dismissed and informed Ms. Hedrick of this wish and asked if Mr. Ward could be contacted. Mr. Ward also informed Ms. Hedrick that he wanted the case to be prosecuted, but understood that the decision was Ms. Hedrick's to make.

Plaintiff filed this civil action approximately two weeks after the criminal case was dismissed. The jury entered verdicts against defendants for $1,295.93 in unpaid wages and $30,000.00 for compensatory damages for the criminal prosecution. The jury awarded punitive damages against defendants as follows: Housecalls, $1.5 million; Mr. Ward, $1.5 million; Mrs. Ward, $1.0 million; and Ms. Stewart, $1. The trial court denied defendants' motions for judgment notwithstanding the verdict or a new trial, and entered judgment based on the jury verdict. Defendants appealed.

The issues are whether: (I) the trial court erred in denying defendants' motions for directed verdict and JNOV on the (A) malicious prosecution and (B) abuse of process claims and (II) the trial court erred in admitting evidence of Housecalls' billing practices.

I

In reviewing the denial of a motion for directed verdict or a JNOV, this Court must determine whether substantial evidence of a claim was presented when all of the evidence is taken in the light most favorable to the non-moving party and all inconsistencies are resolved in the light most favorable to the non-moving party. *Asfar v. Charlotte Auto Auction, Inc.*, 127 N.C. App. 502, 504, 490 S.E.2d

598, 600 (1997), *disc. review denied*, 347 N.C. 572, 498 S.E.2d 376 (1998).

A

Malicious Prosecution Claim

The elements for a malicious prosecution claim are the following: "(1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510, *reh'g denied*, 338 N.C. 525, 452 S.E.2d 807 (1994). Defendants contend that Ms. Stewart and Mrs. Ward did not engage in malicious prosecution because all of the elements of the action were not present. We agree.

[1] Although the fourth element of malicious prosecution, termination of the earlier proceeding in favor of plaintiff, was met, Ms. Stewart cannot be held liable for the claim because she did not initiate the action on her own accord. *See Distributors, Inc. v. Dept. of Transportation*, 41 N.C. App. 548, 551, 255 S.E.2d 203, 206, *cert. denied*, 298 N.C. 567, 261 S.E.2d 123 (1979) (employee is not liable to injury to third persons if employee is following instructions of employer unless employee knew or had reason to know that the acts would injure another). In this case, Ms. Stewart went to the magistrate's office because she was instructed to do so by her employer, Mr. Ward, and she had no knowledge that the property had been returned or would be returned. Ms. Stewart did as instructed, and the magistrate issued a warrant charging plaintiff with conversion by a bailee of the pager and cell phone. There is no evidence in this record that Stewart acted with any malice toward the plaintiff. She reported the situation to her employer, and he made the decision to have her appear before the magistrate.

Furthermore, there is no evidence that Mrs. Ward had any part in the initiation of the action. Plaintiff argues that Mrs. Ward caused the criminal prosecution against plaintiff to be "continued" by stating to Ms. Hedrick that insufficient evidence was "not the point," and therefore this statement satisfies the initiation element of malicious prosecution. We disagree. Plaintiff has confused the tort of malicious prosecution with the tort of abuse of process which is discussed below. Improper actions taken after the issuance of process or initiation of an action are more properly considered under abuse of

process. *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979), *overruled on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Consequently, the trial court should have dismissed the claim for malicious prosecution against both Ms. Stewart and Mrs. Ward.

[2] Although defendants also contend that the trial court should have directed a verdict as to Housecalls and Mr. Ward, we disagree and hold that the trial court correctly allowed the claim to go to the jury as to those defendants. Whether probable cause existed for the initiation of the earlier proceeding is a jury question when the facts are in dispute. *Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 255, 352 S.E.2d 256, 258 (1987). Viewed in the light most favorable to plaintiff, there was evidence from which a jury could find malicious prosecution against the remaining defendants.

[3] There must be a new trial, however, as to Housecalls and Mr. Ward on the claim for malicious prosecution. The issues were submitted in such a manner that the jury found that *all* the defendants maliciously instituted the prosecution and abused process, entitling plaintiff to recover compensatory damages in the total sum of $30,000.00. Because the damages for malicious prosecution and abuse of process are lumped together in one sum and we cannot say what portion of those damages is attributable to the malicious prosecution by defendants Housecalls and Mr. Ward, there must be a new trial as to those defendants to determine damages.

B

Abuse of Process Claim

[4] " '[A]buse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended (sic) to be secured.' " *Stanback*, 297 N.C. at 200, 254 S.E.2d at 624 (quoting *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965)). Indeed, abuse of process " 'requires both an ulterior motive and *an act* in the use of the legal process not proper in the regular prosecution of the proceeding,' and that '[b]oth requirements relate to the defendant's purpose to achieve through the use of the process some end foreign to those it was designed to effect.' " *Id.* at 201, 254 S.E.2d at 624 (quoting R. Byrd, *Malicious Prosecution in*

North Carolina, 47 N.C.L. Rev. 285, 288 (1969)). Plaintiff argues that the efforts of Mr. and Mrs. Ward to have Ms. Hedrick continue with the criminal prosecution of plaintiff, rather than dismissing the matter, support this cause of action. We disagree.

In this case, there is no evidence of any improper use of the legal process *after* the issuance of the criminal summons. The reason given by Ms. Hedrick for the voluntary dismissal was "insufficient evidence." The Wards merely disagreed with her decision and sought to have the trial of the criminal matter proceed in a normal fashion. Standing alone, the statements by the Wards, that "that's not the point" in reply to Ms. Hedrick's explanation for dismissing the case is not sufficient to prove a willful act outside the regular course of the proceedings. Indeed, our case law states that the "act" requirement of abuse of process requires a defendant to commit some "wilful act whereby he sought to use the existence of the proceeding to gain advantage of plaintiff in respect to some collateral matter." *Stanback*, 297 N.C. at 201, 254 S.E.2d at 624. An example of such an improper willful act is the offer to discontinue a proceeding in return for the payment of money. *Id.* Because the elements of abuse of process were not met as to any of the defendants, the trial court erred in failing to dismiss the claim for abuse of process against all the defendants.

II

Over-billing Testimony

[5] Rule 402 of the North Carolina Rules of Evidence states that "[e]vidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (1992). Relevant evidence is defined as evidence which tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). Defendants contend that evidence of Housecalls' billing practices was irrelevant to the claims stated by plaintiff and should not have been admitted at trial. We agree that the trial court erred in allowing the evidence of billing practices and the testimony of Robert Nowell (Mr. Nowell), the Assistant Director of the State Division of Medical Assistance, Program Integrity Section.

In his complaint, plaintiff alleged that defendants used the criminal process, "both before and after commencement of the criminal proceeding . . . in an effort to compel the plaintiff to forego his valid claim for salary, . . . in an effort to retaliate against the plain-

tiff for resigning from Housecalls, and in a deliberate effort to cause extreme embarrassment and expense to the plaintiff." At trial, however, plaintiff offered voluminous evidence through his own testimony and the testimony of Mr. Nowell about Housecalls' billing practices with respect to Medicaid. The testimony, which was admitted over defendants' objections, had little relevance to plaintiff's claims for unpaid wages, abuse of process, and malicious prosecution. The trial court apparently agreed with plaintiff's contention that the evidence went to defendants' motive in instituting criminal process against him.

Plaintiff never offered any evidence, however, which would connect his information about the alleged over-billing practices with the actions of defendants in causing a warrant to be issued against him. As shown above in the quotation from his complaint, plaintiff did not allege any such motivation for defendants' actions. Indeed, there was no evidence presented which indicated that plaintiff knew that there was an investigation by the State, or that he provided any information to the State in connection with its investigation. Plaintiff was not discharged in retaliation for any actions he might have taken; instead, plaintiff resigned on his own accord. The only evidence which remotely bears on the relevance of the over-billing evidence was plaintiff's testimony that Mr. Ward told him that any over-billing of Medicaid would be reconciled. There is simply no competent evidence which would warrant the highly prejudicial evidence that Housecalls was investigated by the State for over-billing Medicaid in a large amount. Even had the evidence been admissible under some theory, its prejudicial effect on the jury verdict far outweighed its slight probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice").

[6] Finally, even assuming *arguendo* that plaintiff's evidence about his knowledge of over-billing practices by Housecalls was relevant and that Mr. Nowell was properly qualified as an expert witness, the testimony of Mr. Nowell was erroneously admitted to corroborate the testimony of plaintiff. Testimony offered in corroboration of other evidence may not contain additional information which was not in the initial evidence. *State v. Mayhand*, 298 N.C. 418, 425, 259 S.E.2d 231, 236 (1979).

In this case, plaintiff offered evidence about Housecalls submitting multiple bills to Medicaid for the same services. Mr. Nowell was

allowed to testify at length that in his opinion Housecalls over-billed Medicaid in two ways: first, by submitting multiple bills for the same services; and second, by "doubling up" after an initial bill was paid by doubling units and costs in subsequent billings. Mr. Nowell was also allowed to testify that the total amount of the alleged over-billing was $381,000.00. This testimony goes much further than that of plaintiff, and in no way can be said merely to corroborate plaintiff's testimony. Plaintiff did not even testify about the alleged practice of "doubling up" as a method of over-billing Medicaid. Therefore, the admission of Mr. Nowell's testimony was prejudicial error.

In summary, all claims for relief against Mrs. Ward and Ms. Stewart are dismissed, but the judgment against Housecalls and Mr. Ward for unpaid wages is affirmed. Although defendants also assigned error to the punitive damages which were awarded to plaintiff, we need not address those issues, because the case must be remanded for a new trial as to Mr. Ward and Housecalls to redetermine the underlying compensatory damages for the malicious prosecution claim. Therefore, the punitive damages will necessarily be redetermined by the jury.

Affirmed in part, reversed in part, and remanded for a

New trial.

Judge MARTIN, Mark D., concurs.

Chief Judge EAGLES concurs in the result and dissents in part.

Chief Judge EAGLES dissenting.

I concur in the result but dissent on the issue of the relevance and admissibility of the over-billing testimony. The majority held that Housecalls' billing practices were irrelevant to the claims stated by the plaintiff and Robert Nowell's testimony should not have been allowed into evidence at trial. The majority went on to hold that even if the billing practices of Housecalls were relevant, the billing evidence was highly prejudicial compared to the slight probative value of the evidence. After careful review, I disagree.

The four elements of a malicious prosecution claim are 1) that defendant initiated the earlier proceeding; 2) that there was malice on the part of defendant in doing so; 3) that there was a lack of probable

cause for the initiation of the earlier proceeding; and 4) that the earlier proceeding was terminated in favor of the plaintiff. *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994), *reh'g denied*, 338 N.C. 525, 452 S.E.2d 807 (1994). In an action for malicious prosecution, the malice element may be satisfied by a showing of either actual or implied (legal) malice. *Best v. Duke University*, 112 N.C. App. 548, 552, 436 S.E.2d 395, 399 (1993), *aff'd in part, rev'd in part on other grounds*, 337 N.C. 742, 448 S.E.2d 506 (1994).

> "Actual malice . . . is defined as 'ill-will, spite, or desire for revenge, or under circumstances of insult, rudeness or oppression, or in a manner evidencing a reckless and wanton disregard of [plaintiff's] rights.' " (Citations omitted). Actual malice, which "is more difficult to substantiate . . . is only required if plaintiff is seeking punitive damages." (Citations omitted). Implied (or legal) malice, on the other hand, "may be inferred from want of probable cause in reckless disregard of plaintiff[s'] rights." (Citations omitted).

Moore v. City of Creedmoor, 120 N.C. App. 27, 43-44, 460 S.E.2d 899, 909 (1995), *aff'd in part, rev'd in part on other grounds*, 345 N.C. 356, 481 S.E.2d 14 (1997). Want of probable cause may not be inferred from malice for purposes of determining whether there is a cause of action for malicious prosecution but malice may be inferred from want of probable cause. *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966).

Here, all four elements of a malicious prosecution claim have been met with respect to Housecalls and Terry Ward. Through Mr. Ward, Housecalls initiated the criminal proceeding against plaintiff. Mr. Ward, the owner of Housecalls, told his employee, Ms. Stewart, to go to a magistrate and get a warrant for plaintiff's arrest. In addition, there is some evidence that the defendants lacked probable cause. The magistrate issued the warrant but the district attorney dismissed the charges against plaintiff because plaintiff had returned the items he had allegedly "wrongfully" withheld from defendants. See *Pitts v. Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978), *but see Best v. Duke University*, 337 N.C. 742, 448 S.E.2d 506 (1994). The only real element in issue is whether the defendants displayed malice in prosecuting plaintiff.

Based on the law of North Carolina, it is clear that the court can infer legal or implied malice from the lack of probable cause. However, Housecalls' illegal billing practices are relevant to support

the notion that defendants harbored actual malice towards plaintiff when they initiated the prosecution against plaintiff.

Housecalls was defrauding Medicaid by double billing the government. Plaintiff had knowledge of these illegal billing practices and defendant knew that plaintiff had knowledge of these practices and could be a persuasive witness in administrative proceedings. When plaintiff noticed that defendant was double charging Medicaid for the same medical expenses and told his supervisor, defendant Terry Ward, Mr. Ward stated that any over-billing would be reconciled. Moreover, when plaintiff resigned, he prepared a letter of resignation citing problems with the accounting system which caused him "multiple ethical dilemmas." Copies of this letter were posted throughout defendants' office. At the time plaintiff resigned, defendants were well aware that the plaintiff had knowledge of their dishonest billing procedures. Furthermore, when the district attorney tried to explain to Mr. and Mrs. Ward that there was no way she could win the case since plaintiff had returned the cell phone and pager, Mr. and Mrs. Ward said: "That's not the point." Mr. and Mrs. Ward demanded that the district attorney proceed with the case. Defendants' desire to press forward with plaintiff's prosecution even after the items in question had been returned suggests that the "point" of the prosecution was to mar plaintiff's personal and professional reputation as a CPA and undermine his credibility as a witness in subsequent proceedings. All this evidence is relevant to substantiate the actual malice element in plaintiff's malicious prosecution claim. Accordingly, the trial court did not err when it admitted the evidence of Housecalls' billing practices.

The majority opinion also addresses Mr. Robert Nowell's testimony. Mr. Nowell is the Assistant Director of the State Division of Medical Assistance, Program Integrity Section. Mr. Nowell was a corroborating witness and testified about Housecalls' illegal billing practices. In the event of a new trial, Mr. Nowell should be allowed to testify but the trial court should carefully limit his testimony to evidence that actually corroborates other testimony.

Accordingly, I agree with the majority and would grant a new trial but would allow Housecalls' billing practices into evidence through both plaintiff and Mr. Nowell to show actual malice.

STATE OF NORTH CAROLINA v. BRIAN KEITH VESTAL

No. COA97-554

(Filed 29 December 1998)

1. **Appeal and Error— dismissal of criminal charge—appeal by State—defendant's failure to raise double jeopardy—jurisdictional review**

   Defendant's failure to assert the double jeopardy issue on appeal did not preclude the appellate court from reviewing whether the State was barred under N.C.G.S. § 15A-1445(a) from appealing an order dismissing a criminal charge against defendant because the rule against double jeopardy prohibits further prosecution of the case.

2. **Constitutional Law— double jeopardy—police misconduct—jury empaneled and sworn—sua sponte dismissal of charge**

   The rule against double jeopardy bars a retrial of defendant on a charge of conspiracy to deliver marijuana where the trial court dismissed the charge with prejudice after a jury had been duly empaneled and sworn on the ground that the police department used in an undercover operation drugs which had been ordered destroyed in a prior case; defendant took no active role in the dismissal; and the trial court indicated that its primary concern was the effect its order would have on future police investigations.

   Judge JOHN concurring.

Appeal by State of North Carolina from order filed 15 July 1996 by Judge Julius A. Rousseau, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 28 January 1998.

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

John Bryson for defendant-appellee.

MARTIN, Mark D., Judge.

The State of North Carolina appeals from order dismissing with prejudice the case against defendant charged with conspiracy to deliver marijuana.

At trial, after the jury had been empaneled and sworn, and subsequent to presentation of the State's case, the trial court, *sua sponte*, dismissed the case against defendant with prejudice on the ground that the High Point Police Department had "violat[ed] a trial court order without court approval," by using drugs in an undercover operation which had been forfeited in a prior case and were awaiting destruction.

As a preliminary matter, the State asserts the rule against double jeopardy, Fifth Amendment to the United States Constitution and the "law of the land" clause of Article I, § 19 of the North Carolina Constitution, does not bar the State, on appeal, from seeking reversal of the trial court's order of dismissal with prejudice. We disagree.

The right to appeal in a criminal proceeding is purely statutory. *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 658 (1977). The State may not appeal a judgment in favor of a criminal defendant in the absence of a statute "clearly conferring that right." *State v. Dobson*, 51 N.C. App. 445, 446, 276 S.E.2d 480, 481 (1981). Statutes authorizing appeal by the State in a criminal proceeding are "strictly construed" and "may not be enlarged" by this Court. *Id.* at 447, 276 S.E.2d at 482.

[1],[2] N.C. Gen. Stat. § 15A-1445(a) (1997) provides the State may appeal an order dismissing a criminal charge "[u]nless the rule against double jeopardy prohibits further prosecution." *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613, *disc. review denied*, 337 N.C. 805 (1994). Because the rule against double jeopardy precludes further prosecution in the present case, the State's appeal must be dismissed.[1]

The United States Supreme Court has articulated one aspect of the underlying rationale of the Double Jeopardy Clause of the United States Constitution as follows:

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1. We note defendant's failure to assert the double jeopardy issue on appeal does not foreclose our review under section 15A-1445(a). It is well settled that the primary goal of statutory construction is to discern the intent of the legislature. *See, e.g., Bowers v. City of High Point*, 339 N.C. 413, 419, 451 S.E.2d 284, 289 (1994). The General Assembly enacted the North Carolina Criminal Procedure Act, which incorporates section 15A-1445(a), in 1977. At that time, a defendant was not required to plead double jeopardy as a bar until the State attempted to retry him. *See State v. Cutshall*, 278 N.C. 334, 343, 180 S.E.2d 745, 750 (1971), *appeal after remand*, 281 N.C. 588, 189 S.E.2d 176 (1972). As a result, we discern that the legislature did not intend to require a defendant, on appeal from an order of dismissal at the first trial, to assert the double jeopardy issue as a prerequisite to this Court's jurisdictional review under section 15A-1445(a). The language of section 15A-1445(a) reinforces this conclusion by

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

United States v. Green, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 204 (1957).

This salutory principle was later relied on in *United States v. Jenkins*, 420 U.S. 358, 43 L. Ed. 2d 250 (1975), *overruled by*, *United States v. Scott*, 437 U.S. 82, 57 L. Ed. 2d 65, *reh'g denied*, 439 U.S. 883, 58 L. Ed. 2d 197 (1978), where the Court held that a dismissal occurring at the stage of the proceeding after jeopardy had attached but prior to the factfinder's conclusion as to guilt or innocence, barred the State from appealing, as the appeal would require further proceedings leading to a factual resolution of the issue of guilt or innocence. *Id.* at 369-370, 43 L. Ed. 2d at 259.

In *Scott*, 437 U.S. 82, 57 L. Ed. 2d 65, the United States Supreme Court, overturning *Jenkins*, relaxed its application of this principle and stated that when a defendant takes an active role in the trial court's dismissal of the indictment, the State is not necessarily precluded from appealing the dismissal. In so holding, the Court concluded that:

> the defendant, by *deliberately choosing to seek termination of the proceedings against him* on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant . . . . Rather, we conclude that the Double Jeopardy Clause, which guards against Governmental oppression, does not relieve a defendant from the consequences of his voluntary choice . . . .
>
> . . . .

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barring appeal by the State when "the rule against double jeopardy prohibits further prosecution." Accordingly, defendant's failure to assert the double jeopardy issue in brief does not relieve this Court of its plenary duty to determine whether a jurisdictional basis exists for the present appeal. *See Waters v. Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978) ("If 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.").

> . . . No interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant.

Id. at 99-100, 57 L. Ed. 2d at 79-80 (1978) (emphasis added).

In *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610, this Court followed the *Scott* reasoning and rejected defendant's argument that the rule against double jeopardy precluded his re-trial for habitual driving while impaired. In that case, the trial court dismissed the charge, upon defendant's motion, on the ground that it had no jurisdiction—a matter "entirely unrelated to the sufficiency of evidence as to any element of the offense or to defendant's guilt or innocence." *Id.* at 551, 445 S.E.2d at 613.

Scott and *Priddy* mandate the rule against double jeopardy will not bar an appeal by the government where the defendant took an active role in the dismissal, because defendant essentially chose to end the trial and cannot later complain that he was "deprived of his 'valued right to have his trial completed by a particular tribunal.' " *Scott*, 437 U.S. at 99-100, 57 L. Ed. 2d at 80 (*quoting United States v. Jorn*, 400 U.S. 470, 484, 27 L. Ed. 2d 543, 556 (1971)); *State v. Priddy*, 115 N.C. App. at 551, 445 S.E.2d at 613. Put simply, the Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99, 57 L. Ed. 2d at 79.

In *United States v. Dahlstrum*, 655 F.2d 971 (9th Cir. 1981), *cert. denied*, 455 U.S. 928, 71 L. Ed. 2d 472 (1982), the government appealed from the trial court's dismissal of an indictment on grounds apart from guilt or innocence. *Id.* at 973. During presentation of the government's case, the trial court became concerned that a government agency had abused its power. *Id.* When the government called a witness in an attempt to eliminate the trial court's concern, the court grew increasingly disturbed and ordered another witness to appear to help explain the agency's practices and procedures. *Id.* On the basis of this testimony, the trial court orally dismissed the indictment against the defendant because of "governmental misconduct." *Id.* In dismissing the appeal, the 9th Circuit stated

> [t]he record convinces us that the judge took complete control of the proceedings and set off on a course over which [defendant] had practically no control. Nowhere does it appear that the judge, prior to the oral dismissal of the indictment, even consulted

> [defendant] on what course of action to take. For that matter, the judge's words and actions indicated that his primary concern was not with the case before him, but with the effect of his actions on future IRS investigations. The entire record indicates that the judge had no interest in completing the trial. [Defendant's] involvement in the termination of the trial was at best minimal and in no way reached the high degree of participation that was present in *Scott*. Nor can it be said that [defendant] retained "primary control" over the course of the trial. For that matter, the record shows that he had no control over what was occurring. . . . His relatively passive role should not be taken to reflect anything beyond a keen appreciation of the fact that the judge had taken over the proceedings.

Id. at 975. (citations omitted).

In the instant case, it is undisputed that jeopardy had attached because the trial court dismissed the charge against defendant "with prejudice" after a competent jury had been duly empaneled and sworn. *See State v. Cutshall*, 278 N.C. at 344, 180 S.E.2d at 751 ("Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn."). It is also undisputed that the trial judge, *sua sponte*, instigated the dismissal and took complete control of the proceeding, indicating his primary concern was the effect his order would have on future police investigations.

Unlike *Scott* and this Court's decision in *Priddy*, defendant here did not take an active role in the process which led to dismissal of the charge against him. Rather, due to the trial court's *sua sponte* dismissal of this case, defendant was involuntarily deprived of his constitutional right to have his trial completed by the jury which had been duly empaneled and sworn. *Cf. United States v. Jorn*, 400 U.S. at 484, 27 L. Ed. 2d at 556. As such, the rule against double jeopardy bars further prosecution of defendant on the charge set forth in the indictment. *See State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (Double Jeopardy Clause protects against "second prosecution for the same offense after acquittal").

Because the rule against double jeopardy deprives this Court of any jurisdictional basis under section 15A-1445(a) to hear the present appeal, it must be dismissed.

Dismissed.

Judge GREENE concurs.

Judge JOHN concurs with separate opinion.

Judge JOHN concurring with separate opinion.

I concur in the majority opinion. However, I write separately to address the issue asserted by the State on appeal, *i.e.* that the trial court lacked authority to enter the challenged dismissal. In order to evaluate the trial court's action in an accurate context, it is necessary to review the circumstances *sub judice* in some detail.

The State in its appellate brief attempts at great length to minimize the confusing and inconsistent versions given the trial court of the history of the drugs involved in the case against defendant. At trial, the State presented evidence that the marijuana which was the subject of defendant's conspiracy charge had been checked out of the High Point Police Department Evidence Room (Evidence Room), having been previously seized in an unrelated concluded case. Upon the trial court's inquiry in the absence of the jury following presentation of the evidence and the charge conference, the prosecutor stated the marijuana had been confiscated in the case of *State v. Emmett James Hagy and Donna Anderson Hagy*, which originated in 1993. The clerk informed the court that her records indicated the Hagy case had been tried 6 July 1993 and that "there was an order to destroy in that case." Prior to an overnight recess, the court directed the prosecutor to "make some investigation and see what [he could] find out" regarding why the marijuana "had been sitting over there two years" prior to being used in the instant case and why

> these law officers [were] taking contraband out to use it at their will and disposal without a court order.

Defendant's trial was conducted during the 24 June 1996 term of Guilford County Superior Court, High Point Division, the offense with which he was charged allegedly having occurred 17 May 1995.

Seeking to respond to the trial court's inquiry the next morning, the State called several witnesses, including the investigating officers and employees of the Evidence Room. Although four pounds of marijuana previously ordered destroyed in the Hagy cases at first could not be accounted for, it subsequently developed that sixty-seven (67)

plants had been ordered destroyed in the Hagy cases and that Evidence Room records indicated five-hundred (500) grams had been received as evidence in the instant case. The court thereupon observed, "[w]ell, it doesn't sound to me like the 500 grams is the same as 67 plants."

After further discussion and delay, the lead investigating officer in the current case, Detective Herbert Norris Sampson, Jr. (Sampson), testified he had "been trying to go back and piece together exactly what [had] happened with respect to this marijuana." Sampson stated he had initially checked out the sixty-seven plants from the Hagy cases on 17 May 1995, but now recalled he had concluded they were unsuitable for the instant undercover investigation. He subsequently had locked them "in our evidence locker," and returned them to the Evidence Room the next day. Sampson indicated he had mistakenly given the prosecutor the wrong case name asserted the previous day to the court. He acknowledged that his testimony "involving 67 plants . . . was an error on [his] part," and that the five-hundred grams of marijuana in the instant case actually came from an unrelated case initiated by a Detective Ferrell, which case Sampson was unable to identify, except by High Point Police Department number.

Following Sampson's testimony, the trial court announced its decision to dismiss the case against defendant

> [f]or improper conduct on the police department, taking drugs out when they had no authorization for it. The drugs were to be destroyed.
>
> Now, it's possible you could have gotten a court order maybe to have used it, but there is no court order; you [the prosecution] don't pretend to have one.
>
> The officers here are just taking drugs out any time they want to, from one file to another and don't keep it straight . . . . I don't think it's right.

The court thereupon called in and excused the jury, explaining the circumstances leading to dismissal of the case. After a recess, the court permitted the prosecutor to present "additional evidence."

Tom Petty (Petty), property evidence clerk of the Evidence Room, and Sampson were recalled. Ultimately, it was determined the marijuana used in the instant case came from the case of *State v.*

James Henry Canter, Jr., which originated in 1993. Evidence Room records indicated numerous items of contraband had been seized in that case, including five pounds of marijuana. Petty testified that an entry in the records dated 18 May 1995 read, "[a]ll items to be destroyed except 500.8 grams of marijuana," which, according to the employee, "was used—to be used in a drug deal and logged in under a new . . . number." The entry resulted, Petty continued, because "the case was over and Officer Ferrell said to destroy those items," except the 500.8 grams.

Sampson related that his "authority to use drugs from another case" resulted from a

> call [to] the D.A. who then approved it to me who [sic] I then ran it back through my lieutenant who then said go with it.

Sampson concluded his testimony by acknowledging that he was unaware of the disposition of the Canter case, and that he "just knew from Detective Ferrell that [the marijuana] was no longer needed."

While the court judgment in the Canter case is not contained in the record on appeal, that judgment is referenced in the portion of the proceedings during which the State was permitted to introduce additional evidence. The Canter judgment appears to have been entered 4 April 1994, more than a year prior to the alleged date of defendant's offense, and to have directed that "all contraband is destroyed and monies taken are forfeited." A subsequent "form order" in the Canter case, likewise not in the record but referenced in same portion of the transcript, apparently provided that the contraband seized in that case be "forfeited and disposed of according to law." No evidence was introduced that either law enforcement officers or prosecutors had sought modification by the trial court of the orders entered in the Hagy and Canter cases.

At the conclusion of the State's presentation of additional evidence, the trial court reiterated its decision to dismiss the charges against defendant, commenting as follows:

> . . . I don't think it's right to take drugs that have been ordered forfeited and destroyed and let the officers use them at their nilly-willy.
>
> . . . .
>
> If officers and the court system itself can't abide by what's right and decent and abide by our rules and what our procedure

> has been, we can't expect drug dealers or anybody else to even attempt to.
>
> . . . .

The trial court thereupon dictated a formal order dismissing the charges against defendant with prejudice, finding as fact, *inter alia*,

> that the officer had no authority to take the marijuana out of the police department after once it's been ordered forfeited without some further court order, and there being none in this case.

The court concluded "that justice require[s] that this case be dismissed as a deterrent to the police department to further activities."

Assuming *arguendo* that the State correctly asserts that the trial court did not act pursuant to statutory authority in dismissing the case against defendant, it is nonetheless well established that, in addition to statutorily denominated powers, the court possesses inherent powers "irrespective of constitutional provisions," *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987), which "power[s] may not be abridged by the legislature." *Id.*; *see also* N.C.G.S. § 84-36 (1995).

> Inherent power is essential to the existence of the court and the order and efficient exercise of the administration of justice. Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice.

Beard, 320 N.C. at 129, 357 S.E.2d at 696.

> Moreover,
>
> [t]he paramount duty of a trial judge is to control the course of a trial so as to prevent injustice to any party. In the exercise of this duty he possesses broad discretionary powers.

State v. Britt, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974).

Against the backdrop of uncontroverted evidence of substantial delay in complying with court ordered destruction of contraband, a delay of nearly two years in the Hagy cases and of thirteen months in the Canter case, of at best incomplete and confused recordkeeping and management of confiscated controlled substances, and of apparent prosecutorial and supervisory police approval of modification of prior court orders without seeking authorization from the court, I

believe the trial court "reasonably" and in the interests of "the proper administration of justice," *Beard*, 320 N.C. at 129, 357 S.E.2d at 696, properly dismissed the case against defendant as, in the court's word, a "deterrent" to future similar conduct. *See State v. Ward*, 31 N.C. App. 104, 107, 228 S.E.2d 490, 492 (1976) (trial court possessed "inherent authority" to dismiss proceeding pursuant to N.C.G.S. § 20-223 to have defendant declared an "habitual offender" of the traffic laws, upon prosecutor's failure to institute action "forthwith" as required by the statute). Were the instant appeal properly before us, therefore, I would vote to reject the State's argument that "the trial court [lacked] authority to dismiss the State's case against defendant on the grounds forming the basis for dismissal in the present case."

SCOTLAND COUNTY, PLAINTIFF-APPELLEE v. GILBERT P. JOHNSON, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARY PATTERSON JOHNSON; JAMES E. JOHNSON, JR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARY PATTERSON JOHNSON; IRENE D. SANN JOHNSON, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF HERVEY MCNAIR JOHNSON; ESTATE OF MARY PATTERSON JOHNSON; ESTATE OF HERVEY MCNAIR JOHNSON, DEFENDANT-APPELLANTS

No. COA98-275

(Filed 29 December 1998)

1. Appeal and Error— appealability—condemnation action

In an action arising from the condemnation of property for a landfill, the trial court's order granting judgment for the county on all issues except compensation was immediately appealable.

2. Eminent Domain— condemnation for landfill—pre-suit notice—purpose and amount of property

The trial court did not err in an action arising from the condemnation of property for a landfill by ruling that the County had complied with the procedural requirements for exercising its powers of eminent domain where defendant contended that the complaint and pre-suit notice were fatally inconsistent. There is no fatal inconsistency between the notice and complaint as long as the original purpose remains, even if additional or different uses are considered.

3. Eminent Domain— condemnation for landfill—public use or benefit

In an action arising from a condemnation for a landfill, the purposes stated in the pre-suit notice under N.C.G.S. § 40A-40 were public purposes where the notice stated that its intention or purpose was enlargement and improvement of the landfill. Although defendants assert that the County's plan to use their land for the mining of soil material and for a buffer zone were not authorized by statute because the buffer zone was not required and mining defendants' land for soil was an economic decision, all that is required in the pre-suit notice is a statement of purpose and the stated purpose in this case is recognized as a public enterprise by N.C.G.S. § 153A-274(3).

4. Eminent Domain— condemnation for landfill—purposes stated in complaint but not in notice

The trial court did not err in an action arising from the condemnation of a landfill by considering additional uses of the condemned land stated in the complaint but not in the pre-suit notice because the uses corresponded with the stated public purpose in the notice of expanding and improving the landfill.

5. Eminent Domain— condemnation for landfill—purposes not stated in pre-suit notice or complaint

The trial court did not err in a condemnation action for a landfill where defendants alleged that the court considered purposes not stated in either the pre-suit statutory notice or the complaint. The court concluded that the taking was for the valid purpose of improving the landfill and the proposed uses all corresponded to that stated purpose.

6. Eminent Domain— condemnation for landfill—fair and careful consideration of the evidence

The trial court conducted a fair hearing and considered all of the evidence in an action for condemnation of property for a landfill.

7. Eminent Domain— condemnation for landfill—counterclaims for trespass, conversion and removal of timber

The trial court correctly denied defendants permission to amend their complaint in an action arising from condemnation of property for a landfill where defendants sought to counter-

claim for trespass and conversion based upon wrongful removal of timber.

Appeal by defendants from judgment entered 26 September 1997 by Judge William C. Gore, Jr. in Scotland County Superior Court. Heard in the Court of Appeals 26 October 1998.

The defendants own land in Scotland County, North Carolina, that is adjacent to a landfill owned by Scotland County ("the County"). The parties negotiated for the purchase of defendants' land by the County but were unable to come to an agreement on price. On 29 March 1996 the County served a Notice of Condemnation ("the Notice") containing a general description of the property, an estimate of just compensation for the property, and a statement that the continued operation of the landfill was "necessary to promote and protect the safety, health, and welfare of our citizenry," and that it was necessary to condemn property adjoining the landfill. The notice also stated that the purposes for the property were the establishment of a 300-foot "buffer zone" and the mining of soil material for construction of an "improved 'cap' " on the existing landfill.

On 20 September 1996 the County filed this condemnation action pursuant to G.S. 40A-40 by filing a complaint condemning the property and by depositing with the Scotland County Clerk of Court $48,000.00, the amount of estimated just compensation for the property. The complaint sought to condemn approximately 40 acres and listed four purposes for the property, including two not stated in the notice: use as an industrial waste site and use as a yard waste facility. Defendants answered on 22 January 1997 denying that the taking was for a public purpose and requesting injunctive relief. On 2 April 1997 defendants amended their answer to include counterclaims for trespass and conversion based upon the County's entry upon the property and removal of timber.

On 14 July 1997 the County filed a Motion For Determination of Issues Other Than Damages. A hearing was held 10 and 11 September 1997. On 26 September 1997 the trial court entered judgment in favor of the County. The trial court found that the Notice was sufficient to comply with the requirements of G.S. 40A-40; that the County was condemning the property for a public purpose; and that because the County had good title to the property by virtue of the condemnation, defendants were not entitled to amend their answer and assert counterclaims for trespass and conversion. Defendants appeal.

Poyner & Spruill, L.L.P., by Charles T. Lane, J. Nicholas Ellis and Gregory S. Camp, and Edward H. Johnston, Jr., Scotland County Attorney, for plaintiff-appellee.

Kitchin, Neal, Webb & Futrell, P.A., by Henry L. Kitchin and Stephan R. Futrell, for defendant-appellants.

EAGLES, Chief Judge.

I

[1] We first address whether the judgment is immediately appealable. Both the defendants and the County contend that in condemnation actions judgments on all issues except compensation are immediately appealable. *Board of Education of Hickory v. Seagle*, 120 N.C. 566, 568, 463 S.E.2d 277, 279 (1995), *disc. review allowed*, 342 N.C. 652, 467 S.E.2d 706, *disc. review improv. granted*, 343 N.C. 509, 471 S.E.2d 63 (1996). We agree and hold that the trial court's order granting judgment for the County on all issues except compensation is immediately appealable.

II

[2] We next consider whether the County complied with G.S. 40A-40 regarding pre-suit notice. G.S. 40A-40 requires that pre-suit notice must contain a description of the property to be taken and a statement of the purpose for which the property is being condemned. Defendants contend that the complaint and pre-suit notice were fatally inconsistent because the complaint included purposes not stated in the notice. Additionally, the complaint sought to condemn 40 acres, whereas plaintiffs allege that before the suit the County only sought to condemn 28 acres. Defendants argue that because of these inconsistencies, the County's pre-suit notice failed and the trial court erred in ruling that the County had complied with the procedural requirements for exercising its powers of eminent domain.

The County contends that the purpose for which the property was condemned has always been to extend, enlarge and improve the landfill. The County argues that the Notice states that the County needed to take the property in order to extend, enlarge and improve the landfill by extending buffer zones and using soil materials to construct an improved cap on the existing landfill. The County argues that the two additional uses stated in the complaint also were for the purpose of extending, enlarging and improving the landfill. Accordingly, the

County argues that there is no fatal inconsistency, because the purpose of condemning the land has not changed. The County argues that over time, "it is inevitable that refinements and changes in public planning will provide additional uses for property originally condemned for another use. So long as the original public purpose remains, the legislature could not have intended that the condemnor must issue new notices and complaints and wait another six months or more before condemning property." Additionally, the County argues that there is no mention in the record of the County taking only 28 acres, so there is no inconsistency regarding the amount of the property being condemned. Accordingly, the County argues that they have substantially complied with G.S. 40A-40.

After careful review of the record, briefs and contentions of the parties, we affirm. G.S. 40A-40 requires that notice of condemnation action must "state the purpose for which the property is being condemned." There are no North Carolina cases or statutes detailing the specificity with which the notice must state the "purpose" of the condemnation. However, while the statute does require that the notice state the "purpose" of the action, it does not require the condemnor to state each and every intended "use" of the condemned property. This distinction is crucial. "Purpose" is not defined by statute. Webster's Dictionary defines "purpose" as "something set up as an object or end to be attained: intention." *Webster's Ninth New Collegiate Dictionary* 957 (1985). Webster's Dictionary defines "use" as "a method or manner of employing or applying something." *Id.* at 1299. A "use" is a step in furtherance of a "purpose." G.S. 40A-40 only requires the "purpose" of the condemnation to be stated in the notice, and does not require a public condemnor to state the additional step of the "uses" for which the property is taken.

The County's notice states its intention or purpose as enlargement and improvement of the landfill. An examination of the complaint reveals that the original purpose or intention for the condemnation action remains: enlargement and improvement of the landfill. The County's contention is persuasive that as long as the original "purpose" remains, there is no fatal inconsistency between the notice and the complaint, even if additional and/or different "uses" are considered. Additionally, both the notice and the complaint describe the area being taken as 40 acres. Accordingly, we hold that there is no fatal inconsistency and that the County has substantially complied with the provisions of G.S. 40A-40. The assignment of error is overruled.

III

[3] We next consider whether the County's original purposes as stated in the Notice were for the public use or benefit. Defendants argue that the statutes do not authorize a county to condemn for the purpose of mining soil material. Defendants assert that the County's plan to use defendants' land "was an economic, proprietary decision" and that "[t]he County chose to use dirt from the Johnson's land, because it was cheaper." Defendants argue that the eminent domain statutes should be strictly construed in order to promote the public policy of encouraging private sector activity in solid waste handling. Defendants next argue that the second alleged purpose, the 300-foot buffer zone, fails as a matter of law because no such buffer is required.

The County initially argues that the stated purposes for the condemnation, to extend, enlarge and improve the landfill, are clearly for the public benefit and are recognized by statute. G.S. 153A-274(3). The County then argues that even if the methods stated in the notice must themselves be for the public use and benefit, it is clear from the record that the uses are intended public uses. The County first argues that although not required by law, the additional buffer zone is necessary to protect its citizens from ground water contamination and to protect the County from potential liability. The County asserts that rarely is condemnation mandatory, but that most condemnations occur to develop a project valued by the community. The County argues that the buffer zones were essential to the continued operation of the landfill and the health and safety of its citizens, and that the record supports the finding that the condemnation was for a public purpose. Second, the County argues that condemnation for the excavation of soil material is a public purpose. Additionally, the County argues that nowhere in the record is there any evidence that the dirt from defendants' property is cheaper, and that there is no support for the contention that the use of the property is a proprietary function. Finally, the County contends that they intend to use the soil materials for placement of a new impermeable cap over the landfill, a use that is clearly for the public use and benefit.

In part II, supra, we found that all that is required in the pre-suit notice is a statement of purpose, and more specific notice of public uses for the condemned property is not required. The stated purpose of the condemnation in the Notice is the enlargement and improvement of the landfill. This purpose is recognized as a "public enter-

prise" by G.S. 153A-274(3). Accordingly, we hold that the purposes stated in the Notice were public purposes. The assignment of error is overruled.

IV

[4] We next consider whether the trial court erred in considering purposes stated in the Complaint but not in the Notice and finding that they were for the public use or benefit. Defendants first assert that the new "purposes" stated in the Complaint "should have been ignored as a matter of law" because they were not included in the Notice. Defendants additionally argue that to the extent that the trial court considered the additional purposes set out in the Complaint, "the trial court either misunderstood or gave improper weight to the evidence" that the uses were for a public purpose. The "additional purposes" were use as an industrial waste site or as a yard waste facility. Defendants contend the evidence shows that the County never had an actual intent to use the land for depositing industrial or yard waste. Defendants assert that the "intent" was never mentioned in pre-suit letters, and the County has not submitted an application for use of the land for waste deposit as required by state regulation. Defendants argue that because the County never considered these new "purposes" before suit, it never had any course of reasoning or judgment as to those "purposes." Accordingly, defendants argue that the County's actions were arbitrary and capricious.

The County argues that the property was condemned for extending, enlarging and improving the landfill. This purpose was stated in both the notice and the complaint. The additional uses set out in the complaint correspond with the stated purpose. The County argues that "it simply makes no sense for the law to require a reinitiation of condemnation proceedings every time an additional use for condemned property was considered." Additionally, the County argues that the evidence shows their intent to use the condemned property for these additional public uses. We agree and affirm.

The trial court did not err in considering the additional uses of the condemned land stated in the complaint because the uses corresponded with the stated public purpose in the notice of expanding and improving the landfill. See part II, supra. Additionally, there was evidence that the County was using the condemned property as a yard waste landfill at the time of hearing and intended to continue using the property in that manner. There is also evidence that the County had intended to use the property as an industrial waste site

when the complaint was filed. Accordingly, the assignment of error is overruled.

V

[5] We next consider whether the trial court erred in considering purposes not stated in either the Notice or complaint. Defendants contend that the trial court abused its discretion in considering these additional "purposes." Additionally, defendants argue that these additional "purposes" were not for the public use or benefit. First, defendants argue that the trial court erred in finding that the County was "extending the landfill," because the evidence is contradictory of such an intent. Second, defendants contend that the trial court erred in finding that the plan to cap the landfill was a public use because there was no such plan. Third, defendants argue that the trial court erred in permitting the County to condemn a "grossly excessive" amount of defendants' property. Fourth, defendants argue that the trial court's adoption of the County's fears about contamination and gas migration was erroneous because there was no evidence to support the fears. Defendants contend that these "theoretical concerns" were a mere pretext for the County's real purpose, to mine the defendants' land for cheap dirt. Finally, defendants argue that even if the trial court did properly consider the "theoretical" gas and water migration problems, the trial court abused its discretion in failing to find that those same problems affected the uncondemned portion of defendants' land.

The County argues here too that although additional uses were considered in the year and a half that elapsed from the time of notice until the hearing, the uses still correspond with the original stated purpose of extending the life and the size of the landfill. The County states that the evidence supports that the planned uses are compatible with the land's use as a buffer zone, and the evidence is clear that an improved cap will be placed on the landfill. The County further argues that the condemnation was not arbitrary or capricious and that there has been no abuse of discretion. Accordingly, the extent of the taking is not reviewable. Finally, as to defendants' final contention, the County argues that defendants are describing an action for inverse condemnation which cannot be raised in a hearing pursuant to G.S. 40A-47.

After careful review of the record, briefs and contentions of the parties, we affirm. First, the trial court concluded that the taking was for the valid purpose of improving the landfill. The County's proposed

uses all correspond to the stated purpose of improving the landfill. Furthermore, the County gave notice of its intention to construct an improved cap and enlarge the buffer zone in both the Notice and the complaint. Second, on this record there is evidence of justification for the County's decision to condemn the property, and defendants have not proven that the County's actions were arbitrary and capricious or an abuse of discretion. Accordingly, the extent of the taking is not subject to review. *City of Charlotte v. Cook*, 348 N.C. 222, 225, 498 S.E.2d 605, 607-08 (1998) (citations omitted). Third, while gas and water migration was not a concern raised by the pleadings, the additional use of the buffer zone to provide protection against migration, evidence of which was in the record, is an additional benefit of a public use already raised in the complaint. Finally, defendants' argument describes an action for inverse condemnation. The trial court did not abuse its discretion in not considering this argument because this issue was not raised by the pleadings and was not appropriate for hearing pursuant to G.S. 40A-47. The assignment of error is overruled.

VI

[6] We now consider whether the trial court failed to give fair and careful consideration to the evidence. Defendants argue that the trial court ignored the defendants' evidence and had prepared its findings and conclusions before all of the evidence had been presented. Defendants also contend that the trial judge attempted to insure that the testimony supported the findings he intended to make by interrupting examination and advising and leading witnesses.

The County contends that the trial judge conducted a fair hearing. The County argues that the trial judge did not interrupt defendants any more than he did the County's attorney, and that the interruptions were made either for clarification or to expand on an issue raised by the witness's testimony. The County asserts that the trial judge's ability to render findings and conclusions so quickly was not the result of bias, but due to the fact that all of the evidence and witnesses indicated the condemnation was for the public use and benefit.

After a careful review of the record, we are not persuaded that the trial court failed to conduct a fair hearing or consider all of the evidence. The evidence is sufficient to support the trial court's findings of fact and the trial court's findings of fact support its conclusions of law. The assignment of error is overruled.

VII

[7] We last consider whether the defendants' counterclaims for trespass, conversion and wrongful removal of timber should be heard. Defendants argue that because the County's notice fails, the Court should remand for hearing on the defendants' counterclaims for trespass, conversion and wrongful removal of timber. Defendants also contend that their answer specifically sought an injunction so, under G.S. 40A-42(a), title did not vest immediately in the County, and they did not have the right to remove timber. Defendants additionally contend that although technically no action for injunctive relief was filed, they could not seek pre-suit relief against actions about which the County did not give notice, and their answer sought injunctive relief in the same manner as a separate action. Accordingly, defendants contend that amendment to the complaint should have been allowed.

The County argues that it complied with the statutory requirements for condemnation proceedings and the taking was for the public use and benefit. The County asserts that pursuant to G.S. 40A-9, the defendants must request permission from the County to remove timber, and there is no request on the record. Accordingly, the County argues that the defendants are merely entitled to compensation. Additionally, the County asserts that defendants were not entitled to an injunction because they did not file for one prior to the filing of the complaint, although defendants had 5 months in which to do so. The County argues that defendants are not entitled to seek the relief they ask for in their answer.

The assignment of error is overruled based on our determination in part II, supra, that the County complied with the statutory requirements for notice. Additionally, G.S. 40A-42 states that "[u]nless an action for injunctive relief *has been initiated*, title to the property . . . together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41." (Emphasis added). Defendants did not file an action for injunctive relief before the complaint here was filed. Accordingly, title to the property vested and the County had the right to take immediate possession when they filed the complaint and deposited the estimated just compensation. The trial court correctly denied defendants' permission to amend their complaint.

In conclusion, we hold that the trial court did not err in determining that the County has substantially complied with the statutory

requirements for condemning defendants' property and that the taking was for a public purpose.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

NORTH CAROLINA DIVISION OF SONS OF CONFEDERATE VETERANS, PETITIONER v. JANICE FAULKNER, COMMISSIONER OF MOTOR VEHICLES, RESPONDENT

No. COA97-1563

(Filed 29 December 1998)

1. **Motor Vehicles— special registration license plates—Sons of Confederate Veterans**

The Sons of Confederate Veterans is a "nationally recognized civic organization" within the meaning of N.C.G.S. § 20-79.4(b)(5) so that members of the N.C. Division of Sons of Confederate Veterans are entitled to have the DMV issue to them special registration license plates bearing the organization's emblem.

2. **Costs— attorney fees—contesting State action—substantial justification**

The trial court erred by ordering the DMV to pay the attorney fees of petitioner-N.C. Division of Sons of Confederate Veterans pursuant to N.C.G.S. § 6-19.1 in an action in which the DMV was directed to issue special registration license plates to petitioner's members because there was substantial justification for the DMV's denial of special registration license plates to petitioner's members based on its interpretation of "nationally recognized" and "civic organization" in N.C.G.S. § 20-79.4(b)(5).

Judge TIMMONS-GOODSON dissenting in part.

Appeal by respondent from order filed 17 September 1997 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 15 September 1998.

Currin Law Firm, PLLC, by Samuel T. Currin and Margaret Person Currin, for petitioner-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hal F. Askins, Assistant Attorney General C. Norman Young, and Special Counsel to the Attorney General Hampton Dellinger, for respondent-appellant.

GREENE, Judge.

North Carolina Division of Motor Vehicles (DMV) Commissioner Janice Faulkner (Commissioner) appeals from the trial court's order directing DMV to issue special registration plates to the Sons of Confederate Veterans (SCV), North Carolina Division (SCV-NCD).

SCV is incorporated and headquartered in Tennessee. SCV's constitution, first adopted in 1896, states that the purposes of SCV include:

> An unquestioned allegiance to the Constitution of the United States of America . . .; to associate in one united, compact body all men of Confederate ancestry and to cultivate, perpetuate and sanctify the ties of fraternity and friendship entailed thereby; to aid and encourage the recording and teaching with impartiality of all Southern history and achievement . . . , seeing to it especially that the events of the War Between the States are authentically and clearly written and that all documents, relics and mementos produced and handed down by the active participants therein are properly treasured and preserved for posterity; to comfort, succor and assist needy Sons of Confederate Veterans, their wives, widows and orphans; to urge, aid and assist in the erection of suitable and enduring monuments and memorials to all Southern valor, military and civil, wherever done and wherever found, particularly stressing that of our heroic Confederate ancestors who, by their sacrifice, perpetuated unto us and our descendants that glorious heritage of valor, chivalry and honor which we now hold and venerate, and to instill in our descendants a devotion to and reverence for the principles represented by the Confederate States of America, to the honor, glory and memory of our fathers who fought in that Cause.

SCV's constitution further provides that SCV "shall be strictly patriotic, historical, educational, benevolent, non-political, non-racial and non-sectarian." Evidence was presented that there are in excess of

2600 SCV-NCD members in North Carolina, and that SCV's international membership exceeds 25,000. The record contains copies of SCV's bimonthly publication, the *Confederate Veteran*. This publication lists new SCV members from over twenty-five states and contains information about SCV events in various states, Brazil, and Europe. In addition, the evidence reveals that:

> [SCV-NCD] donated $5,000 to the Fort Fisher Historical Site to help with the creation of new exhibits; . . . pledged $5,000 to help restore the monuments located on the Capitol grounds; . . . participated in [North Carolina's] Adopt-A-Highway clean-up campaign; . . . secured funding of $5,000 for the restoration of Oakwood Cemetery in Raleigh; . . . donated hundreds [of] books to public libraries and schools across [North Carolina]; . . . provided scholarships . . . in medical research; . . . [and] donate[d] food and other items to various charities at Christmas and throughout the year.

After receiving tax-exempt status as a "[c]ivic league[] or organization[]" from the North Carolina Department of Revenue (Revenue Department), SCV-NCD applied to DMV for special registration license plates bearing the SCV emblem.[1] The Commissioner denied SCV-NCD's request, based on her conclusion that SCV "does not meet the statutory criteria for a civic club." The Commissioner reached this decision after comparing the purposes and activities of SCV with "the statutory language and examples of qualifying civic organizations [contained within section 20-79.4(b)(5)]." SCV-NCD appealed this decision to the trial court, and a hearing was held on 11 September 1997. The trial court, after finding that SCV-NCD met the criteria set forth by the General Assembly in section 20-79.4(b)(5), ordered DMV to issue special registration plates to SCV-NCD upon its presentation to DMV of at least 300 applications. In addition, the trial court ordered DMV to pay the cost of filing SCV-NCD's petition for judicial review, and, after finding that DMV "has failed to show substantial

1. SCV's emblem strikingly resembles the Confederate flag. We are aware of the sensitivity of many of our citizens to the display of the Confederate flag. Whether the display of the Confederate flag on state-issued license plates represents sound public policy is not an issue presented to this Court in this case. That is an issue for our General Assembly. We are presented only with the issue of whether SCV-NCD has complied with the language of section 20-79.4(b)(5), and note that allowing some organizations which fall within section 20-79.4(b)(5)'s criteria to obtain personalized plates while disallowing others equally within the criteria could implicate the First Amendment's restriction against content-based restraints on free speech.

justification for its ruling," ordered DMV to pay SCV-NCD's attorney's fees, pursuant to section 6-19.1, in the amount of $2,500.00.

The issues are whether: (I) SCV-NCD meets the statutory criteria for issuance of special registration plates; and (II) DMV has shown substantial justification for its actions.

I

The standard of review to be employed by the trial court on judicial review of an agency decision depends on the particular issues presented by the parties. *Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). In this case, SCV-NCD's primary contention before the trial court was that "the Commissioner has erroneously determined that [SCV-NCD] does not meet the statutory criteria for civic club . . . ." Accordingly, the trial court was required to apply *de novo* review of the Commissioner's decision. *See Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) ("If [petitioner] argues the agency's decision was based on an error of law, then '*de novo*' review is required."); *Brooks, Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988) ("Incorrect statutory interpretation by an agency constitutes an error of law . . . .").

"[W]here the initial reviewing court should have conducted *de novo* review, this Court will directly review the [agency's] decision under a *de novo* review standard." *Amanini*, 114 N.C. App. at 677, 443 S.E.2d at 119; *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981) ("When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review."). Accordingly, we review the Commissioner's decision *de novo*.

[1] Our General Assembly has provided that:

> [DMV] shall issue the following types of special registration plates:
>
> . . . .
>
> (5) Civic Club.—Issuable to a member of a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax under G.S. 105-130.11(a)(5). Examples of these clubs include Jaycees, Kiwanis, Optimist,

> Rotary, Ruritan, and Shrine. The plate shall bear a word or phrase identifying the civic club and the emblem of the civic club. [DMV] may not issue a civic club plate authorized by this subdivision unless it receives at least 300 applications for that civic club plate.

N.C.G.S. § 20-79.4(b) (Supp. 1997). There is no dispute in the record that SCV-NCD is exempt from state corporate taxes pursuant to section 105-130.11(a)(5), or that DMV received the necessary 300 applications for SCV-NCD plates. The Commissioner contends, rather, that SCV-NCD is not a "civic club" under this statute because it is neither "nationally recognized" nor a "civic organization."

It is a well-established tenet of statutory construction that the intent of the General Assembly controls. *In re Arthur*, 291 N.C. 640, 641, 231 S.E.2d 614, 615 (1977). In ascertaining this intent, we "assume that the Legislature comprehended the import of the words it employed." *State v. Baker*, 229 N.C. 73, 77, 48 S.E.2d 61, 65 (1948). We therefore accord the words in a statute their "natural, ordinary meaning, unless the context requires a different construction." *Arthur*, 291 N.C. at 642, 231 S.E.2d at 615. The General Assembly has not defined "nationally recognized" or "civic organization" in section 20-79.4,[2] but has included a non-exclusive list of qualifying "nationally recognized civic organization[s]." The context of section 20-79.4(b)(5) therefore requires that the phrases "nationally recognized" and "civic organization" be construed to encompass organizations of a similar character as those listed. *See In re Watson*, 273 N.C. 629, 632, 161 S.E.2d 1, 5 (1968) (noting that when the General Assembly includes within a statute "a guide to its interpretation, that guide must be considered by the courts in [its] construction"). The listed "civic clubs" are Jaycee, Kiwanis, Optimist, Rotary, Ruritan, and

2. We note that the General Assembly has given some definition to the phrase "civic organization" in another context. *See* N.C.G.S. § 105-130.11(a)(5) (1997) (exempting "[c]ivic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare" from taxation under that section). Although we are not bound by the General Assembly's definition of the phrase "civic organization" in section 105-130.11 because that section is concerned with a different subject, *see Carolina Truck & Body Co. v. General Motor Corp.*, 102 N.C. App. 262, 267, 402 S.E.2d 135, 138, *cert. denied*, 329 N.C. 266, 407 S.E.2d 831 (1991) (noting that only statutes relating to the *same subject* must be construed together), we find the characterization of "civic organization" in section 105-130.11 instructive because section 20-79.4 specifically refers to section 105-130.11. There is no dispute in this case that the Revenue Department has assigned SCV-NCD tax-exempt status as a civic league or organization pursuant to section 105-130.11; accordingly, we accept that SCV-NCD is a "civic organization" within the meaning of section 105-130.11.

Shrine. N.C.G.S. § 20-79.4(b)(5). To determine the character of these "civic clubs," we turn to the *Encyclopedia of Associations*, which lists "National Organizations of the U.S." and is "the only comprehensive source of detailed information concerning almost 23,000 non-profit American membership organizations of national scope." 1 *Encyclopedia of Associations* Part 1, at ix (33d ed. 1998) [hereinafter *Encyclopedia of Associations*]; *cf. State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970) (noting that courts may resort to dictionaries for assistance in determining the meanings of statutory terms).

Jaycee (a.k.a. Junior Chamber) is defined as an organization "dedicated to the principals of leadership training through community development, . . . [and] conducts charitable programs." 1 *Encyclopedia of Associations* Part 2, § 11742, at 1302. Kiwanis "represent[s] business and professional individuals [and] . . . [s]eeks to: provide assistance to the young and elderly; develop community facilities; foster international understanding and goodwill." *Id.*, § 11747, at 1303. Optimist is a "[s]ervice club[] dedicated to youth and community service." *Id.*, § 11758, at 1304. Rotary, an association of "[b]usiness and professional executives," undertakes "community development programs; promotes high ethical standards in business and professions; . . . [s]upports polio immunization campaigns; [and] offers scholarships to outstanding men and women." *Id.*, § 11762, at 1304. Ruritan is a "[n]onpartisan, nonsectarian community service organization . . . [which finances] charitable, educational, and benevolent activities." *Id.*, § 11764, at 1305. Shrine is a "[f]raternal and charitable organization [which] [m]aintains 22 hospitals for crippled and burned children." *Id.*, § 17026, at 1880. These organizations, regardless of their membership focus, primary purpose, or primary activity, have in common the sponsorship of charitable/benevolent activities within the community.

The organization at issue in this case, SCV, also sponsors charitable/benevolent activities within the community. The *Encyclopedia of Associations* notes that SCV, whose members are "[l]ineal and collateral descendants of Confederate Civil War veterans," engages in "historical and benevolent activities." *Id.*, § 18561, at 2033. In addition, the record reveals that SCV-NCD participates in North Carolina's Adopt-A-Highway clean-up campaign, awards scholarships, and donates food and other items to various charities. The fact that SCV is listed in the *Encyclopedia of Associations* as a "National Organization[]" also aids our determination of whether SCV is

"nationally recognized." The record reveals that SCV has divisions in twenty-four states, organized camps in foreign countries, and members in a majority of states in the United States. Although we decline to impose an arbitrary number of members or states in which an organization is active to show that it is "nationally recognized," it certainly is evidence of national recognition that an organization has ties to a majority of our states. The evidence in this case is therefore sufficient to show that SCV is of a similar character as the qualifying organizations enumerated within section 20-79.4(b)(5), and is a "nationally recognized civic organization" as that phrase is used in section 20-79.4(b)(5).

Accordingly, as SCV-NCD meets the four criteria enumerated by our General Assembly in section 20-79.4(b)(5), SCV-NCD qualifies for special registration plates.

II

[2] Section 6-19.1 allows the trial court to award reasonable attorney's fees to a party contesting State action if: (1) the party prevails; (2) the trial court "finds that the agency acted without substantial justification in pressing its claim against the party"; and (3) the trial court "finds that there are no special circumstances that would make the award of attorney's fees unjust." N.C.G.S. § 6-19.1 (1997). For the purposes of section 6-19.1, "substantial justification" means " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Crowell Constructors, Inc. v. State, ex rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 101 L. Ed. 2d 490, 504 (1988)).

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

Id. (quoting *Pierce*, 487 U.S. at 566, 101 L. Ed. 2d at 505). Rather, to demonstrate that it acted with substantial justification, an agency must show "that its position, at and from the time of its initial action, was rational and legitimate to such a degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency." *Id.*

In this case, the trial court found "that the agency has failed to show substantial justification for its ruling and, therefore, attorney fees are awarded under G.S. § 6-19.1." The trial court further found that "reasonable attorney fees for the prosecution of this action are $2,500.00." We first note that the trial court failed to make the requisite findings of fact to support its award of attorney's fees under section 6-19.1 and applicable case law. *See N.C. Dept. of Correction v. Harding*, 120 N.C. App. 451, 455, 462 S.E.2d 671, 674 (1995) (noting that the trial court must make findings "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney"), *aff'd per curiam*, 344 N.C. 625, 476 S.E.2d 105 (1996). Because we reverse the award of attorney's fees, however, remand for additional findings is unnecessary. A reasonable person could find DMV's position satisfactory or justifiable in light of the circumstances. DMV advocated a narrower interpretation of the phrases "nationally recognized" and "civic organization," noting that SCV is an exclusive organization (limiting its membership to male descendants of Confederate soldiers) existing mainly in southern states, and that SCV is *primarily* a historical organization. Although we have ultimately rejected DMV's contentions, they are not facially irrational or illegitimate, and we note that the trial court did not find that these positions were mere excuses for arbitrary behavior on the part of DMV. Accordingly, the trial court's award of attorney's fees to SCV-NCD is reversed.

Affirmed in part and reversed in part.

Judge SMITH concurs.

Judge TIMMONS-GOODSON dissents.

Judge TIMMONS-GOODSON dissenting in part.

I cannot agree with the majority's conclusion that the Sons of the Confederate Veterans (SCV) meet the criteria for a civic organization set forth by the General Assembly in section 20-79.4(b)(5) of the North Carolina General Statutes. For this reason, I would reverse the order of the trial court directing the North Carolina Division of Motor Vehicles (DMV) to issue special registration plates to SCV.

As the majority notes, section 20-79.4(b)(5) of the General Statutes does not specifically define the term "civic club." Therefore,

the examples listed in section 20-79.4(b)(5)—the Jaycees, Kiwanis, Optimist, Rotary, Ruritan, and Shrine—are the best indicia of the General Assembly's intended recipients of the special registration plates. *See Friends of Hatteras Island v. Costal Resources Comm.*, 117 N.C. App. 556, 452 S.E.2d 337 (1995) (recognizing that examples set out in statute are significant in ascertaining legislature's intent). As DMV points out, the organizations enumerated in the statute share one "primary purpose," which is "to serve their communities by supporting a generally unrestricted range of charitable causes or offering charitable services to all persons." In light of the common characteristic held by the examples provided in section 20-279.4(b)(5), I am of the opinion that to be eligible for the special registration plates, the organization's chief undertaking must be to promote the common good and general welfare of the public at large. Notably, I find support for this position in SCV's brief, wherein it asks this Court to recognize the definition of "civic club" given in Webster's New International Dictionary. Quoting from Webster's, SCV defines "civic club" as "an association of persons for the promotion of the 'general welfare and betterment of life for the citizenry of a community or enhancement of its facilities; esp[ecially] devoted to improving health, education, safety, recreation, and morale of the general public through nonpolitical means.' " Under this definition, I am convinced that the SCV does not qualify as a civic organization.

The SCV's constitution reveals that the club's purpose is primarily historical and that the projects and causes it supports are limited to those which promote the Confederate heritage. Although promoting historical education has a civic component and while SCV involves itself in many laudable activities, its primary focus is advancing issues of peculiar interest to its members, not the general public. In this way, SCV is significantly at odds with the nationally recognized civic organizations enumerated in section 20-79.4(b)(5) of our General Statutes. Accordingly, I would hold that SCV is not a civic organization within the meaning of the statute and, thus, would vote to reverse the order of the trial court. However, I concur fully with the majority's holding reversing the award of attorneys fees to SCV.

MARGARET S. GLASS, PLAINTIFF v. J. CARTER GLASS, DEFENDANT

No. COA98-253

(Filed 29 December 1998)

1. Divorce— alimony—calculation of income—severance pay

An order granting child support and alimony was remanded where the court did not include in its calculation of plaintiff's income amounts from her employer labeled "severance payment." Severance pay is properly includable in a spouse's income for purposes of determining the amount and duration of an alimony award but it is not clear in this case whether the payment should be classified as severance pay. In determining how to characterize the payment on remand, the trial court should use the analytic approach adopted in *Johnson v. Johnson*, 317 N.C. 437.

2. Divorce— alimony—deferred compensation and 401(K) contributions

The trial court erred in an alimony action by excluding plaintiff's deferred compensation and 401(K) contributions from her net disposable take home pay. Although the court can properly consider the parties' custom of making regular additions to savings plans as a part of their standard of living in determining the amount and duration of alimony, excluding amounts paid into savings accounts would allow a spouse to reduce his or her support obligation or increase an alimony award by merely increasing a savings deduction or deferring a portion of income to a savings account.

3. Divorce— alimony—plaintiff's income—findings insufficient

The trial court erred in an alimony action in its calculation of defendant's income by finding without supporting evidence that defendant, who sells insurance, would pick up additional business to replace loss ratio bonus income and commissions from coastal properties following hurricanes. Furthermore, the Court of Appeals could not tell from the record whether the trial court considered this improper finding in making its awards of alimony and child support.

4. Divorce— alimony—marital misconduct—reckless spending

The trial court did not err in an alimony action by concluding that plaintiff had not committed marital misconduct by spending

$30,000 on clothing the year prior to the separation and a further $23,520 on clothes between hearings in June and January. The record reveals that the court found that the lifestyle established by the parties included excessive spending in numerous areas.

5. Divorce— alimony—effective date of new statute—award for prior period

There was harmless error in an alimony action where defendant contended that the court awarded alimony for a period prior to 1 October 1995, the effective date of the new statute. Under the court's order, defendant accumulated a credit against future court-ordered alimony and support payments.

6. Child Support, Custody, and Visitation— support—determination of income

A child support order was remanded where the court erred in calculating the parties' income, as discussed in the alimony portion of the opinion.

Appeal by defendant from alimony and child support order entered 4 March 1997 by Judge Fred M. Morelock in Wake County District Court. Heard in the Court of Appeals 17 November 1998.

Margaret S. Glass (plaintiff) and J. Carter Glass (defendant) were married on 9 April 1976. They have one minor child, John, born 20 February 1989. The parties separated on 31 March 1995 when defendant moved from the marital residence.

On 11 July 1995, plaintiff filed an action for alimony and alimony *pendente lite*, equitable distribution, custody and support of the minor child, and counsel fees. Defendant counterclaimed for custody, child support, and equitable distribution, raising numerous affirmative defenses to the alimony claim, including excessive spending by plaintiff-wife.

On 21 November 1995, plaintiff voluntarily dismissed her claims for alimony and alimony *pendente lite* without prejudice. On the same day, plaintiff filed a new action for postseparation support, alimony, and counsel fees. Defendant answered the new complaint, again raising excessive spending by plaintiff-wife as a defense. The parties were divorced on 26 April 1996. The alimony, custody, and equitable distribution cases were consolidated by agreement and tried in June 1996.

The trial court entered an order and judgment in the equitable distribution case on 15 October 1996 and no appeal was taken. In November 1996, the trial court announced its tentative decision in the alimony and child support case. Before an order was prepared, however, defendant moved that the trial court hear additional evidence relating to events which occurred after the June 1996 hearing. The trial court allowed the motion, received additional evidence, and entered its order on 4 March 1997.

Defendant was required by the March 1997 order to pay alimony of $3,500.00 per month for ten years, retroactive to 1 April 1995. After credits for voluntary alimony payments, defendant had an alimony arrearage of $17,267.02. The trial court also required defendant to pay child support of $2,500.00 per month and one-half the child's unreimbursed medical expenses. Plaintiff's motion for counsel fees was denied. Defendant appealed, assigning numerous errors.

Marc W. Sokol, P.A., by Marc W. Sokol and Sema E. Lederman, for plaintiff appellee.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant appellant.

HORTON, Judge.

Defendant contends the trial court erred in calculating the incomes of both plaintiff and defendant, and that these basic errors call into question the trial court's conclusion that defendant was the supporting spouse and plaintiff was the dependent spouse. Defendant further argues these errors require the case to be remanded so the trial court may make appropriate findings about the parties' incomes and expenses, and so that it may set proper amounts of alimony and child support.

Defendant argues the trial court erred in failing to find that plaintiff was guilty of marital misconduct by reason of her excessive spending, and that alimony should not have been ordered in any amount. Finally, defendant contends that due to the substantial changes in the alimony law effective 1 October 1995, the trial court could not order alimony for the period prior to the date plaintiff filed her second alimony complaint.

I. Alimony

Until 1967, North Carolina alimony law remained essentially unchanged. *See* Sally Burnett Sharp, *Step by Step: The Development*

of the Distributive Consequences of Divorce in North Carolina, 76 N.C.L. Rev. 2017, 2029 (1998) (hereinafter "Sharp"). In 1967, the law of alimony was extensively rewritten and codified as N.C. Gen. Stat. § 50-16.1, *et seq.* Alimony remained fault-based, and was available to a spouse only upon findings that the spouse was dependent, that the other spouse was the supporting spouse, and that the supporting spouse had "committed one of the ten, largely traditional, fault grounds . . . ." Sharp, 2032-2033 (footnotes omitted).

In 1995, a "new" alimony law was enacted by the North Carolina General Assembly. Act of 21 June 1995, ch. 319, 1995 N.C. Sess. Laws 641, codified as N.C. Gen. Stat. §§ 50-16.1A to -16.9 (1995). By its terms, the new alimony law became effective 1 October 1995, and did "not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995." 1995 N.C. Sess. Laws 319, Sec. 12.

One leading commentator on North Carolina family law has summarized the effect of the legislative changes as follows:

> Despite [a] tenacious obsession with adultery, however, the 1995 statutes . . . diminished the role of fault, at least in the early stages of the divorce process, when dependent spouses are most likely to suffer economically and are often almost totally unable to confront the other spouse on anything approaching an equal footing. Most significantly, the new statutes limit admission into evidence only that fault (as defined in § 50-16.3A(b)) that occurred before or on the date of separation, a radical and extremely salutary change from previous law.

Sharp, 2035 (footnotes omitted).

N.C. Gen. Stat. § 50-16.1A (1995) contains definitions of key terms in the new alimony law. N.C. Gen. Stat. § 50-16.2A (1995) sets out the procedure for ordering postseparation support, the successor to alimony *pendente lite*. N.C. Gen. Stat. § 50-16.3A (1995) outlines the procedure for alimony awards.

Assuming that a spouse is entitled to alimony under the provisions of N.C. Gen. Stat. § 50-16.3A(a), its amount and duration are determined in accordance with the provisions of N.C. Gen. Stat. § 50-16.3A(b), which requires the trial court to consider "all relevant factors," including 14 listed factors and a 15th "catch-all" factor. For purposes of this appeal, the crucial factors are:

(1) The marital misconduct of either of the spouses. . . .

(2) The relative earnings and earning capacities of the spouses;

* * * *

(4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;

* * * *

(8) The standard of living of the spouses established during the marriage[.]

Id.

Against this statutory background, we will discuss defendant's assignments of error.

A. Plaintiff's Severance Pay

[1] Defendant contends the trial court erred in its calculation of plaintiff's income as required by N.C. Gen. Stat. § 50-16.3A(b)(2) & (4) (1995), because it failed to include plaintiff's severance pay in the calculation. The trial court found that pursuant to a separation agreement with plaintiff's employer, plaintiff would receive a "severance payment" in the gross amount of $125,000.00, with monthly payments to follow.

Both this Court and our Supreme Court have already determined that severance pay should be included as income for purposes of determining a proper child support award. *See Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992); *Askew v. Askew*, 119 N.C. App. 242, 458 S.E.2d 217 (1995); *Gibson v. Gibson*, 24 N.C. 520, 211 S.E.2d 522 (1975); N.C. Gen. Stat. § 50-16.3A(b)(4) (1995). In addition, although "income" is not defined in our alimony law, the North Carolina Child Support Guidelines (Guidelines) include severance pay in its detailed definition of gross income. N.C. ADMIN. OFFICE OF THE COURTS, N.C. CHILD SUPPORT GUIDELINES AOC-A-162, at 2 (1994). There appears to be no good reason to employ a different definition of income for the purposes of a child support award than for an alimony award. Therefore, we conclude that severance pay is properly includable in a spouse's income for the purposes of determining the amount and duration of an alimony award.

However, it is not clear in the instant case whether the $125,000.00 payment to plaintiff should be classified as severance pay in the usual sense of the phrase. The American Heritage Dictionary 1123 (2d ed. 1982) defines "severance pay" as "[a] sum of money usually based on length of employment for which an employee is eligible upon termination." Although at one point in its order, the trial court characterized the one time payment of $125,000.00 as "severance pay," it later went on to find that the payment was a "bargained-for payment for which Plaintiff gave up various rights and should not be included as part of Plaintiff's income." Thus the record is equivocal as to whether the trial court correctly excluded the initial $125,000.00 payment to plaintiff from her income.

In determining how to characterize the payment to plaintiff, the trial court should use the "analytic" approach adopted by our Supreme Court in *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986), a case decided under our Equitable Distribution Act. In *Johnson*, our Supreme Court determined that the analytic approach should be used in characterizing portions of a personal injury award as either marital or separate property. "The analytic approach asks what the award was intended to replace . . . ." *Id.* at 446, 346 S.E.2d at 435. As we cannot determine from the order in this case what loss the $125,000.00 award was designed to replace, we must remand this issue to the trial court for proper findings of fact.

B. Plaintiff's Retirement Savings

[2] Defendant argues the trial court also erred in excluding plaintiff's deferred compensation and contributions to her 401(K) plan from her net disposable "take home pay." Plaintiff had amounts deducted from her monthly pay pursuant to a contract for deferred compensation that totaled $16,500.00 per year during the marriage of the parties. During the parties' separation, plaintiff entered into a new contract with increased deductions of $20,000.00 per year.

The trial court found that based on the parties' savings practices during the marriage, and the fact that the "standard of living of the parties included substantial savings for retirement[,]" plaintiff's contributions to deferred compensation and retirement plans should not be included in her net disposable income. Plaintiff argues the trial court did not err because it also excluded defendant's contributions to his Keogh plan.

Although we agree that the trial court can properly consider the parties' custom of making regular additions to savings plans as a part

of their standard of living in determining the amount and duration of an alimony award, we conclude the trial court erred in this case when it excluded amounts paid into savings accounts by the parties from their respective incomes. If such an exclusion were allowed, a spouse could reduce his or her support obligation to the other by merely increasing his or her deductions for savings plans. Likewise, a spouse might increase an alimony award by deferring a portion of his or her income to a savings account. Further, our case law establishes that the purpose of alimony is not to allow a party to accumulate savings. *See Sguros v. Sguros*, 252 N.C. 408, 114 S.E.2d 79 (1960); *Roberts v. Roberts*, 30 N.C. App. 242, 226 S.E.2d 400 (1976). Thus, this issue must be remanded to the trial court for a redetermination of the parties' income consistent with this opinion.

C. Defendant's Income

[3] In addition, defendant claims the trial court erred in calculating his income. Defendant sells insurance and part of his income is generated by a "loss ratio" bonus. This bonus is not earned if losses paid on the insurance exceed a certain amount in proportion to the total insurance written. Defendant produced evidence that, based on the damage caused by hurricanes and other losses policyholders sustained in 1996, he would not receive a loss ratio bonus in 1997, 1998, or 1999. In addition, defendant was restricted from writing insurance for property damage in the coastal areas of North Carolina, which would also result in a loss of commissions.

The trial court found defendant would experience a decrease in his annual income of approximately $80,000.00. Despite this reduction, the trial court found, without any supporting evidence of record, that "the Court is of the opinion that the Defendant will pick up additional business to replace his loss of the bonus and his coastal commission." Since the trial court did not have any evidence to support this finding, we agree with defendant that it was erroneous. Further, as we cannot tell from the record whether the trial court considered this improper finding in making its awards of alimony and child support, those issues must be remanded to the trial court.

D. Marital Misconduct

[4] Next, defendant contends the trial court erred in concluding plaintiff-wife had not engaged in marital misconduct. Defendant claims plaintiff engaged in reckless spending amounting to marital misconduct, because she spent approximately $30,000.00 on clothing

the year prior to the parties' separation and further spent at least $23,520.00 on clothes between the date of the hearing in June 1996 and the hearing in January 1997.

Defendant points to the trial court's order finding that "[p]laintiff has not, during the period of separation, changed or reduced her spending habits. The Court find [*sic*] the Plaintiff's spending habits to be unreasonable and excessive." Defendant argues this finding requires the trial court to conclude plaintiff committed marital misconduct. We note that N.C. Gen. Stat. § 50-16.3A(b)(1) provides that "[n]othing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as *corroborating evidence* supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation[.]" (Emphasis added.) Thus, the trial court could properly consider the postseparation expenditures by plaintiff.

However, the record reveals the trial court "finds that the *lifestyle established by the parties included excessive spending* in numerous areas. The parties were unable to maintain their current lifestyle from their income and thus borrowed monies on a regular basis to pay quarterly taxes and other expenses." (Emphasis added.) Based on the facts of this case, wherein the trial court found the pre-separation standard of living of both parties included excessive spending, the trial court did not err when it concluded plaintiff did not commit any marital misconduct. Thus, this assignment of error is overruled.

E. Retroactive Alimony

[5] Finally, defendant argues the trial court erred in awarding alimony for a period prior to 1 October 1995, the effective date of the new alimony statute. Plaintiff originally filed a claim for alimony and alimony *pendente lite* on 11 July 1995, but she took a voluntary dismissal of these claims on 21 November 1995 and refiled an action for alimony and postseparation support on the same day in order to get the benefit of the new alimony statute applicable to actions filed on or after 1 October 1995.

In the instant case, the trial court awarded plaintiff alimony of $3,500.00 per month for ten years beginning 1 April 1995, a date prior to the refiling of this action. Defendant argues that an award of alimony for the period from 1 April 1995 through 21 November 1995 constitutes retroactive alimony, and that plaintiff could not receive alimony for that period without satisfying the fault-centered require-

ments of the alimony law in effect from 1 April 1995 through 30 September 1995.

Even if the trial court's ruling were found to be erroneous, it would appear to be harmless under the facts of this case. According to the uncontested findings of the trial court, after the parties separated, defendant voluntarily paid, for the benefit of his wife and child, the sums of approximately $9,000.00 per month for April through June 1995. During July through November 1995, defendant paid $5,500.00 per month. Thus, the total paid by defendant for the period in question was $54,500.00; and the trial court specifically found that defendant was entitled to a credit for the total amount. The trial court credited $2,500.00 each month of the amount paid as child support, and credited the balance against defendant's alimony obligation of $3,500.00. Defendant's total obligation for the eight months in question was thus $6,000.00 per month, or a total of $48,000.00. Thus defendant was not harmed by the ruling of the trial court beginning his alimony payments effective 1 April 1995, but actually accumulated a credit of $6,500.00 against future court-ordered alimony and support payments. Plaintiff did not cross-appeal from the trial court's findings.

We also note that this issue concerning retroactive alimony may not arise on remand, as the trial court will make new findings of fact and a new determination in accordance with this opinion.

II. Child Support

[6] N.C. Gen. Stat. § 50-13.4(c) (1995) provides that "[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, . . . and other facts of the particular case." The trial court has considerable discretion in considering the factors contained in N.C. Gen. Stat. § 50-13.4(c) when it is determining the appropriate amount of child support. *Boyd v. Boyd*, 81 N.C. App. 71, 78, 343 S.E.2d 581, 586 (1986). If the trial court's findings are supported by competent evidence in the record, its determination as to the proper amount of support will not be disturbed on appeal absent a clear abuse of discretion. *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985).

Because the above-mentioned errors concerning the trial court's calculations of the parties' incomes require this matter to be

remanded for a new determination of child support and alimony, and the errors alleged by defendant may not arise again, we need not address them.

In summary, we affirm the trial court's ruling that the plaintiff was not guilty of marital misconduct; no error was assigned to the trial court's finding that defendant abandoned plaintiff; and we reverse the findings of the trial court with respect to the incomes of the parties. We remand the case for new findings of fact with regard to the current incomes and reasonable expenses of the parties, for a new determination on the issues of supporting spouse and dependent spouse, and for entry of a new child support award and alimony award.

For the foregoing reasons, the decision of the trial court is

Affirmed in part, reversed in part, and remanded.

Judges GREENE and LEWIS concur.

JOYCE CARSON HILL, PLAINTIFF-APPELLANT v. JAMES HARVEY NEWMAN AND PEGGY JOYCE HILL NEWMAN, DEFENDANTS-APPELLEES

No. COA97-1498

(Filed 29 December 1998)

1. Child Support, Custody, and Visitation— visitation—grandparents—standing

The trial court properly exercised jurisdiction under N.C.G.S. § 50-13.2A of an action by a maternal grandmother seeking visitation where the grandchildren had been adopted by a second daughter and there was competent evidence that a substantial relationship existed between plaintiff and the two minor grandchildren. However, there was no standing under N.C.G.S. §§ 50-13.1(a), 50-13.2(b1), or 50-13.5(j) because there was no custody dispute and the natural parents had not abandoned or neglected the children, were not unfit, and had not died.

2. Child Support, Custody, and Visitation— visitation—grandparents—denied

The trial court did not err in an action for visitation where plaintiff was both the natural and adoptive maternal grandmother

of the children but it was apparent from the extensive findings that the court carefully weighed all of the evidence and concluded that it was in the best interest of the children at that time to deny plaintiff visitation rights. It is the best interest of the child and not the best interest of the grandparent that is the polar star in the case and the trial court's findings are binding on appeal if supported by competent evidence.

Appeal by plaintiff from judgment entered 26 June 1997 by Judge A. A. Corbett, Jr. in Lee County District Court. Heard in the Court of Appeals 21 September 1998.

Staton, Perkinson, Doster, Post, Silverman, Adcock & Boone, P.A., by Jonathan Silverman and Michelle A. Cummins, for plaintiff-appellant.

Harrington, Ward, Gilleland & Winstead, by Susan M. Feindel, for defendants-appellees.

HUNTER, Judge.

Joyce Carson Hill (plaintiff) is the natural and adoptive maternal grandmother of two minor children. Defendant Peggy Newman (Peggy) is plaintiff's daughter, and the natural aunt of the two minor children, and James Harvey Newman is her husband (collectively referred to as defendants). On 30 June 1995, Crystal Helms (Crystal), Peggy's sister and the biological mother of the two minor children, signed a consent to adoption form permitting the defendants to adopt the two minor children. The final adoption order was entered on 18 August 1995. However, on 5 March 1996, Crystal filed a motion in the cause to set aside the final adoption order, which was denied by the trial court on 5 August 1996.

At some point, plaintiff became dissatisfied with the amount of time she was able to spend with her grandchildren. Therefore, on 5 March 1996, plaintiff filed an action wherein she sought visitation with her two grandchildren pursuant to N.C. Gen. Stat. § 48-23(2a), which provides that "a biological grandparent is entitled to visitation rights with the adopted child as provided in [N.C. Gen. Stat. §§] 50-13.2(b1), 50-13.2A, and 50-13.5(j)." N.C. Gen. Stat. § 48-23(2a) (1991) (replaced by N.C. Gen. Stat. § 48-4-105 effective 1 July 1996). At the time plaintiff filed her request for visitation, defendants' family was intact and no custody proceeding was ongoing.

On 12 March 1996, defendants filed a motion to dismiss plaintiff's action pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure for failure to state a claim for which relief can be granted, which was denied by the trial court. Defendants subsequently filed a motion for summary judgment pursuant to Rule 56(c), which the trial court reserved ruling upon pending the parties participation in a psychological evaluation. Finally, the trial court entered an order on 26 June 1997 in which it concluded "[t]hat the parties do not get along and will probably never get along and therefore it is not in the best interest of the minor children for the Plaintiff to have any visitation with the minor children."

On appeal, plaintiff contends the trial court abused its discretion in denying her visitation with the two minor children because such visitation was in the best interests of the children, and because the trial court's conclusion was not supported by competent evidence. Defendants, on the other hand, contend first that plaintiff did not have standing to sue for visitation rights; and second, that even if plaintiff did have such standing, the trial court's conclusions were supported by competent evidence and should be affirmed. Before addressing plaintiff's claims, we will first address defendants' contention that plaintiff did not have standing to file a claim seeking visitation.

I. Plaintiff's Standing to Seek Greater

Visitation Rights With Her Minor Grandchildren

There are essentially four N.C. General Statutes that deal with the visitation rights of grandparents: N.C. Gen. Stat. §§ 50-13.1(a), 50-13.2(b1), 50-13.5(j) and 50-13.2A. For purposes of clarity, we will address each of these four statutes separately to determine if any one of them is sufficient to grant standing to plaintiff in this case.

A. N.C. Gen. Stat. § 50-13.1(a):

[1] N.C. Gen. Stat. § 50-13.1(a) is "a broad statute, covering a myriad of situations in which custody disputes are involved." *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (citation omitted). It is a general statute, and therefore must be read in harmony with the more specific statutes dealing with grandparent visitation. In general, it states:

> Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may

> institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

N.C. Gen. Stat. § 50-13.1(a) (1995). In *McIntyre*, our Supreme Court concluded that this statute was available for grandparents who sought visitation rights in two situations: (1) when the parents are unfit, have abandoned or neglected the child, or have died; or, (2) when, by reason of separation or divorce, custody is at issue between the parents. *McIntyre v. McIntyre*, 341 N.C. at 632, 461 S.E.2d at 748. Here, since neither of these situations is present, N.C. Gen. Stat. § 50-13.1(a) is not applicable and may not be used to establish standing for plaintiff.

B. N.C. Gen. Stat. § 50-13.2(b1):

Next, N.C. Gen. Stat. § 50-13.2(b1) provides:

> An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exits between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

N.C. Gen. Stat. § 50-13.2(b1) (1995). By its very language, this is a special statute which applies in situations where the trial court is involved in an ongoing custody dispute and the grandparents intervene in the matter in order to assert their right to visitation with the grandchildren. However, since no custody dispute is involved in this case, this statute is not applicable and may not be used by plaintiff to assert her standing in this case.

C. N.C. Gen. Stat. § 50-13.5(j):

Next, N.C. Gen. Stat. § 50-13.5(j) states:

> In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to [N.C. Gen. Stat. §] 50-13.7, the

> grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

N.C. Gen. Stat. § 50-13.5(j) (1995). In enacting this special statute, the legislature sought to protect the rights of grandparents by enabling them to make a motion in the cause for custody or visitation after the custody of the minor child had already been determined. *See McIntyre v. McIntyre*, 341 N.C. at 633, 461 S.E.2d at 748-749. However, again, since this case does not involve a custody dispute, this statute is not applicable and may not be used to establish plaintiff's standing in this case.

D. N.C. Gen. Stat. § 50-13.2A:

Finally, N.C. Gen. Stat. § 50-13.2A was enacted by the legislature in order to "allow[] grandparents of a minor child who has been adopted by a stepparent or a relative of the child to institute an action for visitation." *Id.* at 633, 461 S.E.2d at 749. This statute provides, in pertinent part:

> A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. . . .

N.C. Gen. Stat. § 50-13.2A (1995). Under the explicit language of this special statute, a grandparent seeking greater visitation rights with his/her minor grandchildren would have standing to bring such an action under this statute so long as "a substantial relationship exists between the grandparent and the child." *Id.* In this case, there is com-

petent evidence in the record to support a finding that a substantial relationship existed between plaintiff and her two minor grandchildren, in that at all relevant times, plaintiff lived in close proximity to her grandchildren, and in fact had helped raise the grandchildren from birth. Further, prior to the adoption taking place in June 1995, the grandchildren had resided at plaintiff's home for approximately eight months. Therefore, since there is competent evidence in the record that a substantial relationship existed, the trial court properly exercised jurisdiction under N.C. Gen. Stat. § 50-13.2A to decide the case on its merits.

II. The Trial Court's Conclusion Denying Visitation to Plaintiff

[2] Next, we address whether the trial court erred in denying plaintiff's request for visitation pursuant to N.C. Gen. Stat. §§ 48-23(2a) and 50-13.2A. As N.C. Gen. Stat. § 50-13.2A notes, the trial court has the authority to grant visitation to grandparents if "it determines that visitation is in the best interest of the child[ren]." N.C. Gen. Stat. § 50-13.2A. Here, it is apparent from the extensive findings made by the trial court that it carefully weighed all of the evidence, and in its opinion, it was in the best interest of the children, at that time, to deny plaintiff visitation rights. The question presented here, therefore, is whether this Court should find that, as a matter of law, the trial court was required to come to a different conclusion and award visitation rights to plaintiff as requested. *See Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979).

It has long been held that custody cases, including those involving visitation, are difficult, such that the trial court, "who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion" in resolving these controversies. *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974); *see also Newsome v. Newsome*, 42 N.C. App. at 426, 256 S.E.2d at 855 (where the court held that the trial court is granted broad discretionary authority in custody cases, since it "has the opportunity to see the parties in person and to hear the witnesses. [It] can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges"); *see also Kerns v. Southern*, 100 N.C. App. 664, 666, 397 S.E.2d 651, 652 (1990) (where this Court held that it is within the trial court's discretion to grant grandparents' visitation rights with their minor grandchildren). Further, a trial court's decision should not be reversed on a whim simply because the appellate court believes, based upon its reading of the cold record, that the trial

court erred; rather, a trial court should only be reversed if the dissatisfied party demonstrates that the trial court committed a manifest abuse of discretion. *Newsome v. Newsome*, 42 N.C. App. at 426, 256 S.E.2d at 855.

In *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), our Supreme Court reaffirmed the oft cited principle that a parent has the paramount right to the care, custody and nurturing of his/her child, and that the State could neither "supply nor hinder" this most basic right. *Id.* at 400-401, 445 S.E.2d at 903. Further, a fundamental part of this "paramount right to custody includes the right to control their children's associations: 'So long as parents retain lawful custody of their minor children, they retain the prerogative to determine with whom their children shall associate.' " *Id.* at 403, 445 S.E.2d at 904-905 (citations omitted).

In that regard, the express provisions of N.C. Gen. Stat. § 48-23 provide that a final order of adoption results in establishing the relationship of parent and child between the adoptive parents and the child, such that "the adopted child becomes legally the child of the adoptive parents and becomes legally a stranger to the bloodline of his natural parents." *Acker v. Barnes*, 33 N.C. App. 750, 751-752, 236 S.E.2d 715, 716, *disc. review denied*, 293 N.C. 360, 238 S.E.2d 149 (1977); *see also* N.C. Gen. Stat. § 48-23 (1991). Therefore, as this Court so eloquently stated in the *Acker* case:

> "[Although] Courts are not insensitive to the yearning of grandparents and other relatives for the company of children in their families . . .[,] such cannot be translated into a legal right without a showing that it is dictated by the needs and welfare of the child. In the absence of such a showing, custodial control goes along with custodial responsibility."

Id. at 752, 236 S.E.2d at 716 (citation omitted). "The welfare of the child is the paramount consideration which must guide the Court in exercising [its] discretion. Thus, the [trial court's] concern is to place the child in an environment which will best promote the full development of his physical, mental, moral and spiritual faculties." *Blackley v. Blackley*, 285 N.C. at 362, 204 S.E.2d at 681. Therefore, it is the best interests of the *child*, and not the best interests of the *grandparent*, that is the polar star in this case, despite plaintiff's contrary contention. Further, the trial court's findings are binding on appeal if supported by competent evidence. *Id.*

In this case, the trial court made the following findings:

15. That [plaintiff] testified that [defendants] are the minor children's adoptive parents[,] and it is apparent that [plaintiff] has not accepted the fact that [defendants] are their "parents". She still feels that these children are Crystal's children.

16. That [plaintiff] repeatedly requested visitation with the children; however, [defendants] found it difficult to arrange frequent visitation since they had gotten the children involved in community and church activities and their time was limited.

17. That [defendants] attempted the following visitation with [plaintiff] on four (4) occasions following the adoption:

A. In August, 1995 following the entry of the final order for adoption, Peggy took the minor children to visit [plaintiff] and other friends and relatives in Columbus County and the visit turned out to be very difficult in that [plaintiff] interfered with Peggy's authority as the children's parent.

B. In September, 1995 [plaintiff] was invited to the [d]efendants' home in Sanford for Courtney's birthday. [Plaintiff] brought Cory, Courtney's biological twin brother. [Plaintiff] spent much of the visit crying and upset about Anthony and Courtney living in Sanford and her inability to see them often.

C. In December, 1995 following Christmas, [plaintiff] was invited to the [d]efendants' home in Sanford. She brought gifts from herself and Harold, the children's grandfather and [plaintiff's] ex-husband, and from Crystal and her husband, Ricky. The cards on Crystal's gifts read from "Mommy and Ricky". Peggy became very upset. [Plaintiff] accused [defendants] of taking Anthony from her. [Plaintiff] became extremely distraught and emotional and started out the door to her car. She threatened to take the children and run off with them. [Defendants] restrained [plaintiff] and attempted to calm her down.

D. In January, 1996 Peggy took the minor children to her brother['s] house in Whiteville, North Carolina. Peggy called [plaintiff] to tell her that they were in Whiteville and [plaintiff] called Crystal to tell her that the children were in town. Crystal came over to Peggy's [brother's] house and began hug-

ging the children and telling them that "Mommy is here." The children were confused. Peggy confronted Crystal and told her that if there was going to be visitation between her and the children, it needed to be planned so that the children would be prepared for the visit. Crystal then told Peggy that no one was going to keep her from her children and assaulted Peggy by striking her. Crystal then threatened to kill Peggy. All of these events took place in front of the children. Peggy then secured warrants against Crystal for assault and communicating threats but later dropped the charges.

. . .

19. That the events during the attempted visitation have been disturbing to the children.

20. That the adults in these families do not get along at all and probably will never get along.

21. That this Court feels that if visitation is allowed, such visitation will be very disruptive to the children.

The trial court then made the following conclusions of law:

2. That the [d]efendants and the minor children are living in an intact family at this time.

3. That the [p]laintiff has not accepted the fact that the [d]efendants have adopted the minor children and are now their parents.

4. That the parties do not get along and will probably never get along and therefore it is not in the best interest of the minor children for the [p]laintiff to have any visitation with the minor children.

It is apparent from the trial court's findings that it struggled with this decision, carefully considering all of the relevant testimony, and in the end afforded greater credibility to the defendants' testimony. After careful review, we find that the trial court did not exceed its discretionary authority in denying plaintiff's request for visitation, and therefore did not commit an abuse of discretion requiring reversal. As such, we overrule plaintiff's assignments of error.

Affirmed.

Chief Judge EAGLES and Judge LEWIS concur.

FRIEDLAND v. GALES

[131 N.C. App. 802 (1998)]

EDWARD L. FRIEDLAND, EXECUTOR OF THE ESTATE OF KIM A. THOMAS, PLAINTIFF-APPELLANT v. MARION ANTHONY GALES, DEFENDANT-APPELLEE

No. COA98-367

(Filed 29 December 1998)

1. Wrongful Death— concealment of identity as killer—estoppel to assert statute of limitations

Defendant's intentional concealment of his identity as the person who killed decedent equitably estopped him from asserting the statute of limitations as a defense to an action for wrongful death of the decedent.

2. Estoppel— wrongful death—statute of limitations—sufficiency of allegations

Plaintiff's allegations were sufficient to plead the application of equitable estoppel to defendant's assertion of the statute of limitations in a wrongful death action where plaintiff alleged that defendant intentionally concealed his involvement in the decedent's murder, preventing plaintiff's knowledge thereof until after the statute of limitations had run, and that plaintiff brought the wrongful death suit within two years after the facts became known.

Appeal by plaintiff from order entered 6 November 1997 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 1998.

Rudolf & Maher, P.A., by David S. Rudolf and Thomas K. Maher, for plaintiff-appellant.

Sharon Dunigan Jumper and Jerry D. Jordan for defendant-appellee.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein, for the North Carolina Academy of Trial Lawyers, amicus curiae.

Smith, Helms, Mullis & Moore, L.L.P., by J. Donald Cowan, Jr., for the North Carolina Association of Defense Attorneys, amicus curiae.

MARTIN John C., Judge.

Plaintiff filed this wrongful death action on 29 March 1996 alleging that defendant had killed Kim A. Thomas on or about 27 July 1990. According to the allegations of the complaint, defendant denied killing Kim Thomas when questioned by the police, claiming that he suspected someone named "BJ" of committing the murder. However, defendant later confided in two fellow prison inmates, while incarcerated for unrelated crimes, that he killed Kim Thomas. Plaintiff alleged:

> 47. Marion Anthony Gales deliberately and fraudulently concealed his involvement in the murder of Kim Thomas by denying any involvement when confronted by the police in 1990. Gales involvement in the murder was therefore not known to Plaintiff until March 1995, when the facts above were first discovered.

Defendant filed a *pro se* answer in which he denied any knowledge about Kim Thomas' death. His subsequent motion to amend his answer to plead the statute of limitations as an affirmative bar to plaintiff's claim was not objected to by plaintiff.

Defendant was represented by counsel at trial. His motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence, based in part on the statute of limitations defense, were denied. At the jury instruction conference, defendant's counsel again argued that plaintiff's claim should be barred by the statute of limitations as a matter of law, in accordance with the previous motions for directed verdict, but requested, for "strategic" reasons, that the statute of limitations issue, and related instructions, not be submitted to the jury. In doing so, defendant agreed to waive "the right to a determination of any factual issues by the jury pertaining to the statute of limitations defense." Without objection from plaintiff, the trial court granted defendant's request that the statute of limitations issue not be submitted to the jury, without prejudice to defendant's right to argue, in further proceedings, that a tortfeasor's concealment of his or her identity has no legal effect upon such tortfeasor's right to assert the defense of the statute of limitations.

The jury found that Kim Thomas died as a result of defendant's acts and awarded plaintiff substantial compensatory and punitive damages. Defendant moved for judgment notwithstanding the verdict. In opposition to the motion, plaintiff contended that because defendant had concealed his identity as the perpetrator of the killing,

he was equitably estopped from asserting the statute of limitations as a defense to the wrongful death action. In its order allowing the motion, the trial court found:

> 1. Kim Thomas died on July 27th, 1990 as a result of a battery by the Defendant, Marion Anthony Gales;
>
> 2. Thereafter the Defendant, Marion Anthony Gales, concealed certain material facts relating to his involvement in the death of Kim Thomas including:
>
> > (a) He lied to police officers and others about his involvement in the death of Kim Thomas. . . .
>
> 3. The concealment as described above by Marion Anthony Gales was reasonably calculated to deceive police officers and others including the Plaintiff or such other persons as might qualify as personal representative of the estate of Kim Thomas.
>
> 4. That such concealment by Marion Anthony Gales was done with the intent to deceive police officers and others including the Plaintiff.
>
> 5. That the Plaintiff was, in fact, deceived by said concealment in that:
>
> > (a) The Plaintiff discovered the victim's death on July 27th, 1990;
> >
> > (b) As a result of the various concealments by the Defendant as described above the Plaintiff did not learn of the Defendant's involvement in the death of Kim Thomas until on or about March 20th, 1995.
> >
> > (c) Because of the Defendant's concealments as described above the Plaintiff could not reasonably have learned of the Defendant's involvement in the death of Kim Thomas until on or about March 20th, 1995.
>
> 6. That the Plaintiff failed to institute this lawsuit within two years from the time of the death of Kim Thomas as a result of his reasonable reliance upon the Defendant's concealments as described above.
>
> 7. That the lawsuit was filed on March 29, 1996.

8. Although the Plaintiff now argues the above facts as factual basis for invoking the doctrine of equitable estoppel as a bar to the defense of the statute of limitations, such theory was not argued by the Plaintiff until the time of a re-hearing upon post trial motions.

Upon those findings, the court concluded:

1. North Carolina law, and in particular North Carolina General Statutes Section 1-53(4), provides for a two-year statute of limitations for the filing of a wrongful death action under G.S. 28A-18-2. Under North Carolina law the statute of limitations for the filing of a wrongful death action accrues from the date of death of the victim.

2. If death of the victim is discovered, the statute of limitations is not tolled on account of fraudulent concealment of the identity of the perpetrator.

3. Defendant's request for withdrawal of any jury issue concerning the statute of limitations defense constituted a waiver of the right to have factual issues pertaining thereto determined by a jury but did not amount to a waiver of the statute of limitations defense.

4. Based upon the facts and law as recited above the Defendant's motion for directed verdict properly could have been granted in this case.

The court granted defendant's motion for judgment notwithstanding the verdict and dismissed plaintiff's action. Plaintiff appeals.

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[1] G.S. § 1-53(4) requires that an action for the death of a person caused by the wrongful act of another be brought within two years of the date of the decedent's death. There is no dispute that plaintiff commenced this action more than two years after the death of Kim Thomas. The narrow issue presented by this appeal is whether defendant's intentional concealment of his identity as the person who caused Kim Thomas' death equitably estops him from asserting the statute of limitations as a defense to this action for her wrongful death. For the following reasons, we hold that one who actively, affirmatively and deliberately conceals his identity as a tortfeasor is equitably estopped from asserting the statute of limitations as a defense to an action for damages resulting from his tortious act. Thus, we

reverse the trial court's order granting defendant's motion for judgment notwithstanding the verdict.

North Carolina courts have recognized and applied the principle that a defendant may properly rely upon a statute of limitations as a defensive shield against "stale" claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit. *See Duke University v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987) ("Equitable estoppel may be invoked, in a proper case, to bar a defendant from relying upon the statute of limitations."); *Nowell v. Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959) ("The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith."); *Hayes v. Town of Fairmont*, 130 N.C. App. 125, 502 S.E.2d 380, 382-83 (1998) ("[O]ur 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."); *Teague v. Randolph Surgical Assoc.*, 129 N.C. App. 766, 501 S.E.2d 382 (1998); *Jordan v. Crew*, 125 N.C. App. 712, 482 S.E.2d 735 (1997) (equitable estoppel did not bar application of the statute of limitations where plaintiff made no allegations of reliance on defendant's misrepresentation); *Bryant v. Adams*, 116 N.C. App. 448, 459-60, 448 S.E.2d 832, 838 (1994), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995) ("A party may be estopped to plead and rely on a statute of limitations defense when delay has been induced by acts, representations, or conduct which would amount to a breach of good faith."); *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993); *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 396 S.E.2d 626 (1990); *One North McDowell Ass'n v. McDowell Development Co.*, 98 N.C. App. 125, 389 S.E.2d 834, *disc. review denied*, 372 N.C. 432, 395 S.E.2d 686 (1990); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 317 S.E.2d 41 (1984), *affirmed*, 313 N.C. 488, 329 S.E.2d 350 (1985); *see generally*, David A. Logan & Wayne A. Logan, *North Carolina Torts* § 9.60 (1996).

> The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play.

McNeely v. Walters, 211 N.C. 112, 113, 189 S.E. 114, 115 (1937) (citations omitted).

The North Carolina Supreme Court elaborated upon the elements of equitable estoppel in *In re Covington's Will*, 252 N.C. 546, 114 S.E.2d 257 (1960); and this Court restated the elements as follows:

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Parker v. Thompson-Arthur Paving Co. at 370, 396 S.E.2d at 628-29. "[N]either bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied." *Id.* at 371, 396 S.E.2d at 629 (quoting *Hamilton v. Hamilton*, 296 N.C. 574, 576, 251 S.E.2d 441, 443 (1979)).

[2] The party seeking to invoke the doctrine of equitable estoppel must plead facts sufficient to raise an issue as to its application. Here, plaintiff alleged that defendant intentionally concealed his involvement in the death of Kim Thomas, preventing plaintiff's knowledge thereof until after the statute of limitations had run, and plaintiff brought suit within two years after the facts became known. Though plaintiff incorrectly labeled his theory as one of "fraudulent concealment", we hold the allegations were sufficient to plead application of equitable estoppel.

"Fraudulent concealment" is generally asserted as a claim for damages, *see e.g., Watts v. Cumberland County Hosp. System, Inc.*, 317 N.C. 110, 343 S.E.2d 879 (1986). It is a form of fraudulent misrepresentation entitling the claimant to damages or rescission of the contract. 1 William S. Haynes, *North Carolina Tort Law* § 10-4 (1989). To assert a claim for fraudulent concealment, there must be a showing that the opposing party knew a material fact, and failed to fully disclose that fact in violation of a pre-existing duty to disclose. *See generally, Watts v. Cumberland County Hosp. System, Inc., supra*; 1 William S. Haynes, *North Carolina Tort Law* § 10-4 (1989). Fraudulent concealment may also operate to toll the statute of limitations where all the elements may be shown. *Connor v. Schenck*, 240

N.C. 794, 84 S.E.2d 175 (1954); *Stallings v. Gunter*, 99 N.C. App. 710, 394 S.E.2d 212 (1990). Defendant points out, however, that he was under no pre-existing legal duty to disclose to plaintiff his identity as the person who caused Kim Thomas' death.

To invoke the doctrine of equitable estoppel to bar a defense, it is not necessary to show a pre-existing duty to disclose a material fact. *Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E.2d 441 (1979) (equitable estoppel may bar a defense even when there is no pre-existing legal duties between the parties); *Hensell v. Winslow*, 106 N.C. App. 285, 416 S.E.2d 426, *disc. review denied*, 332 N.C. 344, 421 S.E.2d 148 (1992). Thus even in the absence of a pre-existing legal duty, a defendant may still be barred from asserting a statute of limitations defense by the doctrine of equitable estoppel. Under the doctrine of equitable estoppel, "the fraud consists in the inconsistent position subsequently taken, rather than in the original conduct. It is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party." *Hamilton* at 576-77, 251 S.E.2d at 443 (quoting H. McClintock, Equity § 31 (2d ed. 1948)); *Parker v. Thompson-Arthur Paving Co.*, *supra*. In the present case it is the doctrine of equitable estoppel, not a claim of fraudulent concealment, that prevents defendant from asserting a statute of limitations defense.

In *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d 832 (1994), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995), the plaintiffs sought to recover damages for injuries sustained due to alleged negligence and breach of express and implied warranties by defendants. In their complaint, the plaintiffs alleged that the defendant "thwarted discovery efforts regarding specific facts" and that the defendant "was the only individual who possessed the information plaintiffs sought." *Id.* at 460, 448 S.E.2d at 838. We observed that the plaintiffs arguably had not filed suit earlier due to the defendant's refusal to disclose facts, and that the plaintiffs "were obviously prejudiced, as evidenced by the claims being subject to dismissal based on the statute of limitation and statute of repose if defendants are not equitably estopped from relying on these defenses." *Id.* We concluded that "since plaintiffs' pleadings sufficiently state a claim for equitable estoppel, we remand to the trial court for a factual determination of whether Adams should be estopped from relying on the statute of limitation and statute of repose." *Id.*

Citing the decision of this Court in *King v. Cape Fear Memorial Hospital, Inc.*, 96 N.C. App. 338, 385 S.E.2d 812 (1989), defendant

argues the statute of limitations for wrongful death must be strictly applied, without exception. In *King*, the issue was whether the "discovery exception" for latent or non-apparent injuries contained in G.S. § 1-15(c) applied to a wrongful death action based upon medical malpractice. The Court held that it did not and that the plaintiff was required to bring her action within the limitations period of G.S. § 1-53(4). *King* did not involve application of the doctrine of equitable estoppel to prevent a defendant from relying upon a statute of limitations defense, thus it is inapposite to our decision in this case.

Generally, where there are facts in dispute as to the existence of the elements of equitable estoppel, the issue of estoppel is for the jury. *Miller v. Talton*, *supra*. However, defendant presented no evidence upon the issue, requested that it not be submitted to the jury, and waived "the right to a determination of any factual issues by the jury pertaining to the statute of limitations." According to the trial court's findings, to which no exception has been taken, defendant actively concealed his wrongful conduct and prevented plaintiff from learning his identity before the statute of limitations had run. As was the case in *Bryant*, the actual injury was known and the claim had accrued, but due to defendant's intentional concealment, an essential fact necessary to bring the action, i.e., the identity of the tortfeasor, was unknown. Plaintiff, lacking the reasonable means to discover the identity of the wrongdoer, reasonably relied on the concealment to his detriment by not filing a wrongful death action until such information became available to him. These findings of fact establish, as a matter of law, that defendant, having actual knowledge of material facts, actively and deliberately concealed those facts with the intent to prevent discovery thereof by others, including the plaintiff; and that in consequence of defendant's conduct, plaintiff was without knowledge of those facts and without means to discover them within the period of the statute of limitations, thereby relying to his detriment on defendant's conduct. Therefore, defendant is equitably estopped from asserting the statute of limitations as a bar to plaintiff's claim. The order granting defendant's motion for judgment notwithstanding the verdict is reversed and this case is remanded to the trial court for entry of judgment in accordance with the verdict of the jury.

Reversed and remanded.

Judges MARTIN, Mark D., and HUNTER concur.

SMITH BARNEY, INC., PLAINTIFF v. RICHARD BARDOLPH, DEFENDANT

No. COA98-312

(Filed 29 December 1998)

1. **Arbitration and Mediation— securities brokerage agreement—arbitration clause—Federal Arbitration Act**

   A securities brokerage agreement is a "contract evidencing a transaction involving commerce" so that the application of an arbitration clause in the agreement is to be determined in accordance with the Federal Arbitration Act.

2. **Arbitration and Mediation— time-bar defenses—question for arbitrator**

   Time-bar defenses within arbitration agreements must be resolved by an arbitrator and not by the trial court.

Appeal by defendant from judgment filed 4 December 1997 by Judge H. W. Zimmerman, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 28 October 1998.

Kennedy Covington Lobdell & Hickman, L.L.P., by Cory Hohnbaum and Joseph W. Moss, Jr., for plaintiff-appellee.

Davis Gordon Doner & Chandler, by Lawrence U.L. Chandler, for defendant-appellant.

MARTIN, Mark D., Judge.

Defendant Richard Bardolph (Bardolph) appeals from the trial court's grant of plaintiff's motion for summary judgment and denial of defendant's motions to dismiss and to compel arbitration.

In 1982 Bardolph opened a securities account with plaintiff Smith Barney, Inc., (Smith Barney) with the objectives of preserving assets, producing income, and investing in securities that are conservative in nature.

As a Smith Barney customer, Bardolph was required to sign a Customer Agreement that contained the following arbitration clause:

> The undersigned [Bardolph] agrees that *all controversies between the undersigned and Smith Barney* and or any of its officers, directors, or employees concerning or arising from (i) any account maintained with Smith Barney by the undersigned;

(ii) any transaction involving Smith Barney and the undersigned, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior, on or subsequent to the date hereof, *shall be determined by arbitration before the National Association of Securities Dealers, Inc.*, the New York Stock Exchange, the American Stock Exchange, or any recognized arbitration facility provided by any exchange and *in accordance with the rules of such body then obtaining.* (emphasis added).

Between May 1990 and December 1990 Smith Barney recommended and sold Bardolph more than $156,000 worth of Airfund I and Airfund II International Limited Partnerships. Bardolph claims he was "force fed enormous amounts of highly unsuitable limited partnerships through aggressive marketing tactics and misleading data manufactured and promoted by the [Smith Barney] broker[s]." Bardolph contends these investments were inconsistent with his stated account objectives of income preservation and appreciation of invested capital. Bardolph alleges, among other things, that Smith Barney made false and misleading statements regarding the nature of these limited partnerships during the initial sale and continually misrepresented the partnership values of these ventures on Bardolph's monthly statements.

On 23 December 1996 Bardolph filed an arbitration claim against Smith Barney with the National Association of Securities Dealers, Inc. (NASD). The arbitration claim alleged, among other things, counts of breach of fiduciary duty, common law fraud, fraudulent concealment, negligence, breach of contract, and failure to supervise. On 19 March 1997 Bardolph submitted a Uniform Submission Agreement to the NASD to arbitrate "in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization."

On 2 June 1997 the parties agreed to stay the NASD arbitration proceeding and entered a stipulation allowing Smith Barney to file a lawsuit in Guilford County Superior Court to determine whether Bardolph's claims were eligible for arbitration.

On 21 July 1997 Smith Barney filed a complaint for declaratory judgment contending that Bardolph filed his arbitration claim more than six years after the events giving rise to his claim and therefore Bardolph's claims were barred by section 10304 of the NASD Code of

Arbitration Procedure (NASD Code). Section 10304, Time Limitation Upon Submission, reads:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.[1]

National Association of Securities Dealers, Inc., Code of Arbitration Procedure, NASD Manual ¶ 10304 (1997).

In response, Bardolph filed a motion to dismiss the complaint and a motion to compel arbitration on 17 September 1997. Bardolph argued Smith Barney was obligated to arbitrate any dispute with its customers under Section 10301 of the NASD Code. Section 10301(a), Required Submission, states:

> Any dispute, claim, or controversy eligible for submission . . . between a customer and a member and/or associated person arising in connection with the activities of such associated persons shall be arbitrated under this code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer.

National Association of Securities Dealers, Inc., Code of Arbitration Procedure, NASD Manual ¶ 10301(a) (1997). Smith Barney filed a motion for summary judgment on 24 October 1997.

On 4 December 1997, after reviewing the briefs and hearing arguments from the parties, the trial court granted Smith Barney's motion for summary judgment and denied Bardolph's motions to dismiss and to compel arbitration. Bardolph appealed to this Court.

On appeal, the question for this Court is whether the six-year time limitation found in section 10304 of the NASD Code should be interpreted by an arbitrator or by the trial court.

[1] At the outset we note the agreement between the parties is a "contract evidencing a transaction involving commerce" and therefore the application of the arbitration clause in the agreement is

1. NASD Code of Arbitration Procedure Section 12 was renumbered as Section 10301, Section 15 was renumbered as Section 10304, and Section 35 was renumbered as Section 10324, without any substantial alterations.

determined in accordance with the Federal Arbitration Act (FAA). 9 U.S.C. § 2 (1970). *See also Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 382 (4th Cir. 1998). "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 785 (1983). "[S]ection 2 created a body of federal substantive law applicable in both state and federal courts that compelled the courts to abandon their hostility toward arbitration agreements and required their vigorous enforcement." *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446, 452 (4th Cir. 1997).

Brokerage agreements, like the agreement between Bardolph and Smith Barney, fall within the broad construction of the term "involving commerce" under section 2 of the FAA. *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 593 (1st Cir. 1996), *citing Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-277, 130 L. Ed. 2d 753, 763-766 (1995). *See also Glass*, 114 F.3d at 452. Accordingly, as both parties concede in brief, the issues regarding the arbitration clause are governed by federal law pursuant to the FAA.

[2] Bardolph contends an arbitrator, not the trial court, should interpret section 10301 of the NASD Code of Arbitration Procedure and determine whether Bardolph's claims are barred as untimely under section 10304. We agree.

Although one of first impression for the North Carolina appellate courts, ten federal circuits have previously addressed this question. The First, Second, Fifth, Eighth, and Ninth Circuits have generally found questions of mere delay, laches, statute of limitations, and untimeliness to be issues reserved for resolution by arbitrators, not courts. *See PaineWebber Inc. v. Elahi*, 87 F.3d 589 (presumption parties intended to arbitrate the timeliness of the submission of their dispute because the parties made an agreement to arbitrate 'all controversies' concerning investment transactions); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2nd Cir. 1991) (strong presumption of arbitrability when the contract contains a broad arbitration clause); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2nd Cir. 1996) (Section 10324 of the NASD Code commits all issues of arbitrability and timeliness to the arbitrators); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750 (5th Cir. 1995) (time limitations defenses raised at trial court are issues of procedural arbitrability and must be decided by arbitrator); *FSC Securities Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994) (by parties agreeing to be governed by the NASD Code, it is a

clear and unmistakable expression of their intent to give arbitrators discretion via section 10324 to interpret section 10301's time limitation); *O'Neel v. National Ass'n of Securities Dealers*, 667 F.2d 804 (9th Cir. 1982) (the validity of time-barred defenses to enforcement of arbitration agreements should be determined by arbitrators rather than by the courts).

The Third, Sixth, Seventh, Tenth, and Eleventh Circuits, on the other hand, have held the trial court, not an arbitrator, must resolve issue of untimeliness in an arbitration agreement. *See PaineWebber Inc. v. Hofmann*, 984 F.2d 1372 (3rd Cir. 1993) (trial court should bar arbitration if claim submitted to arbitration undisputably arose out of events more than six years prior to filing of arbitration); *Roney and Co. v. Kassab*, 981 F.2d 894 (6th Cir. 1992) (trial court should decide whether action to enforce arbitration clause is barred by time limitation defense); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992) (trial court must determine whether section 10304 bars the arbitrator from exercising jurisdiction); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996) (Section 10304 defines the arbitrators' substantive jurisdiction and the trial courts must decide whether a claim is time-barred under that provision); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381 (11th Cir. 1995) (Section 10304 of the NASD Code is a substantive eligibility requirement and the trial court may conduct a 'mini-trial' on timeliness of arbitration claims).

Although the Fourth Circuit has apparently not considered this precise question, Fourth Circuit cases weigh heavily in favor of requiring an arbitrator, not the trial court, to decide issues relating to time-bar defenses in arbitration agreements.

In *County of Durham v. Richards & Associates, Inc.*, 742 F.2d 811 (4th Cir. 1984), plaintiff filed a motion to stay arbitration because the agreement to arbitrate with defendant contained a two-year limitation period, which plaintiff claimed expired. *Id.* at 812. Relying on precedent from the Second, Ninth, and Eleventh Circuits, the Fourth Circuit Court held, "[w]hen a [time] limitations question is raised to defeat a motion to compel arbitration, . . . the question is one for the arbitrator, not the courts." *Id. at* 815. Additionally, using the rationale from *Moses H. Cone Hospital*, 460 U.S. 1, 74 L. Ed. 2d 765, the Fourth Circuit stated:

> "The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues

> should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

County of Durham, 742 F.2d at 815 (*quoting Moses*, 460 U.S. at 24-25, 74 L. Ed. 2d at 785).

The Fourth Circuit again addressed the issue of arbitrability in *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446 (4th Cir. 1997). In *Glass* plaintiff and defendant were scheduled for arbitration regarding defendant's alleged mishandling of plaintiff's stock brokerage account. *Id.* at 446-449. Upon motion of the defendant, the trial court dismissed the scheduled arbitration on the ground of laches. *Id.* at 449. On appeal, the Fourth Circuit reversed stating:

> When faced with an arbitration case . . . the district court's role is limited to [i] determining whether the contract to arbitrate is valid and [ii] whether the dispute involved in the arbitration is within the subject matter of the contract to arbitrate. Once having made those determinations, the district court's role ends and the Act mandates that the district court enter an order of arbitration.

Id. at 457.

The *Glass* court found the existence of a signed arbitration agreement between the two parties was sufficient to establish a valid contract to arbitrate. *Id.* at 456-457. Furthermore, in determining the dispute over laches was within the subject matter of the contract, the court held, "[d]efenses of laches, mere delay, statute of limitations, and untimeliness constitute a broad category of waiver defenses that may be raised to defeat compelled arbitration. Laches, like its companion defenses, however, is a matter of 'procedural arbitrability' solely for the arbitrators' decision and not for the court." *Id.* at 455.

The Fourth Circuit most recently addressed the question of arbitrability in *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380 (4th Cir. 1998). In *Porter* the parties signed a Wellington Agreement, a contract that governs disputes between asbestos producers and asbestos insurers. *Id.* at 381. The Wellington Agreement contained an arbitration clause which read, "[Signatory Insureds and Insurers] shall resolve through alternative dispute resolution . . . any disputed issues within the scope of the Agreement . . . ." *Id.* Defendant submitted a claim to an arbitration panel regarding the Agreement and in response, plaintiff filed a petition for stay of arbitration asserting that

plaintiff's laches and statute of limitations claims had to be adjudicated in court, not by an arbitrator. *Id.* The trial court rejected plaintiff's argument and the Fourth Circuit affirmed. *Id.* at 381, 384.

In accordance with the FAA, the *Porter* court relied upon the " 'heavy [federal] presumption of arbitrability' [] that any ambiguity in the scope of the Wellington Agreement's arbitration clause be resolved in favor of arbitration." *Id.* at 382 *(quoting Peoples Sec. Life Ins. v. Monumental Life Ins.*, 867 F.2d 809, 812 (4th Cir. 1989)). Following the rationale from *Glass*, the *Porter* court stated, "because it can fairly be said that [plaintiff's] timeliness defenses . . . fall within the 'scope of the Agreement,' those defenses must be submitted to arbitration, despite [plaintiff's] at least plausible, contrary construction of the arbitration clause." *Id.* at 382.

Accordingly, consistent with six federal circuits, including the Fourth Circuit, we conclude time-bar defenses within arbitration agreements must be resolved by an arbitrator, not the trial court.

Our holding is reinforced by the language within section 10324 of the NASD Code. Section 10324 states, "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any rulings by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding on the parties." National Association of Securities Dealers, Inc., Code of Arbitration Procedure, NASD Manual ¶ 10324 (1997).

When interpreting the contents of an arbitration agreement to determine if a particular merit related dispute is arbitrable, the common law rule of contract interpretation states that " 'a court should construe ambiguous language against the interest of the party that drafted it.' " *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (*quoting Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 131 L. Ed. 2d 76, 87 (1995)). The purpose of this rule is to protect the party who did not choose the language from an unintended or unfair result. *Id.* (*quoting Mastrobuono*, 514 U.S. at 63, 131 L. Ed. 2d at 87).

In the instant case, Smith Barney drafted the Customer Agreement, including the arbitration clause, which stated that all controversies between the parties "shall be determined by arbitration before the National Association of Securities Dealers, Inc., . . . in accordance with the rules of such body then obtaining." Thus, Smith Barney agreed in the Customer Agreement that any disputes would be

handled in accordance with the provisions found in the NASD Code, including section 10324.

" '[T]he parties' adoption of [section 10324] is a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators. In no uncertain terms, Section [10324] commits interpretation of all provisions of the NASD Code to the arbitrators.' " *Conroy v. Merrill Lynch, Pierce, Fenner & Smith*, 899 F. Supp. 1471, 1476 (W.D.N.C. 1995) (*quoting FSC Securities Corp. v. Freel*, 14 F.3d 1310, 1312-1313 (8th Cir. 1994)). *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L. Ed. 2d 985 (1995) (need 'clear and unmistakable evidence' showing parties agreed to arbitrate.) "[T]he section [10304] time bar is part of the NASD Code of Arbitration Procedure, thus one would assume it is intended to be applied by the NASD itself to control its own procedures, rather than a rule that is somehow 'off-limits' for arbitrators to apply." *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 601 (1st Cir. 1996). Accordingly, by signing the Customer Agreement, including the arbitration clause, Smith Barney consented to allowing an arbitrator, pursuant to section 10324 of the NASD Code, to interpret and determine the applicability of the time-bar provision found in section 10304.

Consistent with the rationale of the Fourth Circuit cases discussed earlier, North Carolina trial courts have a very narrow role in determining arbitrability. As articulated in *Glass*, the trial court's role is limited to determining (i) whether the contract to arbitrate is valid and (ii) whether the dispute involved in the arbitration is within the subject matter of the contract to arbitrate. *Glass*, 114 F.3d at 457.

It is undisputed here that a valid agreement to arbitrate exists between Bardolph and Smith Barney. Moreover, sections 10304 and 10324 of the NASD Code, when read together, demonstrate the parties had a "clear and unmistakable" intent to have an arbitrator decide the six-year time limitation question.

Accordingly, we reverse the trial court's grant of summary judgment in Smith Barney's favor and remand for entry of an order granting defendant's motion to dismiss plaintiff's complaint for declaratory judgment and defendant's motion to compel arbitration.

Reversed and remanded with instructions.

Judges MARTIN, John C., and HUNTER concur.

JIMENEZ v. BROWN

[131 N.C. App. 818 (1998)]

SONIA JIMENEZ AND NANCY SERRA, AS OWNERS AND DISTRIBUTEES OF A JUDGMENT IN FAVOR OF RAUL GUTIERREZ, PLAINTIFF-APPELLEES v. BRUCE E. BROWN, DEFENDANT-APPELLANT

No. COA98-54

(Filed 29 December 1998)

1. Attachment— foreign judgment—debtor's concealment to avoid service of summons

The trial court's finding that defendant judgment debtor's property was subject to attachment on the ground that he had concealed himself in North Carolina with the intent to avoid service of summons was supported by the evidence, including evidence of plaintiff judgment creditors' many attempts at service of process and an attempt by defendant to mislead plaintiffs into believing that the person they had located and attempted to serve in North Carolina was not actually the judgment debtor.

2. Attachment— contents of safe deposit boxes

The contents of a judgment debtor's safe deposit boxes are subject to attachment by judgment creditors.

3. Attachment— bank account—Uniform Transfers to Minors Act

A bank account titled in a judgment debtor's name as custodian for his minor son pursuant to the N.C. Uniform Transfers to Minors Act was not subject to attachment by the judgment creditors because it is the minor's property.

4. Attachment— bank account—Totten Trust

A Totten Trust bank account created by a judgment debtor for the benefit of his minor son pursuant to N.C.G.S. § 53-146.2 was attachable by his judgment creditors because the debtor retained complete control over the account until his death, the trust was fully revocable, and the trust was revoked in part each time the debtor withdrew funds from the account.

5. Attachment— joint bank account—contribution by judgment debtor

A joint bank account of a judgment debtor and his minor son was attachable by the judgment creditors to the extent of the debtor's contribution to the account.

Appeal by defendant from order entered 3 November 1997 by Judge G.K. Butterfield, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 16 November 1998.

Walter L. Hinson, P.A., by Walter L. Hinson and Meredith P. Ezzell, for plaintiff-appellees.

Rose, Rand, Orcutt, Cauley, Blake & Ellis, P.A., by Susan K. Ellis, for defendant-appellant.

SMITH, Judge.

On 15 January 1974, judgment was entered against defendant in Dade County, Florida, in the amount of $1,418,350.16, plus six percent interest. This judgment resulted from a traffic accident that occurred on 1 January 1973 in Dade County. An amended judgment was entered 12 February 1974 directing that plaintiff Raul Gutierrez recover from defendant's insurer the limit of the liability policy, $10,000. The insurer paid that sum and judgment against defendant was reduced accordingly. Defendant paid no part of the original judgment.

Defendant left the state of Florida approximately one year after judgment was entered. Plaintiff Gutierrez was advised by defendant's attorney and insurer that, after diligent efforts to locate defendant, it appeared that defendant had left the country and would not return.

Plaintiff Gutierrez died on 16 August 1981. His assets, including the unpaid judgment, were distributed one-half to plaintiff Sonia Jimenez and one-half to plaintiff Nancy Serra as beneficiaries of the estate. Judgment was assigned to plaintiffs Jimenez and Serra.

On 13 January 1994, plaintiffs brought suit on the original judgment in Dade County, Florida. Attorneys for plaintiffs located defendant in the State of North Carolina. Service of process was attempted by sending suit papers by certified mail and regular mail to defendant's Rocky Mount address. The certified mail was returned; the regular mail was not returned. Further attempts to serve defendant proved unsuccessful. After multiple attempts at serving defendant by mail failed, plaintiffs were finally successful on 16 September 1994, when a private service agent personally served defendant with a copy of the summons and complaint. On or about 23 November 1994, the Dade County Circuit Court entered an Order Impressing Jurisdiction on Defendant Bruce E. Brown. The court found, after reviewing the evidence presented, that defendant was avoiding service of process

and had actual knowledge of the suit. The court entered a judgment of default against defendant on 21 March 1995. On 6 June 1995, final judgment was rendered in favor of plaintiffs against defendant in the sum of $3,215,977.29, plus costs of $638.75, with interest at the rate of twelve percent per year from the date of judgment. This judgment remained (and continues to remain) unpaid. On 28 August 1997, plaintiffs filed a complaint in Wilson County Superior Court seeking judgment giving full faith and credit to the Florida judgment and an order attaching the assets of defendant.

As grounds for attachment, plaintiffs alleged in their affidavit that defendant was "[a] resident of the state who, with intent to defraud his creditors, or to avoid service of summons . . . keeps himself concealed therein." On 28 August 1997, the assistant clerk of superior court for Wilson County entered orders of attachment for various bank accounts and safety deposit boxes. On 11 September 1997, defendant filed a Motion to Vacate Order of Attachment. On 29 September 1997, Judge Butterfield ordered the attachment of a corporate bank account to be dissolved. Thereafter, on 3 November 1997, after hearing arguments of counsel and reviewing the record and affidavits, Judge Butterfield denied defendant's motion, finding in pertinent part:

> 7. It further appears from the evidence that the Defendant, Bruce Brown, has consistently and continually, prior to the filing of the Complaint in this matter, kept himself concealed herein with intent to defraud his creditors or to avoid service of summons.
>
> 8. Pursuant to the Orders of Attachment properly issued by the Clerk of Superior Court of Wilson County, the Sheriffs of Edgecombe, Nash and Wilson Counties served and caused to be attached by this Court the following assets: . . .
>
> . . . .
>
> 10. The assets described hereinabove are assets of the Defendant. Each asset is held by the respective bank in the name of the Defendant individually or in the name of the Defendant as depositor or custodian for Sean E. Brown. Such accounts are subject to levy under execution against the Defendant.

The judge made conclusions of law in accordance therewith. From this order, defendant appeals.

[1] Defendant first argues that the trial court erred in concluding that defendant has concealed himself in North Carolina with the intent to avoid service of summons. The statute on which plaintiffs relied in seeking attachment is N.C. Gen. Stat. § 1-440.3 (1996), which states:

> In those actions in which attachment may be had . . ., an order of attachment may be issued when the defendant is
>
> . . .
>
> (4) A resident of the State who, with intent to defraud his creditors *or to avoid service of summons*,
>
> a. Has departed, or is about to depart, from the State, or
>
> b. Keeps himself concealed therein . . . .

After reviewing the record and arguments before it, the trial court held that defendant had, in fact, concealed himself within this state for the purpose of defrauding creditors or avoiding service of summons. It is well settled that the trial court's findings of fact "are binding on the appellate court if supported by competent evidence, even if there is evidence to the contrary." *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987), *aff'd*, 321 N.C. 589, 364 S.E.2d 139 (1988). Plaintiffs presented affidavits with accompanying exhibits evidencing their argument that defendant was avoiding service of process. Some of the evidence presented to the trial court indicated that defendant received business mail at a post office box in Rocky Mount, North Carolina. On one of plaintiffs' many attempts at service of process, plaintiffs mailed the summons and complaint to defendant at his post office box. The unopened envelope was returned to plaintiffs' attorney, with a return address written in the top left corner reading "F.B. Brown" and listing defendant's post office box. Plaintiffs argue that this behavior evidences defendant's intent to cause plaintiffs to question whether the Bruce Brown they had located was the same one involved in the 1973 Florida automobile accident. After considering all of the evidence, we conclude there was sufficient competent evidence to support the trial court's finding that defendant "consistently and continually . . . kept himself concealed herein with intent to defraud his creditors or to avoid service of summons." This assignment of error is overruled.

[2] Defendant next argues that the trial court erred by not dissolving the orders of attachment relative to defendant's safety deposit boxes. Defendant argues that "[s]ince a safe deposit box does not belong to

a customer but is only rented by the customer from the Bank, a safe deposit box is not property owned by the customer. If the box is not owned by the customer, it cannot be levied upon." This argument is unpersuasive. Although our courts have not previously addressed the issue of attachment of safe deposit boxes, the generally accepted rule is that "the contents of a safe-deposit box may be reached by attachment or garnishment." 6 Am. Jur. 2d, Attachment and Garnishment § 100 (1963) (citing *Tillinghast v. Johnson*, 82 A. 788 (R.I. 1912); *West Cache Sugar Co. v. Hendrickson*, 190 P. 946 (Utah 1920)); *see also National Safe Deposit Co. v. Stead*, 95 N.E. 973 (Ill. 1911), *aff'd*, 232 U.S. 58, 58 L. Ed. 504 (1914); *Trowbridge v. Spinning*, 62 P. 125 (Wash. 1900). We quote with approval the reasoning of a much-cited 1925 case from New York:

> There is no doubt that the Safe Deposit Company has a general and surrounding control and possession of the box. It owns the building and the vault in which the box is located, and makes rules for the customer's access to the box which generally require the assistance of the company in opening it. This possession and control, however, is exercised for the purpose of securing a greater safety for the customer rather than of asserting possession as against him of the contents of the box to which, under proper rules and regulations, he has unquestioned and unqualified access.
>
> . . . .
>
> If a debtor could withdraw his property from the reach of creditors by simply placing it in a safe deposit vault, avoidance of responsibility for obligations would be made easy, and a broad and easily accessible highway opened for escape from an effective administration of the law.

Carples v. Cumberland Coal & Iron Co., 148 N.E. 185, 186-87 (N.Y. 1925) (citations omitted). This is most easily equated with a business owner who leases office space. Although the building he is renting could not be attached as it belongs to another, the contents therein, which are owned and controlled by the business owner, would be subject to attachment. We therefore hold that safe deposit boxes, or the contents therein, are subject to attachment by judgment creditors. This assignment of error is overruled.

[3] As defendant's next two assignments of error, he argues the trial court erred in attaching two bank accounts that "are titled in

Defendant's name, as custodian for his son, Sean E. Brown, under the North Carolina Uniform Transfers to Minors Act [(UTMA)]."

Pursuant to N.C. Gen. Stat. § 33A-9 (Cum. Supp. 1997),

> (a) Custodial property is created and a transfer is made whenever:
>
> . . .
>
> (2) Money is paid or delivered, or a security held in the name of a broker, financial institution, or its nominee is transferred, to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for _____ (name of minor) under the North Carolina Uniform Transfers to Minors Act[.]"

Furthermore, an account set up under this section "is irrevocable, and the custodial property is indefeasibly vested in the minor." N.C. Gen. Stat. § 33A-11(b) (1987). This section further provides that the custodian has all the rights and authority provided for by the Act. *See id.* Such rights and authority include the authority to take control of the custodial property and to collect, manage, or invest it in the best interests of the minor. N.C. Gen. Stat. § 33A-12(a) (1987). The custodian is required to keep custodial property "separate and distinct from all other property" and to keep sufficient records of all transactions with respect to the property. N.C. Gen. Stat. § 33A-12(d)-(e) (1987). Thus, the Act specifically enumerates a custodian's duties, rights, and authority.

Most importantly, for our purposes, the Act limits the circumstances under which a third party may assert a cause of action against the custodial property. N.C. Gen. Stat. § 33A-17(a) (1987) states that

> [a] claim based on (i) a contract entered into by a custodian acting in a custodial capacity, (ii) an obligation arising from the ownership or control of custodial property, or (iii) a tort committed *during the custodianship*, may be asserted against the custodial property by proceeding against the custodian in the custodial capacity[.]

This provides an exclusive list of when a third-party claimant may recover against the custodial property. A tort committed *prior to* the custodianship is not enumerated within this list; therefore, if the accounts are set up under UTMA, they are not subject to attachment.

The only evidence we have before us regarding the first account at issue, the Centura bank account, is a signature card for the account. First, under the "Name and Address of Depositor(s)," it states "Bruce E. Brown[,] custodian for Sean E. Brown Under the N.C.U.T.M.A." Second, under the section entitled "Ownership Type," the card is marked "X" by the blank "Custodian Under N.C.U.T.M.A." Defendant is shown as custodian, with Sandra J. Brown as successor custodian. We can find no competent evidence in the record on appeal supporting the trial court's decision not to dissolve the order of attachment for this account. In fact, all the evidence before us leads to the conclusion that the account was properly created pursuant to UTMA and thus is not subject to attachment because it is the minor's property. Thus, the judgment of the trial court is reversed on this issue.

[4] The second account, the Triangle bank account, was not set up under UTMA. From the evidence in the record, this account was set up as a trust account under N.C. Gen. Stat. § 53-146.2 (1994), with Sean Elliot Brown as beneficiary. This section states in pertinent part:

> (a) If any person establishing a deposit account shall execute a written agreement with the bank containing a statement that it is executed pursuant to the provisions of this subsection and providing for the account to be held in the name of such person as trustee for not more than one person designated as beneficiary, the account and any balance thereof shall be held as a trust account, with the following incidents:
>
> (1) The trustee during the trustee's lifetime may change the designated beneficiary by a written direction to the bank.
>
> (2) The trustee may withdraw funds by writing checks or otherwise, as set forth in the account contract, and receive payment in cash or check payable to the trustee's personal order. Such payment or withdrawal shall constitute a revocation of the trust agreement as to the amount withdrawn.

This is a tentative trust, better known as a "Totten Trust." *See Baker v. Cox*, 77 N.C. App. 445, 335 S.E.2d 71 (1985), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 877 (1986). With this type of account the depositor retains complete control over the funds until his death, the trust is fully revocable, and is revoked in part each time the settlor

withdraws funds from the account. Because of the total control the settlor retains over the account, it is fully reachable by creditors and, thus, subject to attachment. The trial court did not err in finding this account attachable.

[5] As defendant's last two assignments of error, he argues that a different bank account was not subject to attachment because it is in his son's name, with defendant as custodian. There is no evidence, nor is it argued, that this account was set up under UTMA. To the contrary, the evidence in the record shows that the account at issue "was opened . . . in the name of Sean Elliott Brown, Minor, Bruce Brown . . . ." There is no evidence that defendant was acting as custodian of this account. Rather, it appears that this account was established as a joint account. As a joint account, either party may terminate the account or withdraw all funds from the account. Although our courts have not yet spoken on the issue of whether joint accounts are subject to attachment by one of the account holder's creditors, the general rule among other jurisdictions is that "joint bank accounts are vulnerable to seizure by the creditor of one depositor . . . [to the limit of] the amount of the funds in the account equitably owned by the debtor depositor and do not extend to funds equitably owned by the innocent depositor." 11 A.L.R.3d 1465, 1473 (1967); *see, e.g., Amarlite Architectural v. Copeland Glass*, 601 So. 2d 414 (Ala. 1992); *Hayden v. Gardner*, 381 S.W.2d 752 (Ark 1964); *Miller v. Clayco State Bank*, 708 P.2d 997 (Kan. App. 1985); *Delta Fertilizer, Inc. v. Weaver*, 547 So. 2d 800 (Miss. 1989); *Baker v. Baker*, 710 P.2d 129 (Okla. App. 1985); *RepublicBank Dallas v. National Bank*, 705 S.W.2d 310 (Tex. App. 1986). Many of the courts following this general rule "hold that there is a presumption that all of the joint bank account is owned by the debtor . . ." and that the depositors have the burden to prove that ownership of the funds is otherwise. 11 A.L.R.3d at 1476; *see, e.g., Maloy v. Stuttgart Memorial Hosp.*, 872 S.W.2d 401, 402 (Ark. 1994); *Yakima Adjustment Serv., Inc. v. Durand*, 622 P.2d 408, 411 (Wash. App. 1981).

We believe that equitable ownership should be the determining factor and thus hold that joint accounts are attachable to the extent of a debtor's contribution to the account. To hold otherwise would allow seizure of money belonging to an innocent third party.

In this case, defendant held the account jointly with his minor son, who was nine years old at the time the account was opened. Although the record on appeal is silent as to who contributed the

funds for the account; the trial court held this account to be attachable. "[W]e are required, absent a showing to the contrary, to presume the trial court's determination was proper." *Hocke v. Hanyane*, 118 N.C. App. 630, 635, 456 S.E.2d 858, 861 (1995). Defendant has failed to make such a showing. Accordingly, the decision of the trial court is affirmed.

Affirmed in part, reversed in part.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

SHELBY J. DESKINS, EMPLOYEE-PLAINTIFF v. ITHACA INDUSTRIES, INC., EMPLOYER-DEFENDANT, THE HARTFORD ACCIDENT & INDEMNITY INSURANCE COMPANY, CARRIER-DEFENDANT

No. COA97-1567

(Filed 29 December 1998)

1. **Workers' Compensation— change of treating physicians— unilateral decision**

The Industrial Commission's order that plaintiff's benefits be suspended was not supported by the record after the finding that plaintiff unjustifiably refused to cooperate with vocational rehabilitation in that she unilaterally changed treating physicians was set aside. Plaintiff was statutorily authorized to seek medical treatment from a physician other than one provided by defendants and was not obligated to procure the approval of defendants or the Commission prior to seeking such treatment. All that is required of the employee is that she secure the approval of the Commission within a reasonable time after she has selected a physician of her own choosing. N.C.G.S. § 97-25.

2. **Workers' Compensation— vocational rehabilitation— attorney's role**

The Industrial Commission erred by finding that a letter from plaintiff's attorney to her vocational rehabilitation nurse requesting that the nurse contact him directly amounted to a refusal by plaintiff to cooperate with the rehabilitation procedure and concluding that suspension of plaintiff's workers' compensation benefits was warranted. There is absolutely no evidence in the record

that plaintiff refused any rehabilitative procedure ordered by the Commission. N.C.G.S. § 97-25.

3. Workers' Compensation— approval of physician—discretion of Commission

The Industrial Commission did not abuse its discretion in a workers' compensation action by denying further treatment by a physician chosen by plaintiff. N.C.G.S. § 97-25 permits an injured employee to select a physician subject to the Commission's approval; the unambiguous language of the statute leaves the approval of a physician within the discretion of the Commission.

Appeal by plaintiff from opinion and award entered 23 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 1998.

Franklin Smith for plaintiff-appellant.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., for defendants-appellees.

TIMMONS-GOODSON, Judge.

Shelby J. Deskins ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") suspending her workers' compensation benefits based upon its finding that she refused to cooperate with vocational rehabilitation procedures. Based upon the analysis that follows, we affirm in part, reverse in part and remand.

At the time of the hearing, plaintiff was 53 years of age, had a high school education, and was an experienced factory worker. On 22 April 1993, the Commission approved a Form 21 Agreement, whereby Ithaca Industries, Inc. and the Hartford Accident & Indemnity Insurance Company (collectively, "defendants") accepted liability for plaintiff's carpal tunnel syndrome. An amended Form 21 was subsequently filed and approved.

In December of 1992, plaintiff began treatment with Dr. Malcolm Marks for carpal tunnel syndrome. Dr. Marks treated plaintiff conservatively until 18 March 1993, when he performed a left carpal tunnel release surgery. Following the surgery, plaintiff's condition steadily improved, but in May of 1993, she began to experience significant discomfort in her left wrist. Dr. Marks examined plaintiff on 6 August 1993 and noted that the physical therapy had not helped plaintiff's

condition. Thereafter, plaintiff became dissatisfied with Dr. Marks and requested a second opinion regarding her medical treatment. Defendants arranged a second opinion with Dr. David Gower, who examined plaintiff on 29 September 1993 and diagnosed the condition in her hand as "ischemia." Dr. Gower noted that plaintiff's hand was white and cold and that the pulse in her wrist was poor. He discussed these problems with plaintiff's vocational rehabilitation nurse, Linda Swaim, and recommended a second opinion with Dr. Thomas Mutton.

Defendants scheduled a second opinion with Dr. Mutton, a vascular surgeon who examined plaintiff on 29 September 1993. Dr. Mutton performed vascular studies on plaintiff's hand, which proved negative for thoracic outlet syndrome. After her examination by Dr. Mutton, plaintiff told Swaim that she liked Dr. Mutton and preferred to have him as her primary treating physician. Defendants authorized plaintiff's change of treatment to Dr. Mutton.

Plaintiff complained to Dr. Mutton of pain in her left wrist where Dr. Marks had performed the release surgery. For this reason, Dr. Mutton scheduled a re-exploration surgery of the left carpal tunnel, which he performed on 28 October 1993. This surgery resulted in some relief to plaintiff, and she experienced only slight discomfort in her wrist following the surgery. Then, on 6 January 1994, Dr. Mutton performed a right carpal tunnel release. Plaintiff complained of some pain after this surgery, but she made improvement. Dr. Mutton last examined plaintiff on 9 May 1994, at which time he assigned a 0% permanent partial disability rating to both of her hands.

On 8 June 1994, Dr. Mutton released plaintiff to return to work for six hours a day, with instructions that she resume her full-time schedule after completing her home physical therapy. Plaintiff required much coaxing to put forth her maximum effort in the home physical therapy, and after returning to work, she continued to complain of pain in her wrist and maintained that she needed additional medical treatment.

Plaintiff's attorney then filed a motion with the Commission on 16 June 1994, requesting it to approve either Dr. Poehling or Dr. Marks as plaintiff's primary physician. The Chief Claims Examiner of the Commission, Martha A. Barr, reviewed the motion and instructed plaintiff to request a hearing, because the matter could not be resolved administratively. Plaintiff filed a request for hearing on 28 July 1994; however, at her attorney's instruction but without autho-

rization from defendants or the Commission, plaintiff sought treatment from Dr. Marks on 19 August 1994. Like Dr. Mutton, Dr. Marks was of the opinion that plaintiff could work six hours a day, but plaintiff continued to complain of pain, so Dr. Marks performed a carpal tunnel release on 22 September 1994.

On 30 August 1994, defendants responded to plaintiff's request for a hearing and, therein, stated the following: "[P]laintiff has unilaterally changed treating physicians to Dr. Marks. Defendants have not authorized treatment with Dr. Marks. Plaintiff was returned to work by Dr. Mutton and is now doctor shopping." On 8 November 1994, defendants filed a motion to suspend plaintiff's benefits, pursuant to section 97-25 of the North Carolina General Statutes, alleging that "plaintiff's refusal of accepting medical treatment and rehabilitative procedure is not justified." These matters came on for hearing before Special Deputy Commissioner D. Bernard Alston on 19 November 1994.

After receiving plaintiff's medical records and the depositions of Drs. Marks and Mutton, Commissioner Alston entered an opinion and award on 8 April 1997 finding that the medical treatment rendered by Dr. Marks after 6 August 1993, including the release surgery performed 22 September 1994, was probably medically necessary to assist plaintiff with her condition. Commissioner Alston, however, found as follows regarding plaintiff's compliance with vocational rehabilitation treatment:

> Plaintiff has failed to cooperate with vocational rehabilitation. Plaintiff's attorney has also obstructed vocational rehabilitation. Plaintiff's refusal to cooperate with vocational rehabilitation is unjustified and unreasonable. Plaintiff's failure to cooperate with vocational rehabilitation began August 27, 1994, the date that Plaintiff's attorney wrote to the vocational rehabilitation case manager, Linda Swaim, and instructed her not to contact Plaintiff directly.

Based upon these findings, Commissioner Alston ordered defendants to pay for the medical treatment rendered by Dr. Marks, but regarding future treatment, the commissioner stated the following: "[T]he Commission disapproves and does not authorize further treatment by Dr. Malcom Marks as Plaintiff's treating physician. Plaintiff shall return to Dr. Mutton or any other physicians directed by Defendants." In addition, the commissioner suspended plaintiff's temporary total disability compensation until she cooperated with voca-

tional rehabilitation. Commissioner Alston further ordered plaintiff to fully cooperate with her rehabilitation nurse, Swaim, and directed Swaim to resume vocational rehabilitation if approved by Dr. Mutton. Upon plaintiff's resumption of rehabilitation, defendants were to resume temporary total disability benefits as appropriate. Plaintiff appealed this decision to the Full Commission, and the Commission adopted the opinion and award of Commissioner Alston. Plaintiff again appeals.

Plaintiff's sole assignment of error is that the Commission failed to follow the greater weight of the evidence in arriving at its decision. Plaintiff contends that for this reason, the opinion and award should be reversed and the case remanded for new findings. While plaintiff would steer us in a different direction, we conclude that the issues presented to us on this appeal are (1) whether the Commission erred in suspending plaintiff's benefits based upon its finding that she unjustifiably refused to cooperate with rehabilitation procedure and (2) whether the Commission erred by denying further treatment by Dr. Marks and ordering plaintiff to continue treatment with those physicians directed by defendants. We address these questions in turn.

The standard of review on appeal from an order of the Industrial Commission is well-settled. The appellate court must determine whether the Commission's findings of fact are supported by any competent evidence of record and whether those findings, in turn, support the Commission's conclusions of law. *In re Stone v. G&G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997). As the fact-finder, the Commission is the sole judge of the credibility of the witnesses and the weight to be accorded their testimony. *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983). Hence, the Commission's findings of fact are binding on this Court, if there is any evidence in the record to support them. *Murray v. Associates Insurers, Inc.*, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995). This is true, despite the presence of other evidence which might support contrary findings. *Id.* Nonetheless, the Commission's findings of fact may be set aside where " 'there is a complete lack of competent evidence to support them.' " *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390-91 (1980)).

Central to our analysis is section 97-25 of the General Statutes, which provides as follows:

> If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission.
>
> Provided, however, if [s]he so desires, an injured employee may select a physician of [her] own choosing to attend, prescribe and assume the care and charge of [her] case, subject to the approval of the Industrial Commission.

N.C. Gen. Stat. 97-25 (Cum. Supp. 1997). In *Schofield v. Tea Co*, 299 N.C. 582, 264 S.E.2d 56 (1980), our Supreme Court interpreted the above language to mean that "an injured employee has the right to procure, even in the absence of an emergency, a physician of [her] own choosing, subject to the approval of the Commission." *Id.* at 591, 264 S.E.2d at 62. Additionally, the Court held that under the statute, an employee need not notify the employer or obtain the Commission's approval in advance of the change. *Id.* at 592, 264 S.E.2d at 63. All that is required of the employee is that she secure the "approval of the Commission within a reasonable time after [s]he has selected a physician of [her] own choosing to assume treatment." *Id.* at 593, 264 S.E.2d at 63.

[1] Evidence before the Commission in the present case tended to show that due to persistent pain in her wrists following her release by Dr. Mutton to return to work, plaintiff requested that her primary physician be changed to either Dr. Poehling or Dr. Marks. When defendants denied this request, plaintiff's attorney filed a motion on 16 June 1994, requesting the Commission to approve the change. However, before receiving the Commission's approval, plaintiff went to Dr. Marks for treatment, and on 22 September 1994, he performed a carpal tunnel release surgery on plaintiff's hand, which the Commission later concluded was medically necessary.

As we have previously noted, plaintiff was statutorily authorized to seek medical treatment from a physician other than one provided by defendants. Furthermore, she was not obligated to procure the approval of defendants or the Commission prior to seeking such treatment. Therefore, plaintiff's unilateral decision to change treating physicians is not adequate to support the Commission's finding that she unjustifiably refused to cooperate with vocational rehabilitation, and this finding must be set aside. Absent this finding, there is no sup-

port for the Commission's order that plaintiff's benefits be suspended as of August 1994.

[2] Defendants argue, however, that plaintiff's attorney improperly thwarted Swaim's attempts to work with plaintiff. Defendants contend, and the Commission agreed, that the attorney's letter of 27 August 1994 requesting that Swaim contact him directly amounted to a refusal by plaintiff to cooperate with rehabilitation procedure. The Commission relied on this finding as well in support of its conclusion that suspension of plaintiff's benefits was appropriate under 97-25. However, the relevant provision of section 97-25 states as follows:

> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

N.C.G.S. § 97-25 (emphasis added). The language of this statute is quite specific, and the bar to compensation does not apply unless the employee "refus[es] . . . to accept any . . . rehabilitative procedure when ordered by the Commission." *Id.* There is absolutely no evidence in the record that plaintiff refused any rehabilitative procedure ordered by the Commission. Thus, the Commission erred in concluding that the letter to Swaim from plaintiff's attorney warranted suspension of plaintiff's benefits, and we reverse the opinion and award accordingly.

[3] The remaining issue is whether the Commission erred in disapproving further treatment of plaintiff by Dr. Marks. As previously noted, section 97-25 of the General Statutes permits an injured employee to "select a physician of [her] own choosing . . . subject to the approval of the Industrial Commission." As this Court held 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), "[t]he unambiguous language of this statute . . . leaves the approval of a physician within the discretion of the Commission and the Commission's determination may only be reversed upon a finding of

a manifest abuse of discretion." *Id.* at 207, 472 S.E.2d at 387. Plaintiff has not shown, nor do we discern, any abuse of discretion. Accordingly, we uphold the Commission's denial of further treatment by Dr. Marks. For the foregoing reasons, the opinion and award of the Industrial Commission is affirmed in part, reversed in part, and this cause remanded for entry of an opinion and award consistent with this opinion.

Affirmed in part, reversed and remanded.

Judges GREENE and SMITH concur.

LEGINA DAWN HINKLE, PLAINTIFF-APPELLEE v. TIMOTHY RAY HARTSELL, DEFENDANT-APPELLANT

No. COA97-1257

(Filed 29 December 1998)

1. **Evidence— judicial notice—high crime area**

The trial court abused its discretion during a child custody action by taking judicial notice sua sponte of murders, robberies and other violent crimes in and around the premises of the motel where defendant lived. The prevalence of crime in and about the premises and how this crime affects the safety of the motel's residents is no doubt a matter of debate within the community and the court cannot take judicial notice of a disputed question of fact.

2. **Child Support, Custody and Visitation— visitation—restricted—findings insufficient**

The trial court's findings in a child visitation action were insufficient to support severe restrictions on defendant-father's visitation rights where there was no competent evidence in the record that showed that defendant has ever engaged in any conduct that warrants forfeiting his rights to visitation or that the exercise of his right to visitation would be detrimental to the best interest of the child. Additionally, there is no rhyme or reason for the order which prohibited defendant from residing with any of his relatives.

Appeal by defendant from judgment entered 22 July 1997 by Judge Jack E. Klass in Davidson County District Court. Heard in the Court of Appeals 21 September 1998.

Central Carolina Legal Services, Inc., by Scott B. Lewis, for defendant-appellant.

No brief filed by plaintiff-appellee.

HUNTER, Judge.

Although Legina Dawn Hinkle (plaintiff) and Timothy Ray Hartsell (defendant) have never been married, they are the biological parents of the minor child, Nicholas Eugene Hartsell (Nicholas), born 13 October 1995. From the date of Nicholas' birth until 16 June 1996, he resided with plaintiff and defendant in Lexington, North Carolina in Davidson County. When the parties separated, defendant began living with his girlfriend in another county, where he remained during the pendency of this action. On 1 November 1996, plaintiff filed a complaint against defendant in which she sought full custody and control of Nicholas. Defendant answered requesting joint custody, and counterclaimed against plaintiff seeking child support payments.

The trial court sat without a jury, and plaintiff's evidence tended to show that she was gainfully employed and capable of providing for the financial, as well as the emotional, needs of Nicholas. Plaintiff served as the primary caretaker for Nicholas since his birth, and was capable of providing a loving and stable home for Nicholas. Further, plaintiff did not want defendant to have any unsupervised visitation with Nicholas due to her concerns that he was incapable of caring for him properly. In support of this contention, plaintiff testified that defendant was illiterate and had a learning disability.

In contrast, defendant's evidence tended to show he was capable of caring for Nicholas, in that during the time he and plaintiff lived together, he had taken care of Nicholas, including changing Nicholas' diapers and feeding Nicholas. Further, defendant testified that he had previously taken care of his girlfriend's and sister's minor children without any incidents. In addition, defendant confirmed that he resided in a motel room at the Country Manor Inn in Lexington, Davidson County, which consisted of one room and one bathroom, with cooking facilities and a crib for Nicholas. Defendant received $394.00 per month in Social Security disability income, and had expenses in excess of $600.00 per month.

Following a hearing, the trial court entered an order in which it awarded primary custody of Nicholas to plaintiff, and made the following finding with regard to defendant's visitation with Nicholas:

> 8. The Defendant lives in [an] unfit environment to have unsupervised visitation with the minor child, to wit, a motel room at the Country Manor Inn, Lexington, Davidson County, North Carolina. *The court takes judicial notice that murders, robberies and other violent crimes have taken place in and about the premises of the Country Manor Inn.*

(Emphasis added). The trial court then ordered that defendant receive only supervised visitation with Nicholas, with substantial restrictions attached.

On appeal, defendant contends the trial court erred by (1) taking judicial notice that murders, robberies and other violent crimes have taken place in and about the premises of the Country Manor Inn, where defendant resided in Lexington; and, (2) allowing defendant only supervised visitation with Nicholas.

I. Judicial Notice

[1] Rule 201 of the N.C. Rules of Evidence permits the trial court to take judicial notice of adjudicative facts, which are defined as those facts which are:

> (b) . . . [N]ot 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. Gen. Stat. § 8C-1, Rule 201(b) (1992). The trial court is required to take judicial notice of certain facts only when a party requests it and supplies the necessary information pursuant to Rule 201(d); otherwise, it is discretionary with the trial court pursuant to Rule 201(c). N.C. Gen. Stat. § 8C-1, Rules 201(c) and (d); *see also* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 24, at 97 (5th ed. 1998). In this case, it does not appear from the record that plaintiff requested the trial court to take judicial notice of the presence of criminal activity in and about the area where defendant resides, so we must assume that the trial court exercised its discretionary authority in doing so.

It is clear that judicial notice must be taken of the public laws of this State, of the United States, and of any other state or territory of the United States, as well as of any foreign country. *Broun*, § 25 at 100. Further, judicial notice is appropriate to determine the existence and jurisdiction of the various courts of the State; their terms or sessions, and judges; the counties comprising the various judicial districts; and, any earlier proceedings in the court involving the same case. *Id.*, § 26 at 102-103. In addition, "there [are] a wide range of miscellaneous facts which will or may be judicially noticed," including the following:

> [T]he laws of nature; human impulses, habits, functions and capabilities; the prevalence of a certain surname; established medical and scientific facts; well-known practices in farming, construction work, transportation, and other businesses and professions; the characteristics of familiar tools and appliances, weapons, intoxicants, and poisons; the use of highways; the normal incidence of the operation of trains, motor vehicles, and planes; prominent geographical features such as railroads, water courses, and cities and towns; population and area as shown by census reports; the days, weeks, and months of the calendar; the effect of natural conditions on the construction of public improvements; the facts of history; important current events; general economic and social conditions; matters affecting public health and safety; the meaning of words and abbreviations; and the results of mathematical computations.

Id., § 27 at 104-109 (citations omitted). However, although our case law provides a laundry list of situations where judicial notice is appropriate, "[i]t is the spirit and example of the rulings, rather than their precise tenor, that is to be useful in guidance." *Id.*, § 27 at 105. With this in mind, it is our job to determine whether it was appropriate for the trial court in this case to take judicial notice of the fact that criminal activity has taken place in and about the Country Manor Inn in Davidson County.

As the statute implies, a court may take judicial notice of a fact if it is an "indisputable adjudicative fact." *In re D.S.*, 622 A.2d 954, 957 (Pa. Super. Ct. 1993). "A fact is considered indisputable if it 'is so well established as to be a matter of common knowledge.' Conversely, a court cannot take judicial notice of a disputed question of fact." *Id.* (citations omitted). "By taking judicial notice of a fact so commonly known, the court avoids the needless formality of introducing evidence to prove an incontestable issue." *Id.*

In *Thompson v. Shoemaker*, 7 N.C. App. 687, 173 S.E.2d 627 (1970), this Court was presented with a request by the plaintiff to take judicial notice "of the scarcity of low income housing in the City of Charlotte." *Id.* at 690, 173 S.E.2d at 630. This Court refused to do so, stating that "[t]he unavailability of low income housing in Charlotte is undoubtedly subject to debate and in our opinion it is not a factor that can be judicially noticed by this court." *Id.*

Similarly, in the case *sub judice*, the prevalence of crime in and about the premises of the Country Manor Inn, and how this crime affects the safety of its residents, is no doubt a matter of debate within the community. Therefore, rather than simply taking judicial notice that the area was a "high crime area," the trial court should have simply had a member of the community, possibly a Davidson County law enforcement officer, testify to the fact that numerous crimes had occurred in or about the premises. There is no indication in the record about whether the trial court actually heard evidence regarding the criminal activity at the Country Manor Inn. Therefore, we find that the trial court committed an abuse of discretion by judicially noticing this fact *sua sponte*, and the case must be remanded for further proceedings consistent with this opinion.

II. Right to Reasonable Visitation

[2] Next, we address defendant's contention that the trial court erred by granting him only supervised visitation with Nicholas. At the outset, we note that it has often been stated that:

> Since minor children are entitled to the love and companionship of both their parents, insofar as that is possible and is consistent with their welfare, a parent whose child is placed in the custody of another person has a right of access to the child at reasonable times. The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless [1] the parent has forfeited the privilege by his [or her] conduct or [2] unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied.

2 William T. Nelson, *Nelson on Divorce and Annulment* § 15.26, at 274-275 (2nd ed. 1961); *see also In re Custody of Stancil*, 10 N.C. App. 545, 550, 179 S.E.2d 844, 848 (1971).

In determining matters involving child custody and visitation rights of parents, the trial court is granted "wide discretionary power." *Swicegood v. Swicegood*, 270 N.C. 278, 282, 154 S.E.2d 324, 327 (1967) (where our Supreme Court announced that "[w]hile the welfare of a child is always to be treated as the paramount consideration, the courts recognize that wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases"). However, a trial court's discretionary authority is not unfettered. N.C. Gen. Stat. § 50-13.5(i) states, in pertinent part:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the *right of reasonable visitation*, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (1995) (emphasis added). In interpreting this statute, this Court has held that "where severe restrictions are placed on the right [of reasonable visitation], there should be some finding of fact, supported by competent evidence in the record, warranting such restrictions." *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E.2d 822, 824 (1980).

In this case, the trial court made the following finding:

> 8. The Defendant lives in [an] unfit environment to have unsupervised visitation with the minor child, to wit, a motel room at the Country Manor Inn, Lexington, Davidson County, North Carolina.

Thereafter, based upon this finding, the trial court entered an order which contained the following restrictions on defendant's visitation with Nicholas:

> 2. The Defendant shall have *supervised visitation* with the minor child in the home of the Plaintiff as follows:
>
> a. Every other Saturday and Sunday from 9:00 o'clock a.m. until 3:00 o'clock p.m.
>
> b. Father's Day from 9:00 o'clock a.m. until 5:00 o'clock p.m.
>
> c. On the minor child's birthday, October 13th, from 9:00 o'clock a.m. until 1:00 o'clock p.m.

d. For a period of time during the day on Thanksgiving Day, Christmas Day and Easter Sunday.

3. The aforementioned *supervised visitation* shall continue until one of the following occurs:

a. The Defendant finds suitable employment or receives permanent social security above poverty level and maintains his own home, mobile home or apartment with at least two bedrooms with at least a six (6) month lease in Davidson County, North Carolina. *The Defendant shall not reside with any relatives* or [fiancée] and must maintain a suitable living arrangement with a sufficient bed and facilities; or

b When the minor child reaches the age of four (4) years and it is not necessary for the child to have close supervision which he needs while under the age of two (2) years.

(Emphasis added).

Upon review, we find the trial court's findings are insufficient to support these severe restrictions on defendant's visitation rights. There is no competent evidence in the record that shows defendant has ever engaged in any conduct that warrants defendant's forfeiting his right to visitation with Nicholas, *see Johnson v. Johnson*, 45 N.C. App. at 648, 263 S.E.2d at 825, or that the exercise of defendant's right to visitation would be detrimental to the best interests of Nicholas. In fact, we note that the trial court did find that defendant was "a fit and proper person to have secondary care, custody and control of [Nicholas] and it is in the best interests of [Nicholas] that his secondary care, custody and control be placed with the Defendant . . . ." Additionally, we see no rhyme or reason for the trial court's order which prohibited defendant from residing with any of his relatives. There is absolutely no competent evidence in the record that demonstrates why it would not be in Nicholas' best interest to reside with defendant's relatives.

Accordingly, that portion of the trial court's order relating to defendant's visitation rights is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed in part, vacated in part, and remanded.

Chief Judge EAGLES and Judge LEWIS concur.

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, PLAINTIFF v. JELINDA BURNETTE, BY HER GUARDIAN AD LITEM, REBECCA LIPTOW, AND REBECCA LIPTOW, INDIVIDUALLY, AND CATAWBA COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA98-145

(Filed 29 December 1998)

1. **Insurance— insolvent insurer—two policies with same insured—Guaranty Association—extent of obligation**

The trial court did not err in a declaratory judgment action arising from an automobile accident in which the insurer became insolvent by finding that the obligation of the North Carolina Insurance Guaranty Association was limited to $300,000 with a set-off where the insolvent insurer had issued a primary and an excess policy to the insured. N.C.G.S. § 58-48-35 limits the Association's exposure to $300,000 subject to set-off for a single covered claim (the underlying injury) even though the insolvent insurer provided primary and excess coverage under separate policies.

2. **Immunity— governmental—waiver—school board—insolvent insurer—primary and excess coverage with same insurer—limit of indemnity**

The trial court correctly found that a school board had waived governmental immunity to the extent of $300,000 prior to set-off where a complaint was filed against the Board arising from an accident at a school bus stop, the Board was insured by primary and excess policies with the same insurer, that insurer became insolvent, and the North Carolina Insurance Guaranty Association filed this declaratory judgment action to determine its obligation. A local board of education waives its immunity only to the extent it is indemnified by insurance and the Association's responsibility to the Board is limited to $300,000 prior to set-off by statute. The fact that the Board had two policies with the insolvent insurer does not negate the holding that

the waiver is effectual only to the amount that the Board is indemnified.

Appeal by defendants Jelinda Burnette, by her Guardian Ad Litem Rebecca Liptow, and Rebecca Liptow, individually from judgment entered 25 September 1997 by Judge Forrest A. Ferrell in Catawba County Superior Court. Heard in the Court of Appeals 6 October 1998.

Moore & Van Allen, by Joseph W. Eason and Christopher J. Blake, for plaintiff-appellee.

Price, Smith, Hargett, Petho & Anderson, P.A., by William Benjamin Smith, for defendant-appellants Jelinda Burnette, by her Guardian Ad Litem, Rebecca Liptow, and Rebecca Liptow, individually.

Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by Terry D. Horne, for defendant-appellee Catawba County Board of Education.

WALKER, Judge.

The North Carolina Insurance Guaranty Association (Association) is a non-profit unincorporated legal entity established pursuant to the Insurance Guaranty Association Act, N.C. Gen. Stat. § 58-48-1, *et seq.* (the Act). Its purpose is to provide payment of covered claims under certain insurance policies when the insurer has become insolvent. As plaintiff, it filed this action seeking a declaratory judgment as to its responsibilities in an underlying negligence action brought by defendants Jelinda Burnette (Burnette) by her Guardian Ad Litem Rebecca Liptow, and Rebecca Liptow, individually, against defendant Catawba County Board of Education (Board).

The underlying dispute arises out of an automobile accident that occurred on 1 February 1994. At the time, Burnette was a five-year-old student in the school system operated by the Board. While walking toward a school bus stop where she expected to be picked up by one of the Board's school buses, she was struck and injured by a vehicle operated by Cheryl Bradshaw. Burnette filed a complaint against Bradshaw and the Board alleging that the Board was negligent by: (a) instituting school bus procedures which failed to provide for the safe pick-up of children; (b) changing the Board's school bus procedure without notifying Burnette and Liptow or other children creating

a hazard; (c) negligently designing and implementing school bus procedures; (d) failing to safeguard Burnette and other children during the Board's school bus pick-up procedure; and (e) failing to investigate the safety of the Board's school bus pick-up procedure before implementation.

At the time of the accident, the Board was insured by two liability policies issued by United Community Insurance Company (UCIC), a New York-based insurance company. The primary policy had a coverage limit of $1,000,000 and the excess policy had a coverage limit of $5,000,000. On 7 July 1994, UCIC was placed into rehabilitation by a New York court and was subsequently placed into liquidation on 9 November 1995. On 31 May 1995, UCIC was declared insolvent and placed into liquidation in North Carolina by order of the Wake County Superior Court.

After UCIC was placed into liquidation, the Association began to fulfill its statutory obligations to the insureds of UCIC, including the Board. The Association filed this action seeking a declaratory judgment that the allegations made by Burnette in the underlying action would not constitute "covered claims" under the Act and that, if they did, the Association's obligation was limited to an amount, prior to set-off, not to exceed $300,000 under the primary policy issued to the Board by UCIC. Burnette answered asking for a declaratory judgment that the Association is obligated to provide coverage to the extent of $600,000. The Board answered and cross-claimed against Burnette seeking a declaration of whether Burnette had a "covered claim" and if not, to find that the Board had not waived its governmental immunity with regard to their claims. Thereafter, the Board and the Association filed motions for summary judgment and Burnette moved for judgment on the pleadings.

The trial court found "that there is no issue of material fact with regard to the allegation of negligence contained in paragraph 10c [negligent design and implementation of school bus procedures] and the Plaintiff [the Association] is therefore entitled to Summary Judgment on this issue." However, the trial court found that "[w]ith regard to the allegations of negligence in paragraph 10a. b. d. e. [sic] there are genuine material issues of fact and the Plaintiff is not entitled to Summary Judgment as a matter of law as to those acts of negligence." The trial court also found that the Association was obligated to provide coverage to the extent of $300,000 and was entitled to a set-off against the recovery of up to $25,000 of the insurance provided

to Cheryl Bradshaw in the underlying tort action if that amount were recovered. Further, the trial court found that the Board had waived its governmental immunity to the same extent.

It is clear from this record that the trial court made no determination whether defendant Burnette's claims of negligence contained in paragraphs 10 a, b, d, and e constituted "covered claims" under the UCIC policy and the Act as requested by the Association. Indeed, the trial court found that "genuine material issues of fact" existed and that summary judgment was not proper. Thus, this order leaves issues to be determined by the trial court and is not final. *See Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950). Because further action is required by the trial court to make it a final judgment, it is interlocutory. *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 460 S.E.2d 332 (1995).

Interlocutory orders are "ordinarily not directly appealable." *Liggett Group v. Sunas*, 113 N.C. App. 19, 437 S.E.2d 674 (1993). There are two means by which an interlocutory order or judgment may be immediately appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) and (2) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Bartlett v. Jacobs*, 124 N.C. App. 521, 477 S.E.2d 693 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations omitted). Here, the trial court made no Rule 54(b) certification and plaintiff has not shown nor can we discern any substantial right that would be lost absent immediate review.

Thus, this appeal should be dismissed; however, in the exercise of our discretion, we elect to decide the issue presented in defendant Burnette's assignments of error. N.C.R. App. P. 2.

[1] Burnette assigns as error the trial court's finding that the Association's obligation to provide coverage was limited to $300,000 in all events with a set-off of any amount up to $25,000 in liability insurance paid on behalf of Cheryl Bradshaw. She also assigns as error the trial court's ruling that the Board has waived governmental immunity to the same extent. Burnette argues that because the Board had two policies with UCIC, a primary and an excess, the Association should be required to provide up to $300,000 of coverage under each policy for a total of up to $600,000.

The Association's duties are established in N.C. Gen. Stat. § 58-48-35 which provides in part:

> (a) The Association shall:
>
> (1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination. This obligation includes only the amount of each covered claim that is in excess of fifty dollars ($50.00) and is less than three hundred thousand dollars ($300,000). . . . The Association has no obligation to pay a claimant's covered claim, except a claimant's workers' compensation claim, if:
>
> a. The insured had primary coverage at the time of the loss with a solvent insurer equal to or in excess of three hundred thousand dollars ($300,000) and applicable to the claimant's loss; or
>
> b. The insured's coverage is written subject to a self-insured retention equal to or in excess of three hundred thousand dollars ($300,000).
>
> If the primary coverage or the self-insured retention is less than three hundred thousand dollars ($300,000), the Association's obligation to the claimant is reduced by the coverage and the retention. . . . In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

N.C. Gen. Stat. § 58-48-35(a)(1) (1994).

In 1989, N.C. Gen. Stat. § 58-48-35 was amended to include a limitation on the exposure of the Association for a single covered claim. *See* 1989 N.C. Sess. Laws ch. 206, § 3. The amendment provides that the Association has no obligation if the insured had other primary coverage with a solvent insurer or a self-insured retention, either of which is equal to or in excess of $300,000 and applicable to the claimant's loss. N.C. Gen. Stat. § 58-48-35 (1994). In any event, the purpose of this provision is to limit the Association's exposure to $300,000 for a single covered claim. The statute already limited the Association's exposure to $300,000 for a covered claim, and this

amendment limits the amount a claimant can receive from the Association where other primary coverage applies. If other applicable primary coverage exists, the Association is obligated only for the difference between that coverage and $300,000. If more than $300,000 of primary coverage is available, then the Association has no obligation.

Here, we construe the statute to limit the Association's exposure to $300,000, subject to set-off, for a single covered claim (Burnette's injury). Even though the insolvent insurer provided the primary and excess coverage under separate policies, the Association is only obligated to provide $300,000 of coverage less the set-off.

[2] For the same reasons, defendant Burnette argues that the trial court erred in finding that the Board's governmental immunity was waived to the extent of $300,000 prior to set-off. A local board of education waives its immunity only to the extent it is "indemnified by insurance for such negligence or tort." N.C. Gen. Stat. § 115C-42 (1997). This Court has held that a waiver of governmental immunity ceases at the point where indemnification ends. *McDonald v. Village of Pinehurst*, 91 N.C. App. 633, 372 S.E.2d 733 (1988). In *McDonald*, an insurer had become insolvent and the Association had taken over its responsibilities. The city argued that because its insurer had become insolvent its waiver of immunity was ineffectual. This Court disagreed and held that because the Association's responsibility arose out of the insurance contract between the city and the insurer, the waiver was still effective up to the amount of coverage provided by the Association. *Id.*

Here, the fact that the Board had two policies with the insolvent insurer does not negate the holding that the waiver is effectual only to the amount that the Board is indemnified. Because the Association's responsibility to the Board is limited to $300,000 prior to set-off by statute, the Board's waiver is limited to the same extent. Further, neither party argues that the Board has waived its immunity beyond $300,000 less set-off provided by the Association. For the foregoing reasons, defendant Burnette's assignments of error are overruled and the order of the trial court is affirmed.

The Association and defendant Board cross-assign as error the trial court's denial in part of their motions for summary judgment. As this portion of the declaratory judgment was not finally determined by the trial court which found that "genuine material issues of fact" existed, we remand for further proceedings on the issue of whether a "covered claim" exists under the Act.

Affirmed in part and remanded.

Judges GREENE and SMITH concur.

IN THE MATTER OF: THE GRANTING OF A VARIANCE BY THE TOWN OF FRANKLIN, LOUISE DARNELL, PETITIONER-APPELLANT v. TOWN OF FRANKLIN, TOWN OF FRANKLIN BOARD OF ADJUSTMENT, MAC BRYANT, JOHN CRAWFORD, EDWIN HALL, STEVE LEDFORD, JACK POWELL, CLYDE SANDERS, ERNIE SANDERS, AND DICK WALLACE, IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF ADJUSTMENT OF THE TOWN OF FRANKLIN, AND DAVID HENSON, NANCY SCOTT, TOM WOODLEY, MERLE DRYMAN, GARY NICKLESON AND BILLY MASHBURN, IN THEIR CAPACITY AS MAYOR AND MEMBERS OF THE BOARD OF ALDERMEN OF THE TOWN OF FRANKLIN, RESPONDENTS-APPELLEES

No COA98-154

(Filed 29 December 1998)

Jurisdiction— petition for certiorari—plaintiff as aggrieved party—insufficient allegation—motion to amend

The trial court erred in an action arising from a zoning variance by dismissing a petition for certiorari for lack of subject matter jurisdiction in that petitioner failed to allege that she was an aggrieved party. A party must sufficiently plead their aggrieved status when seeking a petition for certiorari; however, the trial court retains the inherent power to inquire into and determine questions of its own jurisdiction and the petitioner had clearly established that she would be affected by this action in her appearance before the Board of Adjustment and at the Town's meeting. As the record shows that petitioner can establish her status as an aggrieved party, an amendment should be allowed under N.C.G.S. § 1A-1, Rule 15(a) to show that jurisdiction exists.

Appeal by petitioner from an order of dismissal entered 24 October 1997 by Judge Ronald E. Bogle and filed 27 October 1997 in Macon County Superior Court. Heard in the Court of Appeals 6 October 1998.

David A. Sawyer for petitioner-appellant.

Jones, Key, Melvin & Patton, P.A., by Bobby Joe Key and Chester M. Jones, for respondents-appellees.

WALKER, Judge.

On 2 July 1997, petitioner Louise Darnell filed a petition for writ of certiorari seeking judicial review of a decision made 2 June 1997 by the Town of Franklin Board of Aldermen (Town). The record in this case shows that the Town's Board of Adjustment initially considered a request from Carriage Park Villas for a variance from the setback requirements in the Town's zoning ordinance. As an adjoining property owner, petitioner appeared and objected to the granting of the variance. After the Board of Adjustment recommended granting the variance, the matter came before the Town at its regular meeting on 2 June 1997. At this time, petitioner again appeared and objected.

Thereafter, petitioner, through her attorney, filed a verified petition for writ of certiorari in the superior court which alleged she was entitled to the writ "[a]s a property owner of the Town of Franklin, whose interests are adversely affected by the actions of the Town of Franklin Board of Aldermen and the Town of Franklin Board of Adjustment."

When the matter came on for hearing on 8 September 1997 in the superior court, the respondents made a motion to dismiss the petition based on lack of subject matter jurisdiction, asserting that petitioner had failed to meet the requirements of N.C. Gen. Stat. § 160A-388 which states an appeal "may be taken by any person aggrieved." N.C. Gen. Stat. § 160A-388(b) (1994). In support of the motion to dismiss, respondents argued that N.C. Gen. Stat. § 160A-388(e) as interpreted by our courts only allows an "aggrieved" party to seek judicial review of such a decision, that the petitioner did not plead sufficient facts to show that she was an "aggrieved" party, and that because petitioner lacked standing, the trial court was without subject matter jurisdiction to consider the petition. The trial court took the matter under advisement and gave the parties until 12 September 1997 to provide the court with further arguments. Within that time, petitioner filed a motion to amend her petition along with a brief in support of the motion to amend, a response to respondents' motion to dismiss, a draft of an amended petition, and an affidavit from petitioner in support of the amended petition which alleged that she was an "aggrieved party."

On 24 October 1997, the trial court entered an order dismissing the petition, stating "it appears to the Court that the Court is without subject matter jurisdiction to hear the Petition for Writ of Certiorari as filed by the Petitioner herein and as a consequence, the same

should be dismissed and the Court is without jurisdiction to rule upon any other motions made or filed herein by any of the parties." Petitioner assigns as error the trial court's dismissal of the petition for lack of subject matter jurisdiction and the failure of the trial court to consider petitioner's motion to amend.

N.C. Gen. Stat. § 160A-388(e) provides that decisions of a local board of adjustment "shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C. Gen. Stat. § 160A-388(e) (1994). Likewise, N.C. Gen. Stat. § 160A-381(c) provides that zoning decisions of local city councils or boards of aldermen "shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C. Gen. Stat. § 160A-381(c) (Cum. Supp. 1997).

"A petition for certiorari is not an action for civil redress or relief . . . [it] is simply a request for the court addressed to judicially review a particular decision of some inferior tribunal or government body." *Little v. City of Locust*, 83 N.C. App. 224, 226, 349 S.E.2d 627, 629 (1986), *disc. review denied*, 319 N.C. 105, 353 S.E.2d 111 (1987). "[A]ll that is needed is the record of the decision involved and a Superior Court judge to review it." *Id.* at 225, 349 S.E.2d at 628. Rule 19 of the General Rules of Practice for the Superior and District Courts provides the procedure for the hearing of petitions for certiorari in superior court. The rule begins with the procedure for recordari and then notes that certiorari is to be sought in the same manner:

> The Superior Court shall grant the writ of recordari only upon petition specifying the grounds of the application. The petition shall be verified and the writ may be granted with or without notice. When notice is given the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties.... In proper cases *and in like manner*, the court may grant the writ of certiorari.

N.C.R. Prac. 19 (emphasis added).

Petitioner argues that the trial court had subject matter jurisdiction over the case and that if the petition were deficient, she should have been allowed to amend her petition so as to establish her standing to bring the petition. We agree.

Judicial review of a zoning decision can only be requested by an "aggrieved party." *Concerned Citizens v. Bd. of Adjustment of*

Asheville, 94 N.C. App. 364, 380 S.E.2d 130 (1989). "An aggrieved party is one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community, amounting to a reduction in the value of his property." *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 397 S.E.2d 657 (1990). When seeking a writ of certiorari, a party must sufficiently plead their aggrieved status in the petition. *See Kentallen, Inc. v. Town of Hillsborough*, 110 N.C. App. 767, 431 S.E.2d 231 (1993).

Here, when the petitioner, as an adjoining property owner, appeared before the Board of Adjustment and at the Town's meeting to object to the granting of the variance, she clearly established that she would be affected by this action, distinct from the rest of the community. However, petitioner did not allege that she was an aggrieved party as required.

Although the petition was deficient in this respect, the trial court retained the "inherent judicial power to inquire into, hear and determine the questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). Thus, while the trial court lacks the power to make an order granting relief where it lacks subject matter jurisdiction, it retains the power to make inquiry whether it has jurisdiction. *See Swenson v. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

A petition for writ of certiorari is a pleading filed in the superior court and is within the scope of the Rules of Civil Procedure which "shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and *proceedings of a civil nature* except when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1 (1990) (emphasis added). Thus, although N.C.R. Prac. 19 provides a procedure for the issuance of a writ of certiorari upon the filing of a petition, we must turn to Rule 15 of the Rules of Civil Procedure in addressing petitioner's request to amend.

Petitioner argues that the trial court should have allowed her to amend pursuant to Rule 15:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a

> party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). We note that Rule 15 is not limited to "civil actions" but applies to "pleadings." *See White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989) (Rule 15 applied to pleading seeking relief in the nature of certiorari although writ not requested).

"[A]s a general rule, '(a) pleading may not be amended so as to confer jurisdiction in a particular case stated; but there may be an amendment to show that the jurisdiction exists.' 1 McIntosh, N.C. Practice 2d, s 1285, p. 713." *Crawford v. Board of Education*, 3 N.C. App. 343, 346, 164 S.E.2d 748, 750 (1968), *affirmed*, 275 N.C. 354, 168 S.E.2d 33 (1969). As the record shows that petitioner can establish her status as an aggrieved party, an amendment should be allowed in that regard to show that jurisdiction exists.

Having determined that the petition was a "pleading" within the meaning of the Rules of Civil Procedure, the trial court had the authority to grant the motion to amend the petition and was not required to dismiss due to lack of jurisdiction.

Accordingly, we hold it was error for the trial court to dismiss the petition and we remand the case with instructions that the petitioner be allowed to amend her petition as requested and that the writ of certiorari be granted.

Reversed and remanded.

Judges GREENE and SMITH concur.

CABELL J. REGAN, PLAINTIFF v. LINDA GAIL SMITH, DEFENDANT

No. COA97-1232

(Filed 29 December 1998)

Child Support, Custody, and Visitation— custody—initial permanent order—changed circumstances—not required

A permanent child custody order was remanded where the order suggested that the court may have believed that plaintiff had the burden to establish changed circumstances but the issue was decided at a time when no prior permanent custody order was in effect. The court was therefore obligated to consider all the evidence and determine which party would best promote the interest and welfare of the child but was not required to find changed circumstances of any kind.

Appeals by plaintiff and defendant from order for custody and order for visitation entered 28 July 1997 by Judge Gary L. Locklear in Robeson County District Court. Heard in the Court of Appeals 21 September 1998.

Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiff-appellant.

No brief for defendant.

LEWIS, Judge.

Plaintiff and defendant are the biological parents of a child born in 1989. This action for custody and support, the first and only such action brought by either party, was filed in August 1996. The child was then living with defendant.

Plaintiff filed an amended complaint in which he requested an *ex parte* emergency order granting him custody of the child pendente lite. Following a hearing on 3 January 1997, at which defendant was not present, the trial court awarded plaintiff with temporary, exclusive custody of the child pending a full hearing on the custody issue. The facts justifying the award of temporary custody are not relevant to our disposition of this appeal.

Following a second hearing on 10 January 1997, which both parties attended, the trial judge issued an order that continued the earlier order for temporary custody and established defendant's visi-

tation rights. Thereafter, the child apparently resided with plaintiff's sister, because on 7 February another order was entered stating that "[t]he minor child shall continue to reside with the sister of the Plaintiff . . . until further orders of this Court."

A full hearing on the issue of permanent custody occurred on 3 June 1997, after which the trial court entered a custody order containing the following conclusion of law: "That given the history, it would be in the child's best interest and further, that the Court has not been shown a substantial reason to change custody, that custody continue with the mother, the defendant." The temporary custody order was dissolved, and custody of the child was, in the word of the trial judge, "returned" to defendant. Plaintiff appeals. Because we cannot tell whether the trial court applied the correct standard when it decided the issue of permanent custody, we remand the case.

In one sense, all child custody orders are "temporary": they are subject to modification, *see, e.g.*, N.C. Gen. Stat. § 50-13.7(a) (1995), and they terminate once the child reaches the age of majority, *see* N.C. Gen. Stat. §§ 50-13.1 through 50-13.3 (Cum. Supp. 1997), N.C. Gen. Stat. § 48A-2 (1984). Yet a distinction is drawn in our statutes, *see* N.C. Gen. Stat. § 50-13.5(d)(2) and (3) (1995), and in our case law, *see, e.g.*, *Story v. Story*, 57 N.C. App. 509, 513-16, 291 S.E.2d 923, 926-27 (1982), between "temporary" or "interim" custody orders and "permanent" or "final" custody orders.

A permanent custody order establishes a party's present right to custody of a child and that party's right to retain custody indefinitely. *See, e.g.*, *In re Custody of Griffin*, 6 N.C. App. 375, 379, 170 S.E.2d 84, 86 (1969). Permanent custody orders arise in one of two ways. If the necessary parties have entered into an agreement for permanent custody, and the trial court enters a consent decree which contains that agreement, the consent decree is a permanent custody order. *See, e.g.*, *Norton v. Norton*, 76 N.C. App. 213, 215-16, 332 S.E.2d 724, 726-27 (1985). In all other cases, permanent custody orders are those orders that resolve a contested claim for permanent custody of a child by granting permanent custody to one of the parties. They are issued after a hearing of which all parties so entitled are notified and at which all parties so entitled are given an opportunity to be heard. *See Broaddus v. Broaddus*, 45 N.C. App. 666, 671-72, 263 S.E.2d 842, 845 (1980).

In contrast, temporary custody orders establish a party's right to custody of a child pending the resolution of a claim for permanent

custody—that is, pending the issuance of a permanent custody order. *See Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986); *accord*, *Gustafson v. Gustafson*, 272 N.C. 452, 457, 158 S.E.2d 619, 622-23 (1968). A temporary custody order may be issued *ex parte*. *See* N.C. Gen. Stat. § 50-13.5(d)(3); *Story*, 57 N.C. App. at 514, 291 S.E.2d at 926.

When a court for the first time decides the issue of permanent custody, it must determine which party to the dispute will "best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (Cum. Supp. 1997); *see Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997); *Story*, 57 N.C. App. at 515, 291 S.E.2d at 927. Although all parties have an incentive to present favorable evidence at the permanent custody hearing, no party has the burden of proof on the "best interest" question. The trial court must decide the "best interest" question based on all the evidence presented. *Pulliam v. Smith*, 348 N.C. 616, 631, 501 S.E.2d 898, 906 (1998) (Orr, J., concurring in the result); *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992), *disapproved on other grounds by Pulliam*, *supra*.

In contrast, once a permanent custody order has been issued, such order may be modified or vacated only upon a showing of substantially changed circumstances affecting the welfare of the child. N.C. Gen. Stat. § 50-13.7(a) (1995); *Pulliam*, 348 N.C. at 618-19, 501 S.E.2d at 899 (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)); *but see Clark v. Clark*, 23 N.C. App. 589, 594, 209 S.E.2d 545, 548 (1974) (where consent decree for permanent custody contained parties' agreement to allow trial judge to modify visitation rights without a showing of changed circumstances, held, trial judge could alter visitation rights without a showing of changed circumstances). The party moving to modify or vacate the order has the burden of proving such changed circumstances. G.S. 50-13.7(a); *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899 (quoting *Blackley*, 285 N.C. at 362, 204 S.E.2d at 681). The rule established by section 50-13.7(a) and developed within our case law requires a showing of changed circumstances only where an order for permanent custody already exists. *Cf. Story*, 57 N.C. App. at 515-16, 291 S.E.2d at 927 (upholding award of temporary custody and remanding case for reconsideration of permanent custody issue based on a "best interest" standard); *accord*, *Griffin*, 6 N.C. App. at 379, 170 S.E.2d at 86.

In this case, the trial judge decided the issue of permanent custody at a time when no prior permanent custody order was in effect. He was therefore obligated to consider all the evidence and determine which party would best promote the interest and welfare of the child, but he was not required to find changed circumstances of any kind. Just as defendant had no burden to prove changed circumstances to modify the temporary custody order, plaintiff was not required to prove changed circumstances to justify entry of a permanent custody order that would alter the child's living arrangements prior to this lawsuit.

The permanent custody order suggests the trial court may have believed, incorrectly, that plaintiff had the burden to establish changed circumstances at the permanent custody hearing. We remand the case for the trial court to reevaluate the evidence based on the "best interest of the child" standard. Our disposition of plaintiff's appeal makes it unnecessary for us to address the other issues raised in plaintiff's brief.

Although defendant filed a notice of appeal in this case, she did not file a brief. Her appeal is therefore dismissed.

Appeal of defendant dismissed; case remanded.

Judges HUNTER and SMITH concur.

GLADYS VINES CAUDILL, PLAINTIFF v. EVERETT CYRIL CAUDILL, DEFENDANT

No. COA98-377

(Filed 29 December 1998)

Divorce— equitable distribution—marital property—gift from parent—burden of proof

An equitable distribution order was vacated and remanded as it pertained to the classification of a tract of land which had been transferred to defendant by his mother where the trial court found that defendant was unable to establish by preponderance of the evidence that he acquired the property by gift. When property is acquired during marriage by one spouse from his or her parent, a rebuttable presumption arises that the transfer is a gift

to that spouse; that presumption must be rebutted by the spouse resisting the separate property classification by showing a lack of donative intent.

Appeal by defendant from judgment entered 30 January 1998 by Judge Samuel A. Cathey in Iredell County District Court. Heard in the Court of Appeals 18 November 1998.

Pressly, Thomas & Conley, P.A., by Jessie Conley, for plaintiff.

Homesley, Jones, Gaines, Homesley & Dudley, by L. Ragan Dudley, for defendant.

HUNTER, Judge.

Plaintiff and defendant were married on 23 December 1961 and separated on 24 October 1992. Plaintiff filed a complaint on 1 November 1993 seeking an absolute divorce and equitable distribution of the marital property. Defendant filed an answer and a counterclaim, also requesting equitable distribution. A judgment of absolute divorce was entered 31 January 1994 and the original equitable distribution order entered 1 May 1996. Defendant appealed that order, assigning error to the trial court's classification of the 1956 Dodge automobile and a forty-six acre tract of land, with improvements. This Court remanded the case to the trial court for additional findings of fact to support classification of the property. An amended equitable distribution order was entered 30 January 1998, and from that order defendant appeals.

We begin our consideration of defendant's assignment of error with a general review of the law of equitable distribution. In an action for equitable distribution the court must classify property as either "marital property" or "separate property," as these terms are defined in N.C. Gen. Stat. § 50-20(b)(1) and § 50-20(b)(2), before dividing the property pursuant to § 50-20(c). *McLeod v. McLeod*, 74 N.C. App. 144, 147, 327 S.E.2d 910, 912-913, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985). Separate property is not subject to equitable distribution. *Id.*

" 'Marital property' means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned, except property determined to be separate property . . . ." N.C. Gen. Stat. § 50-20(b)(1); *McLeod*, 74 N.C. App. at 147, 327 S.E.2d at 913. " 'Separate property' means all real and personal property

acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. § 50-20(b)(2); *McLeod*, 74 N.C. App. at 147, 327 S.E.2d at 913. " 'Property acquired in exchange for separate property' is separate property, as is income derived from separate property and increases in value of separate property." *McLeod*, 74 N.C. App. at 147-148, 327 S.E.2d at 913.

The sole question on appeal in this case is whether the trial court erred by classifying the forty-six acre tract of land as entirely marital property. The trial court made the following findings of fact with respect to the tract of land and the improvements made to it during the course of the marriage:

> The Court finds that the 46 acre tract had belonged to Defendant's family for several generations. The Court finds that the Defendant's mother conveyed the property to the Defendant and his first wife in 1948, that they separated in 1949, and that they conveyed the property back to the Defendant's mother in 1953. The Court finds that in 1967, the Defendant's mother conveyed the property to Defendant, reserving a life estate. That the Court finds that in 1978, the Defendant's mother conveyed her life interest to the Defendant. The Court finds that both conveyances were made during Defendant's marriage and neither deed named Plaintiff as a grantee. That the Court finds the Defendant did not pay his mother any money in exchange for the property and there were no revenue stamps on the Deeds. The Court further finds that the Defendant agree[d] to provide care for his mother in return for the property and the Plaintiff had in fact, quit her job to provide care for defendant's mother when she became ill.
>
> The Court finds that there was a dwelling on the property when Defendant's mother conveyed it to him and that significant and extensive improvements were made to [the] property after Defendant acquired title. The parties executed deeds of trust conveying the property as security for four loans between 1967 and 1992, using at least some of the loan proceeds to construct additional improvements upon the property.
>
> The Court finds that the Plaintiff satisfied her initial burden of establishing that the 46 acre tract was marital property, as defined by N.C.G.S. §50-20(b)(1). The Court finds that the Defendant was unable to establish by a preponderance of the evidence that he acquired the property by gift. That the Court finds

that the transfer of land was an exchange supported by consideration and is therefore marital property.

The Court is not persuaded by Defendant's evidence regarding the classification of this item and finds that the 46 acre tract previously described above is marital property and had a value of $194,297.00 on the date of separation.

The amended distribution order, as ordered by this Court on remand, expands on the finding of fact with regard to whether the transfer of land was supported by consideration. However, in the amended order the trial court misplaces the burden of proof on the defendant. The burden of proof is upon the party claiming that property is marital property to show by a preponderance of the evidence that the property: (1) was acquired by either spouse or both spouses; (2) during the marriage; (3) before the date of the separation of the parties; and (4) is presently owned. N.C. Gen. Stat. § 50-20(b)(1); *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991). The claim that property is marital can be challenged by the other party, who claims the property is separate, by showing, by a preponderance of the evidence, that the property was: (1) acquired by that spouse by bequest, devise, descent, or gift from a third party during the course of the marriage; or (2) acquired by gift from the other spouse during the course of the marriage and the intent that it be separate property is stated in the conveyance; or (3) was acquired in exchange for separate property and no contrary intention that it be marital property is stated in the conveyance. N.C. Gen. Stat. § 50-20(b)(2); *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 788. However, when property is acquired during marriage by one spouse from his or her parent(s), a rebuttable presumption arises that the transfer is a gift to that spouse. *Burnett v. Burnett*, 122 N.C. App. 712, 714, 471 S.E.2d 649, 651 (1996) (citations omitted). In such a case, the presumption must be rebutted by the spouse resisting the separate property classification by showing a lack of donative intent. *Id.*

In the case at hand, plaintiff had the burden to rebut the presumption that the land was a gift to her spouse from his mother, and was therefore separate property. The trial court's finding that the "the Defendant was unable to establish by a preponderance of the evidence that he acquired the property by gift" supports our conclusion that the burden was misplaced. The case is remanded, with the burden of proof on the plaintiff to prove by the preponderance of the evidence a lack of donative intent.

We note that the classification of property must be supported by adequate findings of fact, which must, in turn, be supported by the evidence. *McIver v. McIver*, 92 N.C. App. 116, 127, 374 S.E.2d 144, 151 (1988). The purpose for the requirement that a trial court make specific findings of fact to support its legal conclusions is to enable an appellate court to determine, on review, whether the trial court has correctly applied the law in reaching its judgment. *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988). A failure by the trial court to make adequate findings or conclusions precludes appellate review. *Id.* In keeping with this requirement, on remand the trial court should state findings of fact with regard to whether consideration was given in return for the original transfer of property in 1967, in which a life estate was withheld, or if consideration was given for the transfer of the remaining life estate in 1978. Pertinent dates, which are not clear from the record before us, include the date of defendant mother's stroke, the date plaintiff left her employment to care for the mother, and the period of time care was actually given to the mother by the plaintiff. If the trial court finds that consideration was promised and given for the earlier of the transfers, the property is entirely marital. If, however, the trial court finds that consideration was only given for the transfer of the life estate, the value of the remainder interest transferred in 1967 is separate property. In that case, the marital property would consist of all marital improvements to the property, as well as the value of the life estate transferred in exchange for consideration in 1978.

The equitable distribution order is vacated only as it pertains to the trial court's classification of the forty-six acre tract of land, and to the extent that a proper classification of those properties affects the distributive award previously entered by the court. This case is remanded to the trial court for further proceedings consistent with this opinion.

Vacated and remanded.

Judges MARTIN, John C., and MARTIN, Mark D., concur.

HENDRICKS v. HILL REALTY GROUP, INC.

[131 N.C. App. 859 (1998)]

MARY HENDRICKS (DECEASED), DOUGLAS HENDRICKS (HUSBAND), DOUGLAS TYE HENDRICKS (SON), EMPLOYEE, PLAINTIFFS v. HILL REALTY GROUP, INC., EMPLOYER; SELF-INSURED (KEY RISK MANAGEMENT SERVICES, INC.), SERVICING AGENT, DEFENDANT

No. COA98-406

(Filed 29 December 1998)

Workers' Compensation— average weekly wage—computation—exceptional circumstances

An order of the Industrial Commission in a workers' compensation case calculating the average weekly wage of a realtor for whom death benefits would be paid was affirmed where the Commission's finding that the fifth method in N.C.G.S. § 97-2(5) was the only method which was fair and which would result in a calculation of decedent's average weekly wage which most nearly approximated the amount of wages she would be earning were it not for her injury and resulting death was supported by competent evidence.

Appeal by defendant from judgment entered 16 January 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 1998.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Stephen J. Grabenstein, for plaintiffs-appellees.

Russell & King, P.A., by Gene Thomas Leicht, for defendant-appellant.

WALKER, Judge.

Mary Hendricks, the decedent, was employed as a real estate agent by Hill Realty Group (Hill) who maintained workers' compensation insurance for its agents. On 23 April 1994, Mrs. Hendricks sustained an injury in the course of her employment, which resulted in her death and Hill assumed liability for the injury. Mrs. Hendricks had worked for Hill since April 1992, and her earnings were based solely on commissions.

Hill began making death benefit payments to plaintiffs (decedent's next of kin) under N.C. Gen. Stat. § 97-38 at a rate of $255.89 per week which was based on an average weekly wage of $383.81.

The average weekly wage was determined by averaging the earnings of Mrs. Hendricks over the 52 weeks prior to her death.

The plaintiffs requested a hearing before the deputy commissioner contending that basing the average weekly wage on the 52 weeks prior to her death was unfair and that exceptional reasons existed to use a shorter period of time. In her opinion and award, the deputy commissioner concluded that exceptional reasons did exist and awarded death benefits of $437.70 based on an average weekly wage of $656.61 per week. The average weekly wage was computed using the fifth method of computation provided in N.C. Gen. Stat. § 97-2(5) and based on the earnings of decedent for 1994 divided by the number of weeks worked in 1994. The deputy commissioner ordered that Hill make a lump sum payment of the difference between $437.70 and $255.89 for the 158 weeks of payments already made and ordered that the remaining payments be made at the higher rate.

Hill appealed to the Commission which, in its opinion and award on 16 January 1998, affirmed the deputy commissioner. The Commission made the following findings of fact:

> 1. The deceased employee, Mary Hendricks, began working for defendant-employer in April of 1992. When she began working for defendant-employer, she was a novice with no experience and no training in real estate. Her prior business experience had been as a sitter for elderly individuals in need of care and attention.
>
> . . .
>
> 3. Modest production goals were set for decedent by defendant-employer in 1992. These goals called for her to earn $9,000.00 in the months remaining in 1992 following her hire.
>
> 4. Decedent actually earned $3,603.00 in 1992. This substantial shortfall was not unusual for someone just starting out in the real estate business, as it takes a substantial amount of time for an individual to begin generating a regular stream of business in the real estate industry.
>
> 5. Production goals for 1993 called for $16,000.00 in earnings. Decedent again fell short of this goal as her actual earnings for 1993 were $13,007.50.

6. In late 1993 and in the months of 1994 before her death, the deceased employee began taking steps to increase her productivity and earnings.

7. In December of 1993 decedent purchased a home computer to use in her work as a real estate sales person. Prior to this time, decedent did not have access to a personal computer at home for use in her work.

8. Decedent's use of the telephone as a business tool increased in 1994 prior to her death. During this period she would typically make telephone calls regarding her work whenever she was home between the hours of 7:00 a.m. and 11:00 p.m.

9. Decedent's business activity increased greatly in 1994 over what it had been in 1993. At the time of her death, decedent was working eight to ten hours a day, six to seven days a week. This was a substantial increase over her level of work activity in 1992 and 1993.

10. The above-mentioned activities had a direct impact on decedent's productivity and earnings in 1994. Decedent's earning goal for 1994 was $17,748.00. From 1 January 1994 through the date of her death on 23 April 1994, decedent earned income totaling $9,849.22.

. . .

12. Decedent was able to increase her productivity and earnings despite the fact that she was out of the state with her mother in Kentucky for ten days in early 1994, and the fact that the period from the previous Thanksgiving to mid-January is historically a very slow time in the real estate industry.

13. Decedent's increased earnings in 1994 reflected the naturally extended process of slowly building a successful real estate practice. At the time of her death, decedent's hard work and professionalism were beginning to pay off as she had established a good reputation in the community and was becoming more confident in her duties and how she was performing them.

Hill assigns as error the Commission's finding that exceptional circumstances existed to justify the use of the fifth method of determining average weekly wage found in N.C. Gen. Stat. § 97-2(5). Hill argues that there was insufficient evidence of exceptional circumstances to justify the use of decedent's earnings in 1994 (fifteen

weeks) to compute the average weekly wage where the statute provides that the preferred method is to average the previous 52 weeks of earnings. We disagree and affirm the Commission.

"When the Court of Appeals reviews a decision of the full Commission, it must determine, first, whether there is competent evidence to support the Commission's findings of fact and, second, whether the findings of fact support the conclusions of law." *McAninch v. Buncombe County Schools*, 347 N.C. 126, 131, 489 S.E.2d 375, 378 (1997); *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). "[T]he Industrial Commission is made the factfinding body, and the rule is . . . that the findings of fact made by the Commission are conclusive on appeal . . . when supported by competent evidence." *Rice v. Chair Co.*, 238 N.C. 121, 124, 76 S.E.2d 311, 313 (1953); *Inscoe v. Indus*tries, Inc., 292 N.C. 210, 215, 232 S.E.2d 449, 452 (1977).

The method used by the Commission to compute the decedent's average weekly wage is set out in N.C. Gen. Stat. § 97-2(5):

> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (Cum. Supp. 1997). The intent of this statute is to make certain that the results reached are fair and just to both parties. *Liles v. Electric Co.*, 244 N.C. 653, 94 S.E.2d 790 (1956). "Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision." *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378 (*quoting Liles*, 244 N.C. at 660, 94 S.E.2d at 796).

Here, the conclusion by the Commission that exceptional reasons exist is supported by the competent evidence in the record and the findings made by the Commission. The decedent made certain changes in the way that she performed her job over the closing months of 1993 and the beginning of 1994 including the purchase of a personal computer for use in her work, increased use of the telephone as a business tool, and increased number of hours worked each week. The results of these positive changes were illustrated by the increased commissions earned during the first fifteen weeks of 1994 just before her death. While defendant argues that the result

obtained by the Commission is unfair, we note that the Commission concluded that the fifth method authorized in N.C. Gen. Stat. § 97-2(5) "is the only method which is fair and which would result in a calculation of decedent's average weekly wage which most nearly approximates the amount of wages she would be earning were it not for her injury and resulting death." As this finding is supported by competent evidence, it is binding on this Court. For these reasons, the order of the Commission is

Affirmed.

Judges JOHN and McGEE concur.

VIRGINIA WALL, EMPLOYEE, PLAINTIFF v. MACFIELD/UNIFI, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER, DEFENDANTS

COA98-285

(Filed 29 December 1998)

1. Workers' Compensation— claim—time for filing

The Industrial Commission appropriately determined that a workers' compensation claim was barred by N.C.G.S. § 97-24 where plaintiff was injured in August 1991 and did not file her claim until October 1995. N.C.G.S. § 97-24's requirement of filing a claim within two years of the accident is not a statute of limitation, but a condition precedent to the right to compensation.

2. Workers' Compensation— estoppel—jurisdictional bar

Defendants in a workers' compensation action were not equitably estopped from asserting the jurisdictional bar in N.C.G.S. § 97-24 where defendant employer never told plaintiff that it would file her workers' compensation claim and, in fact, told her that it would deny any claim she filed. Although a jurisdictional bar generally cannot be overcome by consent, waiver, or estoppel, plaintiff here was not lulled into a false sense of security.

Appeal by plaintiff from opinion and award entered 9 January 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 October 1998.

Plaintiff worked for defendant, Macfield, as a texturing operator from 1980 until 1 November 1993. In 1985, plaintiff injured her back at work. Plaintiff injured her back again in 1987 and in August 1991. During August 1991, plaintiff was "doffing" a machine at work, bent over to pick up a package and felt a sharp pain in her back. Plaintiff claimed she called her supervisor at work the next day and reported the incident; however, her supervisor denied that plaintiff ever notified him of her injury. Ms. Roberson, the plant nurse, testified that plaintiff never reported to her that she injured herself at work at anytime in 1991. Ms. Roberson reviewed plaintiff's personnel file and although it contained several completed accident reports for prior incidents, there was no evidence that plaintiff ever reported a work injury at any time in 1991.

Plaintiff claimed she went to see Dr. Knowlton, the Unifi company doctor, the day after her 1991 injury and that he treated her. However, Dr. Knowlton's office records only show that he saw plaintiff in 1984 and 1985, not in 1991.

The office notes of Dr. Harkins, an orthopedic doctor, establish that he saw plaintiff on 14 June 1991 (before her alleged injury at work in August 1991) for back, buttock, hip and leg pain that she had experienced for a week. Moreover, on 27 August 1991, plaintiff went to Cobb Chiropractic Clinic for back pain. On the "Patient Case History" form, plaintiff checked that her back pain was not "an Industrial Accident Case" and plaintiff stated that she had been experiencing back pain for about two months.

Plaintiff applied for and received $3,119.99 in disability benefits under Unifi's group disability policy. Ms. Becky Martin, Unifi's health care plan representative who filed plaintiff's disability claim, testified that there was no indication in plaintiff's medical records or in conversations with plaintiff that her injury was work related. Plaintiff's disability benefits were terminated in 1995 after Dr. Borkto, Aetna's doctor, indicated that she would be able to do some type of sedentary work.

In October 1995, plaintiff filed a workers' compensation claim using a Form 18 which gave defendant employer notice of plaintiff's back injury. Plaintiff conceded that her Form 18 was the first written notice that plaintiff had given defendant about her injury. The defendant denied the claim on 20 February 1996.

The deputy commissioner awarded plaintiff benefits. The Full Commission reversed the deputy commissioner and found that plaintiff's claim was barred by G.S. 97-24. Plaintiff appeals.

Gray, Newell & Johnson, L.L.P., by Angela Newell Gray, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Clayton M. Custer and Lawrence B. Somers, for defendant-appellees.

EAGLES, Chief Judge.

[1] First we consider whether the Full Commission erred in reversing the deputy commissioner's award to plaintiff and concluding that plaintiff's claim was time barred under G.S. 97-24. Plaintiff argues that the Industrial Commission does not have jurisdiction over plaintiff's claim until the employer has filed an accident report with the Commission. After careful review, we disagree.

G.S. 97-24 states that "[t]he right to compensation under this Article shall be forever barred unless the claim be filed with the Industrial Commission within two years after the accident." North Carolina General Statute 97-24's requirement of filing a claim within two years of the accident is not a statute of limitation, but a condition precedent to the right to compensation. *Reinhardt v. Women's Pavilion*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991). Here, the plaintiff was injured in August 1991 and did not file her claim until October 1995. Accordingly, the Full Commission appropriately determined that plaintiff's claim was barred by G.S. 97-24.

[2] Next, the plaintiff argues that the defendants are equitably estopped from asserting the jurisdictional bar in G.S. 97-24. We disagree. Generally, a jurisdictional bar cannot be overcome by consent, waiver or estoppel. *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 312, 309 S.E.2d 273, 276 (1983); *disc. review denied*, 311 N.C. 407, 319 S.E.2d 281 (1984).

> However, our decisions have also acknowledged that the Workers' Compensation Act "requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees." *See, e.g., Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335, 335 S.E.2d 44, 46 (1985) (citation omitted). In addition, we have enunciated a rule to the effect that, in an attempt to achieve the overriding legislative purpose, "equitable estoppel may [be used to] prevent a party from raising the time

limitation of G.S. 97-24 to bar a claim." *Id.* at 337, 335 S.E.2d at 47; *see also Parker*, 100 N.C. App. at 369-72, 396 S.E.2d at 628-30. In *Belfield*, we quoted with approval the following language from a respected treatise:

> The commonest type of case is that in which a claimant, typically not highly educated, contends that he was lulled into a sense of security by statements of employer or carrier representatives that "he will be taken care of" or that his claim has been filed for him or that a claim will not be necessary because he would be paid compensation benefits in any event. When such facts are established by the evidence, the lateness of the claim has ordinarily been excused.

Belfield, 77 N.C. App. at 336, 335 S.E.2d at 47 (quoting 3 A. Larson, *The Law of Workmen's Compensation*, § 78.45, at 15-302 through 15-305 (1983)).

Craver v. Dixie Furniture Co., 115 N.C. App. 570, 578, 447 S.E.2d 789, 794 (1994).

Here the Full Commission found that plaintiff had been told by her supervisor that the claim would be denied because she did not immediately report her accident. The Full Commission went on to conclude that

> [t]here were no facts of record that would enable plaintiff to make an estoppel claim. Plaintiff did not rely on any indication that her worker's [sic] compensation claim was being taken care of. To the contrary, plaintiff was told that she did not have a claim.

The defendants were not estopped from asserting a jurisdictional bar because plaintiff was not lulled into a false sense of security. Defendant employer never told plaintiff that they would file her workers' compensation claim; in fact, plaintiff was told that they would deny any claim she filed. Accordingly, the defendants were not estopped from asserting the jurisdictional bar in G.S. 97-24. This assignment of error is overruled.

Finally, plaintiff argues that the Full Commission erred in reversing the deputy commissioner's finding that the defendants waived their defenses under G.S. 97-18(d). Because the Industrial Commission lacks jurisdiction over plaintiff's claim pursuant to G.S.

97-24, the Full Commission appropriately did not reach this issue. This assignment of error is overruled.

Affirm.

Judges TIMMONS-GOODSON and SMITH concur.

DORIS FRIEND-NOVORSKA, PLAINTIFF v. JAMES C. NOVORSKA, DEFENDANT

No. COA98-225

(Filed 29 December 1998)

1. **Divorce— alimony—supporting spouse's income—desire for new house and car—not considered**

The trial court abused its discretion in an alimony action by considering the supporting spouse's desire to purchase a new house and car. The effect of the trial court's ruling is to allow a supporting spouse to reduce his net monthly income, and thus his obligation to his dependent spouse, based on his expressed "desires" for a new house and automobile rather than on necessity.

2. **Divorce— alimony—supporting spouse's income—investments—properly considered**

The trial court correctly considered a supporting spouse's investment income in ordering alimony even though defendant contended that his investment income was not actually received by him since it was automatically reinvested and argued that it was not guaranteed. A supporting spouse may not insulate himself from payment of alimony by choosing to reinvest income rather than actually receive it.

3. **Divorce— alimony—marital misconduct—findings required**

The trial court erred in an alimony action by not making specific findings on marital misconduct where evidence was offered on that factor.

4. **Divorce— alimony—findings—duration of award**

An alimony order was remanded where the trial court set forth no reason for the thirty-month duration of the award. N.C.G.S. § 50-16.3A(c).

Appeal by plaintiff from alimony order and judgment entered 17 October 1997 by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 21 October 1997.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler, for plaintiff appellant.

Sharpe & Mackritis, P.L.L.C., by Jimmy D. Sharpe and Lisa M. Dukelow, for defendant appellee.

HORTON, Judge.

Doris Friend-Novorska (Doris) and James C. Novorska (James) were married on 13 February 1982 and separated on 30 June 1995. No children were born to their marriage. On 3 January 1996, Doris filed a complaint seeking postseparation support and alimony from James, an equitable distribution of the marital property of the parties, and attorneys' fees.

On 24 July 1997, a judgment of equitable distribution was entered in Orange County District Court. An appeal by Doris from that judgment is now pending before this Court. Thereafter, a judgment was entered awarding Doris alimony and reserving the issue of attorneys' fees. From that judgment Doris appeals, contending the trial court erred in setting the amount of alimony and in failing to make adequate findings with regard to marital misconduct. James cross-appealed, contending the trial court should not have awarded alimony to Doris in any amount.

[1] The first issue before this Court is whether the trial court abused its discretion in awarding Doris alimony in the sum of $600.00 per month for 30 months, after finding that she was a dependent spouse and that she needed more than $1,300.00 per month from James to maintain her standard of living. Specifically, the trial court found that Doris required the sum of $3,089.00 per month "to maintain the standard of living to which she has become accustomed during the last several years of the marriage[.]"

The trial court found as a fact that Doris had an available net income of $1,745.22 per month from her employment and "is in need of a contribution on a monthly basis of $1,343.78 to meet her monthly living needs." At the time of trial, James had net monthly income from his employment of $4,077.00 per month, and net investment income after taxes of $9,729.20 per year (or about $810.00 per month). The

trial court found that James had "actual present monthly expenses [of] $3,758.00" at trial.

In making its decision to award a monthly amount of alimony substantially less than her needs, the trial court erroneously relied on James' desire to purchase a new house and car. The trial court found in pertinent part:

> 15. Based on Defendant's amended financial affidavit submitted at trial, and his own testimony, his actual present monthly expenses are $3,758. This is based on Defendant presently having rent of $745 per month for a luxury apartment, and no payments to make on his present vehicle. However, Defendant desires to purchase a new house with a minimum down payment which would increase his rent\mortgage payments from $745 to $1,277 per month. He has already made inquiries concerning such a new house, and the Court finds that the house he is interested in would be very similar to the marital residence the Plaintiff presently occupies. Defendant also desires to purchase a new automobile and incur monthly payments of $350 per month.

The trial court expressly considered James' desire to live in a house rather than a "luxury apartment," and to purchase a new car, although there is no showing that he needed to do either. After considering the effect of those future expenditures, the trial court found that James could pay alimony of $600.00 per month. The trial court further found that James would receive a tax benefit amounting to about $210.00 per month, and that Doris would receive from the $600.00 monthly payment a net after taxes of $520.00 per month "with which to meet her reasonable needs."

The effect of the trial court's ruling is to allow a supporting spouse to reduce his net monthly income, and thus his obligation to his dependent spouse, based not on necessity, but instead on his expressed "desires" for a new house and automobile. In doing so, the trial court abused its discretion. The trial court's order would allow James to increase his estate while minimizing his obligation to Doris. A supporting spouse may not intentionally increase his monthly expenditures by making unnecessary capital expenditures and thereby avoid, or minimize, his alimony obligation to the dependent spouse.

[2] James argues the trial court erred in ordering any amount of alimony for Doris. He contends his investment income is not actually

received by him since it is automatically reinvested as received. He argues the trial court should not have considered his investment income since it is neither guaranteed nor actually received by him. In addition, he claims the trial court abused its discretion in ordering any amount of alimony for Doris after considering his anticipated expenses for a new house and car. We disagree.

A supporting spouse may not insulate himself from payment of alimony by choosing to reinvest income each year rather than actually receive it. Nor, as pointed out above, may a dependent spouse choose to invest his surplus income in a new house and car when no necessity is shown for the expenditures and the effect is to deprive the dependent spouse of funds necessary for living expenses. Thus, the trial court was correct in considering James' investment income.

[3] Finally, Doris complains the trial court failed to consider evidence of James' marital misconduct. Doris offered evidence tending to show that James communicated with other women during the marriage, and he met with a woman for about an hour on one or two occasions at an apartment he rented before the parties separated. In addition, Doris offered evidence showing that James hugged and kissed the same woman on at least one occasion when he escorted her from his apartment to her car.

N.C. Gen. Stat. § 50-16.3A(c) (1995) provides, in pertinent part, with some exceptions not applicable here, that "the court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor." Factor (1) in subsection (b) is the marital misconduct of the parties. Since the parties have offered evidence on that factor, the trial court was required, by the express terms of the statute, to make specific findings that the existence of the factor was or was not supported by the greater weight of the evidence.

[4] We also note that N.C. Gen. Stat. § 50-16.3A(c) requires that the trial court shall, if making an alimony award, set forth "the reasons for its amount, *duration*, and manner of payment." (Emphasis added.) Here the trial court sets forth no reasons for the 30-month duration of the award. As we said in *Payne v. Payne*, 49 N.C. App. 132, 137, 270 S.E.2d 546, 549 (1980), "[o]vershadowing the entire matter is the inescapable fact that [when the alimony payments cease,] plaintiff's right to 'permanent alimony' will terminate, along with any semblance of her accustomed standard of living." On remand, the trial

court must make a new award of alimony and make specific findings justifying that award, both as to amount and duration. Those portions of the order declaring Doris to be a dependent spouse and James to be a supporting spouse are affirmed.

For the foregoing reasons, the decision of the trial court is

Affirmed in part, and vacated and remanded in part.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.

JIMMIE STACEY RIDDICK, PLAINTIFF v. MELVIN WOODROW MYERS, DEFENDANT

COA98-123

(Filed 29 December 1998)

Jurisdiction— personal—Virginia plaintiff—North Carolina automobile accident

The trial court correctly concluded that North Carolina courts lack personal jurisdiction over Myers where Riddick and Myers were involved in an automobile accident in North Carolina, a Virginia court awarded Myers a favorable judgment for property damages arising from the accident, Myers instituted another suit in Virginia for personal injuries and medical expenses, and Riddick brought this declaratory judgment action in North Carolina seeking a holding that North Carolina law controls disputes arising out of North Carolina accidents and that Myers is barred from maintaining a second action against Riddick, and Myers successfully moved to dismiss for lack of personal jurisdiction. Riddick has been adjudicated to be at fault by the Virginia court and North Carolina case law provides that N.C.G.S. § 1-105 is not available to obtain personal jurisdiction since Myers did not inflict the injury. Riddick is merely attempting to ask the court to declare that North Carolina law applies, an argument more properly made to the Virginia court which has personal jurisdiction over Myers.

Appeal by plaintiff from judgment entered 8 October 1997 by Judge James R. Vosburgh in Dare County Superior Court. Heard in the Court of Appeals 17 November 1998.

Harris, Shields, Creech and Ward, P.A., by R. Brittain Blackerby and C. David Creech, for plaintiff appellant.

No brief filed for appellee.

HORTON, Judge.

On 17 March 1995, plaintiff Jimmie Stacey Riddick, a North Carolina resident, and defendant Melvin Woodrow Myers, a Virginia resident, were involved in a motor vehicle accident near Gatesville, North Carolina. A Virginia District Court awarded Myers a favorable judgment for property damages arising from the accident. Thereafter, Myers instituted another suit in Virginia on 3 July 1997 and asserted a claim against Riddick for personal injuries and medical expenses arising from the same accident.

On 27 May 1997, Riddick commenced the instant action in Gates County Superior Court seeking a declaratory judgment determining the rights of the parties, holding that North Carolina law controls disputes arising out of North Carolina accidents, and concluding that Myers is barred from maintaining a second cause of action against Riddick. In response to Riddick's declaratory judgment action in North Carolina, Myers filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (1990) based on lack of personal jurisdiction. The trial court granted the motion to dismiss. We conclude the trial court was correct.

N.C. Gen. Stat. § 1-75.4 (1996) provides, in part, that:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:
>
> * * * *
>
> (3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

N.C. Gen. Stat. § 1A-1, Rule 4 (1990) provides, in part, that:

> (j) *Process—Manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal

jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) Natural Person.—Except as provided in subsection (2) below, upon a natural person:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . .

In suits involving nonresident drivers of motor vehicles, service upon a nonresident driver may be accomplished by personal service pursuant to Rule 4(j) or by service upon the Commissioner of Motor Vehicles pursuant to N.C. Gen. Stat. § 1-105 (1996). In the instant case, the record reveals that plaintiff Riddick complied with the statutory requirements for service of process. A deputy sheriff in Chesapeake, Virginia, personally served Myers with a civil summons at his residence on 30 June 1997 for the action pending in Gates County, North Carolina.

However, the trial court was correct in ruling that North Carolina courts do not have personal jurisdiction over Myers. "The broad purpose of [N.C. Gen. Stat. § 1-105] is to enable an injured resident of this State to bring back to answer for his tort a *nonresident motorist who has inflicted injury* while using the State highways and by the time suit can be instituted would otherwise be beyond this jurisdiction." *Hart v. Queen City Coach Co.*, 241 N.C. 389, 391, 85 S.E.2d 319, 320 (1955) (emphasis added). Although N.C. Gen. Stat. § 1-105 enables a North Carolina resident to obtain personal jurisdiction over any nonresident involved in an automobile accident in this State by virtue of the operation of a vehicle in North Carolina, the purpose of the statute is to provide " '[j]urisdiction *over the driver who inflicted the injury* . . . .' " *Hargett v. Reed*, 95 N.C. App. 292, 296, 382 S.E.2d 791, 792 (1989) (emphasis added) (citation omitted).

In the instant case, we have the opposite scenario than the one contemplated in the statute. Here, North Carolina plaintiff Riddick has been adjudicated by the Virginia court to be the one at fault. North Carolina case law provides that, since nonresident Myers did not inflict the injury, N.C. Gen. Stat. § 1-105 is not available to obtain personal jurisdiction over him. *See Hart*, 241 N.C. at 391, 85 S.E.2d at 320; *Hargett*, 95 N.C. App. at 296, 382 S.E.2d at 792.

Plaintiff Riddick is merely attempting to ask the trial court to declare that North Carolina law applies to this motor vehicle accident. However, Riddick can more properly make this same argument to the Virginia court, which has personal jurisdiction over Myers. Thus, the trial court was correct in concluding that North Carolina courts lack personal jurisdiction over Myers.

For the foregoing reasons, the decision of the trial court is

Affirmed.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT IN THE MATTER OF A FILING DATED 1 FEBRUARY 1994 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES

(29 December 1998)

No. COA98-149

1. Insurance— automobile rates—income—capital and surplus

The Insurance Commissioner improperly considered income from capital and surplus in arriving at his total return in an order reducing rates for automobiles and increasing rates for motorcycles.

2. Insurance— rate making—retroactive—appellate remand

An order of the Insurance Commissioner on 10 September 1997 setting rates for automobile and motorcycle insurance to be effective 1 January 1995 did not constitute unlawful retroactive rate making where the order was pursuant to an appellate remand. To hold otherwise would bind the parties to a rate declared invalid for a period between the entry of the appealed order and the rehearing on remand; this is inconsistent with the purpose of the remand order and cannot represent sound public policy.

Appeal by the North Carolina Rate Bureau from Order on Remand dated 10 September 1997 by the Commissioner of Insurance. Heard in the Court of Appeals 20 October 1998.

Young Moore and Henderson P.A., by R. Michael Strickland, Marvin M. Spivey, Jr., William M. Trott, and Terryn D. Owens, for the appellant.

North Carolina Department of Insurance, by Kristin K. Eldridge and Sherri L. Hubbard, for the appellee.

GREENE, Judge.

The North Carolina Rate Bureau (Rate Bureau) appeals from an Order of the North Carolina Commissioner of Insurance (Commissioner) entered 10 September 1997.

On 1 February 1994, the Bureau filed a general request for increased rates for private passenger automobiles and motorcycles. In response to the request, the Commissioner held a comprehensive hearing during the summer of 1994 and entered an Order, dated 28 September 1994, reducing rates for automobiles and increasing rates for motorcycles (effective 1 January 1995), but in an amount less than that requested by the Bureau. The Bureau appealed the 28 September 1994 Order to this Court and pursuant to N.C. Gen. Stat. § 58-36-25(b), directed its member companies to implement a new automobile rate and escrow the portion of the rate in excess of that actually approved by the Commissioner. On 17 December 1996, this Court affirmed in part, vacated in part, and remanded the 28 September 1994 Order of the Commissioner. On remand, the Commissioner was to: (1) "make specific findings that clearly show the facts upon which he based his decision that the rate contains a 4.96% margin for dividends and deviations"; (2) recalculate the underwriting profit provisions so as to "exclude investment income earned on capital and surplus"; and (3) make specific findings resolving the conflict in the evidence with respect to the current cost and expense trend provisions. *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 124 N.C. App. 674, 684, 686, 696, 478 S.E.2d 794, 801, 802, 808 (1996), *disc. review denied*, 346 N.C. 184, 486 S.E.2d 217 (1997).

On 10 September 1997, the Commissioner, without further hearings, entered an Order directing that the rates set in his 28 September 1994 Order be "superseded" and new rates set in an amount less than those set in the 28 September 1994 Order. The Bureau was directed to

have its member companies adjust their escrow accounts held pursuant to the 1994 filing to "reflect the difference between the Commissioner's revised ordered rates" and the "rates charged by the member companies" during the period in question.

[1] The Bureau's appeal presents two primary issues, each of which has recently been addressed by this Court. In *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 129 N.C. App. 662, 501 S.E.2d 681 (1998), the majority[1] of the Court held that the Commissioner, utilizing the same methods for determining the rates as used in this case, "improperly considered income from capital and surplus in arriving at his total return." *Id.* at —, 501 S.E.2d at 685. We also held that the findings of the Commissioner, essentially the same as entered in this case, adequately reflected consideration of expected values for policyholder dividends and rate deviations. *Id.* at —, 501 S.E.2d at 687.

[2] The Bureau asserts an additional argument that was not raised or addressed in our previous opinion. It argues the Commissioner had no authority to Order, on 10 September 1997, that the new rates be applied effective 1 January 1995 because this constitutes unlawful retroactive rate making. We acknowledge the general principle that retroactive rate making is improper. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 468, 232 S.E.2d 184, 194 (1977). The recalculation of rates, however, pursuant to a remand order of an appellate court and the application of those rates back to the effective date of the Order reversed on appeal does not constitute unlawful retroactive rate making. To hold otherwise essentially would bind the parties, for a period of time between the entry of the appealed Order and the rehearing on remand pursuant to the appellate court, to a rate declared invalid by the appellate court. This cannot represent sound public policy, and, furthermore, is inconsistent with the purpose of the remand order, which is to correct the error requiring the remand. Accordingly, the 10 September 1997 Order does not constitute an unlawful retroactive rate increase.

We have reviewed, but reject the other arguments asserted by the Bureau. Because the Commissioner "improperly considered income from capital and surplus in arriving at his total return," the 10 September 1997 Order is reversed and remanded for the recalculation of rates.

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1. Judge Greene dissented on the capital and surplus issue, but is bound in this case to follow the holding of the majority in *Rate Bureau. See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

Reversed and remanded.

Judges WALKER and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED DECEMBER 29, 1998

AYCOCK v. FULLER No. 98-444	Wayne (95CVS2056)	Affirmed
AYCOCK v. HOOKS No. 97-1422	Wayne (95CVS1670)	Affirmed
COMMONWEALTH LAND, LLC v. IDOL No. 98-221	Guilford (96CVS1102)	Affirmed
DOWNS v. DOWNS No. 98-14	Davidson (94CVD02124)	Affirmed
GREGORY v. CITY OF KINGS MOUNTAIN No. 98-116	Cleveland (93CVS1279)	Affirmed
IN RE FERNANDO No. 98-303	Orange (97SPC1076)	Affirmed
JENKINS v. WOOLARD No. 97-1547	Guilford (96CVS4090)	No Error
LEE v. SOUTHERN ELEVATOR No. 98-381	Ind. Comm. (620125)	Affirmed in part and Remanded with instructions
MILLER v. SHELL ISLAND HOMEOWNERS ASS'N No. 98-166	New Hanover (97CVS2546)	Dismissed
PERFORMANCE FRICTION CORP. v. LAMBA No. 98-268	Mecklenburg (97CVS14005)	Reversed
PRIOR v. PRUETT No. 97-787	Burke (94CVS943)	Affirmed
ROBESON INV. CORP. v. CUMBERLAND CONSTR., INC. No. 98-315	Cumberland (97CVS873)	Reversed and Remanded
SHELL v. FAIRFIELD SAPPHIRE VALLEY, INC. No. 98-271	Jackson (96CVS009)	Affirmed
STATE v. ABERCROMBIE No. 98-184	Lee (95CRS13484) (95CRS13490)	No Error

STATE v. BAKER No. 98-126	Brunswick (96CRS2464)	No Error
STATE v. BARRETT No. 97-1586	Pitt (94CRS12422) (94CRS24502)	New Trial
STATE v. BECK No. 97-1332	Columbus (95CRS8829)	No Error
STATE v. BOYD No. 98-197	Durham (95CRS13585) (95CRS14674) (95CRS14675) (95CRS14676) (95CRS18886) (95CRS18887) (95CRS18888) (95CRS18889) (95CRS18890) (95CRS18891) (95CRS18892) (95CRS18893) (95CRS18894) (95CRS18895) (95CRS18896) (95CRS18897)	Vacated and Remanded for resentencing
STATE v. CHERRY No. 98-568	Pitt (97CRS4921) (97CRS4922) (97CRS8931) (97CRS4907) (97CRS4908) (97CRS8939)	No Error
STATE v. CONNERS No. 98-151	Henderson (96CRS20168)	No error, but judgment vacated and the cause remanded for resentencing
STATE v. CORBETT No. 98-26	Orange (97CRS1939)	No Error
STATE v. DAIL No. 98-395	Duplin (96CRS4563) (96CRS5162)	No Error
STATE v. DAVIS No. 98-156	Columbus (95CRS8512) (95CRS8513) (95CRS8514)	No Error

STATE v. KNIGHT No. 98-906	Martin (97CRS2500) (97CRS2501) (97CRS2523)	No Error
STATE v. LEE No. 98-185	Craven (97CRS3507) (97CRS3508)	No Error
STATE v. MERRINGTON No. 98-210	Cabarrus (95CRS17839) (95CRS17840)	No Error
STATE v. O'NEAL No. 98-226	Forsyth (94CRS16723)	No Error
STATE v. WARD No. 97-1543	Columbus (97CRS718) (97CRS719)	Case No. 97CRS719— No Error Case No. 97CRS718— Reversed
STATE v. WHITE No. 98-235	Rowan (97CRS1594) (97CRS1550)	No Error
STORICK v. LUMBERMENS MUT. CAS. CO. No. 98-177	Mecklenburg (97CVS9361)	Affirmed
SYSTEMS EXPRESS CORP. v. NAT'L BUSINESS GRP., INC. No. 98-736	Mecklenburg (97CVS8014)	Appeal Dismissed
THACKER v. FOOD LION, INC. No. 98-369	Guilford (96CVS6481)	Affirmed
VILLAGE OF RAINTREE, INC. v. RAINTREE COUNTRY CLUB INC. No. 98-353	Mecklenburg (92CVS11282)	Reversed and Remanded
WEST v. McELREATH No. 98-94	Buncombe (95CVD4792)	Reversed and Remanded

APPENDIXES

ORDER ADOPTING RULE 33A
OF THE RULES OF APPELLATE
PROCEDURE

ORDER ADOPTING RULE 26 OF THE
GENERAL RULES OF PRACTICE
FOR THE SUPERIOR AND
DISTRICT COURTS

ORDER ADOPTING STANDARDS OF
PROFESSIONAL CONDUCT
FOR MEDIATORS

ORDER ADOPTING AMENDMENTS
TO MEDIATED SETTLEMENT
CONFERENCES IN SUPERIOR
COURT CIVIL ACTIONS

ORDER ADOPTING AMENDMENTS
TO THE RULES FOR THE
DISPUTE RESOLUTION COMMISSION

ORDER ADOPTING RULE 33A OF THE RULES OF APPELLATE PROCEDURE

Pursuant to the authority of Article IV of the Constitution of North Carolina and N.C.G.S. §7A-33, the Rules of Appellate Procedure are amended by adding a new Rule 33A to read:

"33A. Secure Leave Periods for Attorneys

(A) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Appellate Division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(C) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the Appellate Division during that secure leave period.

(D) *Content of Designation.* The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts,

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering

with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure leave period in any matter pending in the Appellate Division in which the attorney has entered an appearance.

(E) *Where to File Designation.* The designation shall be filed as follows:

(1) if the attorney has entered an appearance in the Supreme Court, in the office of the Clerk of the Supreme Court;

(2) if the attorney has entered an appearance in the Court of Appeals, in the office of the Clerk of Court of Appeals.

(F) *When to File Designation.* To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

(2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure leave period."

Adopted by the Court in Conference this 6th day of May, 1999, on the recommendation of the Chief Justice's Commission on Professionalism. This amendment is effective January 1, 2000, and applies to all actions and proceedings pending in the Appellate Division on and after that date. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and Court of Appeals and by distribution by mail to each superior and district court judge, district attorney, clerk of superior court, and the North Carolina State Bar.

Wainwright, J.
For the Court

ORDER ADOPTING RULE 26 OF THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to the authority of Article IV of the Constitution of North Carolina and N.C.G.S. §7A-34, the General Rules of Practice for the Superior and District Courts are amended by adding a new Rule 26 to read:

"26. Secure Leave Periods for Attorneys

(A) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Superior and District Courts, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure shall not exceed, in the aggregate, three calendar weeks.

(C) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any trial, hearing, in-court or out-of-court deposition, or other proceeding in the Superior or District Courts during that secure leave period.

(D) *Content of Designation.* The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure,

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no action or proceeding in which the attorney has entered an appearance has been scheduled, peremptorily set or noticed for trial, hearing, deposition or other proceeding during the designated secure leave period.

(E) *Where to File Designation.* The designation shall be filed as follows:

(1) if the attorney has entered an appearance in any criminal action, in the office of the District Attorney for each prosecutorial district in which any such case or proceeding is pending;

(2) if the attorney has entered an appearance in any civil action, either

(a) in the office of the trial court administrator for each superior court district and district court district in which any such case is pending or,

(b) if there is no trial court administrator for a superior court district, in the office of the Senior Resident Superior Court Judge for that district,

(c) if there is no trial court administrator for a district court district, in the office of the Chief District Court Judge for that district;

(3) if the attorney has entered an appearance in any special proceeding or estate proceeding, in the office of the Clerk of Superior Court of the county in which any such matter is pending;

(4) if the attorney has entered an appearance in any juvenile proceeding, with the juvenile case calendaring clerk in the office of the Clerk of Superior Court of the county in which any such proceeding is pending.

(F) *When to File Designation.* To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

(2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.

(G) *Procedure When Court Proceeding Scheduled Despite Designation.* If, after a designation of a secure leave period has been filed pursuant to this rule, any trial, hearing, in-court deposition or other in-court proceeding is scheduled or peremptorily set for a time during the secure leave period, the attorney shall file with the official by whom the matter was calendared or set, and serve on all parties, a copy of the designation with a certificate of service attached. Any party may, within ten days after service of the copy of the designation and certificate of service, file a written objection with that official and serve a copy on all parties. The only ground for objection shall be that the designation was not in fact filed in compliance with this Rule. If no objection is filed, that official shall reschedule the matter for a time that is not within the attorney's secure leave period. If an objection is filed, the court shall determine whether the designation was filed in compliance with this Rule. If the court finds that the designation was filed as provided in this Rule, it shall reschedule the matter for a time that is not within the attorney's secure leave period. If the court finds the designation was not so filed, it shall enter any scheduling, calendaring or other order that it finds to be in the interests of justice.

(H) *Procedure When Deposition Scheduled Despite Designation.* If, after a designation of a secure leave period has been filed pursuant to this Rule, any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the designation with a certificate of service attached, and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period. Any dispute over whether the secure leave period was properly designated pursuant to this Rule shall be resolved pursuant to the portions of the Rules of Civil Procedure, G.S. 1A-1, that govern discovery.

(I) Nothing in this Rule shall limit the inherent power of the Superior and District Courts to reschedule a case to allow an attorney to enjoy a leave during a period that has not been designated pursuant to this Rule, but there shall be no entitlement to any such leave.

Adopted by the Court in Conference this 6th day of May, 1999, on the recommendation of the Chief Justice's Commission on Professionalism. This amendment is effective January 1, 2000, and applies to all actions and proceedings pending in the Superior and District Courts on and after that date. This amendment shall be pro-

mulgated by publication in the Advance Sheets of the Supreme Court and Court of Appeals and by distribution by mail to each superior and district court judge, district attorney, clerk of superior court, and the North Carolina State Bar.

Wainwright, J.
For the Court

ORDER ADOPTING STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

WHEREAS, section 7A-38.2 of the North Carolina General Statutes established the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and de-certification, and

WHEREAS, N.C.G.S. § 7A-39.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the mediated settlement conference program established pursuant to N.C.G.S. § 7A-38.1, and

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to adopt standards for the conduct of mediators and of mediators training programs participating in the pre-litigation farm nuisance mediation program established pursuant to N.C.G.S. § 7A-38.3, and

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to adopt standards for the conduct of mediators and of mediators training programs participating in the pilot program for the settlement of equitable distribution and other family financial matters established pursuant to N.C.G.S. § 7A-38.4.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), N.C.G.S. § 7A-38.3(e), and N.C.G.S. § 7A-38.4(1), Standards of Professional Conduct for Mediators are hereby adopted to read as in the following pages. These standards shall be effective on the 1st day of October, 1999. Until that date, the Standards of Professional Conduct for Superior Court Mediators adopted by this Court on the 30th day of December, 1998, shall remain in effect.

Adopted by the Court in conference the 24th day of June, 1999. The Appellate Division Reporter shall publish the Standards of Professional Conduct for Mediators in their entirety at the earliest practicable date.

Wainwright, J.
For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR ~~SUPERIOR COURT~~ MEDIATORS

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators who participate in mediated settlement conferences pursuant to NCGS 7A-38.1, NCGS 7A-38.3, or NCGS 7A-38.4 in the State of North Carolina or who are certified to do so.

Mediation is a ~~private and consensual~~ process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the

mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his judgment whether his skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his serving on grounds of lack of impartiality or

(2) the mediator determines he cannot serve impartially.

III. Confidentiality: A mediator shall, subject to statutory obligations to the contrary, maintain the confidentiality of all information obtained within the mediation process.

A. Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any nonparty, any information communicated to the mediator by a party within the mediation process.

B. Even where there is a statutory duty to report information if certain conditions exist, a mediator is obligated to resolve doubts regarding the duty to report in favor of maintaining confidentiality.

C. A mediator shall not disclose, directly or indirectly, to any party to the mediation, information communicated to the mediator in confidence by any other party, unless that party gives permission to do so. A mediator may encourage a party to permit disclosure, but absent such permission, the mediator shall not disclose.

D. Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes, provided identifying information is removed.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator

shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He may assist them in making informed and thoughtful decisions, but shall not impose his judgment for that of the parties concerning any aspect of the mediation.

B. Subject to Section A. above and Standard VI. below, a mediator may raise questions for the parties to consider regarding the acceptability, sufficiency, and feasibility, for all sides, of proposed options for settlement—including their impact on third parties. Furthermore, a mediator may make suggestions for the parties' consideration. However at no time shall a mediator make a decision for the parties, or express an opinion about or advise for or against any proposal under consideration.

C. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

D. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A Mediator may, in areas where he is qualified by training and experience, raise questions regarding the information pre-

sented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice whether in response to statements or questions by the parties or otherwise.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process: A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality.

Order Adopting Amendments to Mediated Settlement Conferences in Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes established a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), Rule 7 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions is hereby amended as follows:

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is ~~selected by agreement of the parties,~~ stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of ~~$100~~ $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of ~~$100~~, $125 which is due upon appointment.

C. **CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B.

~~C.~~ D. **INDIGENT CASES.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subse-

quent to the trial of the action. In ruling on such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENT FEES. As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business (7) days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

This amendment shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. It shall be effective on the 1st day of October 1999.

Adopted by the Court in Conference this 24th day of June, 1999.

Wainwright, J.
For the Court

Order Adopting Amendments to the Rules for the Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertifcation, and

WHEREAS, N.C.G.S. §7A-38.2(b) provides for this Court to implement section 7A-38.2 by adopting rules and regulations governing the operation of the Commission,

NOW, THEREFORE, pursuant to N.C.G.S. §7A-38.2(b), Rule B. under Section IV. Meetings of the Commission, is amended to read as follows:

> B. Quorum. A majority of Commssion members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to discipline or decertify a mediator or mediator training program shall require an affirmative vote of 8 members.

This amendment shall be effective on the 1st day of October, 1999.

Adopted by the Court in conference the 24th day of June, 1999. The Appellate Division Reporter shall publish this amendment in the Advance Sheets of the Supreme Court and the Court of Appeals at the earliest practicable date.

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

ADMINISTRATIVE LAW—Continued

Failure to exhaust administrative remedies—consideration of evidence— The trial court did not err when dismissing a complaint for failure to exhaust administrative remedies where plaintiff sought monetary damages, a declaratory judgment, and injunctive relief arising from defendant's failure to approve and fund the readmission of her son to a hospital for treatment of bipolar and attention deficit disorders and contended that defendant-OPC was improperly allowed to place contested facts before the court concerning whether plaintiff had given and abandoned notice of appeal to OPC's appeals panel. The court made no finding with respect to the "contested facts," and there is no indication that the trial judge considered anything other than the allegations of the complaint and the parties' legal arguments with respect thereto. **Jackson v. N.C. Dept. of Human Res., 179.**

Failure to exhaust administrative remedies—effectiveness of remedy— The trial court did not err by dismissing claims including fraud arising from the acquisition of a savings bank for failure to exhaust administrative remedies. The publication and actual mailed notice required by N.C.G.S. § 54C-33(d) and the administrative code satisfy due process standards. **Brooks v. Southern Nat'l Corp., 80.**

Failure to exhaust administrative remedies—monetary damages—The trial court did not err by dismissing plaintiff's complaint for failure to exhaust administrative remedies where plaintiff sought monetary damages, a declaratory judgment, and injunctive relief arising from defendant's failure to approve and fund the readmission of her son to a hospital for treatment of bipolar and attention deficit disorders. Although plaintiff contended that administrative remedies were inadequate because her son could not be financially compensated for damages through administrative procedures, plaintiff's primary claim is for the provision of mental health care to which she claims her son is entitled under Federal and State Medicaid programs. The insertion of a prayer for monetary damages does not render administrative relief inadequate. **Jackson v. N.C. Dept. of Human Res., 179.**

Failure to exhaust administrative remedies—similar cases—adverse rulings—The trial court did not err by dismissing claims arising from the acquisition of a savings bank for failure to exhaust administrative remedies where plaintiff argued that the Savings Institution Division of the N.C. Department of Commerce had approved every conversion/merger submitted to it and would have ruled against his position. Prior approval of other conversion/mergers did not necessarily mean that SID would have approved the merger in this case without regard to plaintiff's argument. **Brooks v. Southern Nat'l Corp., 80.**

Recommended decision—not adopted or rejected—remedy—The trial court did not have subject matter jurisdiction over petitioner's appeal where petitioner obtained a recommendation from the State Personnel Commission to the Local Appointing Authority that he be reinstated with payment for lost wages; he filed this action on 19 March seeking judicial review because he was dissatisfied with the action taken by respondent; the Local Appointing Authority issued its final decision declining to adopt the recommended decision on 9 April; and the court granted respondent's motion to dismiss. The superior court did not have subject matter jurisdiction because petitioner sought judicial review before the Local Hiring Authority had issued its final decision. If petitioner was dissatisfied

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Custody—jurisdiction—foreign court—significant connection—A trial court order in a child custody action denying defendant's motion to dismiss for lack of subject matter jurisdiction in North Carolina was reversed and subsequent custody orders were vacated where the parties disagreed at the hearing about the children's primary residence; and the trial court stated at the hearing that, on the face of the affidavits, it would conclude that Tennessee would be the state with jurisdiction, but that the children had a significant connection with North Carolina and that it was not so unusual with the proximity of the state border to have "everything so jumbled up" that either state could hear the case. A trial court may assume significant connection jurisdiction under N.C.G.S. § 50A-3(a)(2) in an initial custody matter only upon proper determination by the court that the child in question has no home state as defined in 28 U.S.C. § 1738A(b)(4) at the time the custody action before the court was commenced. **Potter v. Potter, 1.**

Support—amount outside Guidelines—no request by either party—The trial court did not err in a child support action by setting support outside the Guidelines without a request from either party where both parties presented without objection evidence of the needs of the children and the parties' relative abilities to provide support. **Chused v. Chused, 668.**

Support—attorney fee—findings—The trial court erred in a child support action by awarding attorney's fees to plaintiff without entering findings on the issue of whether payment of the fees by plaintiff would unreasonably deplete her estate. **Chused v. Chused, 668.**

Support—contempt for unilateral reduction—means to comply—The trial court did not err in a child support action by finding defendant in contempt for unilaterally reducing his court ordered payments where defendant contended that the record did not establish that he had the means or ability to comply but the court ordered that he pay $14,575 and the record reveals that he had an estate of at least $900,000. **Chused v. Chused, 668.**

Support—determination of income—A child support order was remanded where the court erred in calculating the parties' income, as discussed in the alimony portion of the opinion. **Glass v. Glass, 784.**

Support—earning capacity—findings required—The trial court erred in ruling on a motion to reduce child support by using defendant's earning capacity rather than the Guidelines in determining his obligation when there was no finding that defendant acted in bad faith by deliberately depressing his income. **Chused v. Chused, 668.**

Support—from date of complaint—not awarded—findings required—The trial court erred in a child support action by failing to make findings of fact supporting its decision not to award child support as of the date plaintiff filed her complaint. **State ex rel. Fisher v. Lukinoff, 642.**

Support—Guidelines—deviation—findings—The trial court erred in a child support order by deviating from the Guidelines without sufficient findings of fact. **State ex rel. Fisher v. Lukinoff, 642.**

Support—reimbursement for past expenditures denied—findings required—The trial court erred in a child support action by not awarding reim-

CONSTITUTIONAL LAW—Continued

Double jeopardy—deadly weapon—assault upon officer—assault with intent to kill—Defendant's constitutional right against double jeopardy was not violated by the imposition of separate sentences for the offenses of assault with a deadly weapon upon a law enforcement officer and assault with a deadly weapon with intent to kill, both of which arose from the same act of shooting at a deputy sheriff, since each offense requires proof of specific elements not required by the other. **State v. Coria, 449.**

Pro se appearance—advised of risks—no error—The trial court did not err in a cocaine prosecution by allowing defendant to appear pro se where defendant was properly advised and repeatedly warned by the court of the risks he took in declining the assistance of assigned counsel and there is nothing in the record to indicate that he had any reservations prior to his conviction. **State v. Love, 350.**

Right to confrontation—hearsay—child victim of sexual assault—The state and federal constitutional rights to confrontation of a defendant charged with taking indecent liberties with a child and first-degree sexual offense were not violated where the trial court admitted out-of-court statements made by the child under the catch-all hearsay exception after finding that she was incompetent to testify. **State v. Wagoner, 285.**

Right of confrontation—hearsay testimony—Statements made by a second-degree rape and sexual offense victim to her mother, sister, and a nurse fell within firmly rooted exceptions to the hearsay rule and their admission did not violate defendant's Sixth Amendment right to cross-examine the declarant. However, statements which were erroneously admitted under the residual exception because the court did not make the necessary, particularized findings that the statements possessed circumstantial guarantees of trustworthiness violated defendant's Sixth Amendment right of confrontation. **State v. Washington, 156.**

Right of confrontation—unadmitted evidence—inadvertent publication to jury—Defendants' rights of confrontation were violated in a trial for murder and aggravated assault by the inadvertent publication to the jury of portions of the prosecutor's case file which had not been admitted into evidence, including handwritten notes and a typewritten list of statements allegedly made by defendants which implicated both defendants in the crimes and which appeared to state one defendant's record of drug-related convictions. **State v. Hines, 457.**

State—confrontation clause—admission of hearsay testimony—A criminal defendant's right of confrontation under the North Carolina Constitution will be interpreted by applying the reasoning of the United States Supreme Court in *White v. Illinois*, 502 U.S. 346, and *United States v. Inadi*, 475 U.S. 387. Specifically, where hearsay proffered by the prosecution comes within a firmly rooted exception of the hearsay rule, the Confrontation Clause of the North Carolina Constitution is not violated, even though no particularized showing is made as to the necessity for using such hearsay or as to its reliability or trustworthiness. **State v. Washington, 156.**

State—direct constitutional claim—adequate statutory remedy—A visually impaired plaintiff had no direct cause of action against a district court judge under N.C. Const. art. I, § 19 based upon the judge's alleged refusal to allow plaintiff to be accompanied by his assistance dog in the courtroom and the judge's

CRIMINAL LAW—Continued

Defendant's argument—punishment—There was no prejudicial error in a first-degree murder prosecution where the court erroneously sustained the State's objection to defense counsel's closing argument concerning punishment, but defense counsel had informed the jury during voir dire without objection that defendant's punishment if found guilty would be life without parole and defense counsel added a similar reference after the objection was sustained to his closing argument. The jury received sufficient notice of the serious consequences defendant faced if found guilty of first-degree murder. **State v. Cabe, 310.**

Felony murder—self defense—evidence insufficient—The trial court did not err in a prosecution for felony murder by denying defendant's request for an instruction on self-defense as to the underlying felonies, assault and discharging a firearm into occupied property. In felony murder cases, self-defense is available only to the extent that perfect self-defense applies to the relevant underlying felonies and the evidence here failed to support several elements of perfect self-defense. **State v. Martin, 38.**

Guilty plea—informed and voluntary choice—At a hearing on a motion for appropriate relief following defendant's guilty plea, there was adequate evidence to support the court's conclusion that defendant had made an informed choice and entered her plea freely, voluntarily, and with an understanding of the consequences where the judge had questioned defendant concerning her plea before she signed the plea transcript. **State v. Wilkins, 220.**

Guilty plea—informed decision—no plea agreement—At a hearing on a motion for appropriate relief following defendant's guilty plea, there was competent evidence to support the trial court's finding that defendant knew she did not have a plea agreement with the State. **State v. Wilkins, 220.**

Instructions—false, contradictory, and conflicting statements—There was no plain error in a non-capital first-degree murder prosecution in the trial court's instructions on false, contradictory, and conflicting statements. **State v. Andrews, 370.**

Instructions—lapsus linguae—The trial court's use of "lack of provocation by the defendant" rather than "lack of provocation by the victim" in its instructions in a prosecution for non-capital first-degree murder was a mere lapsus linguae and the jury was not misled. **State v. Andrews, 370.**

Instructions—request not in writing—The trial court did not err in a prosecution for second-degree rape and second-degree sexual offense by denying defendant's request that the jury be instructed to disregard the fact that the offenses occurred while he was on furlough from prison where the request for the instruction was not in writing. **State v. Washington, 156.**

Joinder of offenses—no abuse of discretion—harmless error—The trial court did not abuse its discretion in a cocaine prosecution by allowing the State's motion for joinder of a possession count from 22 November with four others committed on 21 July; moreover, any error would have been harmless because the later offense was dismissed early in the proceedings and never submitted to the jury. **State v. Love, 350.**

Jurisdiction—submission to jury—Convictions for rape and sexual offense were vacated where defendant moved at trial to dismiss for lack of jurisdiction,

CRIMINAL LAW—Continued

the trial court denied the motion, implicitly finding that sufficient evidence existed upon which the jury could conclude that the crimes occurred in North Carolina, but the court did not then instruct the jury as to the burden of proving jurisdiction and that it should return a special verdict indicating a lack of jurisdiction if it was not convinced beyond a reasonable doubt. **State v. Bright, 57.**

Jury charge—use of victim—no plain error—There was no plain error in a prosecution for second-degree rape and second-degree sexual offense against a mentally retarded victim in the court's use of "victim" in its charge to the jury. **State v. Washington, 156.**

Mistrial—denied—newspaper article during trial—The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a rape prosecution where defendant left the courtroom during a break in jury selection, telling his attorney he was going to telephone his mother, and did not return; the judge proceeded and ultimately examined the jurors regarding defendant's absence; a newspaper article during the trial described defendant as a fugitive; the court conducted an inquiry and excused two of the seven jurors who had read the article; and defendant was subsequently apprehended and returned to the courtroom. **State v. Jordan, 678.**

Motion to dismiss—circumstantial evidence—The trial court did not err in a robbery and murder prosecution by denying defendant's motions to dismiss for insufficient evidence and for appropriate relief. If the evidence presented is purely circumstantial, the question is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. **State v. Small, 488.**

Motion in limine—opening statement—defendant restricted—The trial court neither erred nor abused its discretion in a prosecution for kidnapping and robbery by denying defendant's motion in limine to forecast evidence in his opening statement regarding the reputation of the house where the crime was committed as a crack house, or by granting the State's motion in limine to restrict defense counsel from making such a forecast in his opening statement. **State v. Allred, 11.**

Pretrial suppression motion—timing of ruling—within court's discretion—There was no abuse of discretion in a cocaine prosecution in the court's failure to rule on a motion to suppress evidence before trial where the charge to which the motion applied was dropped early in the proceedings. The decision as to when to rule on a pretrial suppression motion is in the court's discretion. N.C.G.S. § 15A-976(c). **State v. Love, 350.**

Prior convictions—admitted to show malice—limiting instructions—The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident which resulted from defendant's impaired driving by admitting DUI convictions from 1980. Prior driving while impaired convictions may be offered to show malice and the trial court correctly gave a limiting instruction. **State v. Grice, 48.**

Pro se appearance—advised of risks—no error—The trial court did not err in a cocaine prosecution by allowing defendant to appear pro se where defendant was properly advised and repeatedly warned by the court of the

DIVORCE—Continued

court awarded alimony for a period prior to 1 October 1995, the effective date of the new statute. Under the court's order, defendant accumulated a credit against future court-ordered alimony and support payments. **Glass v. Glass, 784.**

Alimony—findings—duration of award—An alimony order was remanded where the trial court set forth no reason for the thirty-month duration of the award. N.C.G.S. § 50-16.3A(c). **Friend-Novorska v Novorska, 867.**

Alimony—marital misconduct—findings required—The trial court erred in an alimony action by not making specific findings on marital misconduct where evidence was offered on that factor. **Friend-Novorska v. Novorska, 867.**

Alimony—marital misconduct—reckless spending—The trial court did not err in an alimony action by concluding that plaintiff had not committed marital misconduct by spending $30,000 on clothing the year prior to the separation and a further $23,520 on clothes between hearings in June and January. The record reveals that the court found that the lifestyle established by the parties included excessive spending in numerous areas. **Glass v. Glass, 784.**

Alimony—plaintiff's income—findings insufficient—The trial court erred in an alimony action in its calculation of defendant's income by finding without supporting evidence that defendant, who sells insurance, would pick up additional business to replace loss ratio bonus income and commissions from coastal properties following hurricanes. Furthermore, the Court of Appeals could not tell from the record whether the trial court considered this improper finding in making its awards of alimony and child support. **Glass v. Glass, 784.**

Alimony—supporting spouse's income—desire for new house and car—not considered—The trial court abused its discretion in an alimony action by considering the supporting spouse's desire to purchase a new house and car. The effect of the trial court's ruling is to allow a supporting spouse to reduce his net monthly income, and thus his obligation to his dependent spouse, based on his expressed "desires" for a new house and automobile rather than on necessity. **Friend-Novorska v. Novorska, 867.**

Alimony—supporting spouse's income—investments—properly considered—The trial court correctly considered a supporting spouse's investment income in ordering alimony even though defendant contended that his investment income was not actually received by him since it was automatically reinvested and argued that it was not guaranteed. A supporting spouse may not insulate himself from payment of alimony by choosing to reinvest income rather than actually receive it. **Friend-Novorska v. Novorska, 867.**

Equitable distribution—award in excess of net value—The trial court did not err in an equitable distribution action by awarding plaintiff property having a value in excess of the net value of the martial estate; having found sufficient distributional factors to justify an unequal distribution of marital assets to plaintiff and distribution of the entire marital debt to defendant, the trial court acted within its discretion when it distributed the assets and debts independently. **Conway v. Conway, 609.**

Equitable distribution—checks to husband—gifts to wife—wife's separate property—The evidence in an equitable distribution proceeding supported a finding by the trial court that two $10,000 checks sent by defendant wife's aunt

DIVORCE—Continued

to plaintiff husband in consecutive years were in fact gifts to the wife and were her separate property. **O'Brien v. O'Brien, 411.**

Equitable distribution—classification of interest in mother's trust—harmless error—Plaintiff husband was not prejudiced by any error in the trial court's classification of the interest in his mother's trust as irrevocable rather than revocable where the trial court did not classify, value or distribute an interest in the trust or consider the trust as a distributional factor. **O'Brien v. O'Brien, 411.**

Equitable distribution—commingling of marital and separate property—no transmutation into marital property—The mere commingling of marital funds with the wife's separate funds in an investment account did not automatically transmute the separate property into marital property. **O'Brien v. O'Brien, 411.**

Equitable distribution—creation of joint account from separate funds—expressed intent—The trial court did not err in an equitable distribution action by classifying a joint wealth management account as defendant-husband's separate property and distributing it to him where it was opened with funds inherited by defendant and subsequently added to with separate properties in the form of securities. The plain language of N.C.G.S. § 50-20(b)(2) requires that the spouse claiming a joint account as marital property where the account was created with separate funds demonstrate by a preponderance of the evidence that the exchange of separate property was accompanied by an intention that the account be marital property and that such intention was expressly stated in the conveyance. **Friend-Novorska v. Novorska, 508.**

Equitable distribution—distribution factors—fault—The trial court did not err in an equitable distribution action by finding as a distributional factor that defendant had voluntarily and without plaintiff's consent removed himself from the marital home and terminated the relationship after completing his residency and moving to Asheville, but before purchasing a home and establishing his practice. **Conway v. Conway, 609.**

Equitable distribution—distributional factors—medical license not valued—The trial court did not err in an equitable distribution action resulting in an unequal distribution by refusing to assign a value to defendant's professional medical license. The court must consider separate property, including professional licenses, when dividing marital property, but is not required to determine the numeric value of separate property when considering distributional factors. **Conway v. Conway, 609.**

Equitable distribution—equal division—supported by findings—The trial court did not err by failing to award plaintiff husband a greater share of the marital property and a lesser share of the marital debt and by awarding an equal share of marital property to both parties where the trial court found that plaintiff husband has a larger income, a vested retirement benefit, and a substantial employee savings plan benefit while defendant wife has a large separate property estate. **O'Brien v. O'Brien, 411.**

Equitable distribution—investment account—active or passive appreciation—If either or both of the spouses perform substantial services during the marriage which result in an increase in the value of an investment account, that

DIVORCE—Continued

increase is to be characterized as an active increase and classified as a marital asset. **O'Brien v. O'Brien, 411.**

Equitable distribution—investment account—passive increase—An increase in the value of an investment account established with the wife's separate funds was a passive increase and thus the wife's separate property where the evidence showed that the spouses jointly met with the wife's broker and routinely chose between investment alternatives based on the broker's recommendations. **O'Brien v. O'Brien, 411.**

Equitable distribution—investment account—tracing of separate property—Defendant wife met her burden of "tracing out" her separate property in an investment account where the initial deposit into the account consisted of her inheritance from her father's estate; marital funds of $4,550 were later deposited into the account; the sum of $38,658 was thereafter withdrawn from the account for marital purposes; and the $4,550 deposit of marital funds was entirely consumed by the subsequent withdrawal. **O'Brien v. O'Brien, 411.**

Equitable distribution—marital property—gift from parent—burden of proof—An equitable distribution order was vacated and remanded as it pertained to the classification of a tract of land which had been transferred to defendant by his mother where the trial court found that defendant was unable to establish by preponderance of the evidence that he acquired the property by gift. When property is acquired during marriage by one spouse from his or her parent, a rebuttable presumption arises that the transfer is a gift to that spouse; that presumption must be rebutted by the spouse resisting the separate property classification by showing a lack of donative intent. **Caudill v. Caudill, 854.**

Equitable distribution—relative size of marital estate—marital efforts—The trial court did not err in an equitable distribution action resulting in an uneven distribution by considering plaintiff's marital efforts and the relative size of the marital estate. These were appropriate facts to consider in the context of plaintiff's aid in developing defendant's career potential and her contributions to defendant's medical professional license. **Conway v. Conway, 609.**

Equitable distribution—uneven distribution—appreciation of medical license—The trial court did not err in an equitable distribution action resulting in an unequal distribution by not classifying and valuing as marital property the appreciation of defendant's medical license. The evidence tended to show that marital efforts led to the acquisition of the separate property rather than to an active increase in its value. **Conway v. Conway, 609.**

Equitable distribution—valuation of medical practice goodwill—The trial court erred in an equitable distribution action by accepting certain expert testimony regarding the value of the goodwill in defendant's medical practice. When a professional practice has not been established for a sufficient period to determine goodwill based upon comparable past earnings, the capitalization of excess earnings method of valuing goodwill should be used. **Conway v. Conway, 609.**

Post-separation support—appeal interlocutory—An appeal from a postseparation support order was dismissed as interlocutory. Although the legislature has replaced alimony pendente lite with postseparation support, the considera-

EMINENT DOMAIN—Continued

Condemnation for landfill—purposes not stated in pre-suit notice or complaint—The trial court did not err in a condemnation action for a landfill where defendants alleged that the court considered purposes not stated in either the pre-suit statutory notice or the complaint. The court concluded that the taking was for the valid purpose of improving the landfill and the proposed uses all corresponded to that stated purpose. **Scotland County v. Johnson, 765.**

Condemnation for landfill—purposes stated in complaint but not in notice—The trial court did not err in an action arising from the condemnation of a landfill by considering additional uses of the condemned land stated in the complaint but not in the pre-suit notice because the uses corresponded with the stated public purpose in the notice of expanding and improving the landfill. **Scotland County v. Johnson, 765.**

Evidence—comparable sale—The trial court did not abuse its discretion in a condemnation action by allowing as evidence of a comparable sale defendants' conveyance of another tract approximately four months before the taking. **Dept. of Transportation v. Rowe, 206.**

Evidence—cross-examination—sale of adjacent tract—The trial court abused its discretion in a condemnation by sustaining an objection when defendants attempted to cross-examine a State's witness regarding the sale of an adjacent tract where the witness had given a valuation of defendants' property. **Dept. of Transportation v. Rowe, 206.**

Evidence—location of unopened streets excluded—There was no prejudicial error in a condemnation action in the court's refusal to allow defendants to introduce a map showing the location of unopened streets. Although defendants wished to demonstrate to the jury the lack of unity of the remaining tracts, that issue had been determined by the court as a preliminary question of law; moreover, there was a wealth of other evidence about the location of the unopened streets. **Dept. of Transportation v. Rowe, 206.**

Evidence—remainder tract—cost of opening streets and raising grade—The trial court did not err in a condemnation action when it sustained objections to defendants' attempt to offer evidence of the costs of opening unopened streets on the remainder tract and of raising the grade of one tract to the level of the projected road. Defendants were speculating about the future construction of streets and the effects on their remainder property. **Dept. of Transportation v. Rowe, 206.**

Propriety of taking—public purpose established—The trial court did not err in a condemnation action where defendant contended that the court erroneously concluded that the nature and extent of the property acquired was not a judicial question, but it was clear that the trial court did not disregard allegations of arbitrary and capricious conduct by the City. **City of Monroe v. W. F. Harris Dev., LLC, 22.**

Size of taking—necessity to accomplish purpose—The City of Monroe presented sufficient evidence to prove the necessity of a fee simple title and the trial court did not err by concluding that the taking was not an arbitrary and capricious act taken in bad faith where, although it was argued that the City had sufficient land to undertake the expansion of the airport without taking this tract,

EVIDENCE—Continued

cerning defendant employer's alleged over-billing practices for Medicaid because his testimony about over-billing by submitting multiple bills for the same services and doubling up in subsequent billings and the total amount of the alleged over-billing went far beyond plaintiff's testimony that defendant submitted multiple bills for the same services. **Estridge v. Housecalls Healthcare Grp., Inc., 744.**

Credibility of child—inadmissible expert testimony—harmless error—A physician's testimony that he "believed that [a child kidnapping, rape and sexual offense victim] was a reliable informant" constituted expert testimony as to the child's credibility and was improperly admitted. However, this error was not prejudicial because the physical evidence alone overwhelmingly connected defendant to the crimes charged and supported defendant's conviction of those crimes. **State v. Bright, 57.**

Employer's Medicaid over-billing—irrelevancy to unpaid wages, malicious prosecution, abuse of process—Evidence of defendant employer's alleged over-billing practices with respect to Medicaid and an investigation by the State of those practices was not relevant to plaintiff former employee's claims for unpaid wages, abuse of process and malicious prosecution of a charge of conversion of a cellular phone and a pager owned by the employer. **Estridge v. Housecalls Healthcare Grp., Inc., 744.**

Expert—not formally tendered—The trial court did not err in an action for damages arising from an automobile accident in which negligence was stipulated by admitting testimony from a treating physician who was not formally tendered as an expert. His qualifications were elicited for the record by plaintiff, he was further questioned by defendant on cross-examination about his background, and defendant did not object to the doctor's credentials and waived any objection to the doctor testifying as an expert. **Chamberlain v. Thames, 705.**

Expert opinion—psychologist—mentally retarded victim—likely reaction to sexual advance—The trial court did not abuse its discretion in a prosecution for second-degree murder and sexual offense against a mentally retarded defendant by allowing a psychologist to answer the State's hypothetical question concerning the victim's likely reaction to a sexual advance. **State v. Washington, 156.**

Expert testimony—premeditation and deliberation—door opened by defendant—The trial court did not err in a first-degree murder prosecution by admitting expert testimony from the State concerning whether defendant acted with premeditation and deliberation. Defendant opened the door to the State's otherwise inadmissible expert testimony by specifically questioning his own expert as to premeditation and deliberation. **State v. Cabe, 310.**

Hearsay—affidavit contradicting testimony—The trial court did not err by refusing to admit as substantive evidence the purported affidavit of a witness containing a statement which contradicted her trial testimony. The statement was inadmissible hearsay as substantive evidence. **State v. Cozart, 199.**

Hearsay—excited utterance exception—The trial court did not err in a prosecution for second-degree rape and second-degree sexual offense against a

EVIDENCE—Continued

mentally retarded victim by holding that the victim's statements to her sister and mother on the evening of the rape were excited utterances. **State v. Washington, 156.**

Hearsay—excited utterance exception—Statements made by an assault victim to a stranger and an officer concerning an attack upon her by defendant, her father, were admissible under the excited utterance exception to the hearsay rule, although the amount of time between the attack and statements was not shown. **State v. Coria, 449.**

Hearsay—defendant's statement—admission of party opponent—evidence of motive—The trial court did not err in a first-degree murder prosecution by admitting defendant's statement that he sold drugs to make ends meet or by instructing the jury that it could consider this evidence for the purpose of finding motive. The statement constituted a statement by a party opponent admissible under N.C.G.S. § 8C-1, Rule 801(d) and the testimony that defendant was in such dire need of money that he sold drugs tended to make it more probable that his need for money motivated him to rob and kill this victim. **State v. White, 734.**

Hearsay—identification—marital harassment—There was no prejudicial error in a harassment counterclaim under a separation agreement where defendant, who alleged problems with lost mail, testified that a postmaster had identified a photograph of plaintiff. The evidence is classic hearsay; however, it was not prejudicial due to other sufficient evidence of plaintiff tampering with defendant's mail, including a guilty plea to a federal charge of mail fraud. **Reis v. Hoots, 721.**

Hearsay—medical charges—The trial court did not err in an action for damages arising from an automobile accident by admitting medical bills where plaintiff testified pursuant to N.C.G.S. § 8-58.1 as to the charges at Duke for medical services and a physician testified, by way of corroboration, that he agreed with the diagnosis and opinions of the doctor at Duke and that the treatment was necessary for conditions related to the accident. Moreover, the court gave the jury a limiting instruction stating that the second doctor's testimony was for corroboration. **Chamberlain v. Thames, 705.**

Hearsay—medical records—The trial court did not err in an action for damages arising from an automobile accident by admitting medical records where defendant contended that the records were not inherently trustworthy because they were not made at or near the time of the accident. It is not necessary that notes, records, or memoranda be made at or near the time of the accident, but that they be made at or near the time of the treatment rendered to plaintiff. The records in question here were sent to the trial court by registered mail accompanied by an affidavit which satisfied the requirements of N.C.G.S. § 8C-1, Rule 803(6). **Chamberlain v. Thames, 705.**

Hearsay—medical treatment exception—The trial court did not err in a prosecution for second-degree rape and sexual offense by admitting statements the victim made to a nurse who examined her at a hospital. The statements were clearly made for the purposes of medical diagnosis or treatment. **State v. Washington, 156.**

EVIDENCE—Continued

Hearsay—medical treatment—opinion of nontestifying physician—In an action for damages arising from an automobile accident in which negligence was stipulated, the trial court did not err by admitting the testimony of a treating physician regarding the findings and opinions of a nontestifying treating physician. Although defendant contended that the testifying physician had completed his treatment of plaintiff prior to receiving medical records from the other physician, N.C.G.S. § 8C-1, Rule 703 does not prevent an expert from using the findings and opinions of other experts in forming an opinion of his own. Furthermore, defendant's cross-examination was far broader than the matters brought out on direct examination and he thus waived any objection to the use of the records. Lastly, the trial court gave a limiting instruction. **Chamberlain v. Thames, 705.**

Hearsay—nontestifying physician's course of treatment and statements—The trial court did not err in an action for damages arising from an automobile accident by admitting plaintiff's testimony as to a nontestifying physician's course of treatment and statements to her about her condition and its causation. The testimony was both cumulative and corroborative and was not offered to prove the truth of the matters asserted; moreover, even assuming error, it was harmless under the facts of the case. **Chamberlain v. Thames, 705.**

Hearsay—particularized guarantee of trustworthiness—corroborating evidence—There was no error in a prosecution for taking indecent liberties with a child and first-degree sexual offense in admitting statements of the child to others after she was found incompetent to testify where defendant argued that the court inappropriately considered corroborating physical evidence in evaluating trustworthiness. **State v. Wagoner, 285.**

Hearsay—prior statement by defendant—admissible—The trial court did not err in a first-degree murder prosecution by admitting defendant's statement that "he was going to have to cap someone" if his employer did not stop garnishing his wages. If anything, this was a hearsay statement admissible under N.C.G.S. § 8C-1, Rule 801(b) as an admission or statement of a party opponent. **State v. White, 734.**

Hearsay—redirect examination—opening of door—The trial court did not err in an action for damages arising from an automobile accident by admitting on redirect plaintiff's testimony regarding discussions with a nontestifying treating physician. Defendant opened the door to such inquiry on his cross-examination of plaintiff. **Chamberlain v. Thames, 705.**

Hearsay—residual exception—no findings—not prejudicial—There was no prejudicial error in a second-degree rape and sexual offense prosecution where the court admitted statements by an officer and investigator who took statements from the victim under the residual exception to the hearsay rule without making findings of fact supporting the conclusion that the officers' statements were trustworthy. The officers' testimony was almost entirely repetitive of other testimony which was properly admitted. **State v. Washington, 156.**

Hearsay—state of mind exception—victim's statements—Statements made by a murder victim to several witnesses shortly before she was shot by defendant wherein she stated that she was frightened of defendant and believed he was going to kill her were admissible to show the victim's state of mind and the nature of her relationship with defendant. **State v. Childers, 465.**

EVIDENCE—Continued

Hearsay—statement by child— admissible to explain subsequent conduct of officer—The trial court did not err in prosecution for the possession of a firearm by a felon by admitting the statement "Daddy's got a gun" made by a child in the car in which defendant was riding. The trial court specifically instructed the jury that the statement was not to be used to prove its truth, but only as it bore on the state of mind of the police officer and to explain his subsequent conduct. **State v. Alston, 514.**

Hearsay—statements of child sex abuse victim—The trial court did not err in a prosecution for first-degree rape, first-degree sex offense, and taking indecent liberties with a minor by admitting into evidence the hearsay statements of the victim where the court determined that she was unavailable due to her emotional condition and not due to any incompetency. **State v. Hinnant, 591.**

Identification testimony—inaccurate as to facts—admissible—The trial court did not err in a prosecution for robbery and murder by allowing testimony identifying defendant as the perpetrator where the testimony was inaccurate as to the facts. Any uncertainties in the identification go to the weight and not admissibility. **State v. Small, 488.**

Impeachment of hearsay declarant—-inconsistent hearsay statements—admissible—The trial court did not err in a prosecution for robbery and murder by allowing the State to introduce hearsay testimony implicating defendant in rebuttal of defendant's introduction of exculpatory hearsay testimony from the same declarant. N.C.G.S. § 8C-1, Rule 806 provides that inconsistent statements of a hearsay declarant are admissible, in effect treating the out-of-court declarant the same as a live witness for purposes of impeachment. **State v. Small, 488.**

Interview summaries—use by defendant—objection waived—There was no prejudicial error in a prosecution for attempted murder, conspiracy, solicitation to commit murder, and assault in the use of interview summaries of the co-defendants prepared by officers who did not testify. Any objection was waived by defense counsel's use of the statements. **State v. Moore, 65.**

Intoxilyzer results—officer out of jurisdiction—not a substantial violation of defendant's rights—The trial court erred in a prosecution for driving while impaired by allowing defendant's motion to suppress Intoxilyzer results where the Intoxilyzer in the county where defendant was arrested displayed an incorrect date and time, defendant was taken to another county for an Intoxilyzer test and taken before the magistrate there, and defendant moved to suppress the Intoxilyzer results based on the administering officer being out of his jurisdiction. Even if the motion to suppress was procedurally valid, the officer's technical violation would not be so serious as to constitute a substantial violation of defendant's rights. **State v. Pearson, 315.**

Judicial notice—high crime area—The trial court abused its discretion during a child custody action by taking judicial notice sua sponte of murders, robberies and other violent crimes in and around the premises of the motel where defendant lived. The prevalence of crime in and about the premises and how this crime affects the safety of the motel's residents is no doubt a matter of debate within the community and the court cannot take judicial notice of a disputed question of fact. **Hinkle v. Hartsell, 833.**

EVIDENCE—Continued

Lay opinion—comparison of video image of shoes and defendant's shoes—admissible—The trial court did not err in an armed robbery prosecution by admitting testimony from a police officer comparing shoes on a security camera videotape of the robbery to defendant's shoes when he was picked up for questioning. This was an appropriate subject for lay opinion because the similarity between markings on shoes in a video image and markings on the actual pair of shoes can be made by merely observing the video and the shoes. **State v. Mewborn, 495.**

Motion to suppress—required affidavit—The trial court erred in a prosecution for driving while impaired by allowing defendant's motion to suppress Intoxilyzer results obtained by an officer outside his jurisdiction. The motion to suppress was not accompanied by the affidavit required by N.C.G.S. § 15A-977(a). **State v. Pearson, 315.**

Motive and intent—defendant's prejudice relevant—The trial court did not err in a first-degree murder prosecution by admitting evidence relating to defendant's prejudice against homosexuals and Jewish people where evidence of defendant's prejudices was relevant to show his motive and intent when he killed the two black victims. **State v. Burmeister, 190.**

Motive and intent—prior conduct—acting out skinhead song—There was no plain error in a first-degree murder prosecution in the admission of evidence that defendant acted out the lyrics of a skinhead song in a bar fight by kicking a man in the face as he lay on the ground. Evidence of defendant's skinhead beliefs and mindset are relevant to his motive and intent in killing two black victims. **State v. Burmeister, 190.**

Not unduly prejudicial—separation agreement—harassment—The trial court did not abuse its discretion in an action arising from a separation agreement with a no molestation clause and a marital residence transfer clause by admitting evidence concerning plaintiff's transfer of his interest in the residence to a third party who attempted to eject defendant. Although plaintiff contends that the probative value of the evidence is substantially outweighed by the danger of undue prejudice, the trial judge gave a limiting instruction, which indicates that he recognized the potential for prejudice and exercised his discretion. **Reis v. Hoots, 721.**

Other offenses—employing minor to distribute cocaine—no plain error—There was no plain error in a prosecution for various cocaine charges which included employing a minor to traffic in cocaine where the trial court allowed the State to introduce without objection testimony from a minor that he had previously sold cocaine for defendant. **State v. Love, 350.**

Perceptions of lay witness—victim's state of mind—Testimony by a murder victim's co-worker about the demeanor of the victim in the days before she was shot by defendant, her ex-husband, including testimony that the victim "was upset" and "would hold her stomach crying," was relevant and admissible to show the victim's state of mind before the shooting. **State v. Childers, 465.**

Prior offense—modus operandi—admissible—The trial court did not err in a prosecution for robbery and kidnapping by admitting testimony regarding

HOMICIDE—Continued

mere preparation; acts with malice, premeditation, and deliberation; and falls short. There was sufficient evidence in this case of each element and that defendant was the perpetrator. **State v. Cozart, 199.**

Attempted second-degree murder as lesser included offense—instruction refused—evidence of premeditation not contradicted—The trial court did not err in an attempted first-degree murder prosecution by not instructing the jury on attempted second-degree murder. A person commits the crime of attempted second-degree murder when he specifically intends to kill another person unlawfully; does an overt act calculated to carry out that intent that goes beyond mere preparation; acts with malice; and falls short. The only elements that distinguish attempted first-degree murder from attempted second-degree murder are premeditation and deliberation; here, there was no evidence to contradict the State's evidence of premeditation and deliberation. **State v. Cozart, 199.**

Conspiracy—evidence sufficient—The trial court correctly denied defendant's motion to dismiss a conspiracy to murder charge where the evidence, viewed in the light most favorable to the State, was sufficient to submit the charge to the jury on the theory that defendant and others conspired to kill a black person so that defendant could get his spider web tattoo. **State v. Burmeister, 190.**

Felony death by motor vehicle—not a lesser included offense of second-degree murder—The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident resulting from defendant's impaired driving by instructing the jury on second-degree murder, involuntary manslaughter, and misdemeanor death by vehicle, but refusing to instruct on felony death by motor vehicle. Felony death by motor vehicle is not a lesser included offense of second-degree murder. **State v. Grice, 48.**

Instructions—premeditation and deliberation—examples of circumstances supporting inference—There was no plain error in a prosecution for non-capital first-degree murder in the trial court's examples in its instructions of circumstances from which premeditation and deliberation may be inferred. **State v. Andrews, 370.**

Second-degree murder—impaired driving and speeding—evidence sufficient—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a second-degree murder charge based on impaired driving where defendant contended that the court instructed the jury that it could convict if it found either that defendant was driving while impaired or speeding; five witnesses were able to form an opinion as to defendant's speed and there was sufficient evidence for the jury to determine whether defendant was exceeding the speed limit. **State v. Grice, 48.**

Second-degree murder—impaired driving and speeding—proximate cause—evidence sufficient—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a second-degree murder prosecution based on impaired driving and speeding where defendant contended that the evidence was insufficient to prove proximate cause. **State v. Grice, 48.**

Second-degree murder—self-defense not shown—The evidence did not conclusively show that defendant acted in self-defense in shooting the victim so as

INSURANCE—Continued

ment action to determine insurance coverage arising from an auto accident involving a Montgomery Motors employee driving a loaner while his car was being repaired, summary judgment was properly granted for Montgomery Motors and Federated, its insurer, and against the insurer of an employee, Integon, where the Federated policy covered employees but excluded customers. The employee was billed for repairs to his vehicle and there was testimony that he received the loaner because he was a customer; on the record, he was a "customer" under the Federated policy. **Integon Indem. Corp. v. Federated Mut. Ins. Co., 323.**

Coverage—synthetic stucco damages—ensuing loss—The trial court correctly granted summary judgment for defendant in an action seeking damages for defendant's refusal to provide coverage under a homeowner's policy for synthetic stucco damages. The policy in this case not only excluded the cost of repairing the faulty construction, workmanship and materials, but also the cost of repairing the "ensuing loss," whether direct or indirect, caused by the faulty construction, workmanship, and materials. **Alwart v. State Farm Fire and Casualty Co., 538.**

Coverage—uninsured vehicle—ATV—excluded—The trial court did not err by granting summary judgment for State Farm in a negligence action arising from an ATV accident where the ATV was excluded from policy coverage by language which excludes "equipment designed for use principally off public roads." **Corbett v. Smith, 327.**

Excess liability policy—product manufacturer—coverage for product designer—A pressure vessel manufacturer's excess liability policy provided products liability coverage for the vessel designer where the excess policy followed the form of the primary policy and the primary policy was reformed to provide coverage for the designer. **Gaston County Dyeing Mach. Co. v. Northfield Ins. Co., 438.**

General liability policies—products liability—date of occurrence—injury-in-fact rule—The date of discovery of contamination of a medical diagnostic dye, rather than the earlier date when a pressure vessel ruptured and allowed contamination of the dye by a chemical used in the manufacturing process, was the proper date for determining when property damage occurred for purposes of coverage under occurrence-based commercial general liability policies insuring the manufacturer and designer of the pressure vessel. **Gaston County Dyeing Mach. Co. v. Northfield Ins. Co., 438.**

General liability policy—product designer—primary rather than excess coverage—A product designer's claims-made general liability policy was primary and not excess over all other insurance available to the designer through occurrence-based policies issued to the product manufacturer. **Gaston County Dyeing Mach. Co. v. Northfield Ins. Co., 438.**

Insolvent insurer—two policies with same insured—Guaranty Association—extent of obligation—The trial court did not err in a declaratory judgment action arising from an automobile accident in which the insurer became insolvent by finding that the obligation of the North Carolina Insurance Guaranty Association was limited to $300,000 with a set-off where the insolvent insurer had issued a primary and an excess policy to the insured. N.C.G.S. § 58-48-35 limits the Association's exposure to $300,000 subject to set-off for a single covered claim (the underlying injury) even though the insolvent insurer provided pri-

JUDGMENTS—Continued

to indicate any notice to defendants that summary judgment had been entered, and defendants filed their motion for relief in less time than plaintiff consumed in preparing the order and having it signed and filed. **Branch Banking & Trust Co. v. Tucker, 132.**

Rule 60 relief—no abuse of discretion—The trial court did not err by setting aside a summary judgment and entries of default where the trial court found that plaintiff was attempting to collect on the same promissory notes involved in an earlier action which had been voluntarily dismissed with prejudice and plaintiff does not make any contention that the judge abused his discretion and no abuse of discretion was shown on the facts. **Branch Banking & Trust Co. v. Tucker, 132.**

JURISDICTION

Long arm statute—allegations in complaint—The trial court did not err by denying defendants' motion to dismiss for lack of personal jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(2) in an action for fraud and unfair trade practices where the uncontroverted and uncontradicted statements in plaintiff's complaint and the affidavit of its chief financial officer were sufficient to establish a prima facie showing of jurisdiction under North Carolina's long arm statutes, and the court's unimpeachable findings (based on uncontroverted assertions) supported its legal conclusion that the acts of MSN are imputed to defendants Petree and Combs. **Inspirational Network, Inc. v. Combs, 231.**

Minimum contacts—sufficient—The trial court did not err by denying defendants' motion to dismiss for lack of personal jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(2) in an action for fraud and unfair trade practices where defendants had sufficient minimum contacts with North Carolina and exercise of jurisdiction over their persons did not offend due process. **Inspirational Network, Inc. v. Combs, 231.**

Pending appeal—foreign action—not involved in appeal—The trial court did not lack subject matter jurisdiction to enjoin defendants from proceeding with a separate New York action arising from a covenant not to compete where the propriety of the New York action was not a question involved in the pending appeal of the North Carolina action. **Cox v. Dine-a-Mate, Inc., 542.**

Personal—Virginia plaintiff—North Carolina automobile accident—The trial court correctly concluded that North Carolina courts lack personal jurisdiction over Myers where Riddick and Myers were involved in an automobile accident in North Carolina, a Virginia court awarded Myers a favorable judgment for property damages arising from the accident, Myers instituted another suit in Virginia for personal injuries and medical expenses, and Riddick brought this declaratory judgment action in North Carolina seeking a holding that North Carolina law controls disputes arising out of North Carolina accidents and that Myers is barred from maintaining a second action against Riddick, and Myers successfully moved to dismiss for lack of personal jurisdiction. Riddick has been adjudicated to be at fault by the Virginia court and North Carolina case law provides that N.C.G.S. § 1-105 is not available to obtain personal jurisdiction since Myers did not inflict the injury. **Riddick v. Myers, 871.**

Petition for certiorari—plaintiff as aggrieved party—insufficient allegation—motion to amend—The trial court erred in an action arising from a zon-

NEGLIGENCE—Continued

ant-grocery store in a slip and fall negligence action where plaintiff slipped on a grape in a store aisle but was unable to establish that defendant knew or should have known of the grape. Negligence is not presumed from the mere fact of injury; plaintiff is required to offer legal evidence tending to establish essential elements beyond mere speculation or conjecture. **Williamson v. Food Lion, Inc., 365.**

Store security—criminal act of third party—foreseeability—proximate cause—The trial court did not err by granting summary judgment for defendant in a negligence action against the owner of a convenience store arising from an assault at the store. Although plaintiff's forecast of evidence raised a genuine issue of foreseeability in that four previous assaults at this location and two armed robberies are not so different in character from the attack suffered by plaintiff as to make the attack upon him unforeseeable as a matter of law, there was before the trial court no evidence that an act or omission of defendant constituted a proximate cause of the assault upon plaintiff. **Liller v. Quick Stop Food Mart, Inc., 619.**

PARTIES

Motion to add—denied—failure to exercise discretion—An order by the trial court denying defendants' motion to add third parties to a synthetic stucco class action was reversed and remanded. The trial court thought it was without authority to act and did not exercise its jurisdiction, but the record shows that the trial court failed to consider methods available under the Rules of Civil Procedure which would render large additions of parties practical. **Ruff v. Parex, Inc., 534.**

Motion to intervene—declaratory judgment action—determination of heirs for wrongful death action—The trial court did not err by denying appellants' motion to intervene in a declaratory judgment action to determine which potential heirs would share in any proceeds from a wrongful death action brought on behalf of a child where the child's adoption had begun but not been completed. Any interest of appellant (who had provided medical care to the child) is contingent upon the outcome of the underlying wrongful death action, which has yet to be determined. **Alford v. Davis, 214.**

Motion to intervene—no significantly protectable interest—interpretation of intestate succession—limitation of tort liability—Appellants were not provided with a non-statutory basis for intervention by N.C.G.S. § 1A-1, Rule 24 where appellants were the defendants in a wrongful death action on behalf of a child whose adoption had not been completed when she died and the administrator of her estate filed these declaratory judgment actions to determine which potential heirs would share in any proceeds from the wrongful death action. Appellants, as alleged tortfeasors, will not be permitted to intervene in this action to obtain an interpretation of the intestate succession laws in order to limit their own liability. **Alford v. Davis, 214.**

Motion to intervene—permissive—denial not an abuse of discretion—The trial court did not abuse its discretion by denying appellant's motion for permissive intervention pursuant to N.C.G.S. § 1A-1, Rule 24(b) in a declaratory judgment action where appellants were a doctor and medical practice who had provided services to a child who died; the child's adoption had begun but had not

PARTIES—Continued

been completed at the time of death; and the administrator of the child's estate filed this declaratory judgment action to determine the heirs who would share in the proceeds of a wrongful death action. **Alford v. Davis, 214.**

PLEADINGS

Amendment to complaint—corporate name added—no relation back—complaint time barred—The trial court did not err by dismissing a complaint under the statute of limitations where the complaint clearly named Troy Day, an individual, as defendant and alleged that he was a citizen and resident of Cabarrus County, and an amendment substituted the corporate defendant, Day Enterprises, Inc., for the individual defendant, thereby naming a new party-defendant rather than correcting a misnomer. The amendment does not relate back and the claim against the corporate defendant is barred by N.C.G.S. § 1-52(16). **Bob Killian Tire, Inc. v. Day Enters., Inc., 330.**

PUBLIC OFFICERS AND EMPLOYEES

RIF policy—failure to follow—no presumption of harm—The trial court erred in an action arising from the elimination of petitioner's state government position by finding that the substantial evidence in the whole record does not support the conclusion that FSU's failure to follow the State's RIF policy was harmless. The presumption in *N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30, that harm is presumed from a violation of RIF policy does not apply here because petitioner was not one of a class of employees from which one would be chosen to be terminated and a reviewing court would not be forced to speculate on how an agency would weigh factors. Petitioner made no showing that jobs were available during the delay in informing him of his priority reemployment status and therefore failed to show harm. **Neal v. Fayetteville State Univ., 377.**

RAPE

Retarded victim—acts by force—evidence sufficient—In a prosecution for second-degree rape and sexual offense against a mentally retarded victim, the trial court correctly denied defendant's motion to dismiss where counts of rape by vaginal intercourse by force and against the victim's will and having vaginal intercourse with a victim who was mentally retarded were based on one act, and counts of second-degree sexual offense by force and with a mentally defective victim were also based on one act. **State v. Washington, 156.**

REFORMATION OF INSTRUMENTS

Insurance policies—mutual mistake—Primary and umbrella commercial general liability policies issued to the manufacturer of a pressure vessel were properly reformed on the ground of mutual mistake to provide products liability coverage for the vessel designer. **Gaston County Dyeing Mach. Co. v. Northfield Ins. Co., 438.**

ROBBERY

Motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss charges of robbery and attempted robbery

WITNESSES—Continued

questions about recent fights between defendant, defendant's family, and the State's witnesses. Defendant made no offer of proof regarding the responses. **State v. Cozart, 199.**

Cross-examination—scope limited—no prejudice—There was no prejudicial error in a prosecution for attempted first-degree murder in the court's limiting the scope of cross-examination of a State's witness who testified that she was not present at the time of the shooting and whom defendant wished to impeach with an affidavit stating that she was present. **State v. Cozart, 199.**

Instructions—credibility—accomplice—alcohol abuser—Any error was harmless in a first-degree murder prosecution where defendant requested that the court instruct the jury that the testimony of an alcohol abuser must be examined with greater care than ordinary witnesses and that the jury should never convict upon the unsupported testimony of such a witness unless it believed the testimony beyond a reasonable doubt, and the court instructed the jury to consider the opportunity of the witnesses to see, hear, know and remember the facts or occurrences about which the witness testified, that it should examine every part of the testimony of an accomplice witness with the greatest care and caution, and that it should specifically examine the testimony of this witness with great care and caution. The court is not required to frame instructions with any greater particularity than is necessary to enable the jury to properly understand and apply the law to the evidence. **State v. Burmeister, 190.**

WORKERS' COMPENSATION

Approval of physician—discretion of Commission—The Industrial Commission did not abuse its discretion in a workers' compensation action by denying further treatment by a physician chosen by plaintiff. N.C.G.S. § 97-25 permits an injured employee to select a physician subject to the Commission's approval; the unambiguous language of the statute leaves the approval of a physician within the discretion of the Commission. **Deskins v. Ithaca Industries, Inc., 826.**

Average weekly wage—computation—exceptional circumstances—An order of the Industrial Commission in a workers' compensation case calculating the average weekly wage of a realtor for whom death benefits would be paid was affirmed where the Commission's finding that the fifth method in N.C.G.S. § 97-2(5) was the only method which was fair and which would result in a calculation of decedent's average weekly wage which most nearly approximated the amount of wages she would be earning were it not for her injury and resulting death was supported by competent evidence. **Hendricks v. Hill Realty Group, Inc., 859.**

Cause of condition—non-work related factors—The Industrial Commission did not err by finding that plaintiff's torn rotator cuff is work related where defendant contended that she injured her shoulder cleaning houses. N.C.G.S. § 97-53(13) does not require that the conditions of employment be the exclusive cause of the occupational disease. **Garren v. P.H. Glatfelter Co., 93.**

Change of treating physicians—unilateral decision—The Industrial Commission's order that plaintiff's benefits be suspended was not supported by the record after the finding that plaintiff unjustifiably refused to cooperate with vocational rehabilitation in that she unilaterally changed treating physicians was

WORKERS' COMPENSATION—Continued

set aside. Plaintiff was statutorily authorized to seek medical treatment from a physician other than one provided by defendants and was not obligated to procure the approval of defendants or the Commission prior to seeking such treatment. All that is required of the employee is that she secure the approval of the Commission within a reasonable time after she has selected a physician of her own choosing. N.C.G.S. § 97-25. **Deskins v. Ithaca Industries, Inc., 826.**

Claim—time for filing—The Industrial Commission appropriately determined that a workers' compensation claim was barred by N.C.G.S. § 97-24 where plaintiff was injured in August 1991 and did not file her claim until October 1995. N.C.G.S. § 97-24's requirement of filing a claim within two years of the accident is not a statute of limitation, but a condition precedent to the right to compensation. **Wall v. Macfield/Unifi, 863.**

Collateral attack—claims including fraud—The trial court did not err by dismissing pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) a civil action including allegations of fraud and bad faith refusal to pay a claim which arose from a workers' compensation claim involving an inaccurate videotape and an altered Industrial Commission form. The Workers' Compensation Act is a comprehensive regulatory scheme and collateral attacks are inappropriate. **Johnson v. First Union Corp., 142.**

Continuous disability—evidence sufficient—The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff had been continuously disabled since 17 December 1991. Several doctors noted that plaintiff was in extreme pain because of his work related injury, plaintiff's neurosurgeon advised defendant that plaintiff was totally disabled and would not be able to return to manual labor, and vocational consultants concluded after extensive testing that plaintiff was not capable of returning to his prior position. **Sanders v. Broyhill Furniture Indus., 383.**

Credibility determination—deference due the deputy commissioner's determination—The Industrial Commission in a workers' compensation action gave proper deference to the credibility determination of the deputy commissioner in its reversal of the deputy commissioner's decision. **Sanders v. Broyhill Furniture Indus., 383.**

Credibility determination—deputy commissioner reversed by full commission—abuse of discretion—The Industrial Commission abused its discretion in a worker's compensation action when it acknowledged that the deputy commissioner had the ability to observe the witnesses firsthand but did not recognize that this makes the deputy commissioner the best judge of credibility and relied only on the printed words before it to reverse what the deputy commissioner had seen and heard with his own eyes and ears and substituted its judgment of credibility for his. **Hollingsworth v. Cardinal Container Serv., 400.**

Disability—created position—trial offer—declined—The Industrial Commission erred by denying a workers' compensation claim for additional temporary total disability benefits and additional medical treatment. Once disability is established, the employee has the presumption of disability and the employer may not rebut the presumption by showing that the employee could earn preinjury wages in a temporary position or by creating a position not ordinarily

WORKERS' COMPENSATION—Continued

available in the competitive job market. **Stamey v. N.C. Self-Insurance Guar. Ass'n, 662.**

Disability—determination—post-injury earning capacity—The relevant factor in assessing disability is the plaintiff's post-injury earning capacity rather than actual wages earned. **Deese v. Champion Int'l Corp., 299.**

Employment as significant contributing factor—evidence sufficient to support finding—A worker's compensation plaintiff met her burden of showing that her employment caused or was a significant contributing factor to her torn rotator cuff where one of plaintiff's doctors acknowledged the difficulty in pinpointing the exact cause of plaintiff's condition because she also cleaned houses, but made clear that both activities could have contributed to her condition. **Garren v. P.H. Glatfelter Co., 93.**

Estoppel—jurisdictional bar—Defendants in a workers' compensation action were not equitably estopped from asserting the jurisdictional bar in N.C.G.S. § 97-24 where defendant employer never told plaintiff that it would file her workers' compensation claim and, in fact, told her that it would deny any claim she filed. Although a jurisdictional bar generally cannot be overcome by consent, waiver, or estoppel, plaintiff here was not lulled into a false sense of security. **Wall v. Macfield/Unifi, 863.**

Findings—recitation of testimony—There was sufficient competent evidence in the record to support each of the Industrial Commission's findings in a workers' compensation action arising from a foot injury where the Court of Appeals reluctantly accepted the Commission's recitations of testimony as findings of fact. **Bailey v. Sears Roebuck & Co., 649.**

Form 18 not timely filed—no prejudice—The Industrial Commission did not err in a workers' compensation action by finding that plaintiff's failure to timely file a Form 18 was reasonably excused where plaintiff testified that he told his supervisor about his injury and the Commission specifically found that defendant knew about the injury; moreover, assuming that defendant did not know about the injury, defendant presented no evidence that it was prejudiced in any way by the ten month delay in filing the claim. **Sanders v. Broyhill Furniture Indus., 383.**

Injuries arising from employment—acting to benefit of third party—truck driver shot while chasing thief—The Industrial Commission erred in a workers' compensation action by awarding benefits to a decedent and his family where the deceased was a long distance truck driver whose company handbook encouraged drivers to foster good public relations in their contacts with the public; the deceased and another truck driver pursued a thief from a truck stop as the register operator screamed for help; and the deceased was fatally wounded when security guards fired at the automobile of the fleeing thief. **Roman v. Southland Transp. Co., 571.**

Jurisdiction of Industrial Commission—out-of-state job—The Industrial Commission did not err by finding that a contract was made in North Carolina and that the Industrial Commission had jurisdiction where plaintiff had been laid off by defendant from a previous job; his old supervisor telephoned plaintiff at his home in North Carolina and offered him employment; the first offer was

WORKERS' COMPENSATION—Continued

ers' compensation action to support the Industrial Commission's finding and conclusion that plaintiff's claim was not barred by the two year statute of limitations where plaintiff filed her claim on 8 June 1992 and, while there may be some evidence to support a finding that she knew about her illness prior to 13 June 1990, when she ceased work, there is also competent evidence which shows that she was not advised by competent medical authority before 13 June 1990 that her disease was related to her work environment. **Locklear v. Stedman Corp., 389.**

Sufficiency of evidence—aggravation of existing cerebral palsy—There was sufficient competent evidence in a workers' compensation action to support the Industrial Commission's determination that plaintiff's 1993 injury did not aggravate her cerebral palsy or in any way cause her 1995 foot condition. **Bailey v. Sears Roebuck & Co., 649.**

Timely payment—compromise settlement—appealable—Defendant in a workers' compensation action was not subject to the 10% penalty in N.C.G.S. § 97-18(g) for paying a compromise settlement within 27 days of receipt of the Commission order approving the settlement. Although plaintiff contended that compromise settlements are not appealable, so that employers are liable for the penalty after 24 days, the Court of Appeals and Supreme Court have consistently heard and decided appeals involving compromise settlements. Fundamental fairness requires a holding that defendant rightfully assumed that it was entitled to appeal its compromise settlement and was accordingly entitled to tender payment within thirty-nine days of the compromise settlement's approval. **Felmet v. Duke Power Co., 87.**

Timely payment—compromise settlement—not a waiver of appeal—A compromise settlement did not amount to a waiver of the right to appeal in an action in which plaintiff sought the 10% penalty under N.C.G.S. § 97-18(g) for payment of a worker's compensation settlement more than ten days after waiving the right to appeal. **Felmet v. Duke Power Co., 87**

Videotape of job—not an accurate reflection of conditions—The Industrial Commission did not err by "ignoring" a videotape offered by defendant in deciding that plaintiff's work significantly contributed to her torn rotator cuff where defendant contended that the videotape accurately reflected plaintiff's job, but the man used as a model in the video is much larger and certainly much stronger than plaintiff and one of plaintiff's doctors testified that he would not base his answers on the tape because the video was planned, did not show the patient, did not show the material that patient was using at the time of the injury, and did not document the forces or weights involved. **Garren v. P.H. Glatfelter Co., 93.**

Vocational rehabilitation—attorney's role—The Industrial Commission erred by finding that a letter from plaintiff's attorney to her vocational rehabilitation nurse requesting that the nurse contact him directly amounted to a refusal by plaintiff to cooperate with the rehabilitation procedure and concluding that suspension of plaintiff's workers' compensation benefits was warranted. There is absolutely no evidence in the record that plaintiff refused any rehabilitative procedure ordered by the Commission. N.C.G.S. § 97-25. **Deskins v. Ithaca Industries, Inc., 826.**

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina