NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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1. Appointed to a new position and sworn in 25 July 2000.
2. Appointed Chief Judge effective 1 August 2000.
3. Appointed and sworn in 10 August 2000 to vacancy left by J. Patrick Exum who retired 31 July 2000.
4. Appointed Special Superior Court Judge effective 14 July 2000.
5. Appointed to a new position and sworn in 21 July 2000.
6. Appointed Chief Judge effective 1 August 2000.
7. Appointed and sworn in 11 August 2000 to fill vacancy left by Ronald W. Burris who retired 31 July 2000.
8. Appointed to a new position and sworn in 28 July 2000.
9. Appointed to a new position and sworn in 7 August 2000.
10. Resigned 1 July 2000.

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CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

GLORIA ANN EVANS, PLAINTIFF V. JUDITH R. COWAN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR OF STUDENT HEALTH SERVICES, UNC-CH; BRUCE VUKOSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE AFTERHOURS PROGRAM AT STUDENT HEALTH SERVICES, UNC-CH; AND JANE M. HOGAN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSOCIATE DIRECTOR OF STUDENT HEALTH SERVICES, UNC-CH; DEFENDANTS

No. COA97-781

(Filed 5 January 1999)

1. Constitutional Law— State—Law of the Land Clause—employment interest—employment at will

The trial court properly granted summary judgment for defendant on a claim under Art. I, § 19 of the North Carolina Constitution (the Law of the Land Clause) arising from the termination of plaintiff's employment. Plaintiff must possess a property interest in the employment before the Law of the Land analysis may be undertaken and plaintiff's assertions that she fell outside the category of an at-will employee are unfounded.

2. Constitutional Law— State—freedom of speech—public concern—reason for discharge

The trial court did not err by granting summary judgment for defendant on plaintiff's free speech claim under the North Carolina Constitution arising from the termination of her employment where, assuming that the Whistleblower Act did not afford an adequate state remedy, plaintiff's statements related to

internal policies and office administration and there was no forecast of evidence showing that her statements were either the motivating or a substantial factor underlying her dismissal.

Appeal by plaintiff from order filed 16 April 1997 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 18 February 1998.

McSurely Dorosin & Osment, by Alan McSurely, Mark Dorosin and Ashley Osment, for plaintiff-appellant.

Attorney General Michael F. Easley, by Thomas J. Ziko and Celia Grasty Jones, for defendants-appellees.

JOHN, Judge.

Plaintiff appeals the trial court's grant of summary judgment in favor of defendants. We affirm the trial court.

Pertinent factual and procedural information includes the following: Defendant Jane Hogan (Dr. Hogan) was awarded a Ph.D. degree in health care administration in 1991 by the University of Pennsylvania. In 1990, she served as a volunteer consultant at the University of North Carolina at Chapel Hill (UNC-CH) Student Health Services (SHS). In that capacity, Dr. Hogan contacted plaintiff and suggested employment at SHS to plaintiff. The latter had under consideration a tenure track faculty position at the University of South Carolina School of Nursing, but instead agreed 9 April 1990 to become Associate Director of the AfterHours Program (AfterHours) at SHS. AfterHours provided health services to UNC-CH students during evenings, weekends and holidays.

Plaintiff joined a task force comprised of defendant Dr. Bruce Vokoson (Dr. Vokoson), Director of AfterHours; Dr. Hogan; defendant Dr. Judith Cowan (Dr. Cowan), Director of SHS; and Jaclyn Jones (Jones), Acting Director of Nursing. The task force was seeking methods of improving the efficiency of SHS. In addition, plaintiff's duties included clinical responsibilities and the task of recruiting and supervising physician extenders, *i.e.*, physician assistants attached to a physician's medical license, employed in AfterHours.

The AfterHours task force met regularly for several months. In December 1990, plaintiff suggested that SHS change its practice of paying "moonlighting" physicians to provide AfterHours medical care. In plaintiff's opinion, that service could be more efficiently and

economically furnished by full-time nurse practitioners. According to plaintiff, this suggestion made Dr. Vukoson "visibly angry."

In task force meetings, plaintiff also sought implementation of a comprehensive alcohol policy for SHS, noting "most of our patients' problems [are] alcohol-related." At one meeting, plaintiff also expressed concern that Dr. Hogan had acted as the second R.N. covering a SHS night shift. Plaintiff noted Dr. Hogan was a non-employee acting in a medical capacity at a state institution.

In April 1991, Dr. Cowan informed plaintiff that her job responsibilities would be strictly clinical as of 1 July 1991. Shortly thereafter, plaintiff developed pleural pericarditis, an inflammation of the lung tissue and heart covering. Plaintiff informed Jones, her supervisor, that she expected to return to work the week of 5 May 1991. However, because her sick leave was exhausted, plaintiff actually resumed her duties 29 April 1991. On 30 April 1991, Dr. Vukoson telephoned plaintiff's cardiologist to ascertain if plaintiff was working contrary to her physician's instructions.

Plaintiff subsequently received a letter dated 6 May 1991, signed by Jones and Drs. Vukoson and Cowan, described therein as a "Final Written Warning for personal conduct." Noting plaintiff's earlier than anticipated return to work, the correspondence asserted plaintiff's "inconsistent communications" had resulted in 1) the waste of administrative time expended in procuring coverage for her shifts, 2) inconvenience to staff who had agreed to provide coverage, and 3) diminishment in supervisory and employee relations as a result of the confusion. In addition, plaintiff was relieved of responsibility for the AfterHours schedule. According to plaintiff, the warning communicated by the letter was rescinded 30 August 1991.

In May 1991, plaintiff learned at a nursing staff meeting that SHS planned to use "Fellows," physicians who were current recipients of a fellowship in a graduate medical education program, as back-up supervision for nurse practitioners in AfterHours. To be approved to practice in North Carolina, nurse practitioners must work continuously under the supervision of a primary supervising physician (PSP). Believing this new policy would directly conflict with 21 N.C.A.C. 32M.0009(5)(a), plaintiff approached Jones and Dr. Cowan with her concerns. Dr. Cowan contacted the Board of Medical Examiners (the Board) to request clarification of the regulation and obtain advice regarding the proposed practice. Dr. Cowan was informed the physicians in question could properly serve as back-up supervisors. This

response was consistent with information Dr. Hogan had sought and received from the Board.

Plaintiff's re-certification with the Board as a nurse practitioner came due in June 1991. Dr. Vukoson, as plaintiff's PSP, was required to sign her application for reapproval to practice, and despite some reluctance, he did so. However, by copy of a letter to the Board dated 18 October 1991, Dr. Vukoson advised plaintiff he intended to withdraw as her PSP effective 1 January 1992. Dr. Vukoson indicated this decision was based on his increasing lack of trust in plaintiff and what he perceived as her lack of respect for his medical license.

In her deposition, Dr. Cowan related that Dr. Vukoson had communicated to her two instances of plaintiff's failure to follow established protocol in treating students. The first concerned a student with a history of suicide, and the second involved a prescription to a student of a drug not in the treatment protocol and allowing that student to leave SHS while "complaining of what could have been a serious reaction with the [drug]." Dr. Cowan also indicated she was aware of a "profound communication difficulty, such a profound difference in perceptions" between plaintiff and Dr. Vukoson.

On 14 November 1991, the UNC-CH Medical Staff (the Staff) passed a resolution (the resolution) under which only physicians serving as full-time employees of the Staff and working in the same section as a physician extender were permitted to serve as the latter's PSP. This rule in effect prevented any physician other than Dr. Vukoson from acting as plaintiff's PSP.

As a result of the resolution, plaintiff was unable to maintain the necessary medical credentials for her position and was notified she would be discharged as of 6 May 1992. Plaintiff received a pre-termination hearing 24 April 1992 and appealed through the highest available grievance procedure levels. Ultimately, UNC-CH Chancellor Paul Hardin upheld plaintiff's discharge for failure to maintain credentials.

On 16 November 1993, plaintiff filed the instant action in Orange County Superior Court, alleging slander, violation of her federal constitutional rights and violation of her rights under Article I, §§ 1, 12, 14 and 19 of the North Carolina Constitution. Following removal of the case by defendants to the United States District Court for the Middle District of North Carolina, defendants moved for summary judgment. In an order filed 6 January 1995, the federal court granted

summary judgment on the federal constitutional and slander claims and remanded the state constitutional claims brought against defendants in their official capacities to Orange County Superior Court.

On 14 February 1995, defendants sought summary judgment from the trial court on plaintiff's state constitutional claims, arguing each was barred by *res judicata* as being "identical in all respects to the federal constitutional claims already adjudicated." Defendants' motion was allowed, and plaintiff filed timely notice of appeal.

On appeal, this Court reversed the trial court's grant of summary judgment and remanded. *See Evans v. Cowan*, 122 N.C. App. 181, 468 S.E.2d 575 (1996) ("an independent determination of plaintiff's constitutional rights under the state constitution is required"). Upon review by our Supreme Court, the ruling of this Court was affirmed *per curiam*. *Evans v. Cowan*, 345 N.C. 177, 477 S.E.2d 926 (1996).

Following remand to Orange County Superior Court, defendants again moved for summary judgment. The motion was granted in an order filed 16 April 1997. 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.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). In assessing whether this burden is met, all inferences are to be viewed in the light most favorable to the non-movant. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 281, 354 S.E.2d 459, 464 (1987).

[1] Bearing these general principles in mind, we first consider plaintiff's assertion that her termination violated Article I, § 19 of the North Carolina Constitution (the Law of the Land Clause). The Law of the Land Clause provides that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land,"

N.C. Const. art. I, § 19, and has generally been held to be equivalent to the Due Process Clause of the United States Constitution. *Lorbacher v. Housing Authority of the City of Raleigh*, 127 N.C. App. 663, 675, 493 S.E.2d 74, 81 (1997). Given the similarities, a decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause. *Id.*

Defendants argue plaintiff was an employee at will with no vested property right in continued employment, and thus failed to show the threshold element of a due process analysis. Plaintiff, apparently recognizing that the weight of authority supports defendants' position, *see, e.g., Lorbacher*, 127 N.C. App. at 675, 493 S.E.2d at 81 ("plaintiff's complaint fails to state a valid claim under the Law of the Land Clause . . . [because] [h]e simply lacks the requisite property interest in continued employment to trigger the protections afforded by our State Constitution"); *Woods v. City of Wilmington*, 125 N.C. App. 226, 234, 480 S.E.2d 429, 434 (1997) (trial court's grant of summary judgment to defendant on Article I, § 19 claim affirmed where "plaintiff did not possess a cognizable property interest in continued employment protected by the North Carolina Constitution"); and *Ware v. Fort*, 124 N.C. App. 613, 617, 478 S.E.2d 218, 221 (1996) (plaintiff's argument failed "because plaintiff simply had no property right in the position of which he could be constitutionally deprived—under either the North Carolina or federal constitutions"), nonetheless urges us to

> take an independent approach to the unique fact situation here, informed by the particularities of North Carolina constitutional jurisprudence, reflecting the unique language, history and policy of the North Carolina Constitution.

However, plaintiff is unable to point us to a case supporting her position, and we agree with defendants that plaintiff must possess a property interest in the employment at issue before the Law of the Land Clause analysis may be undertaken.

We consider then whether the requisite property interest is present in the case *sub judice*. This jurisdiction has long adhered to the employment-at-will doctrine, *i.e.* "[w]here a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citations omitted). An employee at will has no property interest by virtue of her employment, though an enforceable interest in continued employment may

"be created by [statute], or by an implied contract." *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992) (citations omitted).

Plaintiff, having accumulated but twenty-five months of service, makes no claim of statutory "permanent employee status" under N.C.G.S. § 126-5(c)(1) prior to 1 July 1993. *See also* N.C.G.S. § 126-15.1 (1995) ("probationary employee" is one exempt from state Personnel Act because not "continuously employed for the period of time required by G.S. 126-5(c)). However, plaintiff asserts an implied employment contract in that

> [she] was heavily recruited for the position at SHS and lured away from a better paying tenure track position at the University of South Carolina; was promised that she would be able to continue to conduct her research; given a joint appointment for a time certain with the School of Nursing; and assured that while she would be accepting a position as a PE II, her position would be quickly upgraded to a PE III.

This Court has previously held that an implied employment contract may arise out of representations and additional consideration proffered at the time of hiring. *See Sides v. Duke University*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985) (allegations (1) that plaintiff was assured by employer "she could only be discharged for incompetence, [(2) and that] these assurances induced her to move here from Michigan in order to accept the job offer, and [(3)] were part of her employment contract," sufficient "to remove plaintiff's employment contract from the terminable-at-will rule" for purposes of surviving motion to dismiss breach of contract claim pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (1990) for failure to state a claim). However, our Supreme Court has recently cast doubt upon the *Sides* holding. *See Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 334, 493 S.E.2d 420, 424 (1997) (change of residence exception to employment-at-will doctrine disapproved, and "employer's assurances of continued employment [held not to] remove an employment relationship from the at-will presumption").

In addition, *Sides* is readily distinguishable from the instant case. In *Sides*, the plaintiff was assured individuals in her position could be discharged only for incompetence. *Sides*, 74 N.C. App. at 345, 328 S.E.2d at 828. Nothing in the record indicates plaintiff herein received any analogous promise. Moreover, the *Sides* plaintiff moved from

Michigan to North Carolina to accept employment. On the other hand, plaintiff acknowledged "there were some good reasons why it might be convenient" to remain in Chapel Hill as opposed to relocating to South Carolina, because her data set was located in Chapel Hill.

We therefore conclude that plaintiff's assertions she fell outside the category of an at-will employee are unfounded. *See Salt v. Applied Analytical*, Inc., 104 N.C. App. 652, 659, 412 S.E.2d 97, 101 (1991) (no additional consideration where plaintiff failed to show assurances containing "specific terms or conditions, as in *Sides*"), *cert. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992); *see also McMurry v. Cochrane Furniture Co.*, 109 N.C. App. 52, 57-58, 425 S.E.2d 735, 739 (1993) ("[p]laintiff's failure to accept a tentative offer of employment elsewhere in return for defendant's gratuitous offer of continued employment for an indefinite period was . . . not sufficient additional consideration" to create implied contract). Accordingly, because plaintiff lacked a property interest in continued employment, the trial court's grant of defendant's summary judgment motion on plaintiff's Law of the Land Clause claim is affirmed.

[2] Turning to plaintiff's freedom of speech claim, we note that the North Carolina Constitution proclaims that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . . ." N.C. Const. art. I, § 14. Our Supreme Court has deemed the foregoing section "a direct personal guarantee of each citizen's right of freedom of speech." *Corum v. University of North Carolina*, 330 N.C. 761, 781, 413 S.E.2d 276, 289, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Nonetheless, a citizen asserting abridgement of her state constitutional rights may assert a direct claim thereunder only absent an adequate state remedy. *Id.* at 782, 413 S.E.2d at 289. The judiciary "must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power." *Id.* at 784, 413 S.E.2d at 291.

Arguing that plaintiff possessed an adequate state remedy precluding her direct constitutional claim, defendants point to what is referred to as our "Whistleblower Act," N.C.G.S. §§ 126-84 through 126-88 (1995). In her complaint, plaintiff alleged she was discharged in retaliation for her "good faith and truthful communications about important health and administrative issues at the Student Health Services," speech protected by the North Carolina Constitution. Plaintiff maintains the Whistleblower Act did not afford an adequate state remedy for this claim. Assuming *arguendo* plaintiff is correct,

we nonetheless hold summary judgment was proper on her freedom of speech claim.

For such a claim to be properly advanced, the speech at issue first must involve a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146, 75 L. Ed. 2d 708, 719 (1983). Second, "such protected speech or activity [must have been] the 'motivating' or 'but for' cause for [the plaintiff's] discharge or demotion." *Warren v. New Hanover County Bd. of Education*, 104 N.C. App. 522, 525-26, 410 S.E.2d 232, 234 (quoting *Jurgensen v. Fairfax County*, 745 F.2d 868, 877-78 (4th Cir. 1984)). Resolution of these issues is a matter of law for the court. *Id.*

As to the question of public concern, the court must look to the content, form and context of the speech involved. *Connick*, 461 U.S. at 147-48, 75 L. Ed. 2d at 720; *see also Corum*, 330 N.C. at 775, 413 S.E.2d at 285. The test is whether the employee was speaking as a citizen about matters of public concern, or as an employee on matters of personal interest. *Connick*, 461 U.S. at 147, 75 L. Ed. 2d at 720. Moreover, complaints about conditions of employment or internal office affairs generally concern an employee's self-interest rather than public concern, even though a governmental office may be involved:

> To presume that all matters which transpire within a government office are public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. . . . [T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Id. at 149, L. Ed. 2d at 721; *see also Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986) ("matters of public concern [for First Amendment] purposes must relate to wrongdoing or a breach of trust, not ordinary matters of internal . . . policy") (citation omitted); *see also Jurgensen*, 745 F.2d at 871 (report dealing with police department released by employee not matter of public concern because content of report did not involve or allege illegal activity, corruption, abuse of power, waste or discrimination); *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 354, 342 S.E.2d 914, 925 (no violation of First Amendment rights where "[p]etitioner's speech, his criticism of [department head], was not based on public-spirited concern. Instead, it focused on his own personal displeasure with . . . internal policies"), *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986); and

Pressman v. UNC-Charlotte, 78 N.C. App. 296, 301-02, 337 S.E.2d 644, 648 (1985) (no violation of First Amendment rights where plaintiff's "criticism not based on public-spirited concern but more narrowly focused on his own personal work and personal displeasure with internal policies").

In the case *sub judice*, plaintiff has asserted her termination was occasioned in retaliation for statements uttered regarding four main topics: (1) her proposal to employ nurse practitioners rather than moonlighting physicians in the AfterHours program; (2) her reservations regarding the use of Fellows as back-up supervisors; (3) her concern directed at Dr. Hogan's volunteer status and its concomitant liability implications for SHS; and (4) her expression of the need for establishing a protocol for alcohol-related student health issues. Upon careful review of the record, we conclude each of the foregoing related to internal policies and office administration of SHS and did not rise to the level of public concern.

We note, for example, that no evidence in the record indicates plaintiff ever voiced her concerns publicly outside the employment setting, which would tend to indicate a public concern. *See Godon v. N.C. Crime Control & Public Safety*, 959 F. Supp. 284 (E.D.N.C. 1997) (plaintiff's comments to supervisors at public academy concerning alleged race and sex discrimination in discharge of certain cadets did not constitute protected speech when plaintiff simply approached supervisors with verbal complaints); *cf. Lenzer v. Flaherty*, 106 N.C. App. 496, 501-02, 507-09, 418 S.E.2d 276, 279-282, 284 (plaintiff's speech protected where she reported perceived laxity of employer's investigation into possible patient mistreatment to State Bureau of Investigation, and where evidence indicated plaintiff's concerns had some basis in fact and employer sought to keep allegations from being exposed), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). In addition, regarding the use of Fellows as back-up supervisors, all the evidence indicates, plaintiff's expressed concerns notwithstanding, that the practice was not illegal and was indeed permitted under the applicable regulations. Thus not only was the matter merely indicative of plaintiff's private concern, but plaintiff's concerns proved to be unjustified.

Most significantly, however, assuming *arguendo* the substance of plaintiff's comments touched upon public concern, we are unable to conclude as a matter of law that plaintiff's statements were the motivating, or substantial, factor behind her termination. *See Warren*, 104

N.C. App. at 525-26, 410 S.E.2d at 234. Dr. Vukoson testified he removed plaintiff from his license because she did not give his license the proper respect. Dr. Cowan related two instances wherein plaintiff failed to follow established protocol in treating students. Dr. Cowan also referenced plaintiff's inability to communicate with Dr. Vukoson and Jones, her supervisors. By contrast, while plaintiff's complaint alleged she was discharged in retaliation for protected speech, there was no forecast of evidence showing her statements were either the motivating or a substantial factor underlying her dismissal. Indeed, in her lengthy deposition, plaintiff simply reiterated her "belief" she was terminated in retaliation for expressing her concerns. *See Lenzer*, 106 N.C. App. at 510, 418 S.E.2d at 284 ("the causal nexus between protected activity and retaliatory discharge must be something more than speculation"). Accordingly, the trial court did not err in allowing summary judgment against plaintiff on her free speech claim.

In sum, for the reasons set forth herein, the order of the trial court granting defendants' motion for summary judgment is in all respects affirmed.

Affirmed.

Judges WYNN and McGEE concur.

DEBORAH MATTHEWS, EMPLOYEE, PLAINTIFF-APPELLEE v. CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, SELF-INSURED, EMPLOYER, DEFENDANT-APPELLANT

No. COA97-1490

(Filed 5 January 1999)

1. Workers' Compensation— Rules—dismissal for violation

The Industrial Commission did not err in a workers' compensation action when it vacated the dismissal of plaintiff's case by a Deputy Commissioner based upon plaintiff's violation of an order of the Deputy Commissioner and her failure to appear for her hearing. The Commission, its members, and its deputies may order dismissal of an action or proceeding for violation of the Workers' Compensation Rules, but such an order must specifically enumerate which of the Rules have been violated and what actions constitute the violations. The Deputy Commissioner here

made no findings of a Rules violation; even assuming that there was a violation and a proper order specifying the violation, dismissing this case was an abuse of discretion when viewed in light of the policy concerns of the Worker's Compensation Act because it effectively terminates plaintiff's exclusive remedy when other less permanent sanctions were available.

2. Workers' Compensation— course of treatment—direction by employer

It was noted in a workers' compensation action that the Industrial Commission had based an order on a flawed analysis of N.C.G.S. § 97-25; although the Commission reasoned that employers cannot make motions to designate a treating physician because the statute expressly grants employees the power to request a change in their treating physician and does not make a similar grant to employers, the purpose of the statute is to authorize the Commission to direct a course of treatment and penalize non-compliance by suspending compensation. The statute was not enacted to create and exclusively define the rights of employees and employers with regard to the course of treatment.

3. Workers' Compensation— course of treatment—employer's motion—reasonable grounds

It was noted in a workers' compensation action that an employer's motion to direct the course of treatment must be warranted by reasonable grounds. The motion in this case was well-grounded in fact and demonstrated a sufficient basis to support the challenge to the current treatment regimen advocated by plaintiff; therefore, defendant's motion was appropriate and the Executive Secretary's designation of a treating physician pursuant to the motion is within the purview of N.C.G.S. § 97-25.

4. Workers' Compensation— necessity for hearing—procedural due process

The Industrial Commission erred in a workers' compensation action by not conducting a hearing or remanding for an evidentiary hearing where defendant was unable to offer evidence supporting its case due to a procedural history involving a change of treating physician which was not appealed and hearings resulting in a suspension of compensation which were appealed. The evidence, including the transcript from the hearing below, is insufficient to resolve all the issues and the key finding resulting in the reinstatement of the award was not supported by competent evi-

dence in the record; additionally, defendant's procedural due process rights were offended in that the Commission eliminated any opportunity for defendant to meet its burden of proof. Finally, on remand it is the responsibility of the full Commission to conduct the hearing.

5. Workers' Compensation— expenses of attending future hearings—improper

The Industrial Commission erred in a workers' compensation action by taxing the expenses necessary for plaintiff to attend future hearings where defendant had reasonable grounds for its motion and application to suspend compensation; furthermore, the Commission exceeded its statutory authority in ordering payment of future travel expenses by assessing costs not arising from any hearing.

Appeal by defendant from order of North Carolina Industrial Commission entered 20 May 1997. Heard in the Court of Appeals 16 November 1998.

Tania L. Leon for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas W. Page and Thomas M. Morrow, for defendant-appellant.

SMITH, Judge.

On 27 October 1991, an Opinion and Award by Deputy Commissioner William L. Haigh concluded that Deborah Matthews (Matthews) was *temporarily*, totally disabled and entitled to $406.00 per week for as long as she remained disabled. Deputy Commissioner Haigh's findings included the following:

Matthews began working for Charlotte-Mecklenburg Hospital Authority (Char-Meck) in January 1991. At that time, Matthews had a history of somatization disorder with Munchausen's syndrome (feigning an illness warranting some type of unnecessary medical intervention). From August 1989 to December 1990, Matthews entered various hospitals requesting injections of narcotics for alleged abdominal pain and migraine headaches. She intentionally swallowed a pin in an attempt to undergo surgery, pretended to pass a kidney stone, and falsely denied having a prior extensive hospitalization and work-up for complaints of abdominal pain. In addition, two of her treating physicians declined to treat her further because of her drug-seeking

behavior involving narcotics and sleeping pills. After being employed less than one month, she suffered a back injury while working. On 1 March 1991, a CT scan, which does not reveal whether the annulus is intact, indicated that Matthews had a diffuse annular bulge but *no herniated disc or nerve root encroachment.* Matthews was treated by Dr. Samuel J. Chewning, who prescribed physical therapy and pain medication. On 8 March 1991, Matthews aggravated her injury while moving a five-pound weight at home. On 11 March 1991, her legs became weak and she fell from a stool to a tile floor. On 14 March 1991, Dr. Chewning concluded that a two-by-four inch bruise and six scratches in a starlike configuration over the bruise were totally inconsistent with Matthews' description of the fall. After Matthews changed doctors and briefly attempted to work at Wal-Mart, Dr. Alfred L. Rhyne performed surgery on Matthews to repair a tear in her annulus fibrosus. By 3 June 1992, Dr. Rhyne recommended that Matthews seek help with withdrawal from her apparent drug dependency. By 24 August 1992, Matthews had no back pain. Since 26 February 1991, however, Matthews has been deemed *temporarily,* totally disabled.

Char-Meck unsuccessfully appealed the award to the North Carolina Industrial Commission (the Commission). On 3 March 1995, Char-Meck moved to designate Dr. John Welshofer as Matthews' treating physician. On 23 March 1995, Char-Meck's motion was granted by then Executive Secretary Nick Davis, and Matthews *did not appeal the decision.* On 25 May 1995, Char-Meck filed a Form 24 application to terminate or suspend payment of compensation according to the terms of Workers' Compensation Rule 404. By the time of its application, Char-Meck had paid compensation to Matthews for the period spanning 25 February 1991 to 30 May 1995. The total amount of its indemnity compensation paid at the time of their application was $100,493.42. In support of its application, Char-Meck alleged that Matthews failed to attend appointments with her designated physician. On 5 July 1995, after an informal telephonic hearing, Special Deputy Commissioner W. Bain Jones ordered Matthews' compensation suspended for failure to comply with treatment as directed by the order of 23 March 1995. Due to the informal nature of this hearing, Deputy Commissioner Jones made no findings of fact and conclusions of law. Rather, he stated "reasons" for his decision. Matthews appealed, and her case was docketed for a formal hearing to be held on 7 May 1996. Having moved to Tennessee, however, Matthews failed to attend the formal hearing. As a result, presiding Deputy Commissioner Mary M. Hoag rescheduled Matthews'

hearing for a later date and ordered that Matthews attend all future hearings. Matthews failed to attend the second hearing, and rather than appearing at a third hearing, she had her counsel present an affidavit. In the affidavit, Matthews made factual assertions concerning her inability to appear. She also stated, "I understand that my attorney will be at a disadvantage in presenting my case [] if I cannot testify in person, but I agree to proceed on that basis." As a result of her failure to appear, Deputy Commissioner Phillip A. Holmes dismissed Matthews' appeal with prejudice. Matthews appealed the dismissal to the Full Commission, which granted her motion for reinstatement of compensation pending her appeal. After reviewing the record, briefs, and argument of counsel, the Full Commission vacated the dismissal of Matthews' case, reinstated her award, and ordered Char-Meck to pay plaintiff's necessary travel expenses incurred by attending future hearings. On reconsideration, the Full Commission approved its prior order. Employer appeals.

Char-Meck contends the Commission erred when it vacated the dismissal of Matthews' appeal because Matthews had violated the order of the Deputy Commissioner and had failed to comply with statutory requirements by refusing to appear for her hearing. Char-Meck also assigns error to the Commission's vacating the dismissal of Matthews' claim because Char-Meck was effectively denied the opportunity to offer evidence at the hearing while the Commission accepted Matthews' affidavit in lieu of testimony. Finally, Char-Meck assigns error to the order of the Commission compelling Char-Meck to pay for Matthews' necessary expenses incurred by attending future hearings.

"On appeal, the Full Commission's findings of fact are conclusive if supported by competent evidence, even if there is evidence that would support contrary findings." *Pulley v. City of Durham*, 121 N.C. App. 688, 693, 468 S.E.2d 506, 510 (1996) (citations omitted). However, if the findings are predicated on an erroneous view of the law or a misapplication of law, they are not conclusive on appeal. *See Radica v. Carolina Mills*, 113 N.C. App. 440, 439 S.E.2d 185 (1994). Furthermore, if a finding of fact is essentially a conclusion of law, it will be treated as such on appellate review. *See id.* These well-established principles guide our review in the instant case.

[1] Char-Meck first argues that the Commission erred when it vacated the dismissal of Matthews' appeal. We disagree. N.C. Gen. Stat. § 97-80(a) (Cum. Supp. 1996) gives the Commission the power to

make rules consistent with the Workers' Compensation Act for carrying out its provisions. Under the authority of this statute, the Commission enacted Rule 802. Rule 802 permits the Commission to "subject the violator [of Workers' Compensation Rules (the Rules)] to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure. . . ." N.C. Admin. Code tit. 4, r. 10A.0802 (Jan. 1990). Rule 37 of the North Carolina Rules of Civil Procedure (Rule 37) permits, among other sanctions, "dismissing the action or proceeding or any part thereof." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(a)c (1990). Based on our reading of these rules, the Commission, its members, and its deputies (adjudicators) may order dismissal of an action or proceeding for violation of the Rules. We hold that such an order must specifically enumerate which of the Rules have been violated and what actions constitute the violations. Because Deputy Commissioner Holmes made no findings of a rules violation and because there is no other statutory authorization for the dismissal of proceedings, dismissal was inappropriate.

However, assuming that Matthews' failure to appear constituted a violation of the Rules and that the order dismissing Matthews' case specified which of Matthews' acts were violations, we still deem dismissal inappropriate. This Court has questioned whether administrative termination of disability awards on grounds other than those provided by statute is permissible. *See Kisiah v. Kisiah Plumbing*, 124 N.C. App. 72, 476 S.E.2d 434 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). Furthermore, our Supreme Court has indicated that the Workers' Compensation Act is to be construed liberally, and benefits are not to be denied upon technical, narrow, or strict interpretation of its provisions. *See Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985). Generally, the choice of sanctions is a matter reviewed for abuse of discretion only. *See Routh v. Weaver*, 67 N.C. App. 426, 313 S.E.2d 793 (1984). However, with regard to Rule 37, this Court has stated, "Sanctions directed to the case's outcome, including default judgments and dismissals, although reviewed according to the abuse of discretion standard, are to be evaluated in light of the leading policy concern surrounding discovery rules, which is to encourage trial on the merits." *Lincoln v. Grinstead*, 94 N.C. App. 122, 125, 379 S.E.2d 671, 672 (1989) (citing *American Imports, Inc. v. Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978)). Accordingly, dismissal pursuant to Rule 802 must be evaluated in light of the policy behind North Carolina's Workers' Compensation Act, to provide a swift and certain remedy to an injured worker and to ensure a limited and determinate liability for

employers. *See Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 146 S.E.2d 479 (1966). Thus, when determining whether dismissal was an abuse of discretion, the exclusivity provision of N.C. Gen. Stat. § 97-10.1 (1991) is always relevant. Other considerations include the appropriateness of alternative sanctions under Rule 37, the proportionality of dismissal to the actions meriting sanction, and whether other statutory powers, such as holding a person in contempt under N.C. Gen. Stat. § 97-80 (Cum. Supp. 1996), can effectuate the result desired by the imposition of sanctions. In the instant case, dismissal violates our Supreme Court's guidance in *Harrell*, 314 N.C. 566, 336 S.E.2d 47, because it effectively terminates Matthews' exclusive remedy when other less-permanent sanctions, such as civil contempt, were available to Deputy Commissioner Holmes. Thus, when viewed in light of policy concerns of the Workers' Compensation Act, dismissing Matthews' case was an abuse of discretion. We, therefore, overrule Char-Meck's first assignment of error.

[2] Char-Meck further assigns error to the order of the Industrial Commission alleging that there was never a hearing on the merits of the case regarding the issues at bar. We agree. We note at the outset that the order of 20 May 1997 is based on the Commission's determination that former Executive Secretary Davis's designation of a treating physician was improvidently granted. The Commission based its decision on a flawed analysis of section 97-25. They reasoned that because section 97-25 expressly grants employees the power to request a change in their treating physician, the absence of a similar grant to employers means that employers cannot make motions to designate a treating physician. This is an erroneous view of the law, and under *Radica*, all findings based upon it are not conclusive on appeal. *See Radica*, 113 N.C. App. 440, 439 S.E.2d 185.

Section 97-25 reads in pertinent part,

> Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relating to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.
>
> The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expenses thereof shall

> be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

N.C. Gen. Stat. § 97-25 (1991). The first paragraph of section 97-25 authorizes the Commission to "order such further treatments as may in the discretion of the Commission be necessary" to resolve controversies "arising between the employer and employee relative to the continuance of . . . treatment." *Id.* The fact that the legislature authorized the Commission to use discretion in its resolution of controversies relating to the "continuance" of treatment demonstrates that the legislature anticipated disputes over the proper course of treatment and authorized such disputes to be brought before the Commission. The Commission, however, interprets the second paragraph of section 97-25 as creating the right to request a change in treatment, and because there is no similar language pertaining to the rights of employers, employers have no such right. We disagree. While section 97-25 does permit an injured employee to select a physician of his or her choosing, the choice is subject to the approval of the Commission. This section was not enacted to create and exclusively define the rights of employees and employers with regard to the course of treatment. Rather, the purpose of section 97-25 is to authorize the Commission to direct the course of treatment and penalize non-compliance by suspending compensation. In addition, Workers' Compensation Rule 609 provides for the filing of motions with the Commission. N.C. Admin. Code tit. 4, r. 10A.0609 (March 1995). Because Rule 609 permits the filing of motions with the Commission and section 97-25 allows the Commission to resolve disputes over treatment, Executive Secretary Davis properly considered Char-Meck's motion.

[3] We note that an employer's motion to direct the course of treatment must be warranted by reasonable grounds. *See* N.C. Gen. Stat. § 97-88.1 (1991). Here, Char-Meck's motion to designate the treating physician was well-grounded in fact and demonstrated a sufficient factual basis to support its challenge to the current treatment regimen advocated by Matthews. As the findings made in the original opinion and award indicate, Matthews suffers from a condition which causes her to seek unnecessary medical attention. Matthews has demonstrated a dependency on narcotic pain medication. There is also evidence that Matthews was referred to the doctor designated by Char-Meck for treatment of these conditions. Because these facts form reasonable grounds on which Char-Meck could contest

Matthews' course of treatment, appellant's motion, as permitted by Rule 609, was appropriate. Executive Secretary Davis's designation of the treating physician pursuant to Char-Meck's motion is within the purview of section 97-25; thus, the order of 23 March 1995 was properly granted. As this order was not appealed, it governed Matthews' treatment until a subsequent order of the Commission directed otherwise.

[4] As Rule 404 and section 97-25 allow, Char-Meck submitted an application to suspend Matthews' compensation for non-compliance with the order directing treatment. Because she had not complied with the order, Deputy Commissioner Holmes properly suspended Matthews' compensation. To reinstate her compensation, Matthews could have permitted treatment by her designated physician, selected another physician subject to the Commission's approval, or appealed the administrative decision under Workers' Compensation Rule 703.

Matthews maintains that she attended one appointment with the doctor designated by Char-Meck. Despite thoroughly reviewing the record on appeal, the only indication that this appointment took place are assertions by Matthews' counsel made in her application for review and motion in support of the application. In her brief before this Court, Counsel for Matthews cites her own motion in support of this fact. An unverified application and written motion, otherwise unsupported by the record, is not competent evidence upon which the Commission could base a finding that Matthews attended an appointment with the designated physician. Because there is no competent evidence indicating that Matthews was treated by her designated physician, the Commission could not conclude that Matthews reinstated her right to compensation by compliance with the order directing treatment. Neither did she reinstate her right to compensation by requesting that the Commission approve her choice of physicians under section 97-25.

Matthews did, however, appeal the suspension pursuant to Worker's Compensation Rule 703. Rule 703 states, "The Commissioner or Deputy Commissioner hearing the matter shall consider all issues *de novo*. . . ." N.C. Admin. Code tit. 4, r. 10A.0703(3) (March 1995). Matthews and Char-Meck state that on appeal from an administrative decision, the *de novo* standard of review places the burden on Char-Meck to prove its case anew. We agree. However, because Matthews' actions led to the dismissal of her appeal, Char-Meck was

unable to offer evidence supporting its case. When Matthews appealed the dismissal to the Commission, Worker's Compensation Rule 701 prevented Char-Meck from presenting "new evidence". N.C. Admin. Code tit. 4, r. 10A.0701(6) (January 1992). Thus, the Commission's order was based on its review of the record, briefs, arguments, and motions of counsel. Char-Meck contends that the dismissal coupled with the application of Rule 701 denied it the opportunity to be heard. We agree and reverse the order of the Commission.

This Court has held, "The party against whom an award has been made does not have 'a substantive right to require the Full Commission to hear new or additional testimony. [The Commission] may, and should, do so if the due administration of justice requires.' " *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992) (quoting *Tindall v. American Furniture Co.*, 216 N.C. 306, 311, 4 S.E.2d 894, 897 (1939)). In addition, concerning the appeal of an Opinion and Award, this Court has stated:

> We recognize that the full Commission has the authority to determine the case from the written transcript of the hearing before the deputy commissioner or hearing officer, but when that transcript is insufficient to resolve all the issues, the full Commission must conduct its own hearing or remand the matter for further hearing.

Joyner v. Rocky Mount Mills, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Thus, when evidence, including the transcript from the hearing below, is insufficient to resolve all the issues, the due administration of justice requires the Commission to hold an evidentiary hearing. Here, because there was no formal hearing on the facts surrounding Char-Meck's motion, there is no transcript. Furthermore, documents, for which no evidentiary foundation was laid, were the sole source on which the Commission based its findings of fact. Consequently, the key finding, that Matthews had an office visit with Dr. Welshofer, was not supported by competent evidence in the record. As the evidence in this case was insufficient to resolve the issues raised by Matthews' appeal, the Commission should have conducted a hearing or remanded the matter for an evidentiary hearing. Its failure to do so is reversible error.

Additionally, this Court has held that procedural due process requires, " 'notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a compe-

tent and impartial tribunal having jurisdiction of the cause.' " *In re Appeal of Ramseur*, 120 N.C. App. 521, 526-27, 463 S.E.2d 254, 258 (1995) (citations omitted). In the instant case, Char-Meck properly excepted to the continuation of payments ordered by the Commission. Following its own procedures, the Commission required Char-Meck to participate in a trial *de novo* where Char-Meck bore the burden of proof. Because Char-Meck was not allowed to present evidence, the full Commission, in not taking evidence, eliminated any opportunity for Char-Meck to meet its burden. This offended Char-Meck's procedural due process rights. Accordingly, we reverse the order of the Commission and remand this matter for hearing. Regarding remand, this Court has stated:

> [U]pon the rare occasion that this Court requires an additional hearing upon remand [,] the full Commission must conduct the hearing without further remand to a deputy commissioner. Such an additional hearing without remand to the deputy commissioner avoids an additional delay in cases where the resolution of a plaintiff's claim has already been long delayed.

Crump v. Independence Nissan, 112 N.C. App. 587, 590, 436 S.E.2d 589, 592 (1993) (citations omitted). Therefore, on remand, it is the responsibility of the Full Commission to conduct the hearing.

[5] Char-Meck's last assignment of error is that the Commission exceeded its statutory authority when it taxed the expenses necessary for Matthews to attend future hearings. We agree. In *Tucker v. Workable Company*, 129 N.C. App. 695, 501 S.E.2d 360 (1998), this Court upheld an award of costs that included the employee's cost to attend the hearing. The statutory authority for upholding the award was N.C. Gen. Stat. § 97-88.1 (1991). Section 97-88.1 is titled "Attorney's fees at original hearing," but provides, "If the Industrial Commission shall determine that *any hearing* has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (1991) (emphasis added). Section 97-88.1 supplements section 97-88 and is meant to deter unfounded litigiousness while section 97-88 is meant to compensate the injured employee for costs associated with an appeal that upholds an award but was challenged on reasonable grounds. *See Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 464 S.E.2d 481 (1995), *disc. review denied*, 342 N.C. 516, 472 S.E.2d 26 (1996). To award

costs under this section, the Commission must first determine that a hearing has been brought, prosecuted, or defended without reasonable ground. Only then may the Commission assess the whole cost of the proceedings. As we have stated, Char-Meck had reasonable grounds for its motion and application to suspend compensation. Accordingly, the award of travel expenses is unfounded. Furthermore, the statute authorizes the taxing of costs arising from proceedings that were not based on reasonable grounds. By ordering Char-Meck to pay Matthews' future travel expenses, the Commission has assessed costs not arising from any hearing thereby exceeding their statutory authority. For the abovementioned reasons, we reverse the 20 May 1997 order of the North Carolina Industrial Commission and remand to the Full Commission for an evidentiary hearing consistent with this opinion.

Reversed and remanded to the Full Industrial Commission.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. STEVEN LEE SCHIFFER

No. COA98-196

(Filed 5 January 1999)

1. Search and Seizure— automobile—tinted windows

The trial court did not err in a prosecution for drug-related offenses by denying defendant's motion to suppress where a deputy stopped defendant on Interstate 95 after noticing Florida tags and tinting which the deputy believed was darker than permitted under North Carolina law. Unlike the window-tinting restrictions, the windshield-tinting restrictions are not subject to any exception for vehicles registered in other states and it is immaterial whether defendant's windows were tinted in compliance with Florida law or whether the deputy was mistaken or unaware of certain aspects of window-tinting restrictions. The deputy could reasonably suspect that defendant was violating the windshield-tinting restrictions based solely upon his observation of excess tinting on the windshield and was entitled to stop defendant's vehicle for a brief investigation.

2. Constitutional Law— Commerce Clause—windshield tinting—vehicle registered outside North Carolina

Violation of North Carolina's windshield-tinting laws provided a reasonable basis for a traffic stop in a narcotics case; defendant made no Commerce Clause argument with respect to windshield-tinting laws and defendant's Commerce Clause argument concerning window-tinting was not addressed.

3. Search and Seizure— automobile—consent to search—voluntary

The evidence in a drug prosecution supported the trial court's finding that consent to search the vehicle was voluntarily given where the deputy testified that defendant initially resisted the request for consent only because he was unsure whether he could consent to the search of a car he had borrowed; the deputy's response to those concerns was accurate in that he told defendant that a person in control and possession of the car could consent; and the smell of marijuana gave the deputy probable cause to justify a warrantless search even without defendant's consent. There is no evidence that the deputy spoke to defendant in an intimidating manner or that he engaged in any other conduct designed to coerce defendant into agreeing to a search.

Appeal by defendant from judgments entered 10 April 1997 by Judge D. Jack Hooks, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 27 October 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General William B. Crumpler, for the State.

Daniel Shatz and Musselwhite, Musselwhite, Musselwhite & Branch, by David F. Branch, Jr., for defendant.

LEWIS, Judge.

Defendant pled guilty to several drug-related offenses after his motion to suppress evidence was denied. The only issues raised by his appeal pertain to the denial of his motion to suppress.

The facts found by the trial court in its written denial of defendant's motion are essentially as follows. On 1 February 1996, Deputy J.W. Jacobs of the Robeson County Sheriff's Department, Drug Enforcement Division, was patrolling Interstate 95 from his police

car. He was parked on the median facing southbound traffic. Around 2:45 p.m., he observed a 1986 Pontiac Grand Prix traveling north at fifty-nine miles per hour. The windows and windshield of the car were tinted, and Deputy Jacobs believed the tinting was darker than permitted under North Carolina law. *See* N.C. Gen. Stat. § 20-127(b) (Cum. Supp. 1997) (containing this state's window and windshield tinting restrictions). It is a Class 2 misdemeanor to drive a vehicle on a highway or public vehicular area of this state if the vehicle's windshield or windows are tinted in violation of North Carolina law. G.S. 20-127(d), (d)(2); N.C. Gen. Stat. § 20-176(c) (1993).

When Deputy Jacobs pulled behind the Grand Prix, he noticed it had Florida tags. He pulled alongside the car and looked to see if any window displayed a sticker indicating that the tinting complied with Florida law. Finding no such sticker, he stopped the vehicle.

The windows and windshield of the Grand Prix were, in fact, "considerably darker than [what] is normally allowed" under North Carolina law. Order Filed 1 July 1997 ("Written Order"), Finding of Fact 1, ¶ 3. Because the car was registered in Florida and complied with Florida's tinting laws, however, it was exempt from the window tinting restrictions of G.S. 20-127. *See* G.S. 20-127(c), (c)(10). The car was *not* exempt from the *windshield* tinting requirements of this state, even though its windshield was apparently tinted in compliance with Florida law. G.S. 20-127(c). As Officer Jacobs later discovered, a sticker indicating that the Grand Prix's windows and windshield complied with Florida's tinting laws was affixed to the door jamb inside the car on the driver's side.

At the time of the stop on 1 February 1996, Officer Jacobs was under the good faith but mistaken belief that section 20-127 required vehicles with tinted windows or windshields to display a label in each tinted window or windshield indicating that its tinting complied with North Carolina law. Under the previous statute, such labels were, in fact, required, *see* N.C. Gen. Stat. § 20-127(d) (1993), but effective 1 November 1995, they are not. *See* 1995 N.C. Sess. Laws ch. 473, § 4. In addition, Officer Jacobs was unaware of the recently-enacted subsection (c)(10), which exempts from North Carolina's window tinting restrictions vehicles registered outside this state and in compliance with the tinting laws of the state of registration. Subsection (c)(10) also went into effect on 1 November 1995. *Id.*

Officer Jacobs approached the driver's side door, and defendant, the driver, rolled down his window. The scent of unburned marijuana

wafted from the Grand Prix. Defendant handed Deputy Jacobs his license and registration, which showed that the car was registered in Florida. After a brief conversation, Deputy Jacobs asked defendant for his consent to search the vehicle. Defendant said that because he did not own the Grand Prix, he did not know if he could consent to a search of it. Deputy Jacobs explained that defendant could consent because he was in control of the vehicle. He further explained that he could search the vehicle even without defendant's consent because he smelled marijuana, and that he could obtain a search warrant. Defendant then consented to a search of the vehicle.

When he searched the car's interior, Deputy Jacobs found no contraband but smelled marijuana even more intensely. He asked defendant if there was anything illegal in the trunk, and defendant replied, "I have nothing in the trunk." Upon opening the trunk, Deputy Jacobs "was overwhelmed by the smell of marijuana." He found a blue sheet, covered with a white powdery substance, spread across the trunk. He moved the sheet aside and found a number of brown trash bags sealed with duct tape. He opened one, and inside was a vegetable material he believed to be marijuana. He then seized the items in the trunk.

Defendant was charged with multiple drug offenses. On 30 July 1996, he filed a motion claiming that the stop of his vehicle was unconstitutional and urging the trial court to suppress the evidence seized by Deputy Jacobs. A hearing on the motion was conducted on 9 April 1997. Testimony was received from Deputy Jacobs and from Steve Whalen, the owner of the detail shop in Orlando where the Grand Prix's windows were tinted. At the close of evidence, the superior court judge denied defendant's motion. His ruling and the findings and conclusions on which it was based were first rendered verbally on 9 April 1997. A written version of the judge's ruling was later entered as an order of the superior court on 1 July 1997. The court concluded in its written order that

> the lack of the window sticker, the significantly darker tint that [sic] is provided for and significantly darker tint that [sic] is allowed and typical under the law in the State of North Carolina, was sufficient to give and did give Deputy J.W. Jacobs a reasonable suspicion for stopping said motor vehicle to determine whether the motor vehicle laws of the State of North Carolina were being violated by the operator of said 1986 Pontiac Grand Prix automobile.

Pursuant to a plea agreement, defendant then pled guilty to all six charges against him. The charges were consolidated, and defendant was sentenced to thirty-five to forty-two months in prison and fined $25,000.

* * *

[1] The United States Constitution and the North Carolina Constitution prohibit unreasonable seizures of the person. U.S. Const. amends. IV, XIV; N.C. Const. art. I, § 20. These constitutional protections apply to brief investigatory traffic stops like the one conducted by Deputy Jacobs. *Delaware v. Prouse*, 440 U.S. 648, 653-54, 59 L. Ed. 2d 660, 667 (1979); *see State v. Battle*, 109 N.C. App. 367, 371, 427 S.E.2d 156, 159 (1993). As a general rule, a stop made for investigatory purposes is reasonable, and therefore constitutional, when the investigating officer has a reasonable suspicion, supported by articulable facts, that the person seized may have engaged in or may be engaged in criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989). While the Supreme Court has repeatedly declined to provide a rigid definition for the concept of "reasonable suspicion," *see, e.g., Ornelas v. United States*, 517 U.S. 690, 695, 134 L. Ed. 2d 911, 918 (1996), it has described the term to mean " 'a particularized and objective basis' for suspecting the person stopped of criminal activity." *Id.* at 696, 134 L. Ed. 2d at 918 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 629 (1981)). The level of suspicion required for an investigatory stop, *see supra*, is lower than what is required for a seizure based on probable cause, which is a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity. *Sokolow*, 490 U.S. at 7-8, 104 L. Ed. 2d at 10-11; *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964).

As noted above, the law that Deputy Jacobs initially suspected defendant of having violated pertains to the tinting of motor vehicle windows and windshields.

> (b) Window Tinting Restrictions.—A window of a vehicle that is operated on a highway or a public vehicular area must comply with this subsection. *The windshield of the vehicle may be tinted only along the top of the windshield and the tinting may not extend more than five inches below the top of the windshield or below the AS1 line of the windshield, whichever measurement is longer.* Any other window of the vehicle may be tinted in accordance with the following restrictions:

> (1) The total light transmission of the tinted window must be at least thirty-five percent (35%). A vehicle window that, by use of a light meter approved by the Commissioner [of Motor Vehicles], measures a total light transmission of more than thirty-two percent (32%) is conclusively presumed to meet this restriction.

G.S. 20-127 (emphasis added). The term "AS1 line" apparently refers to the bottom edge of tinting across the top of a windshield, where the tinting is applied by the vehicle's manufacturer. *See* 49 C.F.R. § 571.205, S5.1.1 (1997); American National Standard "Safety Code for Glazing Materials for Glazing Motor Vehicles Operating on Land Highways," ANSI Z26.1-1977, as supplemented by Z26.1a, July 3, 1980, §§ 5 and 6.

The window-tinting restrictions of G.S. 20-127 are subject to a number of exceptions, one of which, as noted above, is applicable to defendant's argument:

> (c) Tinting Exceptions.—*The window tinting restrictions of subsection (b) of this section apply without exception to the windshield of a vehicle.* The window tinting restrictions in subdivisions (b)(1) and (b)(2) of this section do not apply to any of the following vehicle windows:
>
> . . . .
>
> (10) A window of a vehicle that is registered in another state and meets the requirements of the state in which it is registered.

Id. (emphasis added).

Defendant first challenges the superior court judge's finding that his car possessed a "significantly darker tint" than what is "allowed and typical" under North Carolina law. Written Order, Finding of Fact 12. Based on the evidence presented at the hearing, we read this finding of fact—which does not contain either the word "window" or the word "windshield"—to refer *both* to the windows and to the windshield of the Grand Prix. Insofar as it refers to the windshield of the Grand Prix, it is indubitably supported by competent evidence. Deputy Jacobs testified that the "factory tinting" on most vehicles extends down five to six inches from the top of the windshield; this testimony indicates that the "AS1 line" generally is located no more than five or six inches from the top of a windshield. He further testified that before he stopped the Grand Prix, he observed that the windshield tinting extended about ten inches from the top of the wind-

shield. Thus, the windshield was tinted four to five inches in excess of what is permitted under G.S. 20-127(b). This band of excess tinting was indeed "significantly darker" than what is "allowed and typical" under North Carolina law: *no tinting whatsoever* is allowed in this area of the windshield. The trial court's finding to this effect is supported by competent evidence, and it must stand. *See State v. Robinson*, 346 N.C. 586, 596, 488 S.E.2d 174, 181 (1997).

Defendant argues that because his car was registered in Florida, a fact indicated by his Florida license plates, and because his car's windows were in compliance with Florida law, Deputy Jacobs could have no reasonable suspicion that he was violating the North Carolina motor vehicle tinting statute. *See* G.S. 20-127(c)(10). Further, defendant argues that because the stop was based in part on Deputy Jacobs' misconception that North Carolina law required a "compliance sticker" on every tinted window or windshield, the stop was not based on a reasonable suspicion that defendant was violating the law.

Unlike the window-tinting restrictions of section 20-127, the windshield-tinting restrictions are not subject to any exception for vehicles registered in other states. It is immaterial whether defendant's windows were tinted in compliance with Florida law, or whether Deputy Jacobs was mistaken about or unaware of certain aspects of the window-tinting restrictions. Based solely upon his observation of the excess tinting on the Grand Prix's *windshield*, Deputy Jacobs could reasonably suspect that defendant was violating the windshield-tinting restrictions of section 20-127. In fact, the excessively tinted windshield was one of the reasons Deputy Jacobs stopped defendant's car.

> [DEFENSE COUNSEL:] Let me ask you this. Had you decided you were going to stop the vehicle when you followed it and saw the tinted windows at the back, and then the tinted window on the driver's side . . . ?
>
> [DEPUTY JACOBS:] I didn't initially make up my mind until I had actually, when I actually went by the vehicle and saw the tint all the way around, the tint on the windshield, the tint on the side, the tint on the back, and that, along with the traffic that was behind me, because I knew, at that point, I couldn't get back in behind him.
>
> So in answer to your question, as I perceive it to be, it would be, actually when I—*when I saw the tint on the windshield*,

along with the other tint, *is when, yes, I said, I am going to stop this vehicle.*

Transcript of Hearing on Motion to Suppress, p. 35 (emphasis added). Deputy Jacobs was entitled to stop defendant's vehicle for a brief investigation.

[2] Defendant's next argument appears to be this: It violates the Commerce Clause of the United States Constitution to conduct an investigatory traffic stop for the purpose of determining whether a vehicle registered outside North Carolina complies with the window-tinting laws of the state of registration.

Deputy Jacobs had a reasonable suspicion to stop defendant's car on the basis that defendant was violating North Carolina's *windshield*-tinting laws. Because this provided an adequate basis for his investigatory stop, we need not address the Commerce Clause argument raised by defendant with respect to this state's *window*-tinting laws. As stated above repeatedly, section 20-127 distinguishes between the window and windshield of a vehicle. Defendant makes no Commerce Clause argument with respect to North Carolina's windshield-tinting laws. Indeed, the word "windshield" appears nowhere in defendant's brief.

[3] Finally, defendant argues that the evidence was insufficient to support the trial court's finding that defendant voluntarily consented to a search of his vehicle. He argues that his alleged consent was nothing more than an acquiescence to Deputy Jacobs's show of authority and, as such, was not voluntary.

Whether consent to a search is obtained voluntarily or by coercion "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 863 (1973). The mere fact that a person is in custody does not mean he cannot voluntarily consent to a search. *State v. Powell*, 297 N.C. 419, 426, 255 S.E.2d 154, 158 (1979).

The evidence supports the trial court's finding that consent was given voluntarily. Deputy Jacobs testified that defendant initially resisted his request for consent only because he was unsure whether he *could* consent to the search of a car he had borrowed from someone. Deputy Jacobs' response to defendant's concerns was entirely accurate: He told defendant that, as the person in control and possession of the car, he could consent to a search of it. *See State v.*

McDaniels, 103 N.C. App. 175, 187, 405 S.E.2d 358, 365-66 (1991), *aff'd per curiam*, 331 N.C. 112, 413 S.E.2d 799 (1992). Moreover, the smell of marijuana gave Deputy Jacobs probable cause sufficient to justify a warrantless search of the car even without defendant's consent. *See State v. Isleib*, 319 N.C. 634, 638-40, 356 S.E.2d 573, 576-77 (1987). On the basis of this probable cause, it was also accurate for Deputy Jacobs to tell defendant he could obtain a warrant to search the car. *See* N.C. Gen. Stat. § 15A-245(b) (1997).

The statements Deputy Jacobs made to defendant just before defendant consented to the search were entirely accurate. There is no evidence that Deputy Jacobs spoke to defendant in an intimidating manner, or that he engaged in any other conduct designed to coerce defendant into agreeing to a search. We hold that the trial court accurately concluded that defendant voluntarily consented to a search of the Grand Prix. Defendant's motion to suppress the evidence seized was correctly denied.

No error.

Judges GREENE and HORTON concur.

REGINALD KENAN, ADMINISTRATOR OF THE ESTATE OF ISIDRO MORENO, PLAINTIFF-APPELLANT v. JOE BASS, MARK BASS AND ALBERT JOHNSON, DEFENDANT-APPELLEES

No. COA98-420

(Filed 5 January 1999)

Negligence— last clear chance—evidence sufficient for instruction

The trial court erred in a negligence action by not instructing the jury on the doctrine of last clear chance where plaintiff's intestate was working in a metal trailer which was moving adjacent to and touching a cotton picker driven by defendant and plaintiff's intestate was electrocuted when the cotton picker hit a high-voltage power line. The record in the case supports a reasonable inference of each essential element of the doctrine; plaintiff's intestate placed himself in a position of peril in that he had had an opportunity to see the power line and knew that defend-

ant was operating the cotton picker toward the power line; defendant should have been aware of intestate's perilous position; defendant had the time and ability to avoid the accident in that he was, literally, in the driver's seat and intestate was engulfed by stacks of cotton once he was in the trailer and was no longer in a position to see the power line; there was abundant evidence to support an inference of negligence by defendant and the jury found defendant to have been negligent; and there was no dispute that intestate was electrocuted when defendant drove the cotton picker into the power line.

Appeal by plaintiff from judgment entered 15 October 1997 by Judge James M. Webb in Sampson County Superior Court. Heard in the Court of Appeals 19 November 1998.

Ward and Smith, P.A., by Teresa DeLoatch Bryant and A. Charles Ellis; and Albert D. Kirby, Jr. & Assocs., by Albert D. Kirby, Jr., for plaintiff-appellant.

Anderson, Johnson, Lawrence, Butler & Bock, by Steven C. Lawrence and Catherine Ross Dunham, for defendant-appellees.

McGEE, Judge.

This cases arises from a farm accident that resulted in the death of plaintiff's intestate. The record in this case tends to show that plaintiff's intestate and defendant Mark Bass were working together in October 1994 picking cotton on a farm in Duplin County. At the time of the accident, defendant was operating a cotton picker, moving it forward as it dumped cotton into a metal trailer adjacent to the cotton picker. The cotton picker and trailer were so close together they were touching. As defendant operated the cotton picker, driving it forward, plaintiff's intestate was in the trailer to "walk down" or tamp down the cotton as it was dumped into the trailer. Defendant drove the cotton picker into a high-voltage power line. When the cotton picker hit the line, plaintiff's intestate was electrocuted.

Plaintiff, representing the estate of the deceased, filed this negligence action. Allegations against defendants Joe Bass and Albert Johnson were dismissed. The case against defendant Mark Bass went to trial. A jury found that defendant Mark Bass was negligent and that plaintiff's intestate was contributorily negligent. Based on that verdict, the trial court entered judgment against plaintiff, ordering that

plaintiff have and recover nothing against defendant Mark Bass and that the action be dismissed with prejudice. Plaintiff appeals.

Plaintiff assigns error to the trial court's denial of plaintiff's request for a jury instruction on the doctrine of "last clear chance." Plaintiff argues that plaintiff met the common law requirements for a "last clear chance" instruction. We agree.

Our Supreme Court has addressed the doctrine of last clear chance on numerous occasions. In *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968), the Court said,

> [I]t is well established in this State that where the defendant does owe the plaintiff the duty of maintaining a lookout and, had he done so, could have discovered the plaintiff's helpless peril in time to avoid injuring him by then exercising reasonable care, the doctrine of the last clear chance does impose liability if the defendant failed to take such action to avoid the injury. This is in accord with . . . the majority view in other American jurisdictions.

Id. at 576, 158 S.E.2d at 853 (citations omitted).

In *Vernon v. Crist*, 291 N.C. 646, 231 S.E.2d 591 (1977), our Supreme Court said,

> The last clear chance or discovered peril doctrine applies "if and when it is made to appear that the defendant discovered, or by the exercise of reasonable care should have discovered, the perilous position of the party injured or killed and could have avoided the injury, but failed to do so."
>
> In this jurisdiction last clear chance is "but an application of the doctrine of proximate cause." If defendant had the last clear chance to avoid injury to the plaintiff and failed to exercise it, then his negligence, and not the contributory negligence of the plaintiff, is the proximate cause of the injury.

Id. at 654-55, 231 S.E.2d at 596 (citations omitted).

In *Trantham v. Sorrells*, 121 N.C. App. 611, 468 S.E.2d 401, *disc. review denied*, 343 N.C. 311, 471 S.E.2d 82 (1996), our Court said,

> The issue of last clear chance, "[m]ust be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential

element of the doctrine." To obtain an instruction on the doctrine of last clear chance, the plaintiff must show the following essential elements:

> 1) The plaintiff, by her own negligence put herself into a position of helpless peril;
>
> 2) Defendant discovered, or should have discovered, the position of the plaintiff;
>
> 3) Defendant had the time and ability to avoid the injury;
>
> 4) Defendant negligently failed to do so; and
>
> 5) Plaintiff was injured as a result of the defendant's failure to avoid the injury.

Id. at 612-13, 468 S.E.2d at 402 (citations omitted).

The case law in this State is consistent with the Restatement (Second) of Torts:

> § 479. Last Clear Chance: Helpless Plaintiff
>
> A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
>
> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
>
> (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
>
> (i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or
>
> (ii) would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.
>
> § 480. Last Clear Chance: Inattentive Plaintiff
>
> A plaintiff who, by the exercise of reasonable vigilance, could discover the danger created by the defendant's negligence in time to avoid the harm to him, can recover if, but only if, the defendant

(a) knows of the plaintiff's situation, and

(b) realizes or has reason to realize that the plaintiff is inattentive and therefore unlikely to discover his peril in time to avoid the harm, and

(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm.

Restatement (Second) of Torts, §§ 479 and 480 (1965).

We have carefully reviewed the record in this case and find that it supports "a reasonable inference of each essential element of the doctrine" of last clear chance. *Trantham* at 613, 468 S.E.2d at 402.

We address each element:

Element one: In answering this lawsuit, defendant Mark Bass alleged that plaintiff's intestate, Isidro Moreno (Moreno), was negligent in positioning the cotton trailer in close proximity to the power line, and the evidence at trial supports an inference of that alleged negligence. The evidence tends to show the power line extended across the field within the view of Moreno. Moreno positioned the cotton trailer in close proximity to the power line. Moreno then climbed into the trailer to tamp down the cotton as it was dumped into the trailer. One could infer that by positioning the trailer near the power line and climbing into the trailer, Moreno placed himself in a position of peril, because he had had an opportunity to see the power line and he knew that defendant was operating the cotton picker such that it was moving toward the power line.

Element two: Defendant should have been aware of Moreno's perilous position. The record repeatedly shows that defendant was aware of the power line, or should have been aware of it, and was aware that Moreno was in the trailer. During the trial, plaintiff's attorney asked, "Mark, whenever you got into the cotton picker and started to drive . . . toward the back of the trailer to dump the cotton in it, nothing obstructed your view of the power line before that happened, did it?" Defendant replied, "No."

Defendant admitted he knew that Moreno was in the trailer as the cotton picker approached the power line when, in his reply to this lawsuit, defendant stated unequivocally that Moreno "was within the

metal cotton trailer for the purposes of compressing the cotton, which was being deposited by the cotton picker[.]" In his testimony during the trial, defendant said, "I remember seeing [Moreno] in the back of the trailer."

Element three: The record amply supports an inference that defendant had the time and ability to avoid the accident. Defendant was, literally, in the driver's seat. He was operating the cotton picker, and operating it in a field with which he was familiar. He testified that he had picked cotton in that particular field before, but that Moreno had not previously picked there. And defendant acknowledged during his testimony that after he had started the cotton picker, he could have seen the power line had he been paying attention. Plaintiff's attorney asked defendant, "[W]hen you started to dump [the cotton into the trailer], the wire was right in front of you . . . [w]asn't it?" Defendant responded "yes." Plaintiff's attorney then asked, "And, Mark, had you noticed it, you could have seen that wire, couldn't you?" Defendant replied, "Yes, that's correct." Defendant also testified that he had driven the cotton picker forward several feet before hitting the power line. Plaintiff's attorney asked, "So you had gone forward several feet before contact was actually made. Is that correct?" Defendant answered, "Yes, that's right." Describing his own position as the operator of the cotton picker and Moreno's position in the trailer, defendant testified:

> He's kind of at my mercy [with respect to] what's in front of him and what's above him because he can't see anything in front of him because all he's seeing is the back of the picker and the actual cotton inside the picker because it's way above his head and there's just no way to see around or above it.

The record contains numerous other references to the fact that, once he was in the trailer, Moreno was practically engulfed by stacks of cotton and was no longer in a position to see the power line. Plaintiff's attorney asked defendant, "Could [Moreno] have seen that power line?" Defendant answered, "No. There's no way he could have seen it."

Finally on this point, defendant asserted in his reply to this lawsuit that Moreno "[r]emained in the trailer when it became apparent that the cotton picker would make contact with the power lines and the metal trailer in which he had positioned himself." If it was, or should have been, apparent to Moreno that the cotton picker would make contact with the power line and that he should jump out of the

trailer, it certainly should have been apparent to defendant, who was operating the cotton picker, and he should have stopped the cotton picker.

Element four: The record provides abundant evidence to support an inference of negligence by defendant; in the trial of this case, the jury found defendant to have been negligent.

Element five: No one disputes that Moreno was electrocuted when defendant drove the cotton picker into the power line.

The evidence shows that defendant was operating the cotton picker at the time of the accident. Having undertaken the operation of that large piece of machinery, defendant had a duty of "maintaining a lookout." *Exum* at 576, 158 S.E.2d at 853. The evidence also is sufficient to support reasonable inferences of all five elements required for an instruction on last clear chance. *Trantham* at 613, 468 S.E.2d at 402. As in *Exum*,

> [i]t was a question for the jury whether these were or were not the facts of the case. The issue of the last clear chance should have been submitted to the jury with proper instructions thereon. The failure of the court to do so requires that the case be sent back for a new trial.

Exum at 577, 158 S.E.2d at 853; *see also Trantham* at 612-13, 468 S.E.2d at 402.

New trial.

Judges JOHN and WALKER concur.

RAEFORD J. HEATH, PLAINTIFF v. BARBARA GAYLE HEATH, DEFENDANT

No. COA98-78

(Filed 5 January 1999)

1. Divorce— equitable distribution—findings

An equitable distribution judgment containing distributive awards regarding pension plans was remanded where the judgment contained no finding of fact supported by evidence in the record that an in-kind distribution would be impractical and did

not reflect any basis for the distributive awards other than a stipulation discussed below. N.C.G.S. § 50-20(e).

2. Divorce— equitable distribution—distributive award—stipulation—invalid

In an equitable distribution judgment involving distributive awards of pension plans, the stipulation to distributive awards set out in the judgment was unsupported in the record, failed to conform with the safeguards enunciated by the Court of Appeals in equitable distribution cases, and was ignored by the party in the position of defending the judgment; therefore, no stipulation authorized the trial court's distributive awards of the pension plans.

Appeal by plaintiff from equitable distribution judgment and order filed 13 June 1997 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 24 September 1998.

Dotson and Kirkman, by Marshall F. Dotson, III and Tracey G. Tankersley, for plaintiff-appellant.

Winfree and Winfree, by Charles H. Winfree, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's equitable distribution judgment. He contends the court erred by: 1) awarding defendant distributive awards from certain retirement accounts, 2) valuing and distributing a defined benefit pension plan, 3) considering child support payments in reaching its equitable distribution determination, and 4) awarding an unequal distribution of the parties' marital property. For the reasons stated herein, we vacate the judgment of the trial court and remand for entry of a new judgment.

In view of our disposition, a detailed recitation of the facts is unnecessary. The "Judgment and Order of Equitable Distribution" (the judgment) at issue was "entered nunc pro tunc as of February 14, 1997." Five of plaintiff's seven subsequent assignments of error to the judgment challenge the trial court's valuation and distribution of three retirement benefit plans (the pension plans).

[1] Regarding the pension plans, the judgment contained the "specific" finding "that the parties [had] stipulated to the division of [the] employment-related benefits" in the manner directed therein by the

trial court. Notwithstanding, plaintiff challenges the court's distribution of the benefits in accordance with the purported stipulation.

In particular, plaintiff cites N.C.G.S. § 50-20(e) (1995) as establishing a presumption favoring an in kind distribution of marital property, and this Court's decision in *Brown v. Brown*, 112 N.C. App. 15, 434 S.E.2d 873 (1993), as requiring

> a finding by the [trial] court that "an equitable distribution of all or portions of the marital property in kind would be impractical"

id. at 19, 434 S.E.2d at 877, in order to "overcome" the in kind distribution presumption and permit a distributive award, *id.*

We believe plaintiff reads G.S. § 50-20(e) and the mandate of *Brown* correctly. The judgment *sub judice* contains no finding of fact, supported by evidence in the record, that an in kind distribution would be impractical, nor, save for the purported stipulation (as discussed below), does the judgment reflect any basis for the distributive awards entered therein. *See Sonek v. Sonek*, 105 N.C. App. 247, 252, 412 S.E.2d 917, 920, *disc. review allowed*, 331 N.C. 287, 417 S.E.2d 255 (1992) (noting that G.S. § 50-20(e) also "permits a distributive award in order 'to facilitate, effectuate or supplement a distribution of marital property,' " this Court observed that "[n]o North Carolina court has held that distributive awards are authorized only when a distribution in kind is impractical").

Accordingly, we must order the judgment containing distributive awards unsupported by findings of fact vacated and this matter remanded for entry of judgment not inconsistent with our opinion herein. On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion. *See Smith v. Smith*, 111 N.C. App. 460, 505, 433 S.E.2d 196, 223, *disc. review denied*, 335 N.C. 177, 438 S.E.2d 202 (1993).

[2] Prior to concluding, we observe that the stipulation found as fact in the instant judgment would ordinarily obviate the necessity for the further findings of fact by the trial court ordered herein. *See* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 198, at 22-24 (5th ed. 1998) (stipulation is not itself evidence, but rather "removes the admitted fact from the field of evidence by formally conceding its existence"). However,

> [i]n equitable distribution actions, our courts favor *written stipulations* which are duly executed and acknowledged by the parties. *Oral stipulations*, however, are binding if the record affirmatively demonstrates: (1) the trial court read the stipulation terms to the parties, and (2) the parties understood the effects of their agreement.

Fox v. Fox, 114 N.C. App. 125, 132, 441 S.E.2d 613, 617 (1994) (citations omitted) (emphasis in original).

The sole written stipulation which appears in the record regarding the pension plans is found at Schedule C of the Pre-Trial Order. The pension plans are identified and valued thereon—under the heading "Agree on Value; Disagree on Ownership"—as follows:

UPS Teamsters Pension Plan (Present value calculation)	$167,503.00
UPS 401(k)	$ 9,908.00
UPS Thrift Plan	$ 72,000.00.

Nothing is contained on the Schedule or any other document in the record purporting to set forth the parties' stipulation as to distribution of the pension plans.

In addition, close review of the transcript of proceedings reflects no mention of an oral stipulation corresponding to the trial court's finding of fact, and certainly no examination of the parties by the trial court as directed by *Fox*. Finally, we consider it significant that, in responding to plaintiff's arguments, defendant asserts no reliance upon the stipulation referenced in the judgment.

In short, the stipulation to distributive awards set out in the judgment is unsupported in the record, fails to conform with the safeguards enunciated by this Court regarding stipulations in equitable distribution cases, *see Fox*, 114 N.C. App. at 132, 441 S.E.2d at 617, and is no way relied upon, indeed is ignored, by the party in the position of defending the judgment. We must therefore conclude that no stipulation authorized the trial court's distributive awards of the pension plans. *See Byrd v. Owens*, 86 N.C. App. 418, 423, 358 S.E.2d 102, 105-06 (1987) (stipulation in record invalid where "record does not affirmatively reflect that the parties understood the legal effect of their stipulation").

As any remaining assignments of error appear unlikely to recur on remand, we decline to discuss them.

Vacated and remanded.

Judges MARTIN, Mark D., and McGEE concur.

Judge MARTIN, Mark D. concurred prior to 4 January 1999.

STATE OF NORTH CAROLINA v. LARRY GARY, JR.

No. COA98-471

(Filed 5 January 1999)

Appeal and Error— motion in limine denied—no objection at trial—*Hayes* exception inapplicable

Defendant did not preserve for appellate review in a cocaine prosecution alleged error in admitting cocaine found on his person where his pretrial motion to suppress was denied orally, no written denial appears in the record, and the evidence was admitted at trial without objection. The narrow exception in *State v. Hayes*, 130 N.C. App. 154, to the rule that a motion in limine is insufficient to preserve for appeal the question of admissibility if there is no objection at trial was not applicable because the record does not contain a written order denying defendant's motion and therefore such an order was not entered by the trial court.

Appeal by defendant from judgment filed 30 October 1997 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 16 December 1998.

Attorney General Michael F. Easley, by Associate Attorney General Joyce S. Rutledge, for the State.

Public Defender Wallace C. Harrelson, by Assistant Public Defender Ames C. Chamberlin, for defendant appellant.

GREENE, Judge.

Larry Gary, Jr. (Defendant) appeals from the judgment on his conviction for possession of cocaine and for being a habitual felon.

Defendant made a pretrial motion to suppress the evidence against him. Based on the trial court's findings, which appear in the transcript of the pretrial hearing, the court concluded that the police officers had reasonable suspicion to stop the vehicle in which Defendant was a passenger. Accordingly, the trial court orally denied Defendant's motion to suppress the evidence (*i.e.*, a small amount of cocaine) found on Defendant's person. No written order denying Defendant's motion to suppress appears in the record.

At trial, evidence of the cocaine found on Defendant's person was admitted, without objection, through several witnesses. A jury subsequently found Defendant guilty of possession of cocaine and of being a habitual felon.

The dispositive issue on appeal is whether Defendant has preserved the alleged error for appellate review.

A motion *in limine* is generally "insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to that evidence at the time it is offered at trial." *Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998) (*per curiam*); *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (noting that rulings on motions *in limine* are "merely preliminary and subject to change during the course of trial"), *cert. denied*, — U.S. —, 140 L. Ed. 2d 1099 (1998). We recently enunciated a narrow exception to this rule in *State v. Hayes*, 130 N.C. App. 154, 171, 502 S.E.2d 853, 865, *disc. review allowed*, 349 N.C. 235, — S.E.2d — (1998). Pursuant to *Hayes*, "an objection to the denial of the motion *in limine*" without further objection at trial, is sufficient to preserve the evidentiary issues that were the subject of the motion *in limine* for appellate review *if*:

> (1) there has been a full evidentiary hearing where the substance of the objection(s) raised by the motion *in limine* has been thoroughly explored; (2) the order denying the motion is explicit and definitive; (3) the evidence actually offered at trial is substantially consistent with the evidence explored at the hearing on the motion; and (4) there is no suggestion that the trial court would reconsider the matter at trial . . . .

Id. Where the trial court has not "entered" a "definitive and explicit pre-trial order excluding the evidence," however, the *Hayes* exception is inapplicable and the defendant's failure to object to the admission of the evidence at trial precludes appellate review. *Id.* at 172, 502

S.E.2d at 866. "Entry" of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court. *West v. Marko*, 130 N.C. App. 751, 755, — S.E.2d —, — (1998) (holding that the oral rendition of an order in open court does not constitute entry of that order); *cf.* N.C.G.S. § 1A-1, Rule 58 (Supp. 1997) (providing that entry of judgment occurs "when it is reduced to writing, signed by the judge, and filed with the clerk of court").

The record in this case does not contain a written order denying Defendant's motion to suppress the evidence against him; therefore such an order was not entered by the trial court. *See State v. Williams*, 280 N.C. 132, 137, 184 S.E.2d 875, 878 (1971) (noting that the appellate courts are "bound by the record as certified and can judicially know only what appears of record"). It follows that the narrow *Hayes* exception is inapplicable. Accordingly, as Defendant failed to object at trial to the admission of this evidence, he has failed to preserve this issue for our review.

Dismissed.

Judges TIMMONS-GOODSON and HUNTER concur.

RICHARD MELVIN, PLAINTIFF v. ROLAND R. ST. LOUIS, JR. AND FRIEDMAN, RODRIGUEZ, AND FERRARO, P.A., DEFENDANTS

No. COA98-484

(Filed 5 January 1999)

Appeal and Error— notice of appeal—oral—insufficient

An appeal from a civil action was dismissed where plaintiff orally gave notice of appeal before the trial court but the record on appeal does not contain a notice of appeal filed with the clerk of superior court and served upon the appellees. N.C. Rules of Appellate Procedure 3(a).

Appeal by plaintiff from judgment filed 2 March 1998 by Judge James L. Baker, Jr. in Macon County Superior Court. Heard in the Court of Appeals 16 December 1998.

Jones, Key, Melvin & Patton, P.A., by Richard Melvin, for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Dale A. Curriden, for defendant appellees.

GREENE, Judge.

Richard Melvin (Plaintiff) purports to appeal from the trial court's adverse final judgment by orally giving notice of appeal before the trial court. Our Rules of Appellate Procedure provide that notice of appeal in a civil action is taken "by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties . . . ." N.C.R. App. P. 3(a). The requirements of Rule 3 are jurisdictional; therefore oral notice of appeal is insufficient to confer jurisdiction on this Court in a civil action. *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *appeal dismissed and disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990). Because the record on appeal does not contain a notice of appeal filed with the clerk of superior court and served upon the appellees, we are required to dismiss this appeal. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 407 (1991) (*per curiam*).

Dismissed.

Judges TIMMONS-GOODSON and HUNTER concur.

HEATHER FALLIS AND RICHARD FALLIS, AND HEATHER FALLIS AS GUARDIAN AD LITEM FOR HOLLY LEA FALLIS, PLAINTIFFS-APPELLANTS v. WATAUGA MEDICAL CENTER, INC., BY NAME CHANGE FROM WATAUGA HOSPITAL, INC., R. BRUCE JACKSON, II, M.D., AND R. BRUCE JACKSON, II, M.D., P.A., AND LYNN GEORGE, M.D., DEFENDANTS-APPELLEES

No. COA97-621

(Filed 19 January 1999)

1. Damages— collateral source rule—Medicaid—evidentiary references

The trial court did not abuse its discretion by denying plaintiffs' motions for a mistrial in a medical malpractice action arising from a birth where plaintiffs alleged that references were

made to plaintiffs' application for and receipt of Medicaid and other forms of public assistance for the victim in violation of the collateral source rule. The record supports the assertion that the first mention of Medicaid was inadvertent and there was no abuse of discretion in view of the context within which the second question was asked, the trial court's prompt sustaining of plaintiff's objection and willingness to give a limiting instruction to the jury, and plaintiffs' apparent decision to decline the court's offer of such instruction.

2. Damages— collateral source rule—Medicaid—argument of counsel

The trial court did not abuse its discretion in a medical malpractice action by overruling the objection of plaintiffs to an argument of a defense counsel characterized as a reference to public assistance benefits. A challenge by defense counsel to plaintiffs' failure to present particularized evidence in the form of medical bills is far different from asserting to the jury that damages would never be suffered by virtue of payments from collateral sources.

3. Trial— motion for new trial—not timely

The trial court did not err in a medical malpractice action by denying plaintiffs' motion for a new trial where judgment was entered on 8 July 1996, plaintiffs' motion for a new trial was dated 19 July 1996, had attached a certificate of service reflecting mailing to defendants on the same date, and was filed with the clerk on 22 July 1996. Under N.C.G.S. § 1A-1, Rule 59(b), the motion must be served within ten days of the entry of judgment and failure to do so prevents the court from having jurisdiction to entertain the motion.

4. Damages— collateral source rule—new trial denied

The trial court did not abuse its discretion in a medical malpractice action by denying plaintiffs' motion for a new trial due to references to collateral source benefits where plaintiff complained of only four collateral source references in a trial of several weeks, which comprised fourteen volumes and nearly three thousand pages of transcripted proceedings; only one reference was direct and made no mention of receipt of collateral benefits or actual payment by collateral sources; and the remaining three were tangential, with plaintiffs' objections to two of those being promptly sustained by the trial court.

5. Evidence— expert witnesses—data on which opinion based

The trial court did not err in a medical malpractice action by failing to compel a defense expert witness to produce data and facts upon which he based his testimony where the expert relied in deposition upon an article he had earlier published dealing with the causes of brain injuries in newborns, indicated that he was then engaged in additional unpublished research on the subject, and declined as being unduly burdensome to produce copies of the raw data upon which his current research was based. Rule 705 is directed at disclosure in the context of testimony at trial and is not the equivalent of a request for production of documents. Plaintiffs here failed to utilize pretrial discovery measures or subpoenas to secure the documentation and were afforded ample opportunity to cross-examine the expert regarding the basis of his opinions.

6. Appeal and Error— appealability—pretrial motion—withdrawn—waiver

In an appeal decided upon another issue, the procedural context of plaintiffs' Rule 705 motion at trial was suggestive of waiver of the right to raise the denial of the motion on appeal where plaintiffs had filed a pretrial motion to strike an expert's testimony based upon his refusal to produce materials related to previous cases he had reviewed, defendants had moved for a protective order, counsel subsequently appeared in court and announced a compromise involving withdrawal of both motions, the identical issues were again raised by the parties by motions in limine at the outset of the trial as a result of the earlier consent order having broken down, the trial court suggested that the parties attempt to resolve the disputes, and counsel for plaintiffs announced to the trial court the following morning that his motion would be withdrawn. Arguably, plaintiffs are precluded on appeal from pursuing contentions twice withdrawn in the trial court; this circumstance reinforces the previous holding that the court did not err in denying plaintiffs' motion pursuant to N.C.G.S. § 8C-1, Rule 705.

7. Evidence— doctrine of corporate liability—collective evidence rulings

The trial court did not err in a medical malpractice action which included a hospital as a defendant where plaintiffs alleged that the court made various erroneous rulings with the effect of

creating a trial setting in which plaintiffs would not be able to prove their case under the doctrine of corporate liability.

Appeal by plaintiffs from judgment entered 8 July 1996 by Judge C. Walter Allen and orders entered by Judge Loto G. Caviness and Judge James L. Baker, Jr., in Watauga County Superior Court. Heard in the Court of Appeals 28 January 1998.

Egerton & Brenner, by Lawrence H. Brenner, L. Pierce Egerton and Rebeccca A. Leigh, pro hac vice, for plaintiffs-appellants.

Mitchell, Blackwell & Mitchell, by W. Harold Mitchell and Keith W. Rigsbee, for defendants-appellees R. Bruce Jackson, II, M.D. and R. Bruce Jackson, II, M.D., P.A.

Kurdys & Lovejoy, by Mark C. Kurdys, for defendant-appellant Watauga Medical Center, Inc.

State of Florida Agency for Health Care Administration, by Paul A. Vazquez, amicus curiae.

JOHN, Judge.

Plaintiffs appeal the judgment and several orders in this medical malpractice action. Plaintiffs contend the trial court erred by: (1) denying their motions for mistrial and for new trial based upon defendants' alleged references to plaintiffs' receipt of collateral source benefits; (2) failing to compel a defense expert to produce data and facts upon which he based his testimony; and (3) entering certain evidentiary orders. For the reasons set forth herein, we conclude the trial court committed no prejudicial error.

Pertinent factual and procedural information includes the following: On 5 March 1992 at about 2:15 p.m., plaintiff Heather Fallis (Heather) sought evaluation at defendant Watauga Medical Center, Inc. (Watauga) for potential early onset of labor regarding her second child. Plaintiff was admitted to Watauga under the care and treatment of defendant Dr. R. Bruce Jackson, II (Dr. Jackson).

At 4:50 p.m. on that same date, Dr. Jackson prescribed intravenous administration of oxytocin to augment the labor process. At the time the drug was administered, an internal electric fetal monitor was inserted to record the unborn baby's heart rate and the strength and duration of Heather's contractions. At 5:15 p.m., alteration of the baby's heartbeat was observed by Janet Belden, R.N. (Nurse Belden),

who was attending Heather and who communicated the information to Dr. Jackson. At 6:20 p.m., the oxytocin dosage was increased. Shortly thereafter, Nurse Belden telephoned Dr. Jackson at home to inform him of additional fetal heart rate abnormalities revealed by the monitor. In the time period between 6:40 p.m. and 8:05 p.m., Nurse Belden faxed the baby's heart monitor strips to Dr. Jackson at his home and the latter adjusted Heather's oxytocin dosage. At 8:10 p.m., Nurse Belden notified Dr. Jackson that the baby's heart rate had dropped significantly for a full minute and advised him to come to the hospital. Dr. Jackson arrived at 8:25 p.m. The operating room crew was paged to prepare for an immediate cesarean section and responded in approximately ten minutes. Plaintiff Holly Fallis (Holly) was born shortly thereafter.

Holly required major resuscitative efforts following birth including intubation and external cardiac massage. She was subsequently transferred to Baptist Hospital Neonatal Intensive Care Unit in Winston-Salem, and was diagnosed as having cerebral palsy and profound neurological damage.

Heather, in her own capacity and as guardian *ad litem* for Holly, and her husband Richard (Richard) (collectively "plaintiffs") filed the instant complaint claiming the negligence of defendants proximately caused Holly's condition. In particular, plaintiffs alleged Dr. Jackson deviated from the applicable standard of care in multiple respects, resulting in oxygen deprivation and consequently Holly's subsequent afflictions. Plaintiffs also alleged Watauga was negligent in failing to curtail, limit or otherwise regulate the medical practice of Dr. Jackson as it related to the delivery of infants on its premises and that such failure likewise was a proximate cause of Holly's injuries.

After extensive discovery, the case came to trial 20 May 1996. Plaintiffs offered evidence tending to show Holly suffered prenatal asphyxia in consequence of the negligence of defendants. Defendants' evidence indicated Holly's condition resulted from septic shock prior to delivery occasioned by *Haemophilus influenza* non-type B, a bacterial infection contracted by the fetus *in uteri*. Defendants' evidence also suggested failure on the part of Holly's parents to provide financial support, violence or threatened violence between Holly's parents, and their leaving Holly in the care of others for periods of time while one or the other engaged in some personal pursuit. The jury returned a verdict in favor of defendants 11 June 1996, determining neither defendants' negligence was a proximate

cause of Holly's injuries. Judgment was entered 8 July 1996, and plaintiffs moved for new trial 22 July 1996. The motion was denied in an order entered 18 September 1996. Plaintiffs timely appealed.

[1] In the main, plaintiffs insist "repeated references during the trial" were made "to plaintiffs' application for and receipt of Medicaid and other forms of public assistance for Holly." In this regard, plaintiffs assign error to denial of their motions for mistrial, to the overruling of their objections to the closing argument of counsel for Dr. Jackson, and to denial of their new trial motion.

Plaintiffs' motions for mistrial occurred: (1) shortly after Dr. William Hickling (Dr. Hickling), a pediatric neurologist and Holly's treating physician, read on cross-examination from his records a telephone message from Heather which included a reference to the latter's application for Medicaid; and (2) after the trial court had sustained plaintiffs' objection to a question on cross-examination of Heather regarding her establishment of residency in Florida. Both mistrial motions were denied.

A motion for mistrial rests within the sound discretion of the trial court. *Ferebee v. Hardison*, 126 N.C. App. 230, 236, 484 S.E.2d 857, 861, *rev'd on other grounds*, 347 N.C. 346, 492 S.E.2d 354 (1997). Therefore,

> unless the [trial court's] ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

Id. Applying the foregoing test to the case *sub judice,* we decline to disturb the trial court's rulings.

Plaintiffs allege each challenged instance was violative of the collateral source rule, which

> excludes evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff.

Badgett v. Davis, 104 N.C. App. 760, 764, 411 S.E.2d 200, 203 (1991), *disc. review denied*, 331 N.C. 284, 417 S.E.2d 248 (1992). The policy underlying the doctrine is that

> [a] tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source.

Fisher v. Thompson, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981).

Plaintiffs rely primarily upon *Cates v. Wilson*, 83 N.C. App. 448, 350 S.E.2d 898 (1986), *aff'd in part*, 321 N.C. 1, 361 S.E.2d 734 (1987). Defendant health care providers therein were allowed to present evidence tending to show that Medicaid had paid and would continue to pay all the plaintiff's medical bills, as well as evidence of other welfare programs available to defray plaintiff's expenses, child support received by plaintiff's mother, free rent and other support provided by plaintiff's grandmother, and evidence of excellent training for persons suffering plaintiff's handicaps offered at a local public school. *Cates*, 321 N.C. at 4-5, 361 S.E.2d at 737. In addition, the defendants' closing argument contained assertions that in consequence of the evidence of payment and available treatment, plaintiff had suffered no damages. *Id.* at 10, 361 S.E.2d at 740.

Our Supreme Court agreed the foregoing violated the collateral source rule and mandated a new trial, rejecting the argument that the jury's consideration of the liability issues was unaffected "[i]n light of this kind of argument and the nature of the collateral source evidence which was so freely admitted." *Id.* at 11, 361 S.E.2d at 740; *see also Badgett*, 104 N.C. App. at 762, 411 S.E.2d at 202 (new trial granted where testimony revealed portions of medical bills either had been paid by Medicare or "written off" upon receipt of Medicare payments by the furnishing health care provider).

Defendants respond that the extensive evidence held in *Cates* to contravene the collateral source rule was of a different character than the instances complained of in the instant case, and that the trial court did not abuse its discretion in denying the motions for mistrial. We agree.

The solitary direct reference to the collateral source of Medicaid transpired during cross-examination of Dr. Hickling by Dr. Jackson's counsel. Counsel was conducting a thorough review of Dr. Hickling's extensive records during which the latter read from an office note of his staff as follows:

> Heather called, stated Holly's blood levels have not been checked, they are in Florida temporarily, has applied for Medicaid, has a question about meds, please call.

Counsel thereafter directed no follow-up questions to the matter of Medicaid, nor does the record reflect any attempt to draw attention

thereto. Significantly, unlike the circumstances in *Cates*, this single Medicaid application reference within a cross-examination covering over one hundred pages of transcript contained no indication the application had been approved, that plaintiffs had received any payments, or that any of Holly's medical expenses had been defrayed by the program.

Moreover, the record supports defendants' assertion that Dr. Hickling's mention of Medicaid in response to cross-examination was inadvertent. Examination of the transcript of Dr. Hickling's testimony reflects that the telephone message was part of his extensive office records which were provided to defense counsel at the time of Dr. Hickling's testimony, notwithstanding assurances by the doctor at his deposition some two years earlier that he would copy his rather sizable file to plaintiff's counsel who would then forward same to counsel for defendants. It appears defendants' counsel were afforded only a brief opportunity to review the voluminous records during a recess following Dr. Hickling's direct examination. At the hearing on plaintiffs' motion for mistrial, the ignorance of Dr. Jackson's counsel concerning the Medicaid notation prior to Dr. Hickling's testimony was not disputed. In any event, the solitary, apparently inadvertent reference herein pales beside the multiple, varied and deliberate instances in *Cates*.

Finally, the record reflects plaintiff tendered no objection immediately upon the mention of Medicaid, *see* N.C.R. App. P. 10(b)(1) ("in order to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired the court to make"), although counsel asked to approach the bench shortly thereafter and, following an unrecorded conference, the trial court stated, "We'll take that up just before we recess today." Later, outside the presence of the jury, upon plaintiffs' request that the trial court "declare a mistrial, [or] have a special instruction" in view of the Medicaid reference, the court declined to order a mistrial. However, the court offered plaintiffs the option of a special instruction formulated by the court or one drafted by plaintiffs. Plaintiffs initially responded that an instruction would be produced the following morning, but at that time indicated "two typed proposals" would be presented to the court the morning thereafter. However, nothing in the record reveals plaintiffs subsequently proffered a proposed limiting instruction to the trial court.

Based on the foregoing, we cannot say the trial court's denial of plaintiffs' initial mistrial motion was "clearly erroneous so as to amount to a manifest abuse of discretion." *See Ferebee*, 126 N.C. App. at 236, 484 S.E.2d at 861.

Plaintiffs' second mistrial motion was occasioned by the following exchange on cross-examination of Heather by Dr. Jackson's counsel.

> Q. You indicated that Dr. Hickling told you that he thought it would be good for [Holly] to move to Florida.
>
> A. That's correct.
>
> Q. Because the heat would be good for Holly?
>
> A. Yeah.
>
> Q. Yet you have decided that the heat is bad for Holly?
>
> A. The humidity is extremely hot down there, now that I'm there, although the sea is very good for her, the sea air.
>
> . . . .
>
> Q. After you got down to Florida, you did establish a residence in Florida, did you not?
>
> A Yes, sir, we did.
>
> Q And you had to do that in order to be able to get the health care that was needed by Holly, didn't you?
>
> MR. BRENNER: Objection.
>
> MS. LEIGH: Objection.
>
> THE COURT: Objection sustained.

When further questioning revealed Heather had taken Holly to health care providers in Florida, including a hospital stay, counsel for Dr. Jackson asked to approach the bench to register his concern that the appropriate medical records from Florida had not been furnished by plaintiffs. In the absence of the jury and prior to responding, counsel for plaintiffs moved for a mistrial, asserting "that [the residency] question was asked to plant in this jury's mind Medicaid, which is a collateral source." In reply, counsel for Dr. Jackson explained as follows:

> Your Honor, we took her deposition February 29, 1996, and I had asked her if she had established a relationship with any health care providers down there. Her response was no, she had to establish residency; she was doing that at that time. And quite frankly, that's exactly what she said and that didn't have anything to do with Medicaid . . . .

The trial court denied plaintiffs' mistrial motion, noted it had been several days since plaintiffs' counsel had indicated it would present a limiting instruction, and stated it would "offer the same thing" to plaintiffs regarding the instance then at issue. We again note the record reveals no tender by plaintiffs to the trial court of the promised instruction. Indeed, following the conclusion of all the evidence and prior to the closing arguments of counsel, the trial court inquired if either plaintiffs or defendants requested further instructions. None were sought by plaintiffs.

In view of the context within which the question challenged on plaintiffs' mistrial motion was asked, as well as the trial court's prompt sustaining of plaintiffs' objection and willingness to give a limiting instruction to the jury, as well as plaintiffs' apparent decision to decline the court's offer of such instruction, we conclude the trial court did not abuse its discretion in denying plaintiffs' second motion for mistrial.

[2] Plaintiffs next contend the trial court erred in overruling their objections during the following portion of the closing argument of counsel for Dr. Jackson:

> We have heard about Holly having been in the hospital. We have heard about Holly having received medical care. But you have not seen a single medical bill. The first case I've ever been in my life where they're suing for damages and have not put in all of the medical bills that have been incurred up until this time. You haven't seen it. I haven't seen it. The Court hasn't seen it.
>
> Why, why, Mr. Brenner, have you brought this lawsuit and—
>
> MR. BRENNER: Your Honor, I object. This is—
>
> THE COURT: Objection sustained to directing remarks to Mr. Brenner.
>
> MR. BRENNER: We went over this issue. I'd ask the jury be instructed to disregard it.

THE COURT: Objection is overruled.

MR. MITCHELL: Why have they not put the medical bills into evidence?

MR. BRENNER: Object again, Your Honor.

THE COURT: Overruled.

MR. MITCHELL: . . . It may be that the medical bills were so small that they felt like that they would be so contradictory to [the experts'] figures or it may be that because of their own actions they felt that it just wouldn't be right to come here and ask for recovery of medical expenses.

Plaintiffs characterize the foregoing as a

> transparent reference to the plaintiffs' actions in seeking and obtaining public assistance benefits . . . and impermissibly suggested to the jury that the plaintiffs were already fully compensated and were seeking a windfall recovery.

We do not agree.

Initially, we note it is well established that counsel are accorded wide latitude in argument to the jury, and that

> [i]t is left to the trial judge's sound discretion to determine whether counsel has abused [that] latitude accorded him in the argument of hotly contested cases. [The appellate courts] will not review the judge's exercise of discretion unless there exists such gross impropriety in the argument as would likely influence the jury's verdict.

State v. Hockett, 309 N.C. 794, 799, 309 S.E.2d 249, 252 (1983).

Plaintiffs nonetheless refer us once more to *Cates*. However, defendants' counsel therein pointedly argued "that this child would [not suffer the loss of] a penny with its Medicaid, its Aid to Dependent Children." *Cates*, 321 N.C. at 10, 361 S.E.2d at 740. We believe the challenge by Dr. Jackson's counsel to plaintiffs' failure to present particularized evidence of damages in the form of medical bills is far different from asserting to the jury that claimed damages would never be suffered by virtue of payments from collateral sources.

The context of counsel's argument also mitigates against our determination it constituted "gross impropriety." *Hockett*, 309 N.C. at 799, 309 S.E.2d at 252. Immediately prior to the statements at issue,

counsel for Dr. Jackson had, without objection, addressed certain actions and inactions of Heather and Richard indicating shortcomings as parents. Counsel referred to evidence the couple had separated, that Heather had begun seeing another man and followed him to Florida, that Richard was under court order to pay child support and as of March 1996 was $3000.00 behind in those payments, and that Heather had at one point left Holly and gone to Tennessee with her boyfriend for two weeks. Counsel then questioned the absence of medical bills in evidence and referred to the "actions" of Heather and Richard as a possible explanation for the failure to present documentation of medical expenses.

In short, we hold the trial court did not abuse its discretion in overruling the objection of plaintiffs to the argument of Dr. Jackson's counsel as set out above.

[3] Lastly, citing the three instances above and one additional statement by Dr. Hickling to which the trial court sustained plaintiffs' objection, plaintiffs maintain the trial court erred "in failing to order a new trial due to references and argument regarding plaintiffs' receipt of collateral source benefits." We also reject this argument.

N.C.G.S. § 1A-1, Rule 59(b) (1990) (Rule 59(b)) provides in pertinent part as follows:

> (b) Time for motion.—A motion for a new trial shall be served not later than 10 days after entry of the judgment.

Judgment was entered in the case *sub judice* 8 July 1996. *See* N.C.G.S. 1A-1, Rule 58 (Supp. 1997) ("judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court"). Plaintiffs' motion for new trial was dated 19 July 1996, had attached thereto a certificate of service reflecting mailing to counsel for defendants on the same date, and was filed with the clerk of court 22 July 1996.

Under Rule 59(b),

> the motion *must* be served within 10 days of the entry of judgment, for a failure to do so prevents the court from having jurisdiction to entertain the motion. Rule 6(b) specifically prohibits enlargement of the time for serving a motion for a new trial either by order of the court or by agreement of the parties.

W. BRIAN HOWELL, HOWELL'S SHUFORD N.C. CIV. PRAC. & PROC. § 59-13, 718 (5th ed. 1998).

Accordingly, the trial court lacked jurisdiction to entertain plaintiffs' Rule 59 motion, *see Coats v. Coats*, 79 N.C. App. 481, 482, 339 S.E.2d 676, 676 (1986) ("trial court has no authority to alter or amend a judgment under [Rule 59] pursuant to a motion made more than 10 days after entry of the judgment sought to be altered or amended"), and plaintiffs may not now complain the motion was denied. *See Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994) ("[b]ecause defendant's motion for new trial was filed . . . more than ten days after entry of . . . judgment . . . [the trial court] correctly denied that motion").

Moreover,

> [t]he granting or denial of a motion for new trial rests within the sound discretion of the trial judge, and his ruling will not be disturbed on appeal in the absence of a manifest abuse of such discretion or determination that his ruling is clearly erroneous.

Pinckney v. Van Damme, 116 N.C. App. 139, 148, 447 S.E.2d 825, 831 (1994).

[4] Assuming *arguendo* plaintiffs' argument asserting the necessity of a new trial was properly before us, therefore, having determined no abuse of discretion in the matters cited as grounds for the motion, we perceive no manifest abuse of the trial court's discretion in its denial of the motion. Plaintiff complains of but four collateral source references in this trial of several weeks, comprising fourteen volumes and nearly three thousand pages of transcribed proceedings. Only one reference was direct and made no mention of receipt of collateral benefits or actual payment by collateral sources, and the remaining three were tangential, plaintiffs' objections to two of those being promptly sustained by the trial court. The trial court's ruling therefore may not fairly be characterized as "clearly erroneous," *see id.*, and thus it did not err in denying plaintiffs' new trial motion.

[5] Plaintiffs' second assignment of error asserts the trial court erred by failing to compel a defense expert witness "to produce data and facts upon which he . . . bas[ed] his testimony." Plaintiffs' argument misses the mark.

Defendants called Richard L. Naeye, M.D. (Dr. Naeye), Chair of the Department of Pathology at Penn State University, as an expert witness. At the time of Dr. Naeye's 17 April 1996 deposition, he relied upon an article he had earlier published dealing with the causes of brain injuries in newborns. He also indicated he was then engaged in

additional unpublished research on the subject, but declined as being unduly burdensome to produce copies of the raw data upon which his current research was based. Upon direct examination at trial, defendants' counsel inquired as to Dr. Naeye's recent research, and the latter responded he had reviewed sixty cases that he relied upon in forming his opinion. Finally, Dr. Naeye expressed his opinion that Holly sustained irreversible brain damage from septic shock approximately eighteen hours prior to her delivery.

Upon commencement of plaintiffs' cross-examination of Dr. Naeye, the following transpired:

> Q. Dr. Naeye, before I get into my examination, you made reference to materials upon which you based your decision, research involving 60 cases, research involving sudden infant death syndrome and research involving cases other than your published article. Do you recall that?
>
> A. Yes.
>
> Q. Okay. Could you make those available to me?
>
> A. Sure, what would you like? I don't have them here.
>
> Q. Okay. Do you have available to you the research that you referred to in your direct testimony that occurred after the November 1995 article?
>
> . . . .
>
> A. . . . Yeah, we're working on cases right now.
>
> Q. Okay. Well, the 60 cases you referred to, the infant death syndrome and the other cases, could you when you go back make them available for me by Federal Express so I can analyze them?
>
> . . . .
>
> A. Some of [the data] is available. But it's not reasonable. You have no idea what you're asking, because in many cases there are volumes of information that are six or eight inches thick. You're asking my to stop everything else I'm doing in my life and sit down and have thousands of pages of charts, many of which are on microfilm, copied. It's not practical.

Thereafter, outside the presence of the jury, plaintiffs' counsel phrased the above request as a motion, proffered pursuant to N.C.G.S. § 8C-1, Rule 705 (1986) (Rule 705), that Dr. Naeye "go back

and make [the data] available for us and we'll deal with it on rebuttal" through plaintiffs' expert witness. The record reflects no prior written request by plaintiffs for production of the data of Dr. Naeye, either pursuant to N.C.G.S. § 1A-1 Rule 26(b)(4) (1990) (Discovery—Trial Preparation: Experts), N.C.G.S. § 1A-1, Rule 34 (1990) (Production of Documents) or N.C.G.S. § 1A-1, Rule 45(c) (1990) (Subpoena—For Production of Documentary Evidence).

The trial court denied plaintiffs' motion, but explained that plaintiffs' counsel was not restricted in examining Dr. Naeye regarding the basis for his opinions, including the ongoing research. Plaintiffs' counsel thereafter cross-examined Dr. Naeye at length, specifically inquiring as to the basis for his opinions, including his research and publications.

Plaintiffs now argue the trial court erred under Rule 705 by failing "to require disclosure of the underlying facts or data of the expert's opinion prior to his testimony and on cross-examination." In the context of the case *sub judice*, we conclude the trial court did not err.

Rule 705 reads in pertinent part as follows:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

G.S. § 8C-1, Rule 705.

The Commentary to Rule 705 explains that:

> [u]pon the request of an adverse party, the judge must require the expert to disclose the underlying facts on direct examination or voir dire before stating the opinion. . . .
>
> The second sentence of Rule 705 gives the opposing side the right to require disclosure of the underlying facts or data on cross-examination. The cross-examiner is under no compulsion to bring out any facts or data except those unfavorable to the opinion. *N.C. Civ. Pro. Rule 26(b)(4) provides for substantial discovery of the facts underlying the opinion prior to trial.*

G.S. § 8C-1, Rule 705, Commentary (emphasis added).

A careful reading of Rule 705 and the Commentary reveal that the Rule is directed at disclosure in the context of testimony at trial. The clear purport of the section is that, "unless an adverse party requests otherwise," G.S. § 8C-1, Rule 705, an expert's testimony at trial may properly be limited merely to a statement of qualifying credentials and rendition of the expert's opinion, whereupon opposing counsel might then elect to cross-examine the expert regarding any "unfavorable" facts or data. *See* G.S. § 8C-1, Rule 705, Commentary (N.C. Rule 705 differs from equivalent federal rule in that the former leaves it to "opposing counsel [rather than the court] to determine whether to require prior disclosure of the underlying facts"). As defendants correctly assert, therefore, "Evidence Rule 705 is not the equivalent of a request for production of documents," which vehicle the Commentary to the Rule pointedly notes is available "prior to trial." *Id.*

We therefore conclude the trial court did not err in denying plaintiffs' motion pursuant to Rule 705 to "make [Dr. Naeye's research] available [to plaintiffs] by Federal Express." Plaintiffs failed to utilize pre-trial discovery measures or subpoenas to secure the documentation and were afforded ample opportunity to cross-examine Dr. Naeye regarding the basis of his opinions.

[6] Additionally, defendants maintain plaintiffs waived their right to raise denial of their Rule 705 motion on appeal. While it is unnecessary to so hold in view of our determination the trial court did not err in this regard, the procedural context of plaintiffs' motion at trial is indeed suggestive of waiver. While tendering no written request for production of Dr. Naeye's data, plaintiffs filed a pre-trial motion 23 April 1996 to strike his testimony based upon his refusal to produce as orally requested at deposition all materials related to previous cases he had reviewed or in which he had served as consultant or expert witness and all the raw data supporting his research. Defendants meanwhile had moved 9 April 1996 for a protective order seeking to exclude the testimony of Dr. Bahig Shehata, identified by plaintiffs as an expert to rebut the testimony of Dr. Naeye. On 29 April 1996, counsel appeared in court and announced a compromise involving withdrawal of both motions.

The identical issues were again raised by the parties by motions *in limine* at the outset of trial as a result of the earlier "consent order [having] broke[n] down." Following day-long arguments covering over sixty pages of transcript, the trial court suggested that the par-

ties attempt overnight to resolve the disputes. The following morning, counsel for plaintiffs announced to the trial court:

> [the] resolution is that we withdraw our motion as to Dr. Naeye, he's withdrawing his motion as to rebuttal witnesses . . . . That would resolve all of those issues with regard to Dr. Naeye.

It thus appears plaintiffs had raised on two prior occasions the identical issues forming the basis of the motion at trial pursuant to Rule 705, and that plaintiffs had ultimately elected to withdraw those issues from the trial court's consideration. Arguably, therefore, plaintiffs are precluded from pursuing before us contentions twice withdrawn in the trial court. *See State v. Larrimore*, 340 N.C. 119, 149, 456 S.E.2d 789, 805 (1995) (where "defendant withdraws challenged questions . . . the court's ruling [thereon] has [not] been preserved for review"; "defendant abandoned his position at trial and cannot now resume the battle in [appellate] forum"). Such circumstance simply reinforces our holding that the trial court did not err in denying plaintiffs' motion as proffered pursuant to Rule 705.

[7] Lastly, plaintiffs assert the trial court made various erroneous rulings with the effect of creating "a trial setting in which Plaintiffs would not be able to prove their case against Watauga under the doctrine of corporate liability." Specifically, plaintiffs allege the court erred by: (1) granting defendants' motion for protective order; (2) granting defendants' motions *in limine* regarding evidence of past performance problems of Dr. Jackson; and (3) restricting impeachment of Nurse Belden during cross-examination regarding the professional conduct of Dr. Jackson. In each instance, we disagree.

Initially, we observe that plaintiffs were afforded extensive avenues of opportunity to advance their claim of corporate liability, especially through the testimony of their expert witness on hospital quality assurance, Susan DesHarnais, Ph.D. Plaintiffs' evidence, for example, tended to indicate failure of Watauga to develop adequate policies and procedures regarding labor and delivery, and to train labor and delivery nurses concerning such policies and procedures. In addition, evidence tended to reflect inadequate clinical monitoring and/or skills verification in electronic fetal monitoring and other clinical skills, failure of Watauga to establish appropriate lines of communication with labor and delivery services and contingencies, and lack of appropriate avenues for nurses to express their feelings relating to patient care issues.

Turning now to plaintiffs' complaints addressed to the issuance of protective orders, we note plaintiffs through discovery had sought (a) from Watauga the complete labor and delivery records for Dr. Jackson from the time he joined the medical staff at Watauga through 5 March 1992; (b) answers to interrogatories to Dr. Jackson regarding whether his performance at Watauga had ever been evaluated by an expert from outside the hospital and whether he had ever been reported to the National Practitioner Data Base (NPDB); and (c) answers to interrogatories and production of documents from Watauga concerning similar information. The motions for protective orders of both Dr. Jackson and Watauga as to the foregoing information were allowed.

N.C.G.S. § 1A-1, Rule 26(c) (1990) provides for the issuance of protective orders for "good cause shown" in order to protect against "unreasonable annoyance, embarrassment, oppression, or undue burden or expense." Further, discovery orders are generally within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion. *Powers v. Parisher*, 104 N.C. App. 400, 409, 409 S.E.2d 725, 730 (1991), *appeal dismissed* and *disc. review denied*, 331 N.C. 286, 417 S.E.2d 254 (1992). We conclude no abuse of discretion is reflected in the instant record.

Dr. Jackson represented that his medical records covered approximately five hundred and forty (540) patients, averaged one hundred (100) to one hundred thirty (130) pages in length each, and were replete with confidential information specifically protected by N.C.G.S. § 131E-76 (1997) so as to necessitate exhaustive scrutiny and extensive redaction. Moreover, plaintiffs' request was filed more than thirty months following filing of suit and but three months prior to the commencement of trial on 20 May 1996. Based on these circumstances alone, we believe the trial court might properly have determined the request to constitute an undue burden or expense or to be unreasonably tardy, and thus it did not err in allowing a protective order concerning Dr. Jackson's records.

With regard to the interrogatories concerning the exchange of information between Watauga and the NPDB, defendants maintain such disclosure is specifically prohibited by the federal statutory scheme creating the data base. *See* 42 U.S.C. § 11137(b)(1) (1986); Pub. L. No. 99-660, Title IV, § 427, 100 Stat. 3791 (1986) and 45 C.F.R. § 60.13. Plaintiffs do not take issue with this analysis. Accordingly, the trial court did not err in protecting NPDB information from disclosure.

Finally, in interrogatories addressed to both Dr. Jackson and Watauga, plaintiffs requested as follows:

> In his deposition, John R. Marchese, M.D. states that if there were "some question as to performance of a physician [at Watauga Medical Center] . . . the Executive Committee would evaluate the situation, usually obtain expert opinion outside the hospital . . . ." With regard to this statement, please state whether any expert opinion with respect to [Dr. Jackson's] performance at Watauga Medical Center was obtained . . . ?

Defendants argue medical review committee proceedings are specifically protected from discovery under N.C.G.S. § 131E-95(b) (1997) (no person "in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee") and N.C.G.S. § 131E-97 (1997). *See also Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 82-84, 347 S.E.2d 824, 828-29 (1986) (sections protect proceedings of medical review committee, records and materials produced therein, as well as materials considered). Plaintiffs respond by pointing to the portion of the statute providing that

> information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.

G.S. § 131E-95(b).

In our view, plaintiffs' interrogatory, in seeking information generated by Watauga's medical review committee, on its face requests material protected by the statute which was not "otherwise available," *id.*, that is, the decision whether or not to obtain outside evaluation of Dr. Jackson's performance—a matter indisputably "produced," G.S. § 131-95(b), during quality assurance or credentialing activities of Watauga's medical review committee. In this context, we find particularly pertinent the purpose of G.S. § 131E-95 as expressed by our Supreme Court, "*i.e.*, the promotion of candor and frank exchange in peer review proceedings." *Shelton*, 318 N.C. at 82, 347 S.E.2d at 828.

Finally, plaintiffs question the trial court's grant of defendants' motions *in limine* and restriction of cross-examination of Nurse Belden regarding evidence of Dr. Jackson's professional perform-

ance, notably evidence of deliveries by Dr. Jackson in March 1989 and 30 March 1992.

The trial court's decision on a motion *in limine* will not be reversed on appeal absent an abuse of discretion, *see Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 276, 488 S.E.2d 617, 621, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997), *i.e.*, the ruling must be "so unreasonable under the facts of the case as to constitute reversible error." *Id.* Moreover, the trial court has broad discretion in controlling the scope of cross-examination, and such a ruling may likewise not be disturbed absent abuse of discretion and a showing the ruling was so arbitrary it could not have been the product of a reasoned decision. *Jones v. Rochelle*, 125 N.C. App. 82, 85-86, 479 S.E.2d 231, 233, *disc. review denied*, 346 N.C. 178, 486 S.E.2d 205 (1997).

Suffice it to state that after careful review of the record in the instant case, we conclude the trial court did not abuse its discretion in either matter at issue. We elaborate only to note, as an example, that the 30 March 1992 delivery took place subsequent to the delivery of Holly and therefore was not relevant to Watauga's alleged negligence on 5 March 1992. *Cf. Strubhart v. Perry Mem. Hosp. Trust Auth.*, 903 P.2d 263 (Okla. 1995) ("testimony about a doctor's prior conduct is admissible if the hospital . . . knows or should know with the exercise of ordinary care of the prior conduct").

Having thus carefully considered each of plaintiffs' contentions on appeal, we conclude the trial court committed no prejudicial error.

No error.

Judges GREENE and MARTIN, Mark D., concur.

Judge MARTIN, Mark D. concurred prior to 4 January 1999.

JACK S. GRAY AND MARY B. GRAY T/A TOWER CIRCLE MOTEL, PLAINTIFFS v. NORTH CAROLINA INSURANCE UNDERWRITING ASSOCIATION, DEFENDANT

No. COA97-1321

(Filed 19 January 1999)

1. Appeal and Error— appealability—instructions—no objection or exception

An assignment of error in the appeal of an insurance action to instructions on the correct measure of damages was overruled where no objection or exception was taken when counsel was given the opportunity, defendant did not move at the conclusion of the evidence for a directed verdict on this issue, and defendant did not make the argument a part of his motion for judgment n.o.v.

2. Insurance— unfair or deceptive trade practices—pattern of conduct

The trial court erred in an action arising from an insurance claim following a hurricane by denying defendant's motion for a directed verdict on the issues of unfair or deceptive trade practices based on violation of N.C.G.S. § 58-63-15(11) and by awarding treble damages and attorneys' fees based on violation of Chapters 58 and 75. There was insufficient evidence from which a reasonable jury could find that any of the acts of defendant were done with such frequency as to indicate a "general business practice" as required for an unfair and deceptive practice under N.C.G.S. § 58-63-11(a). Moreover, a mere breach of contract, even if intentional, is not sufficiently unfair and deceptive to sustain an action under N.C.G.S. § 75-1.1 and it could not be said in this case that the trial court abused its discretion in failing to find that defendant violated the provisions of N.C.G.S. § 75-1.1 separate and apart from any violation of N.C.G.S. § 58-63-15(11).

3. Declaratory Judgments— insurance claims—mortgage holder—not a party to action

There was harmless error in an action arising from an insurance claim after a hurricane where the trial court submitted to the jury the issue of whether anyone else, particularly Mrs. Gray (an alleged mortgage holder), was entitled to proceeds under the insurance policy where Mrs. Gray appeared neither personally nor by counsel, was not served with process nor made a party,

and certainly is not bound by the judgment of the trial court in this case.

Appeal by defendant and cross-appeal by plaintiffs from amended judgment entered 22 April 1997 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 17 August 1998.

Vandeventer, Black, Meredith & Martin, L.L.P., by Norman W. Shearin, Jr., for plaintiff appellants.

Cranfill, Sumner & Hartzog, L.L.P., by William W. Pollock, for defendant appellant.

HORTON, Judge.

On 31 August 1993, plaintiffs Jack S. Gray and Mary B. Gray (the Grays) traded as the Tower Circle Motel (the Motel). On that day, Hurricane Emily struck the Outer Banks and the Motel suffered wind damage. Insurance coverage for the Motel property was provided by an insurance policy issued by defendant North Carolina Underwriting Insurance Association to "Jack S. & Mary L. Gray T/A Tower Circle Motel." The policy provided coverage to the real property against wind and hail damage only. On 1 September 1993, the Grays filed a claim with defendant for "extensive wind damage."

During the adjustment process, defendant received a copy of a deed of trust from an attorney for Georgia B. Gray. Georgia Gray's late husband was the brother of plaintiff Jack S. Gray. The attorney advised defendant that Georgia B. Gray held a note and deed of trust on the Motel property and that plaintiffs were required, by the terms of that deed of trust, to obtain insurance on the Motel property for the benefit of Georgia B. Gray.

Plaintiffs requested a cash advance during the adjustment process. In accordance with its long-standing policy and on advice of counsel, defendant issued a joint check on 21 October 1993 in the amount of $25,000.00 to plaintiffs and Georgia B. Gray as an advance. Plaintiffs returned the check to defendant.

Defendant hired an adjuster to investigate plaintiffs' wind loss. The adjuster concluded that wind damage to the Motel property exceeded the policy limits. After a review of the adjuster's report and photographic evidence, defendant felt much of the damage to the motel property was due to flooding rather than wind. Defendant hired

a second adjuster to investigate the loss. After consultation with a contractor, the second adjuster determined that the amount of damage to the motel property caused by wind was $60,821.51.

Plaintiffs' attorney informed defendant that they were dissatisfied with defendant's determination of damages, had retained their own engineer and contractor to inspect the property, and requested that they be allowed to submit their own reports to defendant for its consideration. Defendant agreed to consider any additional information submitted by plaintiffs. On several occasions, defendant requested the additional information from plaintiffs, but defendant received no additional information until the commencement of this action on 13 July 1994 in Dare County Superior Court.

Plaintiffs alleged that defendant's actions during the adjustment of the claim breached the insurance policy and also constituted unfair and deceptive trade practices. Plaintiffs also sought a declaratory judgment that they were entitled to receive any proceeds under the policy free of any interest the mortgage holder might have.

On 19 December 1996, a jury found that defendant had breached the policy of insurance; that plaintiffs had been injured by the breach in the amount of $256,256.91; that defendant had done one of five enumerated acts with regards to the claim under the policy, and had done so with such frequency as to indicate a general business practice; that plaintiffs were injured as a result of the business practice in the amount of $117,000.00; and plaintiffs were entitled to the proceeds of the policy free of the claim of any other person. In its amended judgment, the trial court trebled the award of $117,000.00 to $351,000.00, awarded prejudgment interest on all sums awarded, and taxed costs to defendant, including attorneys' fees in the sum of $117,000.00. Defendant appealed. Plaintiffs cross-appealed, contending the trial court should have trebled all damages awarded to plaintiffs and should have awarded attorneys' fees based on the total of all damages awarded by the jury.

The primary questions presented for decision by this Court are: (I) whether the trial court correctly charged the jury on the measure of damages for the loss of personal property; (II) whether plaintiffs introduced sufficient evidence of frequent willful acts by defendant which would support plaintiffs' claim for unfair and deceptive trade practices under Chapters 75 and 58 of the North Carolina General Statutes; and (III) whether the declaratory judgment claim was properly submitted to the jury.

I. Breach of Contract Claim

[1] Plaintiffs alleged that the Motel real property and some personal property suffered wind-related damage from Hurricane Emily, and that defendant breached the policy of insurance by refusing to pay for such damages. The jury answered the breach of contract issue in the affirmative, and answered the damages issue resulting from that breach in the sum of $256,256.91. According to plaintiffs, that amount of damages is made up by adding "$247,973.76, representing the Crittenden assessment of covered loss to the structures damaged by the winds of Hurricane Emily and $8,283.15 in covered loss to personal property ($8,783.35 less $500.00 deductible)."

Defendant contends the claim for loss of personal property should not have been submitted to the jury since plaintiffs did not introduce evidence of the value of the personal property immediately prior to, and immediately after, the wind damage caused by the hurricane. Defendant's assignment of error states that the trial court erred in instructing the jury on the correct measure of damages. Although defendant now complains about the trial court's jury instructions on this issue, no objection or exception was taken to the trial court's instructions in this area following the charge to the jury when the trial court gave counsel an opportunity to do so. "By failing to call the trial court's attention to alleged errors in the jury charge, plaintiff has waived his right to appellate review." *Donavant v. Hudspeth*, 318 N.C. 1, 29, 347 S.E.2d 797, 814 (1986).

Further, we note that defendant did not move at the conclusion of the evidence for a directed verdict on this issue, nor did he make the argument as a part of his motion for judgment notwithstanding the verdict. Consequently, this assignment of error is overruled.

[2] II. Unfair or Deceptive Trade Practices Claim

N.C. Gen. Stat. § 75-1.1 (1994) provides in part:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

N.C. Gen. Stat. § 75-16 (1994) provides:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

Thus, N.C. Gen. Stat. § 75-16 allows a private cause of action for violation of N.C. Gen. Stat. § 75-1.1, and mandates the imposition of treble damages. *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981).

Unfair trade practices in the insurance business are regulated by the provisions of N.C. Gen. Stat. § 58-63 (1994 and Cum. Supp. 1997) (Unfair Trade Practices Act). The Unfair Trade Practices Act prohibits anyone from engaging "in any trade practice which is defined in this Article as or determined pursuant to this Article to be . . . an unfair or deceptive act or practice in the business of insurance." N.C. Gen. Stat. § 58-63-10 (1994). The Act then sets out a listing of actions which are "defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance[.]" N.C. Gen. Stat. § 58-63-15 (1994).

N.C. Gen. Stat. § 58-63-15(11), which is entitled "Unfair Claim Settlement Practices," sets out, in fourteen subsections, various acts which constitute unfair trade practices when committed with "such frequency as to indicate a general business practice . . . ." *Id.* "The relationship between the insurance statute and the more general unfair or deceptive trade practices statutes is that the latter provide a remedy in the nature of a private action for the former." *Kron Medical Corp. v. Collier Cobb & Associates*, 107 N.C. App. 331, 335, 420 S.E.2d 192, 194, *disc. review denied*, 333 N.C. 168, 424 S.E.2d 910 (1992). As a matter of law, a violation of N.C. Gen. Stat. § 58-63-15 is an unfair or deceptive trade practice in violation of N.C. Gen. Stat. § 75-1.1. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 179 (1986) (construing N.C. Gen. Stat. § 58-54.4, the predecessor to N.C. Gen. Stat. § 58-63-15).

In the case *sub judice*, plaintiffs contend defendant violated the following sections of N.C. Gen. Stat. § 58-63-15(11):

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

. . . .

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

. . . .

h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

. . . .

l. Delaying the investigation or payment of claims by requiring an insured claimant . . . to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;

m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]

In Issue Three, the jury was asked to determine whether defendant did at least one of the five prohibited acts, and the jury answered in the affirmative. Issue Four then asked the jury to determine whether defendant did one or more of the above-stated acts with such frequency as to indicate a general business practice. Again, the jury answered in the affirmative. The jury then found in Issue Five that plaintiffs were injured as a proximate result of the conduct of defendant, and assessed damages of $117,000.00 in Issue Six.

Defendant contends there is insufficient evidence to show it violated the provisions of N.C. Gen. Stat. § 58-63-15(11)(b,f,h,l and m), and that the trial court erred in submitting Issues Three, Four, Five, and Six, which relate to the unfair or deceptive trade practices claim. We note that in order to state a claim for an unfair and deceptive practice under N.C. Gen. Stat. § 58-63-11(a), plaintiff must allege that defendant insurance company engaged in the prohibited practices with such frequency as to indicate that the acts are a "general busi-

ness practice" of defendant. *Von Hagel v. Blue Cross & Blue Shield*, 91 N.C. App. 58, 60, 370 S.E.2d 695, 698 (1988). Here there are no such allegations in plaintiff's complaint. Assuming, without deciding, that there was sufficient evidence in this case of a violation of N.C. Gen. Stat. § 58-63-15(11) to warrant submission of Issue Three to the jury, we find that there was insufficient evidence from which a reasonable jury could find that any of the acts of defendant were done with such frequency as to indicate a "general business practice."

"General" is defined as "[b]eing usually the case; true or applicable in most instances but not all." The American Heritage Dictionary 552, (2d ed. 1982). The same dictionary defines "frequent" as "[o]ccurring or appearing quite often or at close intervals[.]" *Id.* at 534. We also find clarification of the "frequency" and "general business practice" requirements in earlier decisions of this Court. In *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 303, 435 S.E.2d 537, 543 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994), plaintiff alleged that defendant insurance company " 'has adopted a policy and practice in the handling of its first-party insured UIM claims to uniformly contest, and refuse to pay UIM claims which involve "stacking" of UIM coverages.' " We held that the allegation of such a general policy and practice was "sufficient to comport with the requirement of G.S. 58-63-15(11) that plaintiff allege that defendant violated the prohibited acts 'with such frequency as to indicate a general business practice.' " *Id.* In *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 422, 424 S.E.2d 181, 185, *disc. review allowed*, 333 N.C. 539, 429 S.E.2d 558, *aff'd*, 334 N.C. 682, 435 S.E.2d 71 (1993), plaintiff alleged that defendant's actions amounted to "aggravated conduct." One action complained of by plaintiff Lovell was that defendant linked the med pay claim and the liability claim, stating that it wanted to settle all claims at once. *Id.* at 423, 424 S.E.2d at 186. We agreed that such an allegation indicated aggravated conduct, and also referred to such action as a violation of N.C. Gen. Stat. § 58-63-15(11)(m), pointing out that

> "[f]ailure to promptly settle claims where liability has become reasonably clear, under one portion of the insurance coverage in order to influence settlement under other portions of the insurance policy coverage" is an unfair claim settlement practice; however, such a violation . . . *must be performed often enough to constitute a general business practice[].*

Lovell, 108 N.C. App. at 423, 424 S.E.2d at 186 (emphasis added).

In support of its contention that the actions of defendant were its general, or typical, business practices, plaintiffs introduced evidence of only one other instance in which plaintiffs contended that defendant violated the provisions of N.C. Gen. Stat. § 58-63-15(11). The property of Islander Condominium Association (Islander) was also damaged by Hurricane Emily. As in the case *sub judice*, the Islander property was insured by defendant, initially adjusted by Crittenden, and later by Cutler. The case with Islander was settled on 1 March 1994 for $595,199.10. In the Islander claim, as in the present case, there was no coverage for loss of rental profits, and plaintiffs claim that, in both cases, defendant showed a lack of concern about the loss of rental profits by both claimants. No lawsuit was filed in the Islander loss.

Although defendant settled many other claims for damage arising from Hurricane Emily, plaintiffs contend the only two commercial claims were their claim and the Islander claim. We note that in the Islander claim there was a disagreement and negotiations over the amount of damages, but the Islander claim was paid in full within six months of the loss without the necessity of a lawsuit being filed. Even assuming *arguendo* that there were violations of N.C. Gen. Stat. § 58-63-15(11) by defendant in its adjustment of the Islander claim, we conclude that this evidence is insufficient to show a pattern of conduct by defendant which would amount to a *per se* violation of the Unfair Claim Practices Act.

We are cognizant of this Court's decision in *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996), *disc. reviews denied*, 345 N.C. 344, 483 S.E.2d 172-73 (1997), but have concluded that it is factually distinguishable and does not mandate a different result. In *Murray*, plaintiff was injured in an automobile accident in January 1986, and obtained a judgment against the negligent driver for $85,000.00 in 1990. *Id.* at 4, 472 S.E.2d at 359. Insurance coverage was provided by three separate policies. *Id.* After repeated attempts to collect the full amount of his judgment, interest, and costs, plaintiff Murray brought an action against the three defendant insurance companies in 1992 for unfair and deceptive trade practices, and against one defendant insurer for punitive damages arising from the company's alleged tortious breach of contract. *Id.* at 5, 472 S.E.2d at 360. Plaintiff Murray alleged five separate violations of N.C. Gen. Stat. § 58-63-15(11) and alleged "numerous demands" on defendant insurers over the course of the protracted litigation. *Id.* at 10-11, 472 S.E.2d at 363. The trial court entered summary judgment for the

defendants, and Murray appealed to this Court. *Id.* at 7, 472 S.E.2d at 361. We reversed the decision of the trial court, holding in pertinent part that plaintiff Murray's allegations of repeated violations of N.C. Gen. Stat. § 58-63-15(11), "along with the case-specific facts alleged and verified in the complaint, when viewed in the light most favorable to plaintiff, and when viewed against the composition of the judgments already rendered against defendants in this case, indicate plaintiff has made out his *prima facie* case of a § 58-63-15(11) violation." *Id.* at 11, 472 S.E.2d at 363. We decline to extend the reasoning of *Murray* to the facts of this case.

After the trial court signed the original judgment in this matter on 24 March 1997, plaintiffs moved that the trial court amend its judgment by, among other things, adding a finding that defendant "willfully engaged in unfair and/or deceptive acts or practices affecting commerce in North Carolina in violation of N.C.G.S. § 75-1.1." On 22 April 1997, the trial court entered an amended judgment which granted much of plaintiffs' motion to amend, but did not make any separate determination that defendant's conduct amounted to a violation of N.C. Gen. Stat. § 75-1.1. The determination of whether an act or practice is unfair or deceptive within the meaning of N.C. Gen. Stat. § 75-1.1 is a question of law for the Court. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988). In *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981), our Supreme Court noted that "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."

However, it is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract. *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 559, 406 S.E.2d 646, 650 (1991). A mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. Gen. Stat. § 75-1.1. *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). Substantial aggravating circumstances attendant to the breach must be shown. *Id.*

In this case, we cannot say the trial court abused its discretion in failing to find that defendant violated the provisions of N.C. Gen. Stat. § 75-1.1, separate and apart from any violation of N.C. Gen. Stat. § 58-63-15(11). Thus, plaintiff's cross-assignment of error is overruled.

The issues of unfair or deceptive trade practices based on a violation of N.C. Gen. Stat. § 58-63-15(11) should not have been submitted to the jury. Defendant's motion for a directed verdict on that claim should have been granted, and the action of the trial court in denying its motion and submitting the claim must be reversed. In addition, the award of treble damages and attorneys' fees based on a violation of Chapters 58 and 75 was erroneous.

III. Declaratory Judgment Claim

[3] An underlying current driving this lawsuit is the family disagreement between plaintiffs and Georgia Gray, widow of the male plaintiff's deceased brother. When plaintiffs purchased the Motel from the brother, a note was given for the purchase price. That note was secured by a mortgage on the property. At the time of the loss involved herein, the brother was deceased, leaving Georgia as his sole heir. There is some indication in the record that the brother died testate, but there is no will as an exhibit.

Early in the claim adjustment process, defendant was notified there was a mortgage on the property, the mortgage required the mortgagor to maintain insurance on the Motel property, and Georgia Gray was entitled to funds which were secured by the mortgage. Plaintiffs contend they had paid all funds due to decedent, and that the mortgage was never canceled. On the advice of counsel, defendant placed Georgia Gray's name as a payee on the $25,000.00 check issued to plaintiffs, and plaintiffs rejected the check for that reason.

When plaintiffs instituted this action against defendant, they also brought a separate action against Georgia Gray to resolve the controversy about her claim against them. Plaintiffs did not make Georgia Gray or the representative of decedent's estate a party to the instant case. However, they sought a declaration from the trial court that no one else, particularly Mrs. Gray, was entitled to proceeds under the insurance policy issued by defendant. Georgia Gray appeared neither personally nor by counsel, was not served with process nor made a party, and certainly is not bound by the judgment of the trial court in this case.

Further, while we note that defendant does not complain about the action of the trial court in submitting the declaratory judgment issue to the jury, rather than deciding the issue as a matter of law, submission of the question to the jury required them to make a decision

on a question of law without adequate guidance given them by the jury instructions on the issue. The instructions provided that

> the plaintiffs must prove by the greater weight of the evidence that they are entitled to be paid the proceeds under the insurance policy free of any claim or interest of any party not entitled to receive payment under the insurance policy. Therefore, as to this issue, I charge that if you find the Grays have satisfied their burden of proof you will answer this issue yes, in favor of the plaintiffs.

Nor does the issue and its affirmative answer provide any guidance to defendant. Certainly no one would quarrel with the decision that plaintiffs should be entitled to receive policy proceeds free of the claim "of any party not entitled to receive payment under the insurance policy." That statement requires neither further argument nor citation of authority. Unfortunately, it does not assist the parties in the present situation, since Georgia Gray contends she is entitled to receive payment under the insurance policy. Gray is not bound by the judgment in this case for the reasons stated above.

We are not advised of the result of the separate action between plaintiffs and Georgia Gray, but may reasonably anticipate that the outcome of that lawsuit will dictate the answer to Georgia Gray's entitlement to any proceeds under the insurance policy involved here. Although we believe the actions of the trial court in submitting this issue to the jury were erroneous, we find the error was harmless since only the parties to this lawsuit are bound by the jury verdict on this issue and the judgment entered thereon.

In summary, there is no error in the judgment of the trial court awarding damages based on the breach of contract claim, but the judgment of the trial court awarding treble damages and attorneys' fees on the unfair and deceptive trade practice claim is erroneous and is reversed. We find no prejudicial error in the judgment of the trial court on the declaratory judgment claim.

No error in part, but reversed in part.

Chief Judge EAGLES concurs.

Judge MARTIN, Mark D., concurred in this opinion prior to 31 December 1998.

RICHARD DEAN FULCHER, BY HIS GUARDIAN AD LITEM BARBARA WALL, AND MR. AND MRS. R.H. WALL, PARENTS OF THE DECEASED EMPLOYEE RICHARD WALL, PLAINTIFFS V. WILLARD'S CAB COMPANY, NON-INSURED, EMPLOYER, DEFENDANT

No. COA98-282

(Filed 19 January 1999)

1. **Evidence— employer-employee relationship—memoranda and affidavit—dated after decedent's death—not probative**

   In a workers' compensation action arising from the death of a taxicab driver, an affidavit from another driver of taxicabs owned by defendant which contained memoranda should not have been relied upon by the Commission because the memoranda and affidavit were dated after the driver's death. They are not probative of whether an employee-employer relationship existed between the driver and defendant at the time of the driver's death.

2. **Workers' Compensation— employer-employee relationship—leased taxicab**

   The Industrial Commission erred in a workers' compensation action by finding that an employer-employee relationship existed between a taxicab driver and defendant where the driver was fatally wounded while operating a taxicab leased from defendant. Standing alone, provisions in the contract between the driver and defendant regarding possession of handguns while driving the leased taxicab and permission for any other person to operate the cab do not establish that the driver was defendant's employee.

Judge GREENE concurring in the result.

Appeal by defendant from opinion and award entered 5 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 1998.

Parrish, Newton & Rabil, LLP, by Daniel R. Johnston and Carl F. Parrish, for plaintiff-appellee Richard Dean Fulcher.

Davis and Hamrick, L.L.P., by Shannon L. Warf, L. Kathryn Slocumb, and H. Lee Davis, Jr., for defendant-appellant.

LEWIS, Judge.

Defendant Willard's Cab Company has a franchise from the City of Winston-Salem to operate a taxicab business. It owns a number of

vehicles equipped for use as taxicabs. On 26 October 1994, defendant and Byron Richard Wall entered into a contract in which defendant was designated as "lessor" and Wall was designated as "lessee." Defendant agreed to rent a taxicab in good condition to Wall, to provide liability insurance on the taxicab, and to maintain it. Wall was to pay defendant for the use of a taxicab each time he drove one. This "per-shift" fee was $55.00. The lease provided that Wall was free from defendant's "control or direction," and that he was to "exercise complete discretion in the operation" of the leased taxicab. Wall was to keep all fees and tips he collected, and he was not restricted to any specific geographic area in the operation of his taxicab. He was also free to take or refuse calls from defendant's dispatcher.

The lease expressly denied any employer-employee relationship between Wall and defendant. Defendant did not withhold income taxes or Social Security taxes from Wall. The lease further provided that Wall was not to "carry or possess a handgun" while operating the vehicle, and was not to "permit . . . the operation of the . . . vehicle as a taxicab by any person other than . . . himself." Wall was also required to comply with certain Winston-Salem ordinances regulating the operation of taxicabs.

On 1 November 1994, Wall was operating a taxicab leased from defendant. He accepted a dispatch to pick up a passenger at approximately 1:00 a.m. About 1:35 a.m., he was found outside his cab, bleeding from a gunshot wound to the back of the head. He later died as a result of the wound.

The decedent's estate filed a workers' compensation claim some time prior to 18 December 1995. Some time between 6 February 1996 and 6 June 1996, the decedent's dependent child, Richard Dean Fulcher, and the decedent's parents, Mr. and Mrs. R.H. Wall, were substituted as plaintiffs. Fulcher is represented by his mother and guardian ad litem, Barbara Wall.

Sustaining the decision of the deputy commissioner, the Full Commission found that an employer-employee relationship existed and that Wall was fatally wounded in the course and scope of his employment. It confirmed the award of benefits to the plaintiffs.

On appeal, defendant contends that the Commission erred by admitting into evidence the affidavit of Spurgeon W. Wood, by finding that an employer-employee relationship existed between Wall and defendant, and by finding that the death of Wall was attributable to an accident arising out of and in the course of his employment.

I

[1] After evidence was presented to the deputy commissioner, plaintiffs were allowed to introduce into evidence an affidavit of Spurgeon Wood, who also drove taxicabs owned by defendant. The affidavit contained two memoranda dated 17 November 1994 and 22 August 1995 respectively. The November 1994 memorandum informed "All Drivers" that thenceforth, there would be different check-in times and the drivers could select their times. The August 1995 memorandum, addressed to "All Owner Operators," stated that they would "be given two weeks of vacation on their vehicles." Defendant contends that these documents should not have been admitted for the purpose of establishing that Wall was defendant's employee. We agree.

" 'As a general rule, mere . . . proof of the existence of a condition or state of facts at a given time . . . does not raise any presumption that the same condition or facts existed at a prior date.' " *Sloan v. Light Co.*, 248 N.C. 125, 133, 102 S.E.2d 822, 828 (1958) (quoting 31 C.J.S. Evidence, § 140). The memoranda and affidavit are dated after Wall's death. They are not probative of whether an employee-employer relationship existed between Wall and defendant at the time of Wall's death. The Commission should not have relied on them to reach its decision. The Commission's Finding of Fact Number Nine, to the effect that on 1 November 1994 defendant had "a schedule requiring drivers to check in at specified times," is not supported by competent evidence.

II

[2] We next consider whether Wall was an employee of defendant at the time of his death. "[T]he existence of the employer-employee relationship at the time of the accident is a jurisdictional fact. . . . The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Lucas v. Li'l General Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976). The law applicable to this issue is summarized in *Gordon v. Garner*, 127 N.C. App. 649, 658-59, 493 S.E.2d 58, 63 (1997) (footnotes omitted), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 86 (1998):

> In *Hayes v. Elon College*, [224 N.C. 11, 29 S.E.2d 137 (1944),] our Supreme Court concluded that the central issue in determining whether one is an independent contractor or an employee is whether the hiring party "retained the right of control or superin-

> tendence over the contractor or employee as to details." [*Id.* at 15, 29 S.E.2d at 140.] The court then went on to explain that there are generally eight factors to be considered, none of which are by themselves determinative, when deciding the degree of control exercised in a given situation. These factors include whether . . . "[t]he person employed (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time." [*Id.* at 16, 29 S.E.2d at 140.]

In this case, the Commission's findings of fact do not support its conclusion that an employer-employee relationship existed between defendant and Wall. These findings indicate that "the right of control did not rest" with defendant. *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 661, 228 S.E.2d 43, 46 (1976).

Alford also involved a taxicab driver who leased his vehicle for a fixed amount per shift and retained his fares and tips. There, on the issue of the driver's employment status, we said,

> Findings of fact support the Commissioners' conclusion that appellant was an independent contractor, because the right of control did not rest in Victory. Claimant rented a taxicab from Victory for a twenty-four hour period for a flat fee of $15, and Victory had no supervision or control over the manner or method claimant chose to operate that cab. Claimant had complete control over his work schedule while he used the cab. He could disregard the radio dispatcher, use the cab for his own purposes during the time it was rented, and he kept all the fares and tips he earned.

Id. at 661, 228 S.E.2d at 46 (citations omitted).

Plaintiffs argue that this case is distinguishable from *Alford* because here, (1) Wall was obligated by his contract with defendant not to carry or possess a handgun while driving defendant's taxicab and not to permit any other person to operate the cab, and (2) the contract states that the handgun restriction was "in the interest of

both parties to enhance the public image, promote personal safety and increase revenues." While these provisions do show that defendant exerted some control over Wall's work, they are the only such evidence of an employer-employee relationship. Standing alone, they do not establish that Wall was defendant's employee.

As noted above, the *Hayes* court indicated that when a worker has the "free[dom] to use such assistants as he may think proper," it suggests that he is an independent contractor rather than an employee; in contrast, *Hayes* implies, a worker is more likely to be an employee of another when the other party has prohibited him from procuring and using assistants. 224 N.C. at 16, 29 S.E.2d at 140. In this case, however, the contractual provision prohibiting non-lessees from operating defendant's taxicabs does *not* demonstrate defendant's employer-like control over Wall. Rather, this provision was designed to protect defendant's property from being operated by persons it had not approved. This case is not a case like *Hayes*, where a contract for the installation of six telephone poles and the transfer of electrical wires from old poles to the new poles prohibited the installer from choosing and hiring his own assistants. Performance of the *Hayes* contract *required* the labor of many people, whereas the performance of Wall's side of the contract in this case required the labor of just one person: Wall, the cab driver.

The Commission's findings do not show that defendant had the right to exert an employer's degree of control over Wall. Because an employer-employee relationship is a prerequisite to coverage by, and recovery under, the Workers' Compensation Act, *see* N.C. Gen. Stat. § 97-2 (Cum. Supp. 1997), § 97-3 (1991); *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261, and because that relationship is lacking in this case, we need not reach defendant's remaining assignment of error.

Reversed.

Judge HORTON concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

I do not agree that Wall was an independent contractor, but because I believe his injury was not an accident arising out of and in the course of his employment, I agree with the majority that the award of the Commission must be reversed.[1]

There are several items of evidence, necessary for my analysis, not included in the recitation of the facts by the majority. The evidence revealed Wall was shot in the back of the head, shell casings were found in the back seat of the taxicab, and Wall's blood was found splattered on the inside of the taxicab's windshield. The Commission found Defendant knew many of the customers seeking taxicab service were dangerous, the killing of Wall was "an unlooked for and untoward event," and Wall was shot in the back of the head at 1:35 a.m. "while operating the taxicab."

The Commission concluded: (1) there was an employer-employee relationship between Wall and Defendant on 1 November 1994; and (2) the death of Wall on 1 November 1994 was an injury by accident arising out of and in the course of his employment.

I

Employee or Independent Contractor

The ultimate test for determining whether an employer-employee relationship exists, rather than that of an employer and independent contractor, is the extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed. *Hayes v. Elon College*, 224 N.C. 11, 15-16, 29 S.E.2d 137, 140 (1944). The *Hayes* court enunciated several factors that can be used in making this determination, including the freedom to use such assistants as the person employed thinks proper. *Id.*

In this case, Defendant owned a taxicab franchise and entered into a contract with drivers and owners for the operation of the taxicabs. The driver paid for his own gasoline, collected and kept his own fares, and worked at his own schedule. The fares were controlled, not by Defendant, but by the City of Winston-Salem. The drivers were not able to possess firearms while operating the taxicabs, nor were they allowed to permit any other person to assist them in the operation of the taxicabs. Although the relationship has some indicia of an independent contractor, I believe Defendant's self-imposed prohibitions

1. Because I also agree with Part I of the majority's opinion, I will not address that issue.

against the possession of firearms and the use of assistants moves this relationship into one of employer-employee. *Cf. Alford v. Cab Co.*, 30 N.C. App. 657, 228 S.E.2d 43 (1976) (city imposed controls over taxicab driver not sufficient to justify classification of driver as employee). The fact that the handgun restriction may have been "in the interest of both parties" is not material, as it was nonetheless a restriction imposed by the Defendant. Likewise, though the prohibition against the use of assistants may have been designed to protect Defendant's property, it was still a restriction imposed by Defendant. It surely cannot be disputed that these two restrictions constitute some control of the manner and method in which the driving of the taxicab was to be performed.

Any effort by the majority to distinguish the facts in *Hayes* from the facts in this case is not helpful. Indeed, the facts are different, but the issue is the same: whether there was control over the manner and method of doing the work. Here the work of driving the taxicab only requires one person, as noted by the majority, but it did not, in the absence of the restriction on the use of assistants, have to be Wall.

II

Under the North Carolina Workers' Compensation Act (Act), an injury is compensable if it is: (1) by accident; (2) arising out of the employment; and (3) in the course of the employment. N.C.G.S. § 97-2(6) (Supp. 1997); *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E.2d 350, 353 (1972). Whether the injury is an accident arising out of and in the course of the employment is a mixed question of law and fact. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). In other words, this Court is bound by the Commission's findings of how, when, and where the injury occurred, provided those findings are supported by competent evidence. Whether those findings support the conclusion that the injury was an accident arising out of and in the course of the employment presents a question of law and is fully reviewable on appeal.

Accident

An accident is an unusual event or result which is not expected or designed by the injured employee. *Adams v. Burlington Industries*, 61 N.C. App. 258, 300 S.E.2d 455 (1983). As a general proposition, therefore, if an injury occurs under normal work conditions and the employee was injured while performing his regular duties in the usual and customary manner, there is no accident within the meaning of the Act. *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360

(1980). Assaults may constitute an accident, if they are unexpected and without design on the part of the employee who suffers the assault. *Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531.

Defendant argues that the assault against Wall in this case was expected and thus not an accident within the meaning of the Act. Defendant suggests the finding by the Commission that the operation of a taxicab is a dangerous activity supports its argument. I disagree.

Defendant's argument necessarily rests on the premise that an injury is expected if the injured employee is employed to perform a dangerous job, and is injured while performing that job. If our courts accepted this premise, employees would receive no protection under the Act, when performing the very job they were employed to perform, if the job is dangerous and the injury is related to the dangerous activity. For example, there would be no workers' compensation coverage for the police officer assigned to the bomb squad, if the bomb goes off when he is trying to disarm it. Additionally, there would be no coverage for the coal miner who enters into the coal mine to dig the coal and is injured in the process. I therefore reject Defendant's argument and would hold that the finding of the Commission that Wall, a taxicab driver, was shot in the back of the head, an unexpected event, supports its conclusion that his death was an accident within the meaning of the Act. *See* 2 Arthur Larson, *Larson's Workers' Compensation Law* § 37.20 (1998).

Arising out of and in the Course of the Employment

"Arising out of employment," refers to the manner in which the injury occurred, its cause. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E.2d 865 (1963). In other words, whether the injury was a natural and probable consequence of the employment. *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964). If the injury is caused by a "hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment." *Cole v. Guilford County*, 259 N.C. 724, 727, 131 S.E.2d 308, 311 (1963).

"In the course of the employment" refers to the time, place, and circumstances under which the injury occurs. *Robbins*, 281 N.C. at 238, 188 S.E.2d at 353. The ultimate inquiry is whether the employee was, at the time of the injury, doing the work of his employer. Leonard T. Jernigan, Jr., *North Carolina Workers' Compensation* § 6-1 (2d ed. 1995). An injury to an employee while he is performing acts "solely for the benefit or purpose of the employee or a third person" are not

compensable. *Lewis v. Tobacco Co.*, 260 N.C. 410, 412, 132 S.E.2d 877, 879 (1963).

In this case, the Commission found as fact that Wall was shot in the back of the head at 1:35 a.m. "while operating the taxicab." There is no dispute that he was dispatched at 1:00 a.m. to a location in Winston-Salem. There are no findings and there is no evidence, however, on whether the person who shot Wall was the person who requested the dispatch, a person about to be or being transported for the benefit of Defendant, a person assaulting Wall as he was doing the business of Defendant, or an assault occurring at a time while Wall was not doing the work of Defendant. The fact that Wall was killed at 1:35 a.m. "while operating the taxicab," after having received a 1:00 a.m. dispatch, does not answer the question of whether he was operating the taxicab at the time of the killing and in the work of Defendant. Because Plaintiffs had the burden of proving each element of their claim, *Taylor*, 260 N.C. at 437, 132 S.E.2d at 867, and failed to meet this burden, the Commission erred in concluding that Wall was killed arising out of and in the course of his employment with Defendant.[2] Accordingly, though Wall was an employee of Defendant, I would reverse the Commission's award because his injury, though an accident, did not arise out of and in the course of his employment with Defendant.

MARGARET ATKINSON, PLAINTIFF v. DAVID E. ATKINSON, DEFENDANT

No. COA97-1539

(Filed 19 January 1999)

1. Divorce— equitable distribution—counterclaim in divorce complaint—claim pending at time of divorce

Plaintiff-former wife had a valid equitable distribution claim pending at the time of the divorce of the parties pursuant to the trial court's order denying defendant-former husband's motion to

2. Plaintiffs argue in their brief to this Court that the person "who pled guilty to murdering" Wall formerly resided at the address where Wall was dispatched and this evidence supports the conclusion that Wall was killed while transporting the killer pursuant to the dispatch. The facts upon which this argument is based simply are not supported by either the findings of the Commission or the evidence. Furthermore, Plaintiffs' argument that Defendant presented no "alternative theory of the murder" is to no avail, as Plaintiffs had the burden in this case.

dismiss plaintiff's claim for equitable distribution on the ground that the parties were not separated at the time the claim was filed where defendant alleged a claim for equitable distribution when he asserted in his divorce complaint that such a claim was pending, and plaintiff joined in that claim by admitting the allegations of the complaint.

2. **Estoppel— counterclaim for equitable distribution—denial of claim prohibited**

Defendant was equitably estopped to deny the existence of an equitable distribution claim by plaintiff when he asserted a counterclaim for equitable distribution in his divorce complaint and plaintiff joined in this claim by her reply.

3. **Judges— overruling of another judge—same issue—no material change in circumstances**

The trial judge had no authority to deny plaintiff's post-divorce claim for equitable distribution and to overrule plaintiff's objection to the dismissal of defendant's counterclaim for equitable distribution in his divorce complaint where the trial judge was reconsidering the same issue that had previously been decided in favor of plaintiff by a different superior court judge, and "intervening circumstances" enumerated by the trial judge were not material changes in circumstances permitting him to overrule the other judge.

4. **Divorce— equitable distribution—claim pending at time of divorce—voluntary dismissal—refiling**

Where plaintiff wife had a valid equitable distribution claim pending at the time the parties were divorced, she could thereafter take a voluntary dismissal of her equitable distribution claim under Rule 41(a)(1) and subsequently refile her action within one year.

Judge GREENE dissenting.

Appeal by plaintiff from judgment entered 15 July 1997 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 20 October 1998.

Lea, Clyburn & Rhine, by J. Albert Clyburn and James W. Lea, III, for plaintiff-appellant.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellee.

WALKER, Judge.

Plaintiff and defendant were married on 25 September 1967. On 31 May 1990, plaintiff filed a complaint against defendant seeking, among other things, equitable distribution of property pursuant to N.C. Gen. Stat. § 50-20. The defendant filed an answer and counterclaim in which he asked the court for an equitable distribution of the marital property. The plaintiff filed a reply to defendant's counterclaim and admitted that the parties were entitled to equitable distribution of their marital property. An order was entered 14 September 1990 in which the trial judge found that plaintiff and defendant were living together and not separated and declined to rule on both parties' motions.

On 4 August 1992, defendant filed a separate action for divorce in 92 CVD 2215 in which he alleged, "all pending claims arising out of the parties' marriage including both the plaintiff's and defendant's claims for an equitable distribution of marital property, are pending in . . . 90 CVD 1708." On 8 September 1992, plaintiff answered defendant's complaint by stating "the allegations contained in the complaint are admitted" and joined the request that a divorce be granted. In the present appeal, the trial judge noted "there is no reference to equitable distribution in the answer." This is incorrect in view of plaintiff's admission. On 25 September 1992, the divorce was granted and the trial judge stated in his order "that all pending claims arising out of the parties' marriage, including both the plaintiff's and defendant's claims for an equitable distribution of marital property, are pending in New Hanover County Case File No. 90 CVD 1708." On 26 October 1992, in 90 CVD 1708 defendant filed a voluntary dismissal of his counterclaim for equitable distribution stating the reason for the dismissal was "the same having been filed before the parties separated."

On 24 November 1992, defendant filed a motion pursuant to Rule 12(b)(1) and (6) and N.C. Gen. Stat. § 50-21 to dismiss plaintiff's claim for equitable distribution alleging the parties were not separated at the time the claim was asserted. On 28 January 1993, Judge Allen Cobb held a hearing on defendant's motion and in his order concluded:

> . . . the Court having reviewed the record in this matter and having additionally reviewed the pleadings and judgment in the case styled "David E. Atkinson v. Margaret Atkinson," case number 92 CVD 2215 and heard the arguments of counsel and the Court

being of the opinion that the ends of justice would best be served by the denial of the Defendant's motion to dismiss.

From that order the defendant appealed to this Court which dismissed the appeal as being interlocutory. On 4 April 1994, plaintiff voluntarily dismissed her action without prejudice in 90 CVD 1708.

On 3 April 1995, plaintiff filed an action, 95 CVD 985, seeking equitable distribution of the marital property. The defendant answered admitting that marital property existed, but asserted the divorce in 92 CVD 2215 terminated a right of action for equitable distribution. On 28 June 1996, the trial judge placed 95 CVD 985 on "Inactive Status." The following entry was made on the record: "Last activity 5/22/95. Discovery pending. Settlement negotiation ongoing. Continuance Order issued 2/5/96."

On 17 March 1997, plaintiff moved in 90 CVD 1708 to "set aside the dismissal and/or strike the dismissal on the grounds that the Plaintiff had admitted to allegations of the Defendant's action for equitable distribution and joined in the Defendant's prayers for relief for equitable distribution."

On 15 July 1997, the trial judge held a hearing on the defendant's motion to dismiss plaintiff's claim for equitable distribution. In his order, the trial judge combined both cases 90 CVD 1708 and 95 CVD 985, overruled plaintiff's objection to defendant's voluntary dismissal of his counterclaim, and dismissed plaintiff's claim for equitable distribution.

In the order, the trial judge found:

9. . . . The court would refer the issue back to Judge Cobb were he still presiding, and Judge Cobb would clearly be empowered to reconsider his ruling based upon the intervening circumstances. . . . This court, in such a review, will defer to the findings and conclusions of Judge Cobb, and this court believes it lacks jurisdiction to reverse his decision absent some intervening new circumstances which by clear and cogent circumstances justify a different result. This court would not reconsider or reverse the ruling entered by Judge Cobb, and would consider itself bound by his ruling, but for the intervening circumstances.

10. The intervening circumstances justify a reconsideration of the earlier motion to dismiss. Although not intended as an exhaustive listing of the circumstances justifying a reconsidera-

tion, the following are enumerated by the court as relevant to the decision:

> 10.1 The failure of the wife to proceed diligently and in a timely fashion after having been given the opportunity to [do] so by Judge Cobb;
>
> 10.2 A hearing at this late date will require a consideration of seven years of postseparation transactions and difficult valuations;
>
> 10.3 Discovery is still pending, and neither party, as of the time of this hearing, is prepared to present a proposed property inventory as required either by the general statutes (50-21) or the local rules;
>
> 10.4 In the pre-trial discussions, both parties have raised the need for expert valuations of businesses and real estate, including a shopping center the mortgage which has been discharged by Husband since separation;
>
> 10.5 The decision of the wife to allow her attorney to dismiss her action rather than proceed to trial in April 1994 when it was calendared for trial.

The trial judge then concluded that due to these factors a change of circumstances had occurred which now permitted him to reconsider the earlier denial of defendant's motion to dismiss plaintiff's equitable distribution claim. Further, plaintiff had failed to preserve her right to equitable distribution of the marital property prior to the divorce and plaintiff could not rely upon defendant's original invalid request for equitable distribution asserted in his counterclaim. Also, the only requests of record for equitable distribution were fatally defective and plaintiff's reasserted claim filed one year after her voluntary dismissal was also fatally defective. In addition, plaintiff had previously been permitted to pursue her claim on equitable instead of legal grounds and the "ends of justice would no longer be served by denying" defendant's motion to dismiss plaintiff's claim for equitable distribution.

Plaintiff contends the trial judge erred in dismissing her claim for equitable distribution and in overruling her objection to defendant's voluntary dismissal of his counterclaim for equitable distribution. Defendant contends that the trial judge properly dismissed

plaintiff's claim for equitable distribution and properly overruled her objection to defendant's motion to dismiss his claim for equitable distribution.

[1] In examining the record before us it reveals Judge Cobb reviewed the files in 90 CVD 1708 and in 92 CVD 2215 before concluding that defendant's motion to dismiss the equitable distribution claim should be denied. The trial court is required to review the pleadings in accordance with Rule 8 which provides in part:

> (a) *Claims for relief.*—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain
>
> > (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and
> >
> > (2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded . . . .
>
> . . .
>
> (e) *Pleading to be concise and direct; consistency.*—
>
> > (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.
>
> . . .
>
> (f) *Construction of pleadings.*—All pleadings shall be so construed as to do substantial justice.

N.C. Gen. Stat. § 1A-1, Rule 8 (1990).

In his divorce complaint, 92 CVD 2215, the defendant clearly alleges a claim for equitable distribution of the marital property when he asserts that such a claim is pending. For what other reason would he include a reference to this matter in his complaint? The plaintiff answered and admitted the parties have a claim for equitable distribution of the marital property. Thus, it is apparent that when Judge Cobb considered all of the pleadings in these cases, he determined a claim had been made for equitable distribution of the marital prop-

erty and that he was bound to construe the pleadings in accordance with Rule 8 so "as to do substantial justice."

The defendant appealed from the denial of his motion to dismiss his equitable distribution claim by Judge Cobb. This Court was presented with the issue of whether or not there remained existing claims between the parties in *Atkinson v. Atkinson*, 113 N.C. App. 201, 438 S.E.2d 759 (1993) (unpublished). Our Court found the appeal to be interlocutory as the denial of his motion was not a final determination of all claims. Therefore, this Court found there were other matters still to be adjudicated. The only matter left to be determined was the equitable distribution claim.

[2] In addition, we find defendant should be equitably estopped to deny existence of an equitable distribution claim. Similarly, in *Hunt v. Hunt*, 117 N.C. App. 280, 283-84, 450 S.E.2d 558, 561 (1994), the defendant asserted a counterclaim for equitable distribution of the marital property in which the plaintiff joined by her reply. Without objection, the trial court then preserved the issue of equitable distribution for further proceedings prior to its granting the divorce. *Id.* The defendant then moved for a voluntary dismissal of his counterclaim for equitable distribution. *Id.* This Court held that "the defendant was precluded, by principles of equitable estoppel, from defeating plaintiff's right to equitable distribution by submitting to a voluntary dismissal of his counterclaim." *Id.* Likewise, defendant's actions in alleging the existence of an equitable distribution claim now preclude him from denying the same.

[3] Also, it is well established that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge made in the same action." *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (*quoting Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). In *Madry v. Madry*, 106 N.C. App. 34, 38, 415 S.E.2d 74, 77 (1992), this Court held that even though a subsequent trial judge may rehear an issue and enter a ruling if there has been a material change in the circumstances of the parties and the initial ruling was one which was addressed to the discretion of the trial judge, one district court judge may not overrule another judge as was attempted here. When the trial judge entered the order denying plaintiff's claim for equitable distribution and overruling her objection to the dismissal of defendant's

counterclaim, he was reconsidering the same issue that had previously been decided in favor of plaintiff by Judge Cobb in 1993. The trial judge stated that the "intervening circumstances" enabled him to reconsider the order entered by Judge Cobb. However, we conclude these enumerated "intervening circumstances" were not material changes in circumstances permitting the trial judge to overrule Judge Cobb.

[4] Having determined that plaintiff has a valid equitable distribution claim pending pursuant to Judge Cobb's order, the plaintiff could take a voluntary dismissal under Rule 41(a)(1) and subsequently refile her action within one year, which she did in 95 CVD 985. Our Supreme Court has held under factually similar circumstances that if an equitable distribution claim is pending and not voluntarily dismissed under Rule 40(a)(1) until after a divorce is entered, a new action based on that claim may be filed within the one-year period as provided by the rule. *Stegall v. Stegall*, 336 N.C. 473, 479, 444 S.E.2d 177, 181 (1994). In *Stegall*, the plaintiff filed an action for divorce which included claims for alimony and equitable distribution. *Id.* at 474, 444 S.E.2d at 178. The defendant then filed an action for divorce which was granted. *Id.* Subsequently, the plaintiff dismissed her action and then refiled her equitable distribution claim within the one-year period permitted under Rule 41(a)(1). *Id.* The Court held that her claim survived and we likewise hold that plaintiff's equitable distribution claim survives in this case.

Finally, we note that in his order the trial judge set out the history of proceedings between these parties. This review by the trial judge reveals that both parties had been represented by multiple attorneys during the course of this litigation; however, the trial judge only noted that plaintiff's present counsel was her fourth attorney of record. We also note that from the time the original complaint was filed, five different district court judges have heard various matters in these cases. Furthermore, it would appear that the delays in concluding these proceedings can be attributed to both parties.

Therefore, the order of the trial judge is reversed and the case is remanded for further proceedings to effect an equitable distribution of the parties' marital property.

Reversed and remanded.

Judge SMITH concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I accept the general premise that Judge Smith, who entered the order in dispute dismissing plaintiff's claim for equitable distribution (ED), could not overrule Judge Cobb's earlier order denying defendant's motion to dismiss plaintiff's ED claim. *See Madry v. Madry*, 106 N.C. App. 34, 37-38, 415 S.E.2d 74, 77 (1992). It appears the basis for both motions (*i.e.*, that plaintiff and defendant were not separated at the time the ED claim was filed and it therefore was premature) was the same. As noted by Judge Smith in his extensive order, however, Judge Cobb did not address the legal implications of defendant's motion to dismiss. Instead, Judge Cobb utilized equitable principles in denying the motion: "the Court being of the opinion that the ends of justice would best be served by the denial of the Defendant's motion to dismiss." Judge Smith, very much aware of his constraints in reevaluating the motion to dismiss, concluded that the "ends of justice would no longer be served by denying [defendant's] motion to dismiss," and set forth five separate reasons in support of this conclusion, which all are supported by the record. Accordingly, Judge Smith, finding material changes in circumstances since the entry of Judge Cobb's order, was justified in addressing the merits of the motion to dismiss. *Id.* (second judge may enter contradictory ruling from earlier ruling if there has been a material change in circumstances and the matter is one addressed to the discretion of the court). In addressing the merits of the motion to dismiss, Judge Smith concluded that plaintiff's ED claim was not asserted after the date of separation and before the entry of the divorce, thus making it invalid. I agree. N.C.G.S. § 50-21(a) (Supp. 1997) (ED claim can be filed at "any time after a husband and wife begin to live separate and apart"); *see also Howell v. Howell*, 321 N.C. 87, 361 S.E.2d. 585 (1987) (valid ED claim must be filed before grant of divorce). There are findings to support this conclusion and those findings are supported in this record. Because plaintiff had no valid ED claim prior to the time she dismissed it, the refiling of that same claim is also invalid. Thus, *Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994), relied upon by the majority, is of no help to plaintiff.

I, therefore, would affirm the trial court.[1]

1. The majority, in reversing the trial court, relies in part on the argument that defendant asserted an ED claim in his divorce complaint and because he has never dismissed that claim, the ED claim remains properly before the trial court. I do not agree.

WHEELER v. QUEEN

[132 N.C. App. 91 (1999)]

BILLY L. WHEELER, TRUSTEE UNDER THE MYRTLE P. WHEELER TRUST DEED DATED DECEMBER 13, 1990; BILLY L. WHEELER, TRUSTEE UNDER THE WILL OF MYRTLE P. WHEELER DATED FEBRUARY 26, 1986; AND BILLY L. WHEELER, INDIVIDUALLY, PETITIONERS v. BILLY TODD QUEEN, RESPONDENT

No. COA97-1580

(Filed 19 January 1999)

Trusts— termination—distribution of property—terms of incorporated will—codicil

The trial court did not err in a declaratory judgment action to determine the parties' rights to land described in a Trust Deed by determining that the trust corpus passed to petitioner, although the action was remanded to the trial court for clarification of the language of the judgment, where Mrs. Wheeler executed a Trust Deed in 1990 to insure that her material needs would be taken care of during her lifetime; she incorporated into the Trust Deed a 1986 will by reference; she executed a second will on 16 June 1992 which expressly revoked all prior wills and codicils; and the trial court concluded that the trust corpus passed under the will dated February 26, 1986. The Trust Deed was not transformed by the incorporation of the 1986 will into a testamentary document, subject to revocation by a later drafted will. However, the judgment was remanded to clarify that the trust corpus did not pass

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The divorce complaint simply acknowledged there were, at the time the divorce complaint was filed, pending ED claims filed by both plaintiff and defendant. This acknowledgment does not itself constitute an ED claim.

The majority also relies in part on equitable estoppel to prevent the dismissal of plaintiff's ED claim. I, however, do not believe equitable estoppel applies in this case. The *Hunt v. Hunt* case, 117 N.C. App. 280, 450 S.E.2d 558 (1994), relied upon by the majority, is distinguishable. In *Hunt*, the wife filed a reply joining in the husband's request in his counterclaim for an equitable distribution of their marital property. The *Hunt* trial court, in granting the parties a divorce, included language in the divorce judgment noting that a valid ED claim had been asserted in the counterclaim and that the ED claim would be preserved for further proceedings. This Court subsequently held that the husband, based on the facts in that case, was equitably estopped from defeating the wife's ED claim by taking a voluntary dismissal of his counterclaim. In this case, however, defendant asserted an ED claim in his counterclaim, but plaintiff did not join in that claim. Instead, her reply alleges "that defendant go without relief on his counterclaim." Furthermore, in this case, the divorce judgment only acknowledged that ED claims were pending. In any event, any party seeking to assert equitable estoppel is required to present themselves to the court with clean hands, *see Hinson v. Hinson*, 80 N.C. App. 561, 573, 343 S.E.2d 266, 273 (1986), and as acknowledged by the majority, plaintiff is partially to blame for the long delays and confusion in this case and thus is not entitled to assert equitable estoppel.

under the will but according to the Trust Deed, which included the 1986 will incorporated by reference.

Appeal by respondent from judgment entered 10 September 1997 by Judge Robert H. Hobgood in Granville County Superior Court. Heard in the Court of Appeals 15 September 1998.

Royster, Royster & Cross, LLP, by T.S. Royster, Jr., and Burnette & Wilkinson, by Michael P. Burnette, for petitioner-appellee.

Edmundson & Burnette, by R. Gene Edmundson, J. Thomas Burnette, and James T. Duckworth, III, for respondent-appellant.

LEWIS, Judge.

On 13 December 1990, Myrtle P. Wheeler executed a "Trust Deed," which she recorded the following day. The Trust Deed stated that in consideration of ten dollars, Myrtle Wheeler "hereby give[s], grant[s], bargain[s], sell[s] and convey[s] unto" Billy L. Wheeler, Trustee, "his successors and assigns, for the purposes and upon the limitations hereinafter specifically defined, a one-half undivided interest in" two parcels of land. The property is described as measuring 142.587 acres.

The Trust Deed continues in relevant part:

1.

The Trustee herein shall receive, hold, manage, lease, encumber, sell, construct, assign, alter, invest, reinvest and otherwise deal with said property and all additions thereto as the Trustee may deem for the best interest of the beneficiary of said Trust Estate, without the necessity of authorization by, or accounting to, or confirmation of any Court.

. . . .

3.

The Trustee is authorized and directed to pay from time to time to, or for the benefit of, Myrtle P. Wheeler, such sums as may be necessary for her support and maintenance during her lifetime, such sums to be paid first out of the income from the trust property, and if said Trustee, in his sole discretion, deems it desirable or necessary for the comfortable support and maintenance of the said Myrtle P. Wheeler, may pay a portion, or all of the cor-

pus of the Trust Estate to or for the benefit of Myrtle P. Wheeler. The amounts necessary for the support and maintenance of the said Myrtle P. Wheeler shall be in the sole and absolute discretion of the Trustee.

4.

Upon the death of Myrtle P. Wheeler, this Trust shall terminate and the Trustee shall be discharged, and all of the property which remains in the Trust Estate including corpus and accumulated income, if any, shall pass as directed under the terms and provisions of the Last Will and Testament of Myrtle P. Wheeler dated February 26, 1986, which Will is incorporated herein by reference.

. . . .

6.

This trust is irrevocable.

IN TESTIMONY WHEREOF, the party of the first part has hereunto set her hand and seal, this the day and year first above written.

(s) Myrtle P. Wheeler (SEAL)

The Last Will and Testament of Myrtle P. Wheeler, dated February 26, 1986, appoints Billy L. Wheeler as executor. It provides in relevant part,

ITEM III

I give and bequeath all of my tangible and intangible personal property to my grandson, Billy Todd Queen, to be his absolutely.

ITEM IV

I give, bequeath and devise all of the real property which I may own at the time of my death to my son, Billy L. Wheeler, as Trustee to be held and managed for the uses and purposes as follows:

A. The main objective and purpose of this trust is to provide for the maintenance of my grandson, Billy Todd Queen, and to that end my Trustee shall pay from time to time to or for the benefit of my grandson, Billy Todd Queen, such sums either from the corpus or accumulated income of the trust as he in his sole and

absolute discretion deems adequate for the maintenance of my said grandson.

. . . .

D. Upon the death of my daughter, Ruth Jean Wheeler Queen, this trust shall terminate and the property then remaining in the trust shall be delivered to my grandson, Billy Todd Queen, free and discharged of the trust. In the event my grandson, Billy Todd Queen, should die prior to the termination of this trust as above provided, the trust shall them [sic] terminate and all of the trust property shall be delivered to and become the property of my son, Billy L. Wheeler, free and discharged from the trust.

Mrs. Wheeler executed a second will on 16 June 1992, which expressly revoked all prior wills and codicils. The 1992 Will names as executor the testator's son, "Billie L. Wheeler," and it contains the following relevant provisions:

ITEM TWO: I hereby will, devise and bequeath, all monies of which I die seized and possessed, to my son, Billy L. Wheeler, completely.

ITEM THREE: In the event my son, Billie L. Wheeler, predeceases me, then I hereby will and bequeath all monies of which I die seized and possessed to my grandson, Billy Todd Queen, completely.

ITEM FOUR: I hereby will, devise and bequeath all the rest and residue of my property of which I die seized and possessed, whether the same be real, personal or mixed, to my grandson, Billy Todd Queen, absolutely and in fee simple.

Myrtle Wheeler died on 26 December 1995.

Billy L. Wheeler filed this lawsuit against Billy Todd Queen, seeking a judgment that would declare the parties' rights with respect to the land described in the Trust Deed. The superior court judge concluded that the 1986 Will "was properly incorporated by reference into the Trust Deed . . ., effectively merging the two documents into one and passing title to the land at decedent's death to Billy L. Wheeler, as Trustee, under the decedent's Will dated February 26, 1986." Defendant appeals.

The writing that Myrtle Wheeler recorded in 1990 expressed Mrs. Wheeler's intention to create a trust in order to provide for her own

support during her lifetime. It identified specific property as the trust res—an undivided one-half interest in certain real estate in Granville County—and it conveyed this property to Billy Wheeler as trustee. A valid, express, inter vivos trust was established. *See Baxter v. Jones*, 14 N.C. App. 296, 306-08, 188 S.E.2d 622, 627-28, *cert. denied*, 281 N.C. 621, 190 S.E.2d 465 (1972).

We are asked to determine how the real property within the trust was to be disposed of once the trust ended. Our responsibility is to ascertain the intent of the settlor and to carry out that intent. *Callaham v. Newsom*, 251 N.C. 146, 149, 110 S.E.2d 802, 804 (1959). We derive the settlor's intent from the language and purpose of the trust, construing the document as a whole. *Davison v. Duke University*, 282 N.C. 676, 707, 194 S.E.2d 761, 780 (1973).

The case turns on our interpretation of Paragraph Four of the Trust Deed. Again, that paragraph reads,

> Upon the death of Myrtle P. Wheeler, this Trust shall terminate and the Trustee shall be discharged, and all of the property which remains in the Trust Estate including corpus and accumulated income, if any, shall pass as directed under the terms and provisions of the Last Will and Testament of Myrtle P. Wheeler dated February 26, 1986, which Will is incorporated herein by reference.

If we were to read these words without considering them in the context of the entire Trust Deed, we might perceive an intent by Mrs. Wheeler for the real property within the trust literally to "pass" under her 1986 Will. Moreover, we could further this perceived intent by inferring that the Trust Deed conveyed to the trustee only an estate for the life of Mrs. Wheeler, and that Mrs. Wheeler retained an interest, fully devisable, in the lands conveyed into the trust. Thus, it would be possible for the real property in the trust to "pass" under Mrs. Wheeler's 1986 Will. The interest in the trust lands that Mrs. Wheeler retained would pass, under the 1986 Will, to petitioner as trustee for respondent.

Upon closer scrutiny of the Trust Deed, a better interpretation emerges. This trust was created by Myrtle Wheeler, a widow with grandchildren, primarily to ensure that her material needs would be taken care of during her lifetime. To that end, she appointed her son trustee of certain real property and instructed him to deal with it so as to produce income for her support and maintenance. Specifically, Mrs. Wheeler directed her son to "manage, lease, encumber, sell, con-

struct, assign, alter, invest, reinvest and otherwise deal with said property and all additions thereto." It was Mrs. Wheeler's further instruction that support payments should first be paid "out of the income of the trust property" and second, only if "desirable or necessary," out of the "corpus of the Trust Estate."

The trustee was expressly authorized to sell the trust corpus. It was contemplated by the settlor that these sales would convey estates in fee simple: The trust instrument provides for distribution of "all of the property which *remains* in the Trust Estate" at Mrs. Wheeler's death (emphasis added). Indeed, given the purpose of this trust, it would have made little sense for Mrs. Wheeler to have given the trustee only a life estate in the trust lands. It might have become necessary, for example, for the trustee to sell or encumber some or all of the trust property to pay emergency medical expenses; doing so would be far more difficult, and would generate far less income, if the trustee could convey only a life estate. There would be little if any market for such property.

Furthermore, the Trust Deed does not state that the trust corpus and accumulated income "shall pass under the 1986 Will"; it states that the trust property "shall pass *as directed under the terms and provisions*" of the 1986 Will, "which Will is incorporated herein by reference" (emphasis added). This incorporation by reference effectively inserted the 1986 Will in its entirety into the Trust Deed. *Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978).

Construing the document as a whole, we read the dispositional language of the Trust Deed as evincing an intent by Mrs. Wheeler that at her death, the trustee must distribute any property remaining within the trust to those persons designated to take it under her 1986 Will. The 1986 Will contains neither a specific reference to the 1990 trust nor a residuary clause. Instead, it makes a simple disposition of all her personal property to Billy Todd Queen, and all her real property to Billy Wheeler as trustee for Billy Todd Queen.

It must be that when Mrs. Wheeler executed the Trust Deed in 1990 and incorporated the 1986 Will by reference, she intended that any real property remaining in the trust at her death should be distributed to those persons taking real property under her 1986 Will, and that any accumulated income should be distributed to those persons taking personal property under her 1986 Will. This is so even though the Trust Deed states that at Mrs. Wheeler's death, "the Trustee shall be discharged." A trustee's duties continue until the

trust beneficiaries receive all the property due them under the trust. *Wachovia Bank & Trust Co. v. Taliaferro*, 246 N.C. 121, 128, 97 S.E.2d 776, 782 (1957).

Here, of course, no distribution of the real property remaining within the 1990 trust was necessary. Upon Mrs. Wheeler's death, Billy Wheeler retained legal title to the real property within the 1990 Trust, but he assumed the duty of managing that property as trustee for Billy Todd Queen under the terms and provisions of the trust set forth in the 1986 Will.

Mrs. Wheeler's execution of a second will in 1992 did not alter the terms of the 1990 trust. When the 1990 Trust Deed incorporated the 1986 Will by reference, it was not thereby transformed into a testamentary document, subject to revocation by a later-drafted will. Rather, the Trust Deed became a document with instructions for disposing of trust property upon termination of the trust, instructions which the Trust Deed otherwise lacked. The effect of this incorporation by reference was to make the 1986 Will part of the 1990 Trust Deed, not the other way around. *Booker*, 294 N.C. at 152, 240 S.E.2d at 363.

The trial court concluded that the trust corpus passed "under the decedent's will dated February 26, 1986." In the sense that the provisions of the 1986 Will determined the disposition of the trust property, the court's statement is true. We hold that the trust property passed under the provisions of the Trust Deed as amended by the incorporation of the 1986 Will by reference.

In conclusion, we agree with the trial court that the trust corpus passed to petitioner upon Mrs. Wheeler's death. However, we remand to the trial court with the recommendation that it alter the language of its judgment to clarify that the trust corpus did not pass "under" Mrs. Wheeler's will, but that it passed according to the 1990 Trust Deed, whose terms included the provisions of the 1986 Will incorporated therein by reference. Perhaps it is little more than semantics, but we would clarify that what survived the revocation of "all other wills and codicils" by the 1992 Will was not a will but rather the original and amended Trust Deed.

Remanded.

Judges MARTIN, John C. and WALKER concur.

EDDY HOWARD HEARNDON, PLAINTIFF v. CAROL R. HEARNDON, DEFENDANT

No. COA98-68

(Filed 19 January 1999)

1. Appeal and Error— violations of appellate rules—sanctions

An appellant's counsel was directed as a sanction to pay a sum equal to the cost of the appeal where the index of the contents of the record on appeal did not include the entire list of contents of the record, the pages in the record were not numbered consecutively, various documents granting extensions of time were not in chronological order, and the argument in the brief did not contain the pertinent assignment of error number nor the record page number where the assignment of error could be found.

2. Divorce— equitable distribution—discharge in bankruptcy

An equitable distribution claim was properly discharged in a bankruptcy proceeding and defendant was not entitled to excess funds generated by a foreclosure sale of the marital property. The Bankruptcy Court would have had the opportunity to protect defendant's property interest in the bankruptcy proceeding if defendant had filed a complaint objecting to the discharge of her equitable distribution claim, requested relief from the stay to proceed with the state court action for equitable distribution, or requested that the Bankruptcy Court abstain from exercising jurisdiction pursuant to 28 U.S.C. § 1334(c)(1).

3. Appeal and Error— preservation of issues—equitable distribution—bankruptcy discharge—pension issue not raised

An issue in an equitable distribution action regarding whether a bankruptcy proceeding discharged defendant's interest in her husband's military pension was not addressed where the order before the court specifically dealt with excess funds from a foreclosure sale of the marital residence. The trial court was never presented with the issue of whether defendant's rights in the pension were discharged.

Appeal by defendant from order entered 5 February 1997 by Judge Dexter Brooks in Onslow County Superior Court. Heard in the Court of Appeals 22 October 1998.

Carol Hearndon (defendant) appeals from an order denying her claim to certain excess proceeds of a foreclosure sale. This order arose out of the following facts:

Defendant and Eddy Hearndon (plaintiff) were married 22 November 1974 and five children were born of the marriage. The parties separated 15 November 1994. Defendant filed for divorce from bed and board, custody, child support, and other relief on 15 November 1994. The defendant was granted the divorce from bed and board on 3 February 1995.

Defendant filed for absolute divorce on 20 November 1995. The absolute divorce was granted on 19 January 1996 with the issues of child custody, child support and equitable distribution reserved for a hearing at a later date.

Plaintiff filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code on 13 March 1995 in the United States Bankruptcy Court in the Eastern District of North Carolina. Defendant received specific notice that plaintiff filed for bankruptcy and in response, on 27 April 1995, defendant filed a Proof of Claim. Defendant indicated that an equitable distribution claim was pending and the amount of the claim included a one-half interest in real property and a retirement account with the total amount to be determined. The real property in question was the marital home during the marriage but was not owned as tenancy by the entirety. Plaintiff was the sole record owner of the property.

On 16 May 1995, the Trustee in bankruptcy filed a motion to sell the real property free and clear of any liens. Defendant responded to the motion on 24 May 1995 and requested the court allow her to have possession of the property, purchase plaintiff's interest in the property, or grant other or further relief. On 30 June 1995, the Bankruptcy Court entered an order lifting the automatic stay and the co-debtor stay and allowed a foreclosure sale of the property. Any excess funds from the foreclosure sale were ordered to be forwarded to the Trustee to be held pending further orders from the Bankruptcy Court.

On 12 July 1995, the Bankruptcy Court released plaintiff from all dischargeable debts. The "Discharge of Debtor" document indicated

that no complaint objecting to the discharge of plaintiff was filed within the time fixed by the Bankruptcy Court.

The proceeds from the foreclosure sale exceeded the costs of administration and secured interest in the residence and as a result $9,364.70 was collected from the foreclosure sale. These proceeds were forwarded to the Trustee. Since plaintiff had been discharged from bankruptcy, the Trustee sent the excess funds back to the Substitute Trustee on the foreclosed Deed of Trust. The excess funds were then turned over to the Onslow County Clerk of Superior Court.

The Clerk of Superior Court heard the issue of distribution of the excess funds. The Clerk scheduled the matter to be heard in the Superior Court. The Superior Court concluded that defendant's claim for equitable distribution was within the jurisdiction of the Bankruptcy Court and because defendant failed to make a proper request to the Bankruptcy Court for removal of the equitable distribution claim to state court, defendant had waived her right to do so. The Superior Court denied defendant's claim for excess funds of the foreclosure sale and ordered the excess funds turned over to plaintiff. Defendant appeals.

Lanier & Fountain, by Keith E. Fountain and Timothy R. Oswalt, for defendant-appellant.

No brief filed for plaintiff-appellee.

EAGLES, Chief Judge.

[1] Initially we note defendant violated Rules 9(a)(1), 9(b)(4), and 28(b)(5) of the North Carolina Rules of Appellate Procedure. *See* N.C.R. App. P. 9(a)(1) (1998), N.C.R. App. P. 9(b)(4) (1998), N.C.R. App. P. 28(b)(5) (1998). The index of the contents of the record on appeal does not include the entire list of contents of the record. The pages in the record were not numbered consecutively and various documents granting extensions of time were not in chronological order, making the record difficult to follow. Finally, the argument in appellant's brief does not contain the pertinent assignment of error number, nor does it contain the record page number where the assignment of error can be found. Despite these procedural errors, this Court has decided to review the merits of this appeal; however, under Rule 25 and Rule 34 we direct, as a sanction for violation of the rules, that defendant-appellant's counsel pay as a penalty a sum equal to, but in addition to, the costs on appeal.

[2] The sole issue on appeal is whether defendant's claim for equitable distribution of marital property was properly discharged in the plaintiff's bankruptcy proceeding. Defendant contends that the trial court committed reversible error in concluding as a matter of law that the defendant's equitable distribution claim was discharged. After careful review, we disagree.

Equitable distribution is a statutory right granted to spouses under G.S. 50-20 which vests at the time of separation. G.S. 50-20(b). This vested right does not create a property right in marital property. *Perlow v. Perlow*, 128 B.R. 412, 415 (E.D.N.C. 1991). Nor does the separation create a lien on specific marital property in favor of the spouse. *Id.* It only creates "a right to an equitable distribution of that property, whatever a court should determine that property is." *Id.* (quoting *Wilson v. Wilson*, 73 N.C. App. 96, 99, 325 S.E.2d 668, 670, *cert. denied*, 314 N.C. 121, 332 S.E.2d 490 (1985)). A "claim" is defined, under the bankruptcy section of the United States Code, as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1996). Accordingly, an equitable distribution action can be a "claim" under the bankruptcy code. *Perlow*, 128 B.R. at 415.

In *Perlow v. Perlow*, the parties were granted an absolute divorce and equitable distribution was reserved for a later date. *Id.* at 413. On 18 October 1988 while the equitable distribution action was still pending, Mr. Perlow filed a petition for bankruptcy. *Id.* at 413. Mr. Perlow listed Ms. Perlow as an unsecured creditor on a claim listed as "Case 88 CVD 813; Contingent Disputed, Unliquidated; Division of Marital Property." *Id.* at 413-14. Ms. Perlow received two different written notices that her equitable distribution claim was listed as a debt in Mr. Perlow's bankruptcy case. *Id.* at 414. On 25 October 1988, Mr. Perlow filed a document entitled "Notice of Plaintiff's Bankruptcy" and mailed a copy of it to Ms. Perlow's attorney. *Id.* This notice specifically stated that "[a]ll matters of equitable distribution will be requested to be completed by the Bankruptcy Court." *Id.* Ms. Perlow also received a document entitled "Order and Notice of Chapter 7 Bankruptcy." *Id.* This notice stated that "[i]f a creditor believes that debtor should not receive a discharge under 11 U.S.C. § 727 or a specific debt should not be discharged under 11 U.S.C. § 523(c) for some valid reason specified in the bankruptcy law, the creditor must take action to challenge the discharge." *Id.* The notice provided that the

deadline to file a complaint objecting to the discharge of a debt was 17 January 1989. *Id.* Ms. Perlow never filed an objection. *Id.*

On 21 September 1989, Ms. Perlow filed a motion with the district court requesting that the court distribute the marital property and debts. *Id.* On 23 January 1990, Mr. Perlow sought an adversary proceeding in Bankruptcy Court to determine whether Ms. Perlow's interest in the equitable distribution claim was discharged in the bankruptcy proceeding. *Id.*

The Bankruptcy Court determined that Ms. Perlow's rights were those of an unsecured creditor and the claim for equitable distribution was discharged. *Id.* at 414-15. The district court upheld the Bankruptcy Court's decision that Ms. Perlow's claim for equitable distribution was appropriately discharged. *Id. See also Justice v. Justice*, 123 N.C. App. 733, 740, 475 S.E.2d 225, 230 (1996), *aff'd*, 346 N.C. 176, 484 S.E.2d 551 (1997) (holding that because plaintiff received adequate notice that his marital interests were at issue but did not object to the discharge of marital debts or request relief from the stay to pursue an action for equitable distribution, his equitable distribution claim was properly discharged in the bankruptcy proceeding).

The same reasoning applies here with regard to the excess funds from the foreclosure sale of the real property. Here, as in *Perlow v. Perlow*, plaintiff filed a petition for bankruptcy following the grant of a divorce from bed and board but prior to the hearing in state court on the parties' equitable distribution claim. The petition for bankruptcy filed 13 March 1995 stated that the deadline for filing a complaint objecting to the discharge of the debtor or determining the dischargeability of certain types of plaintiff's debt was 20 June 1995. Following the petition in bankruptcy, defendant filed a Proof of Claim listing the defendant's pending equitable distribution claim which included real property and a retirement account. On 16 May 1995 the Trustee filed a motion to lift the automatic stay and on 24 May 1995, the defendant responded to the motion to lift the automatic stay and asked that the court acknowledge her one-half interest in the property. However, nowhere in defendant's motion did defendant mention or indicate that she was seeking to have the dischargeability of her equitable distribution claim decided. Neither did defendant ask the Bankruptcy Court to lift the automatic stay to permit her to pursue her equitable distribution claim in state court. Additionally, the defendant's response to the Trustee's motion to sell the property free

and clear of liens cannot be construed as a valid complaint to determine dischargeability under 11 U.S.C. § 523(c). See *Kennerley v. Kennerley*, 995 F.2d 145, 146-47 (9th Cir. 1993).

On 30 June 1995, the Bankruptcy Court lifted the automatic stay and co-debtor stay to allow the Trustee to sell the real property at a foreclosure sale free and clear of any liens. On 12 July 1995, the Bankruptcy Court released plaintiff from all "dischargeable debts." Plaintiff never objected to the discharge within the time period fixed by the Bankruptcy Court. Had defendant filed a complaint objecting to the discharge of her equitable distribution claim, requested relief from the stay pursuant to 11 U.S.C. § 362(d) to proceed with the state court action for equitable distribution, or requested that the Bankruptcy Court abstain from exercising jurisdiction over the matter pursuant to 28 U.S.C. § 1334(c)(1), the Bankruptcy Court would have had the opportunity to protect defendant's property interest in the bankruptcy proceeding. Accordingly, we hold that defendant's equitable distribution claim was properly discharged in the bankruptcy proceeding and defendant is not entitled to the excess funds generated by the foreclosure sale of the marital property.

[3] Defendant also argues that the bankruptcy proceeding did not discharge the interest in her husband's military pension. However, we may not address the merits of this issue because it is not properly before this Court.

The Order appealed from specifically deals with the excess funds from the foreclosure sale, but does not determine defendant's claim to a portion of plaintiff's military pension. Rule 10(b)(1) of the Rules of Appellate Procedure states, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (1998). Here the trial court was never presented with the issue of whether the defendant's rights in the pension were discharged. Accordingly, whether the rights in the pension fund were discharged by the bankruptcy is not properly before this Court.

In conclusion, we hold that the trial court did not commit reversible error in denying defendant's claim to the excess funds from the foreclosure sale of the real property. We also require that defendant's counsel pay as a penalty for violating the rules of appellate procedure a sum equal to, but in addition to, the costs on appeal.

Affirmed.

Judges JOHN and McGEE concur.

CHARLIE STEVE SPRUILL, PLAINTIFF-APPELLANT v. LAKE PHELPS VOLUNTEER FIRE DEPARTMENT, INC. AND CRESWELL VOLUNTEER FIRE DEPARTMENT, INC., DEFENDANT-APPELLEES

No. COA98-237

(Filed 19 January 1999)

1. **Governmental Immunity— volunteer fire department— immunity at scene of fire**

   The trial court erred by granting summary judgment for defendants in an action against a volunteer fire department arising from a motor vehicle accident on an icy road one-half mile from the site where defendants were fighting a fire. Although defendants asserted immunity under N.C.G.S. § 58-82-5(b) and N.C.G.S. § 20-114.1(b1), the latter applies to a cause of action against an individual member of a rural fire department, not to the rural fire department itself, and the first limits the liability of a rural fire department at the scene of a fire. The words "at the scene" provide immunity for acts and omissions only in a specific place and a broader reading would be inconsistent with the plain meaning of the words.

2. **Governmental Immunity— waiver—volunteer fire department—liability insurance**

   Plaintiff's argument as to waiver of governmental immunity by the purchase of insurance by a volunteer fire department was inapplicable because Chapter 160A of the General Statutes applies to municipalities, which are governmental entities, but not to incorporated volunteer fire departments such as defendants.

Appeal by plaintiff from order entered 5 December 1997 by Judge William C. Griffin, Jr. in Washington County Superior Court. Heard in the Court of Appeals 8 October 1998.

Hardee & Hardee, by G. Wayne Hardee and Charles R. Hardee, for plaintiff-appellant.

Baker, Jenkins, Jones & Daly, P.A., by Kevin N. Lewis and Ronald G. Baker, for defendant-appellee Lake Phelps Volunteer Fire Department, Inc.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendant-appellee Creswell Volunteer Fire Department, Inc.

McGEE, Judge.

Plaintiff's vehicle ran off Rural Paved Road 1149 in Washington County into a ditch bank on 10 March 1996. Plaintiff sustained disabling injuries and property damage to his vehicle. At the time of plaintiff's accident, defendants were fighting a fire one-half mile away at 478 Ambrose Road. Plaintiff filed suit against defendant volunteer fire departments alleging that they were negligent in failing "to exercise reasonable [care] under the existing circumstances while responding to said fire[.]" Plaintiff further alleged that his collision and resulting injuries and property damage were caused by defendants having spilled water on the road "from their vehicles, hoses or otherwise," which turned to ice and caused plaintiff's vehicle to run off the road. Defendant Creswell Volunteer Fire Department, Inc. acknowledged in its brief that the location of plaintiff's wreck was at the site where defendants were filling their tank trucks from a hydrant to fight the fire at 478 Ambrose Road. Defendant Lake Phelps Volunteer Fire Department, Inc. admitted in its answer to plaintiff's complaint that "some water may have gotten onto Rural Paved Road 1149."

Pursuant to the North Carolina Rules of Civil Procedure, Rule 12(b)(6), defendants filed motions to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted. In support of their motions, defendants asserted immunity under N.C. Gen. Stat. §§ 58-82-5(b) and 20-114.1(b1), which limit liability of rural volunteer fire departments and firefighters. The trial court granted defendants' motions to dismiss in orders entered 18 July 1997 and 25 July 1997. The trial court entered an amended order "to clarify the record, and by consent of the parties," granting summary judgment to defendants on 5 December 1997. Plaintiff appeals from this order.

I.

[1] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c); *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62, 414 S.E.2d 339 (1992).

Plaintiff argues that neither N.C. Gen. Stat. § 58-82-5(b) nor N.C. Gen. Stat. § 20-114.1(b1) cited by defendants limits defendants' liability under the facts of this case. We agree.

N.C. Gen. Stat. § 20-114.1(b1) (1993) states that "[a]ny *member* of a rural volunteer fire department . . . shall not be liable in civil damages for any acts or omissions relating to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire . . ." (emphasis added). This statute applies to a cause of action against an individual member of a rural fire department, but not to the rural fire department itself.

In N.C. Gen. Stat. § 58-82-1 (1994), the General Assembly specifically authorized privately incorporated fire departments, like the defendants in this case, "to do all acts reasonably necessary to extinguish fires and protect life and property from fire." The General Assembly then limited the liability of a rural fire department as follows:

> (b) A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of a reported fire, when that act or omission relates to the suppression of the reported fire or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard by the department or the fireman unless it is established that the damage occurred because of gross negligence, wanton conduct or intentional wrongdoing of the rural fire department or the fireman.

N.C. Gen. Stat. § 58-82-5(b) (1994).

It is clear that, subject to several conditions, the General Assembly intended to immunize rural volunteer fire departments from acts or omissions "at the scene of a reported fire." *Id.* However, the General Assembly did not define what constitutes "the scene" of a reported fire.

Plaintiff does not argue that defendants' alleged negligence did not relate to the *suppression* of the reported fire, but rather that the alleged negligence of defendants did not occur "at the *scene* of the reported fire." Plaintiff submitted an affidavit at summary judgment in support of this contention, which stated "[t]he distance between the scene of my wreck to the scene of the fire was one-half mile." Defendants neither filed an opposing affidavit, nor in any manner disputed the distance asserted by plaintiff. Indeed, defendants attempted to interpret this fact to their advantage, and defendant Creswell Volunteer Fire Department Inc. contended in its brief that the "accident in fact occurred at the scene of a reported fire, since it took place within a half mile of the burning dwelling and at the site where the fire departments were filling their tank trucks from a hydrant."

Plaintiff's and defendants' arguments present conflicting interpretations of the meaning of the phrase "at the scene of a reported fire" as it is used in N.C. Gen. Stat. § 58-82-5. To determine if defendants may assert immunity under N.C. Gen. Stat. § 58-82-5, it must be determined whether "the scene" of the fire extends to the location of defendants' alleged negligent act, one-half mile from the reported fire in this case. Defendants' admissions as to the distance between plaintiff's wreck and the fire leave no factual dispute as to the question of whether defendants' alleged negligence occurred "at the scene" of the fire. Thus, whether "the scene" of the fire extends to the location of defendants' alleged negligent act, although usually a mixed question of fact and law, is in this case solely a question of law.

Our Supreme Court has held that when "language of a statute is clear and unambiguous, the Supreme Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning." *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996) (citation omitted). Given the absence of a statutory definition as to exactly what area constitutes "the scene" of the fire, we decline to interpret the statute inconsistent with the statute's "plain and definite meaning." *Id.*

Plaintiff relies on *Geiger v. Guilford Coll. Comm. Volunteer Fireman's*, 668 F. Supp. 492 (M.D.N.C. 1987), in which the federal district court strictly construed N.C. Gen. Stat. § 69-39.1(b) (superseded by N.C. Gen. Stat. § 58-82-5). In *Geiger*, a volunteer fire department responded to a call involving two people who were overcome by fumes while working on a large gasoline tank. During the rescue by

the fire department, plaintiff was injured. There was no fire at the scene, nor was any fire reported. The court ruled that N.C. Gen. Stat. § 69-39.1 did not limit the fire department's liability because the alleged negligence did not occur "at the scene of a reported fire." *Geiger* at 494. The defendant argued that the court "should broadly construe the statute to limit the liability of fire departments for all duties fire departments ordinarily undertake." *Id.* In response the court stated:

> The court cannot adopt defendant's arguments. The wording of the statute clearly requires a "reported fire" and an act or omission relating to the "suppression" of the "reported fire" before the limitation of liability applies. The possibility of a fire occurring is insufficient. A court cannot ignore clear and precise statutory language. Judicial interpretation allows a court to resolve statutory ambiguities, not create them. If this court were to view N.C.G.S. § 69-39.1(b) as encompassing the facts of this case, the court would be closer to engaging in judicial legislation than judicial interpretation.

Id.

The court in *Geiger* stated that "a reported fire" is required to apply the immunity statute, and that "the possibility of a fire occurring" was "insufficient" for defendants to claim immunity. *Geiger* at 494. Similarly, N.C. Gen. Stat. § 58-82-5 requires that the alleged negligent act occur "at the scene" of a reported fire before a rural volunteer fire department can assert immunity.

The fact that plaintiff's wreck occurred where defendants had filled their fire trucks with water from a fire hydrant, one-half mile away from the reported fire, is insufficient for defendants to claim immunity. The words "at the scene" provide immunity for defendants for acts and omissions only in a specific place. A broader reading of the statute would be inconsistent with the plain meaning of the words. *See State ex rel. McDonald v. Whatcom Cty. Etc.*, 575 P.2d 1094 (Wash. Ct. App. 1978) *aff'd*, 593 P.2d 546 (Wash. 1979) (holding that "[t]he words 'at the scene' . . . imply a specific place . . . and limit rather than expand the officer's power to arrest," and "[t]he 'scene' is the place where the accident occurred").

II.

[2] Plaintiff further argues that defendants "are protected by governmental immunity, which is waived to the extent of the stipulated lia-

bility insurance coverage." Plaintiff's argument simply does not apply in this case.

Plaintiff again relies on *Geiger*, in which the federal court stated that North Carolina follows common law rules of sovereign immunity. The court further stated that Guilford County, which had employed defendant to furnish fire protection to the Guilford College Fire Protection District, was "a municipal corporation and the North Carolina courts have recognized that the 'operation of a fire department is a function which a municipality undertakes in its governmental capacity.' " *Geiger* at 495 (citations omitted). Thus, the court found that the volunteer fire department had waived governmental immunity to the extent of its liability insurance coverage. *Id.* The defendant volunteer fire department in *Geiger* contracted with a governmental entity, Guilford County, to provide fire protection. *Geiger* at 494. In the present case, however, it was neither alleged, nor was evidence presented, that defendants had contracted with any governmental entity to provide fire protection. Further, no governmental entity is a party to this action and the plaintiff has neither alleged nor argued that the defendants are governmental entities, only that they are North Carolina corporations.

Waiver of immunity by purchase of liability insurance applies to governmental or sovereign immunity and is governed by N.C. Gen. Stat. § 160A-485 (1994). *See Gregory v. City of Kings Mountain*, 117 N.C. App. 99, 450 S.E.2d 349 (1994); *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Chapter 160A of the General Statutes applies to municipalities, which are governmental entities, but not to incorporated volunteer fire departments such as defendants. Any immunity of defendants is derived from a specific grant of immunity by the General Assembly set forth in N.C. Gen. Stat. § 58-82-5. Plaintiff's argument as to waiver of governmental immunity by the purchase of insurance is inapplicable in this case.

The trial court's order of summary judgment in favor of defendants is reversed for the reasons stated in our analysis of plaintiff's first argument and this matter is remanded to the trial court for trial on the remaining issues.

Reversed and remanded.

Judges JOHN and MARTIN, Mark D., concur.

Judge Martin concurred in the result of this opinion prior to 4 January 1999.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. SANDRA J. BARRETT, ATTORNEY, DEFENDANT

No. COA98-412

(Filed 19 January 1999)

1. **Attorneys— comingling funds—acting as rental agent—applicability of Rules of Professional Conduct**

   The Disciplinary Hearing Commission of the North Carolina State Bar properly concluded that defendant-attorney violated Rule 10.1(a) of the Rules of Professional Conduct when she failed to separately maintain fiduciary funds and personal funds when acting as an agent to collect rent. Where there is a fiduciary relationship, a lawyer must keep any property received separate from his or her own property and Rule 10.1 applies not only to a lawyer-client relationship but also to other business relationships.

2. **Attorneys— comingling funds—acting as rental agent—records required by Rules of Professional Conduct**

   The Disciplinary Hearing Commission of the North Carolina State Bar erroneously concluded that defendant-attorney violated Rule 10.2 of the Rules of Professional Conduct in her management of collected rent accounts where no attorney-client relationship existed. Rule 10.2 relates solely to lawyer-client relationships and it can be interpreted independently of Rule 10.1.

Appeal by defendant from judgment entered 7 November 1997 by the North Carolina Disciplinary Hearing Commission. Heard in the Court of Appeals 29 October 1998.

Fern Gunn Simeon for plaintiff-appellee.

Johnson, Mercer, Hearn & Vinegar, PLLC, by George G. Hearn and Reed J. Hollander, for defendant-appellant.

WALKER, Judge.

On 22 May 1997, the North Carolina State Bar (the State Bar) filed a complaint against defendant alleging she had violated the Rules of Professional Conduct of the State Bar. The allegations stemmed from defendant's commingling of personal funds with funds she received from rent she collected for Mark Ferguson.

The evidence presented by stipulation of the parties tended to show the following: Defendant is a licensed attorney in North Carolina who practices law and maintains an office in Asheville. In 1996, defendant agreed to act as an agent for Mark Ferguson in collecting rent payments from Daniel and Ellen Meekins who rented property belonging to Ferguson. No attorney-client relationship existed between defendant and Ferguson at any time between January 1996 and August 1997.

The Meekins lease began on 24 May 1996 and they paid their rent each month to defendant who then deposited the rental payments into her personal bank account at Blue Ridge Savings Bank, account number 53-202627-6 (the 6276 account). This account held money belonging to defendant on which she wrote personal checks. Ferguson authorized defendant to only use the rental proceeds for repair and maintenance of his rental property and to deduct her management fees.

The defendant did not send to Ferguson rental payments she collected from 24 May 1996 to 1 August 1996. In August 1996, defendant sent the rental proceeds for June and July 1996 to Ferguson's parents. Later, they wrote and telephoned defendant on several occasions and asked about the additional rental payments due to their son. In January 1997, defendant agreed to turn over the rental of Ferguson's property to Michael Ross, a realtor. On 15 January 1997, defendant sent the security deposit in the amount of $595.00 to Ross; however, defendant did not send Ross the additional rental payments that were owed to Ferguson.

On 4 February 1997, Ferguson's parents filed a grievance against defendant with the State Bar. On 14 February 1997, defendant deposited $3,675 of her personal funds into the 6276 account and gave Ferguson's parents checks which represented the rent proceeds with interest from August 1996 through January 1997, less maintenance fees, costs and management fees. In addition, defendant failed to

keep her bank statements for the 6276 account during her management of the property.

The Disciplinary Hearing Commission (DHC) made findings of fact and concluded that:

> 2. The defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:
>
> (a) By failing to hold, maintain, and safeguard Ferguson's funds that she received in a fiduciary capacity, defendant unintentionally misappropriated fiduciary funds in violation of Rule 10.1(a) of the North Carolina Rules of Professional Conduct.[1]
>
> (b) By not maintaining a bank account, separately identifiable from her business or personal account, to hold the funds that she held in a fiduciary capacity, defendant violated Rule 10.1(b) of the North Carolina Rules of Professional Conduct.
>
> (c) By depositing Ferguson's funds into an account which contained her personal funds, defendant commingled fiduciary and personal funds in violation of Rule 10.1(a) of the North Carolina Rules of Professional Conduct.
>
> (d) By not promptly paying funds due Ferguson, defendant violated Rule 10.2(e) of the North Carolina Rules of Professional Conduct.
>
> (e) By not maintaining adequate minimum records regarding Ferguson's funds, defendant violated Rule 10.2(b) and (c) of the North Carolina Rules of Professional Conduct.
>
> (f) By not reconciling the balances of funds that she held in a fiduciary capacity, defendant violated Rule 10.2(d) of the North Carolina Rules of Professional Conduct.

Additional findings of fact regarding discipline were then entered by the DHC as follows:

> 1. The defendant's misconduct is aggravated by the following factors:
>
> (a) defendant's conduct involved multiple offenses; and

1. The Rules of Professional Conduct of the North Carolina State Bar have since been replaced by the Revised Rules of Professional Conduct of the North Carolina State Bar which became effective on 17 April 1998.

(b) defendant's conduct resulted in the misappropriation of funds that she held in a fiduciary relationship.

The DHC also found defendant's misconduct was mitigated by several factors including: the absence of a prior disciplinary record; absence of a dishonest or selfish motive; full and free disclosure to the hearing committee or a cooperative attitude toward the disciplinary proceedings; and good character and reputation. The mitigating factors were found to outweigh the aggravating factors.

The DHC entered an order of discipline suspending the license of defendant for two years, but permitted the suspension to be stayed for two years upon certain terms and conditions.

On appeal defendant contends Rules 10.1 and 10.2 do not apply to her since she was in a business relationship outside the practice of law, that both rules are void for vagueness, and that the DHC found improper aggravating factors.

A *de novo* standard of review is appropriate when a petitioner argues that the administrative agency's decision was based on an error of law. *Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 567, 452 S.E.2d 337, 344 (1995). An incorrect statutory interpretation by an agency constitutes an error of law under N.C. Gen. Stat. § 150B-51(4) when the issue on appeal is whether the state agency erred in interpreting a statutory term. *Id.* This Court may then substitute its own judgment for that of the agency and employ *de novo* review. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 678, 443 S.E.2d 114, 120 (1994).

[1] First, defendant contends that she was not required to comply with Rule 10.1 because she was only acting in a business relationship with Ferguson. Rule 10.1(a) states:

> (a) Any property received by a lawyer in a fiduciary capacity shall at all times be held and maintained separately from the lawyer's property, designated as such, and disbursed only in accordance with these rules. These rules shall not be generally applicable to a lawyer serving as a trustee, personal representative or attorney in fact. However, a lawyer serving in such a fiduciary role must segregate property held in trust from property belonging to the lawyer, maintain the minimum financial records required by Rules 10.2(b) and (c) of this chapter, and instruct any financial institution in which property of a trust is held in accordance with Rule 10.2(f) of this chapter. . . .

The defendant conceded that a fiduciary relationship was created with Ferguson when she began acting as his agent in collecting the rent. Where there is a fiduciary relationship, a lawyer must keep any property received separate from his own property according to this rule. Thus, Rule 10.1 applies not only to a lawyer-client relationship but also to other business relationships the lawyer may engage in. Defendant's argument that the language of Rule 10.1(a) is merely an introduction to the substantive rule is unpersuasive. Therefore, the DHC properly concluded that defendant violated Rule 10.1(a) when she failed to separately maintain fiduciary funds and personal funds.

[2] Next, defendant contends the DHC erroneously concluded she violated Rule 10.2 (b) (c) (d) and (e) as her actions did not arise out of a lawyer-client relationship. Rule 10.2 (b)-(e) states:

> (b) A lawyer shall maintain complete records of all funds, securities, or other property of a client received by the lawyer. . . .
>
> (c) The minimum records of funds received and disbursed by the lawyer shall consist of the following:
>
> > (1) a journal, file of receipts, file of deposit slips, or checkbook stubs listing the source, client, and date of the receipt of all trust funds. . . .
> >
> > (2) a journal, which may consist of cancelled checks, showing the date, receipt of all trust fund disbursements, and the client balance against which the instrument is drawn. . . .
> >
> > . . .
> >
> > (5) any bank statements or documents received from the bank regarding the account, including, but not limited to, notices of the return of any instrument drawn on the account for insufficient funds.
>
> (d) A lawyer shall reconcile the trust account balances of funds belonging to all clients at least quarterly. A lawyer shall render to the client appropriate accountings of the receipt and disbursement of any funds, securities, or property belonging to the client in the possession of the lawyer. . . .
>
> (e) A lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or properties belonging to the client to which the client is entitled in the possession of the lawyer.

The defendant argues that since no lawyer-client relationship existed, Rule 10.2 is not applicable. Plaintiff argues this Rule should be read in conjunction with Rule 10.1(a) and (b) because a lawyer who receives fiduciary property must maintain adequate records and promptly disburse such property. Rule 10.2 speaks specifically to the duty of a lawyer regarding property he holds and thus applies when there is a lawyer-client relationship. Since Rule 10.2 relates solely to lawyer-client relationships it can be interpreted independently of Rule 10.1. The DHC erroneously concluded that the defendant violated Rule 10.2.

Therefore, since we have concluded defendant did not violate Rule 10.2, we need not address the remaining assignments of error. This case is remanded to the DHC for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges JOHN and McGEE concur.

MICHAEL HARVELL, PLAINTIFF v. NORTH CAROLINA ASSOCIATION OF EDUCATORS, INC., DEFENDANT

No. COA98-396

(Filed 19 January 1999)

Employer and Employee— Family and Medical Leave Act— worksites for field representatives

The worksites for field representatives of the NCAE are their branch offices rather than the NCAE headquarters in Raleigh for the purpose of determining whether the NCAE had fifty or more employees within seventy-five miles of its headquarters and was thus subject to the Family and Medical Leave Act at its headquarters worksite.

Appeal by plaintiff from judgment entered 29 October 1997 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 29 October 1998.

Akins, Hunt & Fearon, P.L.L.C., by Donald G. Hunt, Jr., for plaintiff-appellant.

Allen & Pinnix, P.A., by M. Jackson Nichols, for defendant-appellee.

WALKER, Judge.

Defendant North Carolina Association of Educators, Inc. (NCAE) is a non-profit corporation that is a member association providing services to North Carolina teachers who have voluntarily joined. Plaintiff was hired by defendant as a network systems programmer in May 1995. In June 1996, plaintiff's wife was pregnant and he requested twelve weeks of unpaid leave under the Family and Medical Leave Act (FMLA) by sending the request to his supervisor, William Newkirk. On 31 July 1996, he sent his request for leave to John Wilson, NCAE's Executive Director. After discussions, on 9 September 1996, Newkirk confirmed in writing the granting of plaintiff's leave request from 3 September 1996 until 3 November 1996. Newkirk also stated in the letter that ". . . employment of any sort while on FMLA time off is prohibited."

Plaintiff's leave of absence began on 3 September 1996 and at his request, plaintiff was allowed to exhaust the 12 days of his annual leave, 13 days of his sick leave, 5 days of compensatory leave, and 3 days of personal leave before going on unpaid leave on 16 October 1996. On 30 October 1996, the parties met and agreed that plaintiff would return to work on 2 January 1997. On 15 November 1996, plaintiff requested that the prohibition on secondary employment during his leave be removed. His request was granted; however, plaintiff testified that he did not seek any secondary employment from the date the restriction was removed until he returned to work. He also testified that he received at least two offers for work prior to the restriction being removed but he was unable to accept either of them. Plaintiff's employment was terminated by defendant in March 1997, which is not at issue in this case.

After his dismissal, plaintiff filed a complaint with the United States Department of Labor (USDOL) concerning an alleged FMLA violation by defendant for prohibiting him from working during his period of leave. During the USDOL's investigation, NCAE was informed that it was not subject to FMLA because it did not have 50 employees within 75 miles of the NCAE headquarters.

On 9 May 1997, plaintiff filed this action alleging that defendant violated FMLA. Defendant moved to dismiss under Rule 12(b)(6) which was converted to a motion for summary judgment. On 29 October 1997, the trial court ordered that defendant was entitled to summary judgment because there was "no material issue as to the material fact of whether Defendant NCAE employs less than 50 employees within 75 miles of the Raleigh headquarters worksite." On appeal, plaintiff contends the trial court erred when it granted summary judgment for defendant.

A motion for summary judgment "is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 344, 469 S.E.2d 583, 585 (1996) (*quoting* N.C. Gen. Stat. § 1A-1, Rule 56(c)). The party moving for summary judgment bears the burden of proving the lack of a triable issue of fact. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). The evidence is viewed in the light most favorable to the nonmoving party. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 666, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995).

The FMLA provides that, under certain circumstances, an employer must allow an eligible employee to take up to twelve work weeks of leave during any twelve-month period. 29 U.S.C. § 2612(a)(1) (1994).

The statute defines an eligible employee as an employee who has been employed: "(i) for at least 12 months by the employer with respect to whom leave is requested under section 102; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A) (1994). However, an employee is not eligible if the employee is "any employee of any employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. § 2611(2)(B)(ii).

Plaintiff argues that defendant's calculation of the number of employees within a 75-mile radius of the headquarters is incorrect since it failed to count all the people it employs as UniServ directors.

UniServ directors are field representatives of NCAE who work with local associations and although many perform their duties from offices located outside the 75-mile radius, all are headquartered in Raleigh.

Plaintiff contends that the worksite of the UniServ directors is at the headquarters in Raleigh for the following reasons: (1) they travel all the time and spend at least fifty percent of their time in the field away from the office; (2) they are essentially salespeople; (3) the remote office of a UniServ director is not a single site of employment since they are not required to report there daily, the offices do not have separate management, many UniServ offices only contain equipment, and only four of these offices have secretaries; (4) all UniServ directors receive their work assignments from Raleigh and report to a single manager; and (5) UniServ directors have significant contacts with the Raleigh headquarters.

However, in his affidavit, Wilson testified that 39 people were employed at the NCAE headquarters in Raleigh from June through November 1996. He also stated that seven employees worked at branch offices within the 75-mile radius of the headquarters. Further, the other 18 or 19 people, UniServ directors and support staff, employed by NCAE were located in branch offices beyond 75 miles of the headquarters. He stated that UniServ directors work throughout the state, but each is assigned "a fixed worksite which serves as their office and home base." He testified that his determination was consistent with the USDOL's representative's finding that the NCAE was not subject to FMLA because it employed less than 50 employees within a 75-mile radius of the NCAE headquarters. Sanford Younce, a UniServ director for 24 years based in Charlotte, also testified that although most UniServ directors travel every day, their "fixed worksite" or "point of origination" is their office even if they are not required to report there on a daily basis.

Plaintiff's evidence fails to refute defendant's determination that UniServ directors are assigned a fixed worksite which serves as their office and home base. Plaintiff's argument relies solely on his interpretation of the term "worksite" in the statute and fails to address the uncontested evidence of Wilson and Younce that the worksites for UniServ directors are their branch offices. Therefore, since there is no genuine issue of material fact, the trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judges JOHN and McGEE concur.

DEBORAH DILTHEY SEIPP, PLAINTIFF v. WAKE COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA98-320

(Filed 19 January 1999)

Schools and Education— injury at PTA event—liability of school board—no statutory immunity

A county board of education was not entitled to immunity under N.C.G.S. § 115C-524(b) for injuries sustained by plaintiff while attending a haunted house on school property sponsored by the school PTA, assuming that the PTA was a "non-school group" and that the haunted house was conducted "for other than school purposes," where the PTA used the school property pursuant to a verbal agreement with the principal and failed to comply with board of education rules requiring a signed facility use application, payment of a processing fee, proof of liability insurance, execution of a hold harmless agreement, and approval by both the principal and the board.

Appeal by defendant from order filed 12 December 1997 by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 27 October 1998.

Edwards & Kirby, L.L.P., by David F. Kirby, for plaintiff-appellee.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Warren T. Savage, for defendant-appellant.

GREENE, Judge.

Wake County Board of Education (Board) appeals from the denial of its summary judgment motion.

Deborah Dilthey Seipp (Plaintiff) filed this action against the Board seeking to recover damages for personal injuries she sustained

while attending a Haunted House (Event) sponsored by the Parent-Teacher Association (PTA) and held on the premises of the Lacy Elementary School (School), one of the schools in the Board's school system. The PTA is composed solely of volunteer teachers, administrators, and parents of students who attend the School. The Event was announced by way of School bulletins printed by the School and distributed by the teachers at the School to the students. Tickets for the Event were purchased by the students from the teachers at the School, who held the money for the benefit of the PTA. All the funds raised from the Event went directly into the PTA operating budget and were used for the funding of programs and the purchasing of equipment at the School.

The Board encouraged the use of School facilities by the community and implemented rules and regulations (Rules) for their use. Those Rules provided in pertinent part: (1) "[t]he superintendent shall have prepared and provided to principals a standard application form for the use of school facilities by the various user groups"; (2) "[a]ny group desiring to use a school facility shall make application in the office of the principal of the school of the facility desired at least two (2) weeks prior to the date of the intended use"; and (3) "[t]he following guidelines should be followed" when applying for use of a School facility:

> Any agency, group, or individual interested in using a school facility . . . **MUST** [(a)] [s]ubmit a completed *Facility Use Application* to the building level principal at least two weeks . . . in advance of the event; [(b)] [s]ign and date the application . . . as indication of a contractual agreement to abide by school policy and payment requirements; [(c)] [a]ttach . . . a check in the amount of $25.00 for the processing fee, . . . [provide] proof of liability insurance, [and provide a] hold harmless agreement.

The Facility Use Application had to be approved by the School principal and processed and approved by the Board's Community Schools Office.

The PTA did not complete a Facility Use Application, pay an application fee, execute a hold harmless agreement, or provide proof of liability insurance. The use of the School for the Event by the PTA was informally and orally approved by the School principal and although not consistent with the Rules, was consistent with the normal practice of the Board.

It is alleged in the complaint and admitted in the answer that the Board purchased liability insurance which was in effect on the date of Plaintiff's injury.

The single issue presented is whether the PTA's use of the School for the Event, where Plaintiff was injured, was "pursuant to" an agreement made within the meaning of section § 115C-524(b).

"A county or city board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority." *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990), *disc. review improvidently allowed*, 329 N.C. 691, 406 S.E.2d 579 (1991). Any local board of education may waive its immunity by securing liability insurance. N.C.G.S. § 115C-42 (1997). The purchase of liability insurance does not, however, constitute a waiver of immunity to the extent personal injures are sustained in the use of school property, if the use of the school property is "for other than school purposes" and "pursuant to" an "agreement" with a "non-school group" entered into consistent with "rules and regulations" adopted by the local board of education. N.C.G.S. § 115C-524(b) (1997); *Linder v. Duplin County Bd. of Education*, 108 N.C. App. 757, 760, 425 S.E.2d 465, 467, *disc. review denied*, 333 N.C. 791, 431 S.E.2d 25 (1993).

Plaintiff argues that the Board is not entitled to immunity under section 115C-524(b) for three distinct reasons: (1) the PTA-sponsored Event was a School event and thus was not "for other than school purposes"; (2) the PTA is a School group and thus does not qualify as a "non-school group"; and (3) the Event was not held pursuant to an agreement consistent with Board Rules.

Assuming, without deciding, that the PTA is a "non-school group" and that the Event was conducted "for other than school purposes," the Board is not entitled to the immunity granted under section 115C-524(b) because the agreement with the PTA was not entered pursuant to the Rules adopted by the Board. The Rules simply do not allow for a verbal agreement between the School principal and the group wishing to use School facilities. The fact that this may be the custom is not material. The Rules are specific in requiring the group "interested in using a school facility" to "[s]ubmit a [signed and] completed *Facility Use Application*" to the School principal, attach a processing fee, show proof of liability insurance, and execute

a hold harmless agreement. This application must be approved by the School principal and the Board. In this case, the PTA did not submit an application pursuant to the Rules and the use of the School for the Event was therefore outside the scope of section 115C-524(b). The trial court correctly rejected the Board's summary judgment motion based on section 115C-524(b).

The Board also argues that the denial of its motion for summary judgment was error because "[P]laintiff failed to offer sufficient evidence to make out a prima facie case of negligence and because [P]laintiff was contributorily negligent as a matter of law." We do not reach this issue. The denial of a summary judgment motion, except as it involves questions of personal jurisdiction, is not appealable. *Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978); *Colombo v. Dorrity*, 115 N.C. App. 81, 83, 443 S.E.2d 752, 754, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 517 (1994). We have addressed the sovereign immunity issue on this appeal because it raises a question of personal jurisdiction. *Id.*

Affirmed.

Judges LEWIS and HORTON concur.

IN THE MATTER OF: REMONE ROBINSON

No. COA98-165

(Filed 19 January 1999)

1. Juveniles— transfer of case—disposition

The trial court did not err in proceedings on juvenile petitions by refusing to change the venue of the dispositional hearing to the District of Columbia where the juvenile was in the custody of his mother, who resided in the District of Columbia, but was temporarily living with his uncle in Catawba County, North Carolina. There is no definition of the word "reside" in N.C.G.S. § 7A-558 and "residence" at common law meant a person's actual place of abode, whether permanent or temporary. Even if the juvenile resided outside the State of North Carolina, N.C.G.S. § 7A-558 refers to the transfer of juvenile cases to another district within North Carolina and there is no statutory provision requiring the

transfer of a juvenile delinquency proceeding to a foreign jurisdiction for disposition.

2. Juveniles— commitment—alternatives—findings insufficient

A juvenile order of commitment was remanded for a new dispositional hearing where the court counselor merely stated that the juvenile "probably" would not be accepted into alternative placements and there was no evidence of any attempts to investigate alternatives to commitment.

Appeal by juvenile from Juvenile Disposition and Commitment Order filed 17 December 1997 by Judge Timothy S. Kincaid in Catawba County District Court. Heard in the Court of Appeals 6 October 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Robin W. Smith, for the State.

Daniel R. Green, Jr. and Gregory D. Huffman, for juvenile-appellant.

GREENE, Judge.

Remone Robinson (the Juvenile) appeals from a Juvenile Disposition and Commitment Order entered by the trial court on 17 December 1997.

On 8 December 1997, six juvenile petitions alleging delinquency were issued against the Juvenile, a fourteen year old visiting his uncle in Catawba County, North Carolina. He was in the custody of his mother, who resided in the District of Columbia. The Juvenile was alleged to have been in possession of alcoholic beverages, in possession of cocaine, in possession of stolen property, in possession of a hand gun, and resisting arrest. At the adjudicatory hearing, the Juvenile admitted to possession of stolen property and resisting arrest. The other charges were dismissed by the district attorney. After the adjudication, the Juvenile moved to change venue of the dispositional hearing to the District of Columbia on the grounds that he was a resident there. This motion was denied and the trial court proceeded with the dispositional hearing. The Juvenile's attorney argued that because this was the Juvenile's first juvenile disposition and because no alternatives to commitment had been attempted, commitment to the Division of Youth Services was not appropriate. A social worker testified that "at this time nor in the foreseeable future do we

have any resources for placement of this young man to be anywhere near appropriate." The juvenile court counselor testified that alternative placements "probably [will] not accept [the Juvenile]." With respect to two specific alternative placements suggested by the Juvenile's attorney, the social worker stated: "I can guarantee that he would not be accepted at either, or deemed appropriate for either program."

The trial court, in committing the Juvenile to the Division of Youth Services, found he was a resident of Catawba County, would be a "threat to persons or property in the community," and alternatives to commitment "have been attempted unsuccessfully or were considered and found to be inappropriate."

The issues presented are whether: (I) the Juvenile "resides" in Catawba County; and (II) there is sufficient evidence in this record to support the finding that alternatives to Division of Youth Services commitment were inappropriate.

I

[1] On the motion of any juvenile, the trial court "shall transfer the proceeding to the court in the district where the juvenile resides for disposition." N.C.G.S. § 7A-558(a)(3) (1995). There is no dispute in this case that the trial court had jurisdiction to *adjudicate* the petitions. N.C.G.S. § 7A-523(a) (1995) (district court has exclusive jurisdiction over any juvenile alleged to be delinquent); N.C.G.S. § 7A-558(a) (1995) ("A proceeding in which a juvenile is alleged to be delinquent . . . shall be commenced and adjudicated in the district in which the offense is alleged to have occurred."). Instead, the Juvenile argues he "resides" in the District of Columbia, and therefore the trial court was required to transfer his case to the District of Columbia for disposition. We disagree.

As there is no definition of the word "reside" in section 7A-558, and because the word is clear and unambiguous, we are required to give the word its plain and definite meaning. *See Underwood v. Howland, Comr. of Motor Vehicles*, 274 N.C. 473, 479, 164 S.E.2d 2, 6 (1968). Residence, at common law, had reference to "a person's actual place of abode, whether permanent or temporary." *Sheffield v. Walker*, 231 N.C. 556, 559, 58 S.E.2d 356, 359 (1950).

In this case, all the evidence shows that the Juvenile was in the custody of his mother, who lived in the District of Columbia, and, at

the time of the delinquent offenses, he was temporarily living with his uncle in Catawba County, North Carolina. Thus, for the purposes of section 7A-558, the Juvenile resided in Catawba County at the time of the offenses and the trial court correctly proceeded with disposition in that district.

In any event, even if we had determined that the Juvenile resided outside the State of North Carolina, we do not read section 7A-558 as mandating that the trial court transfer the disposition of a juvenile delinquency proceeding to a foreign jurisdiction. Section 7A-558 is more properly construed to have reference to the transfer of such cases to another district within this State. There is no statutory provision requiring the transfer of a juvenile delinquency proceeding, properly filed in this State, to a foreign jurisdiction for disposition.[1]

II

[2] There is agreement among the parties to this appeal that a commitment to the Division of Youth Services can occur only if the alternatives to commitment listed in sections 7A-647, 7A-648, and 7A-649 "have been attempted unsuccessfully or were considered and found to be inappropriate." N.C.G.S. § 7A-652(a) (Supp. 1997). The trial court found these alternatives "were considered and found to be inappropriate." This finding, however, to be sustained, must be supported by evidence in the record. N.C.G.S. § 7A-651(e) (Supp. 1997) (findings must be supported by "substantial evidence in the record that the judge . . . explored and exhausted or considered inappropriate" the community resources needed to meet the needs of the juvenile); *In re Bullabough*, 89 N.C. App. 171, 184, 365 S.E.2d 642, 649 (1988). The trial court "ha[s] an affirmative obligation to inquire into and to seriously consider the merits of alternative dispositions." *In re Groves*, 93 N.C. App. 34, 39, 376 S.E.2d 481, 484 (1989) (rejecting as inadequate the court counselor's testimony that "[w]e don't have a Drug Rehabilitation Program").

In this case, the Juvenile contends the evidence does not support the trial court's finding, and we agree. There simply is no evidence that any actual attempts to investigate alternatives to commitment were made. The court counselor merely stated that the Juvenile

1. We note that Article V(a) and Article VI of the newly enacted "Interstate Compact on the Placement of Children," to be codified at N.C. Gen. Stat. § 7B-3800 (effective 1 July 1999), provides that North Carolina can impose the institutional placement of adjudicated juvenile delinquent children in an out-of-state jurisdiction, with North Carolina retaining jurisdiction to determine the proper disposition.

"probably" would not be accepted into alternative placements. Accordingly, we must vacate the order of commitment and remand for a new dispositional hearing.

Vacated and remanded.

Judges WALKER and SMITH concur.

PATRICK BARRETT, PH.D., PETITIONER v. NORTH CAROLINA PSYCHOLOGY BOARD, RESPONDENT

No. COA98-155

(Filed 19 January 1999)

Psychologists and Psychiatrists— psychologists—licensing—reciprocity—senior psychologist

The North Carolina Psychology Board erred by refusing petitioner's application for reciprocity based on its construction of N.C.G.S. § 90-270.13. That statute has provision for granting licensure to people licensed by a similar board in another jurisdiction, requires that the applicant be a "senior psychologist," and requires the North Carolina Board to enact rules defining that term. The Board had not adopted any rules defining "senior psychologist" almost three years after it was directed to do so by the Legislature; failure to define the term is tantamount to a decision by the Board that any applicant meeting the other prerequisites of the statute qualifies as a "senior psychologist." In any event, petitioner cannot be held to an undefined requirement when a definition is mandated by the Legislature.

Appeal by respondent from Order on Petition for Judicial Review dated 14 November 1997 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 6 October 1998.

Allen and Pinnix, P.A., by Noel L. Allen and M. Jackson Nichols, for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorneys General Robert M. Curran and Anne J. Brown, for the State.

equitable distribution action was the only issue and a non-jury issue, the motion seeking a jury trial was also denied.

Defendants Thad, Alan, Sharp Farms, and SF Inc. argue first that the trial court should have allowed their request for a jury trial and second that the trial court abused its discretion in denying their motion to sever. We note that an order denying a motion for a jury trial is immediately appealable. *See In re McCarroll*, 313 N.C. 315, 316, 327 S.E.2d 880, 881 (1985). This opinion addresses the dispute between plaintiff and defendants Thad, Alan, Sharp Farms, and SF Inc.; references to "defendants" hereafter indicate defendants exclusive of Pender Sharp.

This case requires us to address the question of first impression of whether a third party to an equitable distribution action has a state constitutional right to a trial by jury in an action for constructive trust.

> In order to determine whether there exists a constitutional right to trial by jury of a particular cause of action, we look to article I, section 25, which ensures that there is a right to trial by jury where the underlying cause of action existed at the time of adoption of the 1868 constitution, regardless of whether the action was formerly a proceeding in equity.

Kiser v. Kiser, 325 N.C. 502, 510, 385 S.E.2d 487, 491 (1989). "A constructive trust is a common law property right arising in equity to prevent a person from holding property under circumstances 'making it inequitable for him to retain it.' " *Lamb v. Lamb*, 92 N.C. App. 680, 685-86, 375 S.E.2d 685, 688 (1989) (quoting *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970)). This property right arises immediately upon the wrongful act. *See Cline v. Cline*, 297 N.C. 336, 343, 255 S.E.2d 399, 404 (1979). A constructive trust has been described also as a duty imposed by the courts to prevent unjust enrichment, *see Guy v. Guy*, 104 N.C. App. 753, 757, 411 S.E.2d 403, 405 (1991), and as a remedy fashioned by the court, *see Weatherford v. Keenan*, 128 N.C. App. 178, 179, 493 S.E.2d 812, 813 (1997), *disc. review denied*, 348 N.C. 78, 505 S.E.2d 887 (1998).

Actions seeking to impose trusts in situations where it would be unfair for the legal title-holder to retain the property were recognized in North Carolina prior to 1868. *See, e.g., Smith v. Smith*, 60 N.C. 581 (1864); *Garner v. Garner*, 45 N.C. 1 (1852). Furthermore, constructive trust claims are routinely heard by juries in modern times. *See,*

e.g., *Lane v. Lane*, 115 N.C. App. 446, 448, 445 S.E.2d 70, 71, *disc. review denied*, 338 N.C. 311, 452 S.E.2d 311 (1994); *Watkins v. Watkins*, 83 N.C. App. 587, 589, 351 S.E.2d 331, 333 (1986); *Ferguson v. Ferguson*, 55 N.C. App. 341, 343, 285 S.E.2d 288, 290, *disc. review denied*, 306 N.C. 383, 294 S.E.2d 207 (1982). We hold that under *Kiser*, a third party litigant to an equitable distribution proceeding has a state constitutional right to a jury trial in an action seeking to impose a constructive trust.

Plaintiff seeks a constructive trust as one count of her complaint; she also seeks equitable distribution of her marital property. The result we reach today mandates that the trial judge allow defendants, here third parties to the marital property distribution, to have their case heard by a jury. This result is entirely consistent with our prior case law.

A judge in an equitable distribution action may recognize both legal and equitable interests in property and distribute such interests to the divorcing parties, even if such distribution requires an interest be "wrested from the hands of the legal titleholder by the imposition of a constructive trust." *Upchurch v. Upchurch*, 128 N.C. App. 461, 463, 495 S.E.2d 738, 739 (*Upchurch II*), *disc. review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998). A plaintiff must name or join as defendants in her equitable distribution action those who are alleged to hold title to marital property. *See Upchurch v. Upchurch*, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-64 (1996) (*Upchurch I*). In *Upchurch I*, there was evidence that the husband had titled marital property and funds in his name and his sons' names. This Court held that the sons were "necessary part[ies] to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property." *Id.*, 468 S.E.2d at 64. Without the sons, "the trial court would not have jurisdiction to enter an order affecting the title to that property." *Id. Upchurch I* was remanded so that the trial judge could consider the evidence of a constructive trust under the clear and convincing evidence standard, and the trial judge's decision on remand also was appealed. *See Upchurch II.*

However, the sons in *Upchurch I* and *Upchurch II* did not request a jury trial on the issue of property to which they held title. We noted in *Upchurch II* that "the trial judge was responsible for determining the weight and credibility of the evidence" of a constructive trust because he was the finder of fact. *Upchurch II*, 128 N.C. App. at 468, 495 S.E.2d at 742. The *Upchurch* cases, therefore, hold that a judge in

Affirmed.

Judges WALKER and SMITH concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, ET AL., PLAINTIFFS v. LINDLEY LABORATORIES, INC., ET AL., DEFENDANTS

No. COA98-147

(Filed 19 January 1999)

Mortgages— equitable subrogation—not applicable

The trial court did not err in a declaratory judgment action by denying plaintiff priority of lien through equitable subrogation where plaintiff had taken a deed of trust on a property (Lot 8) on 9 November 1994; an additional encumbrance was placed on Lot 8 on 12 May 1995 when it was substituted for the property in an existing deed of trust with defendant; Lot 8 was conveyed and the new owners gave plaintiff another deed of trust on 8 December 1995; the original deed of trust on Lot 8 (9 November 1994) was canceled; the original owners defaulted on the substitute deed of trust to defendant (12 May 1995); and foreclosure began. Equitable subrogation will not be enforced to displace an intervening right of title; defendant's 12 May deed of trust gained priority when the 9 November deed of trust was canceled.

Appeal by plaintiffs from judgment dated 12 November 1997 by Judge Abraham P. Jones in Alamance County Superior Court. Heard in the Court of Appeals 6 October 1998.

Northern Blue, LLP, by David M. Rooks, III, for plaintiff-appellants.

Daniel S. Bullard, for defendant-appellee.

GREENE, Judge.

First Union National Bank (Bank) appeals from the judgment of the trial court denying the relief requested in its Complaint for Declaratory Judgment.

The evidence before the trial court, which is not in dispute, reveals that on 9 November 1994, W. Lin Cobb and Breta Cobb (the Cobbs) gave a deed of trust to Bank encumbering Lot 8, Fairchild Heights in Alamance County (Lot 8). This deed of trust was recorded at Book 910, Page 426 in the Alamance County registry. On 12 May 1995, a loan modification agreement (Agreement) was executed between the Cobbs and Lindley Laboratories, Inc. (Defendant), which substituted Lot 8 for property listed in a previous deed of trust given by the Cobbs to Defendant. This Agreement was duly recorded at Book 936, Page 56 in the Alamance County registry. On 8 December 1995, the Cobbs conveyed Lot 8 to Wayne A. Tissot and Marilyn J. Tissot (the Tissots), and recorded the deed at Book 971, Page 156 of the Alamance County registry. Also on 8 December 1995, the Tissots gave a deed of trust to Bank encumbering Lot 8. This deed of trust was recorded at Book 971, Page 158 of the Alamance County registry. The 9 November 1994 deed of trust from the Cobbs to Bank was marked satisfied as of 12 December 1995 and was canceled of record. The Cobbs subsequently defaulted on the note secured by the 12 May 1995 deed of trust and Agreement to Defendant and foreclosure proceedings were instituted on this 12 May 1995 deed of trust.

Bank alleged in its declaratory judgment complaint, argued to the trial court, and now argues to this Court that "the lien of the Tissots' deed of trust to [Bank] is equitably subrogated to the lien of the Cobb deed of trust to [Bank] such that the [8 December 1995] Tissot deed of trust is entitled to priority over [Defendant's 12 May 1995] deed of trust." We disagree.

The single issue is whether Bank is entitled to the benefit of equitable subrogation.

Although we recognize the doctrine of equitable subrogation, it simply does not apply in this case. "Subrogation is a consequence which equity attaches to certain conditions. It is not an absolute right, but one which depends on the equities and attending facts and circumstances of each case." 73 Am. Jur. 2d *Subrogation* § 11 (1974). Subrogation will not be enforced to "displace an intervening right of title." *Id.* at § 15.

In this case, when the 9 November 1994 deed of trust to Bank was marked satisfied and canceled, Defendant's 12 May 1995 recorded deed of trust gained priority over any subsequently recorded deeds of trust, including the 8 December 1995 deed of trust to Bank, as a mat-

ter of law. *See Bank v. Bank*, 197 N.C. 68, 72, 147 S.E. 691, 693 (1929) (priority given to mortgage first recorded); N.C.G.S. § 47-18 (1984); N.C.G.S. § 47-20 (Supp. 1997). Because subrogation cannot be used to displace Defendant's "intervening right of title," the trial court correctly denied Bank any declaratory relief. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955), relied on by Bank in its brief to this Court, is not helpful to Bank because Bank cannot claim that it was "excusably ignorant" of the superior rights given to Defendant's recorded 12 May 1995 deed of trust upon cancellation of the 9 November 1994 deed of trust to Bank. *Peek*, 242 N.C. at 15, 86 S.E.2d at 755 (equitable subrogation used to grant relief to party "excusably ignorant" of intervening lien).

Affirmed.

Judges WALKER and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 JANUARY 1999

BLOUNT v. GRADY-WHITE BOATS, INC. No. 98-392	Ind. Comm. (224946)	Affirmed
DENG v. LEE No. 98-240	Wake (96CVS08587)	Affirmed in part, Reversed in part and Remanded
EPLEY v. BECKER No. 98-354	McDowell (96CVS245)	Affirmed
MARTIN v. ENGLISH No. 98-249	Madison (96CVS172)	Affirmed
MAXWELL v. MAXWELL No. 98-252	Cumberland (94CVD3116)	Affirmed
PARKS v. CUNNINGHAM No. 98-547	Greene (97SP32)	Dismissed
QUESENBERRY v. ANSCO & ASSOC. No. 98-457	Ind. Comm. (322638)	Affirmed
SMITH v. N.C. MOTOR SPEEDWAY, INC. No. 98-81	Mecklenburg (97CVS9961)	Affirmed
STATE v. ALEXANDER No. 98-228	Mecklenburg (97CRS10970) (97CRS120944)	No Error
STATE v. BEALE No. 97-1544	New Hanover (96CRS12815) (96CRS12816)	No Error
STATE v. HOPPER No. 98-532	Cabarrus (96CRS4693)	No Error
STATE v. JONES No. 98-241	Wilkes (95CRS526)	No prejudicial error
STATE v. JUDD No. 98-187	Harnett (96CRS10791) (96CRS10792) (96CRS10793)	Affirmed
STATE v. PATTERSON No. 98-520	Mecklenburg (97CRS8325)	No Error
STATE v. PITTS No. 98-255	Wake (96CVS05842)	Affirmed

STATE v. STEWART No. 98-242	Mecklenburg (95CRS66578) (95CRS66579)	No Error
STATE v. WALKER No. 98-522	Rowan (96CRS13552) (96CRS16372)	No Error
US FIDELITY & GUAR. CO. v. YADKIN, INC. No. 96-1506	Guilford (96CVS6783)	Appeal Dismissed

FILED 19 JANUARY 1999

AERO CAD CORP. v. CO-Z DEV. CORP. No. 98-418	Yadkin (97CVS207)	Affirmed
ANDERSON v. N.C. DISTRIB'N CTR. No. 97-1268	New Hanover (96CVS04134)	Reversed and Remanded
BISHOP v. BISHOP No. 98-61	Gaston (93CVD3676)	Affirmed
BROWN v. TEXFI INDUS. No. 98-650	Ind. Comm. (473813)	Affirmed
CHAPLIN v. CARSON No. 98-657	Davie (93CVD168)	Remanded
CORNETT v. CORNETT No. 98-133	Catawba (95CVD874)	Affirmed
DOCKERY v. SEVEN LAKES TRUE VALUE HARDWARE No. 98-808	Ind. Comm. (267188)	Affirmed
GRANT v. GRANT No. 98-487	McDowell (96CVD86)	Dismissed
HOG SLAT, INC. v. BOBCAT FARMS No. 97-847	Sampson (95CVS159)	Affirmed
HUFFMAN v. BROWNING No. 98-36	McDowell (97CVS340)	Affirmed
IN RE FOARD No. 97-1276	Guilford (92SPC1042)	Affirmed
IN RE VICK No. 98-745	Wayne (93J135)	Reversed and Remanded
IN RE WRIGHT No. 98-552	Davidson (96J63)	Affirmed

KRIM v. COASTAL PHYSICIAN GRP., INC. No. 98-96	Durham (96CVS04668)	Affirmed
MATCHEM v. MATCHEM No. 98-390	Mecklenburg (97CVD11479) (97CVD11481) (97CVD11653)	Affirmed
STATE v. BARKLEY No. 98-545	Mecklenburg (96CRS64650) (96CRS10834)	No Error
STATE v. BLOUNT No. 98-66	Bertie (96CRS1975) (96CRS1976)	New Trial
STATE v. BOSTICK No. 98-864	Guilford (97CRS39600)	No Error
STATE v. BRITTAIN No. 98-746	Burke (96CRS7011)	No Error
STATE v. BROWN No. 98-565	Cumberland (97CRS12715)	No Error
STATE v. CAMPBELL No. 98-758	Alamance (97CRS7160)	No Error
STATE v. CARTER No. 97-1570	Onslow (96CRS17988) (96CRS17989) (96CRS17990) (96CRS17991) (96CRS17992) (96CRS17993) (96CRS17994) (96CRS17995)	No Error
STATE v. CHANCE No. 98-132	Cherokee (97CRS249)	No Error
STATE v. FERRARI No. 98-724	Buncombe (97CRS058804)	No Error
STATE v. FLOYD No. 98-651	Mecklenburg (97CRS9838)	Reversed
STATE v. HARRIS No. 98-100	Nash (95CRS6669) (95CRS6670) (95CRS6671) (95CRS6672)	No Error
STATE v. JOHNSON No. 98-862	Guilford (92CRS32478) (92CRS32479)	No Error

STATE v. JOHNSON No. 98-600	New Hanover (96CRS23704)	No Error
STATE v. KIRKLAND No. 98-807	New Hanover (97CRS1684)	No Error
STATE v. LEDBETTER No. 98-46	Guilford (95CRS20001)	New Trial
STATE v. LITTLE No. 98-787	Beaufort (96CRS7407)	No Error
STATE v. MARKOW-SEARS No. 98-628	Wayne (96CRS8680)	No Error
STATE v. McCLAIN No. 98-243	Alexander (97CRS824) (97CRS825) (97CRS826) (97CRS827) (97CRS828) (97CRS1369) (97CRS1370) (97CRS1371) (97CRS1372) (97CRS1373) (97CRS1374) (97CRS1375) (97CRS1376) (97CRS1377) (97CRS1378)	No Error
STATE v. MILLS No. 98-754	Durham (97CRS21004)	No Error
STATE v. PEELE No. 98-843	Beaufort (95CRS7727)	No Error
STATE v. SANDERS No. 98-571	Buncombe (97CRS52808) (97CRS05317)	No Error
STATE v. SPELLER No. 97-1548	Cleveland (95CRS8559)	No Error
STATE v. THOMPSON No. 98-555	Robeson (95CRS291)	No Error
STATE v. TOMPKINS No. 98-786	Beaufort (97CRS1357)	No Error
STATE v. WINSTON No. 98-755	Edgecombe (96CRS11987) (96CRS11988) (96CRS11989)	No Error

STRICKLAND v. BD. OF TRUSTEES FORSYTH TECH. No. 98-338	Forsyth (97CVS1047)	Affirmed
TRADEWINDS MARINA, LLC v. HARDY No. 98-379	Carteret (96CVS1473)	Reversed and Remanded
TREEZA v. CHAPMAN No. 98-426	Wilkes (96CVS2631)	Dismissed

FAULKENBURY v. TEACHERS' AND STATE EMPLOYEES' RET. SYS.

[132 N.C. App. 137 (1999)]

DOROTHY M. FAULKENBURY, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, (IN HIS OFFICIAL CAPACITY); AND STATE OF NORTH CAROLINA, DEFENDANTS

WILLIAM H. WOODARD, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF v. NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND STATE OF NORTH CAROLINA, DEFENDANTS

BONNIE G. PEELE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, (IN HIS OFFICIAL CAPACITY); AND STATE OF NORTH CAROLINA, DEFENDANTS

RALPH R. HAILEY, JR., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, (IN HIS OFFICIAL CAPACITY); AND STATE OF NORTH CAROLINA, DEFENDANTS

No. COA97-1365

(Filed 2 February 1999)

1. Pensions and Retirement— State disability benefits—calculation—mortality factor

The trial court erred as a matter of law in ordering that the additional disability benefits due plaintiffs under *Faulkenbury v. Teachers' and State Employees' Ret. Sys. of North Carolina,* 345 N.C. 683, be calculated according to plaintiffs' expert where the trial court construed the Supreme Court's decision as mandating the use of a mortality factor in computing the actuarial equivalent of additional disability benefits. While plaintiffs argue that they faced the risk of dying while awaiting the underpayments, there is no forfeiture of payments by deceased members and the retirement statutes and the Faulkenbury decision do not mandate use of a mortality factor in computing the actuarial equivalent.

2. Pensions and Retirement— State disability benefits—retroactive payments—interest

The trial court erred by allowing plaintiffs (State and local employees) to collect post-judgment interest on retroactive disability benefits. The State of North Carolina is not required to pay interest on its obligations unless it is required to do so by contract or by statute; here, the General Assembly has not authorized the allowance of post-judgment interest but has provided that all retirement benefits shall include regular interest at 4%.

Appeal by defendants from judgments entered 25 August 1997 and 24 October 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 19 August 1998.

G. Eugene Boyce and Marvin Schiller for plaintiffs-appellees.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Edwin M. Speas, Jr., Special Deputy Attorney General Norma S. Harrell, and Special Deputy Attorney General Alexander McC. Peters, for defendants-appellants.

WALKER, Judge.

This case involves four consolidated cases appealed from two decisions of the trial court on remedial questions following a judgment for the plaintiffs on liability. (Plaintiff Hailey's case was consolidated with the three original actions and certified as a class action on 28 July 1997). On 21 July 1995, the trial court entered judgment for the plaintiffs and concluded they were entitled to receive additional dis-

ability benefits. This judgment was affirmed by our Supreme Court in *Faulkenbury v. Teachers' and State Employees' Ret. Sys. of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997). These cases, certified as class actions, challenged the way disability benefits were calculated under the Teachers' and State Employees' Retirement System of North Carolina and the North Carolina Local Governmental Employees' Retirement System. The Supreme Court noted that members of the class were:

> [A]ll persons who were receiving disability benefits in a lesser amount than they would have received had the law not been changed; persons who retired on service retirement who could have retired on disability retirement at higher rates if the law had not been changed; all living heirs, beneficiaries, or personal representatives of any estate of one who was receiving less as a disability retiree than he would have received if the law had not been changed; and who had not selected a designated survivor beneficiary; and all living heirs, beneficiaries, or personal representatives of the estate of a deceased survivor beneficiary who was receiving benefits pursuant to the election of an option by a deceased disability retiree.

Id. at 698, 483 S.E.2d at 431.

Thus, the plaintiffs include all class members who had been employed for more than five years as of 1 July 1982 and whose retirement and disability benefits were vested under either the Teachers' and State Employees' Retirement System of North Carolina or the North Carolina Local Governmental Employees' Retirement System.

On 1 July 1982, the method of calculating disability benefit payments was changed so that the plaintiffs received less in disability payments than they would have received had they retired for disability prior to that date. All of the plaintiffs became disabled after 1 July 1982 and received benefits which were reduced from what they would have received if there had been no change in the law on 1 July 1982. Plaintiff Woodard died after the commencement of this action and his widow was substituted as a plaintiff.

In its decision, the Supreme Court held that the change in calculation of the plaintiffs' disability benefits by the retirement systems impaired their contractual rights. *Id.* at 694, 483 S.E.2d at 429. According to the decision in *Faulkenbury*, the additional disability

payments owed to the plaintiffs were to be determined by applying N.C. Gen. Stat. § 128-32 and N.C. Gen. Stat. § 135-10 which have virtually identical provisions as follows:

> Should any change or error in the records result in any member or beneficiary receiving from the Retirement System more or less than he would have been entitled to receive had the records been correct, the Board of Trustees shall correct such error, and as far as practicable, shall adjust the payment in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid.

N.C. Gen. Stat. § 128-32 (1995) (local government employees); N.C. Gen. Stat. § 135-10 (1997) (state government employees).

The trial court held in its 21 July 1995 judgment that it "retain[ed] jurisdiction . . . to decide at a second trial, if necessary, the issues of specific amounts of underpayments, interest and actuarial interest due to each class member. . . ."

In addressing this matter, the Supreme Court stated that the relevant statute sections showed it was the intent of the General Assembly that "if there was an underpayment of a pension compensation, it would be paid at the actuarial value." *Faulkenbury*, 345 N.C. at 695, 483 S.E.2d at 430. Regarding the payment of interest on underpayments, the Supreme Court stated that if the state or local governments possessed sovereign immunity, it was waived by N.C. Gen. Stat. § 135-1(2), which defines actuarial equivalent as a "benefit of equal value when computed upon the basis of such mortality tables as shall be adopted by the Board of Trustees, and regular interest." *Id.* at 696, 482 S.E.2d at 430 (*quoting* N.C. Gen. Stat. § 135-1(2) (1995)). Further, the Court noted that N.C. Gen. Stat. § 128-21(2) defines actuarial equivalent as a "benefit of equal value when computed at regular interest upon the basis of such mortality tables as shall be adopted by the Board of Trustees." *Id.* (*quoting* N.C. Gen. Stat. § 128-21(2) (1995)). Also, the Supreme Court held that these sections require regular interest at four percent (4%) to be included in the actuarial value so the plaintiffs are entitled to the actuarial value of underpayments including interest. *Id.*

Thus, pursuant to *Faulkenbury*, the plaintiffs who were presently receiving disability benefits were entitled to pursue claims for underpayments for the three years before these actions were commenced. *Faulkenbury*, 345 N.C. at 695-96, 483 S.E.2d at 429-30. Further, in determining that plaintiffs were entitled to regular interest on the

underpayments, the Court stated the following in addressing the defendants' argument:

> The defendants say that allowing recompense under all these sections gives the plaintiffs double recovery. They say that the payment of underpayments at their actuarial equivalent will fully compensate the plaintiffs and that the plaintiffs should not be paid interest. We disagree.
>
> In allowing interest, the court was following the definition of actuarial equivalent prescribed by N.C.G.S. § 128-21(2) and N.C.G.S. § 135-1(2). There is no double recovery.

Id.

In its decision, the Supreme Court remanded the case to the trial court for a determination of the additional disability benefits due the plaintiffs.

At the hearing in the trial court, the evidence consisted of the deposition testimony of the parties' respective actuarial experts. The plaintiffs offered the deposition testimony of their expert, Robert G. Sanford Jr. (Sanford), along with various exhibits in support of his calculations. The defendants offered the deposition testimony of their expert, Donald M. Overholser (Overholser). In arriving at his conclusion of the additional disability benefits due the plaintiffs, Sanford utilized a calculation of actuarial equivalent which required the inclusion of a mortality factor. The defendants' expert, Overholser, calculated the additional disability benefits without the application of a mortality factor.

On 25 August 1997, the trial court found that Sanford's "calculations and methodology are in accord with the statutory definition of actuarial equivalent and contain the correct calculation and methodology for calculating pension underpayments" due the plaintiffs. The trial court then ordered that the additional disability benefits due the plaintiffs be "calculated by application of the statutory definition of actuarial equivalent" based on a mortality factor as testified to by Sanford. On 24 October 1997, another hearing was held after which the trial court entered an order upholding the plaintiffs' claim for judgment interest and denied the defendants' motion for a stay of the order of 25 August 1997.

On appeal, where the facts are not at issue, a *de novo* standard of review is applied in determining whether an error of law exists. *Ayers v. Bd. of Adjust. for Town of Robersonville,* 113 N.C. App. 528, 530,

439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994); *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 431 S.E.2d 183 (1993). "Any error made in interpreting a statute is an error of law." *Savings & Loan League v. Credit Union Comm.*, 302 N.C. 458, 464, 276 S.E.2d 404, 409 (1981).

[1] On appeal, the defendants contend that the trial court erred as a matter of law in requiring the payment of additional disability benefits based on a mortality factor because it mistakenly interpreted the statutes governing the retirement system and the Supreme Court's decision in *Faulkenbury*. The defendants further contend that the use of a mortality factor is not relevant in the calculation of additional disability benefits owed to the plaintiffs or their survivors as there is no risk of such benefits being forfeited. On the other hand, the plaintiffs contend that both N.C. Gen. Stat. § 128-32 and § 135-10 require that the actuarial equivalent based on a mortality factor be used to calculate the amount of additional disability benefits to be paid as determined by the decision in *Faulkenbury*. Furthermore, the plaintiffs argue that since they faced the risk of dying before having received the additional disability benefits, the use of a mortality factor is relevant in making the calculations.

The plaintiffs' expert, Sanford, testified that he is employed as a consulting actuary with ADP Benefit Services in Richmond, Virginia, where he has 20 years of experience in the design, financing, management, and administration of employee benefit programs. Sanford noted that he had been contacted by the plaintiffs' counsel and informed "that there had been a decision that a group of retirees were entitled to be caught up" and paid "past underpaid retirement benefits." He stated that he was "hired to perform the calculation of the amount needed to make up for those past benefits." In his approach to this case, Sanford stated that he reviewed the statutes applicable to the retirement systems in Chapters 135 and 128 and the Supreme Court's decision in *Faulkenbury*, all of which were furnished to him by the plaintiffs' counsel. He explained why his approach included a mortality factor in his calculations in addition to the regular interest.

On direct examination, he testified:

Q. In your opinion what is missing from a calculation made . . . using only the four percent interest component?

A. This plan's definition defines two components in computing the actuarial equivalent. One is the regular interest and the other is the prescribed mortality tables. . . .

Sanford then gave an explanation of "actuarial equivalent" as follows:

The Actuarial Equivalent of a benefit is the amount of money that a benefit is 'worth' at a given date based on a stated mortality table and interest rate. If the Actuarial Equivalent of a benefit is determined at the beginning of the benefit payout period, it is determined by discounting the future benefit payments for both interest and mortality, i.e. the probability that the person will survive to receive each future benefit [payment]. If the Actuarial Equivalent of a benefit is determined at the end of a payment period, the reverse is true. The 'accumulated' Actuarial Equivalent must accumulate prior benefits with interest over the past time period and also for the inverse of mortality, or the 'benefit of survivorship.'

Further, on direct examination, Sanford was asked to illustrate the actuarial equivalent with a hypothetical where a person's benefit is incorrect at age 50 and corrected at age 55:

Q. If you will, illustrate for us . . . what it is you are talking about when you say actuarial equivalent with reference, say to a person 50 years old and, say, for over a period of five years. Illustrate . . . with reference to that person where the benefit is incorrect at age 50 and is corrected—when that person reaches the age of 55.

A. We are dealing with a single benefit of $1,000 that was payable at age 50. And we are going to accumulate that for mortality and 4 percent interest. The interest accumulation would—just using simple interest on the original amount, would accumulate $40 every year. . . .

The reflection of the mortality component requires that you select—you construct what we call a life table based on these mortality rates. You start with one person in your life table at age 50 . . . let's assume that every year the chance of dying is 1 percent. At age 51, we are down to .99 of a person, .98,.97,. . . .

The actuarial equivalent of the $1,000 is your original $1,000 plus your $200 interest divided by the .95. There is a 5 percent chance of dying over the five year period.

Q. And so the bottom line answer to the equation you have on the bottom there, then, would give you the actuarial equivalent of what that person should have gotten over that five year period.

A. Yes.

On cross-examination, Sanford was questioned further about how he defined the "benefit of survivorship."

Q. And what do you mean by the benefit of survivorship?

A. The benefit of survivorship is this mortality factor we went through here where you—it is basically the probability of having died from the time those payments were made until the present time.

. . .

Q. What is the benefit of survivorship in this instance?

A. . . . [I]t is a calculation that, I believe is called for under the plan, that in addition to the interest component of actuarial equivalent it prescribes that mortality be reflected in the calculation.

Q. Well, why would you reflect the benefit of survivorship if whether the person lives doesn't make any difference?

A. Because the plan definition calls for it.

In referring to his hypothetical of an incorrect benefit being paid to a person at age 50, but corrected at age 55, Sanford testified as follows:

Q. And why is that—can you tell us simply why that is the value of it?

A. The interest component is just a simple accumulation on the $1,000 for five years. The mortality component—it shows here that the probability of dying in that five year period is 5 percent. And that is the survivorship piece that gets added on.

Q. And the significance there is that some people die and do not receive their money?

A. Right. The concept is, you know, a little bit like you are accumulating a retirement fund and everybody is setting aside money, but some people will not live to ever receive anything. And part of the funding for the people who do survive will come from the money that is forfeited by the people that die in the meantime. That is, you know, somewhat of an idea of this benefit of survivorship.

In summary, Sanford testified that his approach of using a mortality factor was based on the usual assumption of a risk that benefits would not be paid to a survivor of a member and thus would be forfeited. While the plaintiffs argue that they faced the risk of dying before having received the additional disability benefits, Sanford stated that he included the benefit of survivorship in his calculations because he understood the plan called for it. He admitted his calculations were based on benefits not being paid to a survivor of a member.

The defendants' expert, Overholser, testified that he is employed at Buck Consultants where he is the principal consulting actuary and works primarily with governmental retirement systems. He serves as director of the public employees' retirement system consulting practice for the firm and is a member of both task forces that worked with the governmental accounting standards board in setting their standards for public pension plans. He is also the chairman of the subcommittee on public retirement systems of the Academy of Actuaries. In addition, he currently serves as the actuary for the statewide retirement systems in South Carolina, Georgia, and Alabama, as well as for the teachers' retirement system in Kentucky, and has served as actuary for the retirement systems in North Carolina since 1985.

Overholser explained that he examined the same information as Sanford, including the *Faulkenbury* decision, relevant statutes, and mortality tables. On direct examination he was asked:

Q. [W]hat is an actuarial equivalent or what is it supposed to be?

A. It is a payment of equivalent value. Mr. Sanford in his testimony gave a definition of actuarial equivalent, which I would say is pretty accurate. It is just converting one stream of payments into another stream of payments so that they are equivalent when taking into account the time value of money and the chance or probability that a person will receive payment or a series of payments.

> In all actuarial calculations that deal with equivalency, three factors are considered: the benefits to be paid, the time value of money factor, and the survivorship factor are always combined and you get a value on that basis. Doing this you can always equate streams of payments. This is kind of what the concept of actuarial equivalent is.

In his capacity as a consulting actuary for this State's retirement systems, he stated that actuarial equivalent factors were regularly used.

> Q. And when would they use them?
>
> A. When members retire, if they elect an optional form of benefit which is the actuarial equivalent of their basic benefit, the factors are used to convert the regular allowance into the optional allowance, into the actuarial equivalent of the optional allowance.
>
> Q. [W]ould that be, for example, if someone retired at age 65 and then instead of taking the maximum benefit he chose to take a smaller benefit so that his wife could have a benefit after his death? Is that when you use this calculation?
>
> . . .
>
> A. The kind you just described is a joint survivor benefit or a survivorship benefit where you leave a benefit to a survivor after your death.

Overholser then testified that he disagreed with the calculations by Sanford. He explained his disagreement in the following manner:

> I disagree with the calculations in the context of the . . . decision of the court in this case.
>
> These factors and this calculation would be appropriate if we were only going to make payments to the members who have survived until the present time. These calculations build in a survivorship factor when there is really no contingency risk or forfeiture of the benefits.
>
> According to the court ruling, not only the people who survive would be entitled to payment, but also the people who have died since they received the payments and before the present time. So there is really no risk of forfeiture; hence there is no sur-

vivorship value involved. Hence the mortality or survivor factor would not be involved in these calculations.

Overholser was further asked to explain how he interpreted the language of the retirement statutes to his determination that a mortality factor is not relevant in the calculation of additional disability benefits here.

> Q. And how would you relate the language in the statutory provision about the mortality tables to your opinion that no calculation for mortality should be included?
>
> A. Well, in calculating actuarial equivalency, you apply a mortality table if it is relevant to the calculation, in particular if there is a benefit of survivorship involved. If there is no benefit of survivorship, you do not introduce the mortality element. . . . Where there is an element of risk of forfeiture involved, . . . you do reflect the mortality. . . .
>
> There is nothing at all contradictory in not using mortality here because it doesn't enter into an actuarial equivalent calculation when there is no element of forfeiture or risk.
>
> Q. Are you aware of any experience or any instance in which mortality tables are used to calculate an actuarial equivalent when the risk of mortality does not prevent payment.
>
> A. I am not.

In summary, Overholser explained that to include a mortality factor in the calculation when there was no risk of losing benefits would be to create "value out of nothing." He stated Sanford's calculations would be correct if you have to survive to get the benefit, and those who do survive would get a "windfall, a benefit of survivorship, because [they] profit from the forfeiture of benefits by the people who have died in the interim." However, Overholser concluded that since the Court had ordered that the additional disability benefits be paid "to people who have died . . . there is no benefit of survivor[ship] from forfeiture."

Therefore, it is apparent from the testimony of Sanford and Overholser that the foundation of the mortality factor used in the calculation of a retroactive benefit is premised on whether that benefit is forfeited by a member who does not survive to the time of payment and whether that payment which is forfeited is paid to those members who have survived from the original group.

Black's Law Dictionary defines mortality tables as, "A means of ascertaining the probable number of years any man or woman of a given age and of ordinary health will live." Black's Law Dictionary, 1009 (6th ed. 1991). "A mortality table should only be used for the purpose it is meant to fulfill." *Vinson & Elkins v. Commissioner*, 99 T.C. 9, 53 (1992), *affirmed*, 7 F. 3d 1235 (1993) (explaining the determination of which mortality table was to be used in determining pre-retirement death benefits versus post-retirement annuities). The key factor in determining when to apply a mortality factor is whether or not survivorship is a risk factor in the calculation of benefits to be paid. As Sanford explained in his testimony, the benefit of survivorship is "the probability of having died from the time those payments were made until the present time" with those payments being forfeited.

Within the retirement statutes a mortality factor is relevant, as Overholser pointed out, when, for example, an employee retires, instead of taking the maximum benefit, he chooses to take a smaller benefit so that his beneficiary can have a larger benefit after the employee's death. In this example, the life expectancy of the employee determines the amount of the benefit because it affects the likelihood that the benefit will continue to a certain point. The use of mortality tables may be ignored if a forfeiture of compensation does not occur at death. William H. Schmidt, *Limitations on Contributions and Benefits*, C529 A.L.I.-A.B.A. 137 (1990) (explaining the use of mortality tables in determining the actuarial equivalence of a defined benefit plan). "[I]t is a well settled rule of statutory construction that, where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded." *Matter of Banks*, 295 N.C. 236, 240, 244 S.E.2d 386, 389 (1978).

The plaintiffs argue they faced the risk of dying while awaiting the underpayments while Sanford's calculations were based on the risk of forfeiting these payments by members who had died. Our retirement statutes do not recognize the risk asserted by the plaintiffs and included in Sanford's calculations. Since there is no forfeiture of payments by deceased members, there are no other risks associated with these underpayments.

We have carefully reviewed all relevant statutes and the decision in *Faulkenbury* including the option elections for retirees and we

find no authority which mandates the calculation of additional disability benefits as contended by the plaintiffs.

The trial court construed the Supreme Court's decision in *Faulkenbury* to mandate the use of a mortality factor in computing the actuarial equivalent of the additional disability benefits. We do not construe our retirement statutes and the decision in *Faulkenbury* to mandate such a construction. The trial court erred as a matter of law in ordering that the additional disability benefits due plaintiffs be calculated according to the plaintiffs' expert.

[2] Next, the defendants contend that the trial court erred in allowing the plaintiffs to collect post-judgment interest on their retroactive benefits. The trial court awarded post-judgment interest at the legal rate of eight percent (8%), as set by N.C. Gen. Stat. § 24-1 (1991), in addition to the regular interest of four percent (4%) required under the retirement statutes.

The plaintiffs contend that they should be granted post-judgment interest pursuant to our Supreme Court's decision in *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). In that decision, the Supreme Court held that when the State enters into a contract, it implicitly agrees to be sued for damages. The Court further held that when the State is sued for damages, it will "occupy the same position as any other litigant." *Id.* at 320, 222 S.E.2d at 424. Therefore, the plaintiffs argue that if the State is to be treated like "any other litigant," that means it should be required to pay post-judgment interest. However, the defendants contend that despite the holding in *Smith*, the State is not required to pay post-judgment interest unless there is statutory authority requiring it to do so.

Our Courts have held that the State is not required to pay interest on its obligations unless it is required to do so by contract or by statute. *Stanley v. Retirement and Health Benefits Division*, 66 N.C. App. 122, 123, 310 S.E.2d 637, 638, disc. review denied, 310 N.C. 626, 315 S.E.2d 692 (1984); *Davidson & Jones, Inc. v. N.C. Dept. of Administration*, 69 N.C. App. 563, 570, 317 S.E.2d 718, 723, *affirmed in part and reversed in part*, 315 N.C. 144, 337 S.E.2d 463 (1985); *Yancey v. Highway Commission*, 222 N.C. 106, 109, 22 S.E.2d 256, 259 (1942). This has been the long established rule in this State. The decision in *Smith* did not change this rule. In *Smith*, the issue of whether to allow post-judgment interest was not before the Court. Instead, that case dealt with the issue of whether a plaintiff could sue the State in a breach of contract action. *Smith*, 289 N.C. at 320, 222

S.E.2d at 424. The decisions by our appellate courts since *Smith* confirm this point. *See Stanley*, 66 N.C. App. at 123, 310 S.E.2d at 638; *See Davidson & Jones, Inc.*, 69 N.C. App. at 570, 317 S.E.2d at 723.

Under our retirement statutes, N.C. Gen. Stat. § 135-1(2) and § 128-21(2), regular interest is to be included in the payment of retroactive retirement benefits. Statutes that allow recovery against the State are to be strictly construed. *Myers v. Dept. of Crime Control*, 67 N.C. App. 553, 555, 313 S.E.2d 276, 277 (1984). In *Myers*, this Court held that the plaintiff was not entitled to post-judgment interest on an award of damages under the State Tort Claims Act. *Id.* This Court, following the reasoning in *Yancey*, stated that post-judgment interest is not collectible against the State without authorization by the General Assembly or unless the State has agreed to do so. *Id.* The Court further noted that interest can be assessed at the legal rate on recovery of workers' compensation benefits because N.C. Gen. Stat. § 97-86.2 provided that such interest was to be awarded. *Id. at* 555-56, 313 S.E.2d at 277. However, N.C. Gen. Stat. § 24-1 *et seq.*, which allows for post-judgment interest, contains no provision for the allowance of such interest to be awarded against the State. The General Assembly has not authorized the allowance of post-judgment interest against the State but has provided that all retirement benefits shall include regular interest of four percent (4%). Therefore, post-judgment interest should not have been awarded against the defendants.

In conclusion, the order of the trial court is reversed and the case is remanded for a determination of additional disability benefits owed to the plaintiffs consistent with this opinion.

Reversed and remanded.

Judges LEWIS and MARTIN, John C., concur.

JAMES R. PITTMAN, EMPLOYEE, PLAINTIFF v. INTERNATIONAL PAPER COMPANY, EMPLOYER, WAUSAU INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA98-341

(Filed 2 February 1999)

1. **Workers' Compensation— functional capacity evaluation— injury arising out of and in course of employment**

There was competent evidence that plaintiff was required to perform a functional capacity evaluation (FCE) before he returned to work and therefore any injury which resulted from the FCE arose out of and in the course of his employment.

2. **Workers' Compensation— deposition—ex parte physician-plaintiff communication—no impropriety**

The second deposition testimony by plaintiff's treating physician did not result from an improper ex parte communication and was properly considered by the Industrial Commission where the ex parte communication occurred between the physician and the plaintiff-patient and was conducted to support plaintiff's motion before the Commission to allow further depositions and the taking of additional evidence.

3. **Workers' Compensation— credibility—reversal of hearing officer—explanation not required**

The Industrial Commission does not have to give an explanation in reversing a Deputy Commissioner on credibility matters.

4. **Workers' Compensation— deposition testimony not disregarded**

The Industrial Commission did not erroneously disregard the first deposition testimony of plaintiff's treating physician where the Commission's findings indicate that it considered both of the physician's depositions, and although the Commission did not explicitly find that it rejected opinions expressed by the physician in his first deposition, its opinion and award clearly demonstrates that it accepted the physician's testimony in his second deposition and thereby rejected the contrary testimony in his first deposition.

Judge GREENE concurring.

Judge LEWIS dissenting.

Appeal by defendants from opinion and award entered 26 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 October 1998.

Gillespie & Higgins, by James B. Gillespie, Jr., for plaintiff appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Gregory M. Willis, for defendant appellants.

HORTON, Judge.

Plaintiff alleged that a job-related injury occurred in March of 1993 and he filed a workers' compensation claim. This claim was denied by both the Deputy Commissioner and the Full Industrial Commission (Commission). Plaintiff then received medical treatment after the alleged March 1993 injury from Dr. James Markworth (Dr. Markworth), who performed surgery on plaintiff. Plaintiff experienced some relief but also continued to suffer from pain in his lower back and occasionally in his left leg.

On 27 July 1993, Dr. Markworth released plaintiff to return to work on 16 August 1993, with no specific instructions to refrain from any particular type of work. He did instruct plaintiff to be careful with body mechanics and lifting. Plaintiff went back to the workplace and reported to the company nurse, Hazel Harris (Ms. Harris). Ms. Harris arranged for plaintiff to be examined by a physician, Dr. John Cromer, Jr. (Dr. Cromer). Dr. Cromer examined plaintiff and recommended a functional capacity evaluation (FCE). Ms. Harris testified that she spoke with defendant-employer's workers' compensation supervisors who stated that plaintiff was not to return to work until he passed the FCE. On 18 August 1993, plaintiff performed the FCE where he was required to lift weights, among other things.

On 23 August 1993, plaintiff returned to work without restrictions, but several days later he complained to Ms. Harris about soreness in his lower back. This increased in severity and he saw Dr. Cromer who put plaintiff on light duty work. Plaintiff also saw Dr. Markworth who prescribed medication and continued plaintiff on light duty work. On 25 August 1993, plaintiff filed a workers' compensation claim alleging an injury from the FCE and defendants denied compensation.

In his first deposition in April of 1996, Dr. Markworth stated that it was his opinion that the activities at the FCE did not significantly

contribute to plaintiff's back problems. In late May of 1996, however, Dr. Markworth wrote plaintiff's attorney and stated that in speaking with plaintiff after the deposition, he gathered new information about plaintiff's symptoms and wished to change his conclusions based on this new information. The time for taking of depositions had expired on 2 June 1996. Plaintiff's counsel received the letter on 12 June 1996 and made a motion for additional time to take another deposition of Dr. Markworth. The Deputy Commissioner denied the motion. In order to make an offer of proof for the Commission and preserve an objection to the denial of the motion, plaintiff's attorney then questioned Dr. Markworth under oath in the presence of a court reporter on 23 July 1996. The court reporter then prepared a transcript of the proceeding. Defendants were neither notified of this proceeding nor represented at it.

The Commission subsequently allowed plaintiff to re-depose Dr. Markworth over the dissent of one Commissioner, who noted that:

> Plaintiff had more than ample opportunity, over seven months, to prepare the information he wanted to present to Dr. Markworth . . . .
>
> By allowing repeated depositions of doctors based upon the rephrasing of long known information, the majority [of the Full Commission] is needlessly prolonging litigation and encouraging attorneys to not be fully prepared for depositions.

Dr. Markworth then stated in his second deposition that the FCE *did* contribute to plaintiff's lower back problems. The Full Commission, again with one Commissioner dissenting, awarded plaintiff workers' compensation benefits.

On appeal defendants contend that: (I) the Commission erred in finding that the FCE arose out of or was in the course of plaintiff's employment; (II) the sworn statement taken from Dr. Markworth after his first deposition was an improper *ex parte* communication; (III) the Commission substituted its judgment for that of the Deputy Commissioner without an explanation for the substitution; and (IV) the Commission failed to consider Dr. Markworth's testimony from his first deposition on 24 April 1996.

I

In order to receive compensation under the North Carolina Workers' Compensation Act, an injury must arise out of and occur in

the course of the employee's employment. N.C. Gen. Stat. § 97-2(6) (Cum. Supp. 1997). "The term 'arising out of' refers to the origin of the injury or the causal connection of the injury to the employment, while the term 'in the course of' refers to the time, place and circumstances under which the injury occurred." *Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 81 N.C. App. 140, 142, 343 S.E.2d 551, 552, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986).

This Court has held that an injury is compensable under workers' compensation if it is " ' "fairly traceable to the employment . . ." or if "any reasonable relationship to employment exists." ' " *White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 723, 303 S.E.2d 547, 549 (citations omitted), *disc. review denied*, 309 N.C. 325, 307 S.E.2d 170 (1983). "Whether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law," and this Court's review is limited to whether the findings and conclusions of the Commission are supported by any competent evidence. *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997).

[1] Defendants argue that the FCE exam did not arise out of and during the course of plaintiff's employment because defendants did not order it and it was conducted upon the recommendation of Dr. Cromer, an independent physician who is not an employee of defendants. We disagree. In this case, there is ample evidence in the record to support the Commission's findings that "defendant-employer required plaintiff to undergo the functional capacity evaluation as an incident to his continuing employment . . . ."

There is evidence in the record which shows that plaintiff was not to be allowed to work until the FCE was completed. Indeed, Ms. Harris's notes state that the FCE would be conducted and agreed to by Dr. Markworth and Dr. Cromer before plaintiff would return to work. There was also evidence in the form of the testimony of Leneve Duncan, the therapist who conducted the FCE, that Ms. Harris asked her to perform the FCE "to see if [plaintiff] could return to work." When there "is an element of actual compulsion emanating from the employer, the work connection is beyond question." 2 Arthur Larson, *Larson's Workers' Compensation Law* § 27.32 (1997). In this case, there is competent evidence that plaintiff was required to perform the FCE before he returned to work and therefore any injury which resulted from it arose out of and during the course of employment.

II

[2] Defendants next argue that the Commission erred in considering the second deposition testimony of Dr. Markworth because improper *ex parte* communications had occurred in obtaining the sworn statement which provided the basis for the second deposition. Specifically, defendants claim that Dr. Markworth changed his opinion in the second deposition because plaintiff and his attorney conducted an "*ex parte* lobbying campaign." We disagree.

This Court has previously held that the Commission erred when it considered deposition testimony of a plaintiff's treating doctor who had previously engaged in an *ex parte* conversation with the defendant's legal counsel. *Salaam v. N.C. Dept. of Transportation*, 122 N.C. App. 83, 88, 468 S.E.2d 536, 539 (1996), *disc. review improvidently allowed*, 345 N.C. 494, 480 S.E.2d 51 (1997). This holding was based on, among other things, considerations of protecting patient privacy, the confidential relationship between physician and patient and the "untenable position in which *ex parte* contacts place the nonparty treating physician . . . ." *Id.* at 87, 468 S.E.2d at 539.

The fact situation in the instant case is distinguishable from that of *Salaam*. Here, the party which conducted an *ex parte* communication with Dr. Markworth was the plaintiff-patient. The safeguards which were implemented in *Salaam* are not necessary in this case because it is plaintiff who conducted the *ex parte* communication with his own treating physician. Therefore, we decline to extend the rule prohibiting *ex parte* communications between a plaintiff's treating physician and the defense counsel to *ex parte* communications between a treating physician and the plaintiff-patient.

Moreover, *Salaam* is further distinguished from the present case because the *ex parte* communication between Dr. Markworth and plaintiff's attorney was specifically conducted to support plaintiff's motion before the Commission to allow further depositions and the taking of additional evidence.

N.C. Gen. Stat. § 97-85 allows the Commission to receive further evidence when reviewing a decision of the Deputy Commissioner, provided "good ground be shown therefor . . . ." N.C. Gen. Stat. § 97-85 (1991). The decision to receive additional evidence is within the sound discretion of the Commission, and will not be reversed on appeal unless the Commission manifestly abuses its discretion. *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992).

Although defendants excepted and assigned error to the action of the Commission in receiving additional evidence, it was not argued in defendants' brief and is not, therefore, before us now. We do agree, however, with the reasoning of the dissenting Commissioner that in exercising its discretion to receive additional evidence, the Commission should consider all the circumstances of the case, including the delay involved in taking additional evidence, and should not encourage a lack of pre-deposition preparation by counsel or witnesses. This record does not show, however, that the Commission manifestly abused its discretion in allowing the additional evidence to be taken.

Accordingly, this assignment of error is overruled.

III

[3] Appellant contends that the Commission erred because it substituted its judgment for that of the Deputy Commissioner without an explanation. We disagree. Our Supreme Court recently held in *Adams v. AVX Corporation*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998), that the Commission does not have to give an explanation in reversing the Deputy Commissioner on credibility matters because "[i]t is the Commission that ultimately determines credibility." Furthermore, in this case, there was no specific reversal by the Commission on the basis of credibility. Accordingly, this assignment of error is overruled.

IV

The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings. *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). The Commission "is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Id.* However, even though the Commission may choose not to believe some evidence, it cannot "wholly disregard or ignore competent evidence" and must at least consider and evaluate all of the evidence before rejecting it. *Id.*

[4] In this case, defendants argue that the Commission disregarded the testimony of Dr. Markworth from his first deposition and thereby committed error. We disagree. In its opinion and award, the Commission indicates that it "reviewed the prior opinion and award based upon the record of the proceedings before Deputy

Commissioner Lawrence Shuping which also include[s] the additional depositions taken of Drs. Markworth and Grubbs." The findings of the Commission also indicate that it considered the various depositions of Dr. Markworth. Although the Commission did not explicitly find that it rejected the opinions expressed by Dr. Markworth in his first deposition, its opinion and award clearly demonstrates that it accepted the testimony given by Dr. Markworth in his second deposition, and thereby rejected the contrary testimony found in Dr. Markworth's first deposition. It is obvious that the Commission considered all the evidence before it and was not required to make an express finding that it did so.

The award of the Full Commission is affirmed.

Judge GREENE concurs with separate opinion.

Judge LEWIS dissents.

Judge GREENE concurring.

I fully concur with the majority opinion, but write separately to clarify the Commission's duty to make findings.

The Commission must make "definitive findings to determine the critical issues raised by the evidence," *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980), and in so doing, must indicate in its findings that it has "consider[ed] and evaluate[d]" the evidence with respect to the critical issues raised in the case, *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680-81, 486 S.E.2d 252, 254 (1997) (remanding where the Commission had made "no definitive findings to indicate that it [had] considered or weighed [a particular expert's] testimony"). "It is not, however, necessary that the . . . Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the . . . Commission." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998) (noting that "negative" findings are not required).

In this case, the Commission indicates that it "reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Lawrence Shuping which also include the additional depositions taken of Drs. Markworth and Grubbs." In addi-

tion, various findings throughout the Opinion and Award of the Commission indicate consideration of Dr. Markworth's opinion. It was not necessary for the Commission to make "negative" findings concerning Dr. Markworth's first deposition. By accepting the testimony in Dr. Markworth's second deposition as true, the Commission adequately demonstrates that it does not accept the contrary testimony given by Dr. Markworth in his first deposition.

Judge LEWIS dissenting.

I respectfully dissent from the majority opinion because I am disturbed by the Full Commission's handling of the depositions of Dr. Markworth. My two concerns are: first, with plaintiff's 1 August 1996 "Proffer of Evidence" and the "Testimony Under Oath of Dr. James W. Markworth" from 23 July 1996 that it contained; and second, with the Full Commission's decision to permit the taking of an additional deposition from Dr. Markworth after a legitimate one had been taken and the time allotted for this method of discovery had expired.

The majority addresses defendants' concerns over improper *ex parte* communications by distinguishing this case from *Salaam*, noting that the communication here was between the patient and his doctor. I agree that this Court should not attempt to prevent a patient from discussing his ongoing treatment with his doctor, and I would not disapprove if that were the only communication at issue. However, when the doctor wants to reduce these communications to statements used for testimony in court by presenting them to an attorney in a deposition format, Rule 605(d) of the Workers' Compensation Rules of the North Carolina Industrial Commission and Rule 30(b)(1) of the North Carolina Rules of Civil Procedure require that notice be given to the opposing party. No such notice was given here, and that made the "Examination Under Oath" an improper *ex parte* communication.

Plaintiff may have called the 23 July proceeding a mere "Examination Under Oath," using a phrase that appears nowhere in the text of North Carolina's Rules of Civil Procedure, Rules of Evidence, or Workers' Compensation Act, but it had every substantive appearance of being a deposition. Dr. Markworth answered questions posed by plaintiff's attorney out of court, and the session was taken down and transcribed by a court reporter who notarized the document. The lack of notice to or presence of the opposing party prevented this from being a deposition in form as well as substance. The

one-sided nature of the proceeding, which involved only plaintiff's attorney and doctor and of which the opposing party had no notice, made it an improper *ex parte* communication.

The majority, citing G.S. § 97-85 and *Keel*, states that this testimony could be taken in the Full Commission's discretion, and that the decision to do so will not be reversed on appeal absent a showing of manifest abuse of discretion by the Commission. The facts of this case present just such an abuse of discretion. While the decision to allow the taking of testimony may have otherwise been within the Commission's discretion, the manner in which the testimony used to support plaintiff's motion was actually taken violated the plain language of the Commission's own Rule 605(d) requiring notice to the opposing party. The inherent contradiction in such a decision is nothing short of a manifest abuse of discretion.

Commissioner Sellers, in her dissent to the Full Commission's 19 May 1997 order permitting the taking of another deposition from Dr. Markworth, stated that in addition to the procedural problems noted above, "[p]laintiff had more than ample opportunity, over seven months, to prepare the information he wanted to present to Dr. Markworth," whom he then sought to re-depose. This was not newly discovered evidence, but a witness's desire to make a complete change in testimony after the time for depositions to be taken had expired. As Commissioner Sellers stated, "[b]y allowing repeated depositions of doctors based upon the rephrasing of long known information, the majority [of the Full Commission] is needlessly prolonging litigation and encouraging attorneys to not be fully prepared for depositions." Like Commissioner Sellers, I would not treat a clear deadline in such a flexible manner, as it gives the appearance of exceptional efforts to reverse a result.

Defendants filed an exception to the 19 May order and, in the record on appeal, assigned error on this point. It was, however, not argued in defendants' brief and could technically be deemed abandoned under Rule 28(b)(5) of the Rules of Appellate Procedure. In light of the egregious nature of the Industrial Commission's decisions regarding Dr. Markworth's repeated depositions, I would utilize Rule 2 of the Rules of Appellate Procedure "[t]o prevent manifest injustice to" defendants and consider this claim. Because I remain concerned by the use of what amounted to an improper deposition to continue the chance to take yet another deposition after the time for doing so had expired, and because I do not wish our holding in this case to encourage similar limitless elasticity in the future, I would vacate the

decision of the Full Commission and remand the case for an analysis of only that evidence which met the deadlines clearly in place.

DELTA ENVIRONMENTAL CONSULTANTS OF NORTH CAROLINA, INC., PLAINTIFF-APPELLEE, CROSS-APPELLANT v. WYSONG & MILES COMPANY, DEFENDANT-APPELLANT, CROSS-APPELLEE

No. COA98-214

(Filed 2 February 1999)

1. Unjust Enrichment— overbilling of contract—cause of action in contract

The trial court erred by permitting an unjust enrichment counterclaim in an action arising from environmental consulting contracts where plaintiff-consultant contended that it had not received full payment and defendant counterclaimed for unjust enrichment, contending that plaintiff had been paid for work not performed. The contracts govern the relationship between the parties and an action for breach of contract rather than unjust enrichment is the proper cause of action.

2. Pleadings— amendments—undue delay—denied

The trial court did not abuse its discretion in an action arising from environmental consulting services by denying defendant's motion to amend its previously amended pleadings to include a claim for unfair or deceptive acts or practices. The trial judge denied the motion because it came "rather late in the case," which is interpreted as the trial court's determination that the timing of the motion was a result of undue delay.

3. Costs— court's discretion—not reviewable

The trial court's decision not to tax plaintiff with full costs in an action arising from an environmental services consulting contract was not reviewable by the Court of Appeals where the costs assessed were governed by N.C.G.S. § 6-20. Costs not allowed as a matter of course under N.C.G.S. § 6-18 and § 6-19 may be allowed in the court's discretion under N.C.G.S. § 6-20.

4. Attorneys— fees—contract clause

The trial court did not err in an action arising from contracts for environmental consulting services by not taxing attorneys' fees against plaintiff. Contractual provisions for attorney fees are invalid in the absence of statutory authority as a general rule; this case does not qualify as an exception.

5. Contracts— professional services—evidence of standard of care—common knowledge exception—not applicable

The trial court did not err in an action arising from contracts for environmental services by granting plaintiff's motion for a directed verdict on defendant's counterclaim for breach of contract where the court declared that defendant's failure to offer expert testimony made its evidence insufficient to prove the standard of care owed by plaintiff as a matter of law. Although defendant contended that it did not need to introduce expert testimony under the "common knowledge" exception, this case involved the standard of care utilized by professional engineers for environmental cleanup and the Court of Appeals' review of volumes of transcripts and exhibits led to the conclusion that expert testimony was required to explain and prove the standard of care.

6. Contracts— language—plain and unambiguous meaning

The trial court did not err in an action arising from contracts for environmental services in granting a directed verdict on defendant's breach of contract counterclaim where defendant contended that plaintiff had been obliged to fully delineate the extent of environmental contamination, but the language of the contract stated that the scope of work was to better delineate the scope of pollution. The trial court interpreted the contract by its plain, unambiguous meaning.

7. Statute of Limitations— environmental consulting services—continuing course of treatment doctrine—not applicable

The trial court did not err by granting a directed verdict on negligence counterclaims in an action arising from contracts for environmental consulting services based upon the four-year statute of repose in N.C.G.S. § 1-15(c). Although defendant-Wysong argued that the continuing course of treatment doctrine pushed back the start of the four-year time limit, the continuing

course of treatment doctrine has been adopted with regard to medical malpractice and the Court of Appeals declined to expand the doctrine's breadth to encompass negligence arising from the provision of professional engineering services between sophisticated corporate parties.

8. Statute of Limitations— environmental consulting services—acts giving rise to causes of action

The trial court did not err by granting plaintiff's motion for a directed verdict under N.C.G.S. § 1-15(c) on negligence counterclaims arising from environmental consulting contracts where, according to defendant-Wysong's expert witness, no action after a spill was a departure from the standard of care, so that any acts giving rise to the causes of action occurred before the spill, the spill was discovered on 15 July 1991, and Wysong's counterclaim was not filed until 27 September 1995. The dismissed counterclaims were not preserved within four years from the last act of the defendant giving rise to the cause of action.

9. Contracts— action for breach—jury's verdict—not contrary to evidence

The trial court properly denied plaintiff-Delta's motions for a directed verdict, judgment nov, and a new trial in an action for monies due under a contract for environmental consulting services where Delta's assignment of error was based on the contention that the jury's verdict was contrary to law and the greater weight of the evidence. While plaintiff-Delta's evidence included bills for services rendered and not paid, defendant-Wysong presented evidence that Delta's billing methods were unreliable and inaccurate and the verdict simply reflected the jury's scepticism as to the reliability or credibility of Delta's evidence or witnesses.

10. Contract— action for breach—nominal damages—instructions

A breach of contract action for monies due under environmental consulting contracts was remanded with an instruction that the trial court enter judgment awarding at least nominal damages where the jury concluded that defendant had breached its promise to pay for services rendered but awarded no damages. Violation of a legal right entitles a party to at least nominal damages; however, in this case, the jury instructions did not include an instruction that a finding in favor of the plaintiff on the first issue required an award of at least nominal damages.

Appeal by defendant and cross appeal by plaintiff from judgment entered 4 April 1997 by Judge Charles C. Lamm, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 November 1998.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by Kiran H. Mehta and Stanford D. Baird, and Ruff, Bond, Cobb, Wade & Bethune, L.L.P., by Hamlin L. Wade, for plaintiff-appellee.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Amiel J. Rossabi and David S. Pokela, for defendant-appellant.

SMITH, Judge.

In the late 1980's, extreme environmental contamination and pollution of soil and groundwater occurred at the manufacturing facility of Wysong & Miles Company (Wysong) in Greensboro, North Carolina. Wysong sought an environmental consultant to help it deal with the pollution and contamination. Wysong hired Delta Environmental Consultants of North Carolina, Inc. (Delta), a Charlotte-based subsidiary of a national environmental consulting and engineering firm, to assist Wysong in formulating and implementing a cleanup plan. In March or April 1988, Delta and Wysong entered a service contract for environmental services (first contract). On 24 February 1994, Delta and Wysong entered a second contract, which remained effective until Wysong terminated the Contract in April 1995. Over the course of their seven-year relationship, Delta performed tasks and billed Wysong on a time, fees, and materials basis. From October 1994 to April 1995, Wysong failed to pay Delta for the invoices it submitted each month. Despite being delinquent in payment, Wysong continued to ask Delta to perform work and in January 1995, assured Delta that it would bring its account current. In April 1995, Delta brought suit to collect $29,370.58. On 18 January 1996, Wysong amended its answer and counterclaimed against Delta. Wysong counterclaimed alleging unjust enrichment because Delta had received payment for work that had not actually been performed. Wysong's counterclaim also alleged negligence in that Delta failed to perform its remedial work to the level of skill ordinarily exercised by members of its profession. Wysong's motion to amend its answer and counterclaim to include allegations of unfair or deceptive acts or practices in commerce in violation of N.C. Gen. Stat. § 75-1.1 was denied.

The matter was heard before a duly impaneled jury on 11 February 1997. The jury returned the following verdicts:

PLAINTIFF, DELTA, CLAIM:

1. Does the Defendant, Wysong, owe the Plaintiff, Delta money on account? YES

2. What amount if any does the Defendant, Wysong, owe the Plaintiff, Delta, on account? NONE

DEFENDANT, WYSONG, COUNTERCLAIMS:

I.

1. Was the Plaintiff, Delta, unjustly enriched by receiving payments from the Defendant, Wysong, for work that was not performed or costs that were not incurred in relation to work performed? YES

2. What amount, if any, should the Defendant, Wysong, recover of the Plaintiff, Delta, based upon unjust enrichment? $225,000

II.

1. Was the Defendant, Wysong, damaged by the negligence of the Plaintiff, Delta? Yes

2. What amount of damages has the Defendant, Wysong, sustained as a proximate result of any negligence? $9,000

Judge Lamm's order and judgment was filed on 8 April 1997. On 14 April 1997, Judge Marvin K. Gray entered an order denying Delta's motion for partial summary judgment and Wysong's motion for summary judgment. Judge Gray's order denied Wysong's motion to amend its previously amended answer and counterclaim and declared all other motions moot. On 24 July 1997, Judge Lamm filed an order that denied Delta's motions for judgment notwithstanding the verdict and for new trial. This order also denied Wysong's motion to amend/alter the judgment but granted Wysong's motion for a conditional new trial on the issue of damages in its unjust enrichment claim. Defendant and plaintiff appeal.

Wysong filed its notice of appeal on 8 August 1997, and Delta filed its notice of appeal on 15 August 1997. Wysong appeals from the 14 April 1997 order of Judge Gray denying their motion to amend, oral orders by Judge Lamm of 3 February 1997 allowing Delta's motion for

directed verdict on several of Wysong's negligence claims and dismissing Wysong's claim for breach of contract, the order and judgment of 8 April 1997 taxing only a small portion of costs against Delta, and the order of 24 July 1997 granting a partial new trial on the issue of damages for Wysong's unjust enrichment claim. Delta appeals from oral orders denying their motion for directed verdict and judgment notwithstanding the verdict on Wysong's unjust enrichment claim. For similar reasons they appeal from the order and judgment of 8 April 1997, and they also appeal from the order of 24 July 1997 denying Delta's motion for a new trial on Delta's payment on account action.

[1] Wysong first seeks reinstatement of the verdict granting Wysong damages for its unjust enrichment claim against Delta arguing that the trial court erred by setting aside the jury award. We disagree. It is well established that "[i]f there is a contract between the parties[,] the contract governs the claim[,] and the law will not imply a contract." *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). Here, the first and second contracts govern the relationship between the parties with regard to payment and services rendered. Thus, an action for breach of contract, rather than unjust enrichment, is the proper cause of action. Accordingly, we reverse the trial court's decision to permit Wysong's unjust enrichment claim. Consequently, the trial court's grant of a conditional new trial on the issue of damages for unjust enrichment is reversed.

[2] Wysong next argues that the trial court erred when it denied Wysong's motion to amend its previously amended pleadings to include a claim for unfair or deceptive acts or practices in commerce. Motions to amend are governed by N.C. Gen. Stat. § 1A-1, Rule 15 (1990). Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced. *See Members Interior Construction v. Leader Construction Co. Inc.*, 124 N.C. App. 121, 476 S.E.2d 399 (1996), *disc. review denied*, 345 N.C. 754, 485 S.E.2d 56 (1997). Despite cases cited by Wysong, our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. *See Isenhour v. Universal Underwriters*, 345 N.C. 151, 478 S.E.2d 197 (1996). Denying a motion to amend without any justifying reason appearing for the denial is an abuse of discretion. *See Coffey v. Coffey*, 94 N.C. App. 717, 381 S.E.2d 467, *disc. review allowed*, 325 N.C. 705, 388 S.E.2d 450 (1989), *disc. review improvidently granted*, 326 N.C. 586, 391 S.E.2d 40 (1990).

However, proper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. *See News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). Other reasons that would justify a denial are bad faith, futility of amendment, and repeated failure to cure defects by previous amendments. *See Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 391 S.E.2d 211, *plaintiff's disc. review allowed*, 327 N.C. 426, 395 S.E.2d 674, *defendant's disc. review denied*, 327 N.C. 426, 395 S.E.2d 675, *reconsideration of defendant's motion for disc. review denied*, 327 N.C. 632, 397 S.E.2d 76 (1990), *withdrawn*, 328 N.C. 329, 402 S.E.2d 826 (1991). When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling. *See Coffey*, 94 N.C. App. 717, 381 S.E.2d 467. In the instant case, the trial judge denied the motion because it came "rather late in the case." We interpret this as the trial court's determination that the timing of the motion was the result of undue delay. Wysong claims that the trial court's ruling is an abuse of discretion. We disagree. Wysong correctly cites *Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 97 N.C. App. 511, 389 S.E.2d 576, *disc. review denied*, 326 N.C. 801, 393 S.E.2d 898 (1990), for the proposition that in showing prejudice (by undue delay, bad faith, etc.), the burden is on the party opposing the motion to amend. However, in *Mosley*, the plaintiff's amendment adding a claim for unfair or deceptive acts or practices in commerce was allowed by the trial court. There, this Court recognized that the defendant had not met its burden in convincing *the trial court of the existence of prejudice*. Here, however, the trial court was convinced by Delta's argument and denied Wysong's motion to amend. Because Wysong has failed to show an abuse of discretion, we find no error in the trial court's denial of their second motion to amend.

[3] Wysong next assigns error to the trial court's failure to tax Delta with the full costs. Taxing of costs is governed by Article 6 of the North Carolina General Statutes. N.C. Gen. Stat. §§ 6-18 and 6-19 (1986) detail certain actions where costs are allowed as a matter of course. Costs not allowed as a matter of course under sections 6-18 and 6-19 may be allowed in the court's discretion under N.C. Gen. Stat. § 6-20 (1986). The court's discretion under section 6-20 *is not reviewable on appeal. See Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 468 S.E.2d 513, *disc. review denied*, 344 N.C. 438, 476 S.E.2d 119 (1996) (*citing Chriscoe v. Chriscoe*, 268 N.C. 554, 151 S.E.2d 33 (1966)) (emphasis added). In the instant case, Wysong's

action does not fall within the purview of sections 6-18 and 6-19. Therefore, the costs assessed by the trial judge are governed by section 6-20 and are not reviewable by this Court.

[4] Wysong also argues that the trial court erred by not taxing Wysong's attorneys' fees against Delta. We disagree. "As a general rule[,] contractual provisions for attorney's fees are invalid in the absence of statutory authority. This is a principle that has long been settled in North Carolina and fully reviewed by our Supreme Court . . . ." *Forsyth Municipal ABC Board v. Folds*, 117 N.C. App. 232, 238, 450 S.E.2d 498, 502 (1994) *(citing Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 266 S.E.2d 812 (1980)). "[T]he general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). Wysong argues that public policy can support exceptions to the general rule and that the trial court erred by failing to tax Wysong's attorneys' fees against Delta. For this proposition, Wysong cites *Gram v. Davis*, 128 N.C. App. 484, 495 S.E.2d 384 (1998) (allowing a legal malpractice plaintiff to recover as damages, attorney's fees for the cost of correcting the defendant attorney's negligence). While exceptions to the general rule exist, we disagree with Wysong's contention that their case merits qualification as an exception. Our Supreme Court has stated that the general rule invalidating attorney's fees clauses not authorized by statute was derived from certain public policy considerations surrounding promissory notes, deeds of trust, guaranties on promissory notes, and commercial construction contracts. *See Bromhal v. Stott*, 341 N.C. 702, 706, 462 S.E.2d 219, 222, *reh'g denied*, 342 N.C. 418, 465 S.E.2d 536 (1995). According to the *Bromhal* Court, a separation agreement differs from a commercial, arms-length transaction. *Id.* Furthermore, "[t]he public policy rationale for frowning upon contractual provisions for the recovery of attorney's fees in the commercial and debtor-creditor context simply does not apply to separation agreements." *Id.* at 707, 462 S.E.2d at 222 (recognizing contractual provisions for the recovery of attorney's fees in separation agreements as an exception to the general rule). Despite the fact that the clause in question was part of a contract for professional services, this contract was entered into at arms length. Both parties were sophisticated, and although Delta's knowledge of environmental cleanup was superior to Wysong's, Wysong was nonetheless outside Delta's realm of influence. Therefore, based on our

Supreme Court's decision in *Bromhal*, the instant case does not qualify as an exception to the general rule. Accordingly, we find no error in the trial court's taxing of costs.

[5] Wysong's fourth argument is that the trial court erred when it granted Delta's motion for a directed verdict on Wysong's claim for breach of contract. In reviewing a directed verdict, this Court must determine whether the evidence taken in the light most favorable to the non-moving party is sufficient as a matter of law to be submitted to the jury. *See Davis v. Dennis Lilly Co.*, 330 N.C. 314, 411 S.E.2d 133 (1991). More specifically, Wysong argues the trial court erred by declaring that Wysong's failure to offer expert testimony made its evidence insufficient to prove the standard of care owed by Delta as a matter of law. Wysong argues that under the "common knowledge" exception, it did not need to introduce expert testimony to prove that Delta failed to use the level of care and skill ordinarily exercised by members of its profession. This Court has stated that where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care, expert testimony is not needed. *See Little v. Matthewson*, 114 N.C. App. 562, 442 S.E.2d 567, *aff'd*, 340 N.C. 102, 455 S.E.2d 160 (1995). However, the application of the "common knowledge" exception has been reserved for those situations where professional conduct is so grossly negligent that a layperson's knowledge and experience make obvious the shortcomings of the professional. *See Little*, 114 N.C. App. 562, 442 S.E.2d 567 (*citing Buckner v. Wheeldon*, 225 N.C. 62, 33 S.E.2d 480 (1945), where infection arose from a compound fracture that protruded through an open wound and was not cleansed or sterilized before the bone was set and placed in a cast). In the case *sub judice*, the standard of care utilized by professional engineers for environmental cleanup was at issue. Our review of volumes of transcripts and exhibits leads us to conclude that this case certainly required expert testimony to explain and prove the standard of care required of Delta. Because Wysong offered no evidence to prove the standard of care, we find no error in the decision of the trial court.

[6] Wysong also argues that the trial court interpreted the contract in a manner contrary to law. Wysong claims that under the 1988 contract, Delta was obliged to fully delineate the extent of environmental contamination. The language of the contract undercuts this assertion. The contract states, "The proposed scope of work for the second phase is designed to . . . *better* delineate the extent of the contaminant plumes from the identified sources," (emphasis added). The trial

court interpreted the contract by its plain, unambiguous meaning. Delta's responsibility was not to fully define the area of contamination. Rather, Delta only agreed to "better delineate" the scope of pollution. Because the trial court properly interpreted the contracts and because this case is not appropriate for the "common knowledge" exception, we find no error in the trial court's decision to grant Delta's motion for directed verdict on Wysong's breach of contract claim.

[7] Wysong's final argument is that the trial court erred when it entered a directed verdict as to several of Wysong's negligence counterclaims. In reviewing the trial court's decision on a motion for directed verdict, we must determine whether the evidence taken in the light most favorable to the non-moving party is sufficient as a matter of law to be submitted to the jury. *See Davis*, 330 N.C. 314, 411 S.E.2d 133. Here, the trial court granted Delta's motion for a directed verdict based upon the four-year statute of repose in N.C. Gen. Stat. § 1-15(c) (1996). Section 1-15(c) provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: . . . Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

Id. The statute of repose created by section 1-15(c), begins to run on the date of the "last act of the defendant giving rise to the cause of action." *See Sharp v. Teague*, 113 N.C. App. 589, 439 S.E.2d 792, *disc. review granted*, 336 N.C. 317, 445 S.E.2d 397 (1994) *disc. review improvidently granted*, 339 N.C. 730, 456 S.E.2d 771 (1995). Wysong argues that the continuing course of treatment doctrine pushes back the start of the four-year time limit to the last date of remedial work performed by Delta. We disagree. Our Supreme Court has adopted the "continuing course of treatment doctrine" with regard to malpractice by hospitals and other health care providers. *See Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996). In *Horton*, our Supreme Court stated

> [T]he doctrine tolls the running of the statute for the period between the original negligent act and the ensuing discovery and

> correction of its consequences; *the claim still accrues at the time of the original negligent act or omission.*
>
> To benefit from this doctrine, a plaintiff must show both a continuous relationship with a physician and subsequent treatment from that physician. The subsequent treatment must consist of an affirmative act or an omission related to the original act, omission, or failure *which gave rise to the claim.*
>
> We now affirm that the continuing course of treatment doctrine, *only as set forth above*, is the law in this jurisdiction.

Id. at 137, 472 S.E.2d at 781 (emphasis added). We note that the "continuing course of treatment doctrine" is not part of N.C. Gen. Stat. § 1-15(c) (1996); rather, it is a construct of our courts. Therefore, in light of the holding in *Horton*, which narrowly defines the "continuing course of treatment doctrine," we elect not to expand the doctrine's breadth to encompass the negligence arising from the providing of professional engineering services between sophisticated corporate parties.

[8] Thus, we must determine whether the action is timely under section 1-15(c), more specifically, whether the action was commenced within "four years from the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (1996). Wysong presented expert testimony in support of their negligence counterclaim. During cross-examination, Wysong's expert testified as follows:

> Q. Are you saying that what Delta did wrong was in connection with the design of the system?
>
> A. Wasn't necessarily the design of the system, it was the way the system was operated.
>
> Q. Which is a consequence of the design of the system, is that right?
>
> A. Design and/or installation.
>
> Q. And, the design and/or installation of the system was complete as of the time of the spill, is that right?
>
> A. That is correct.

Q. Whatever it is that Delta did which was a departure from the standard of care, it did some time before the spill actually occurred, is that correct?

A. That is correct.

According to Wysong's expert witness, no action after the spill was a departure from the standard of care. Therefore, any acts giving rise to the causes of action dismissed by the trial court occurred before the spill. Because the spill was discovered on 15 July 1991 and Wysong's counterclaim was not filed until 27 September 1995, the dismissed counterclaims were not preserved within the statutory period prescribed by section 1-15(c). Accordingly, Delta's motion for directed verdict was properly granted.

[9] We now turn to Delta's appeal. As we have held that the contracts between Delta and Wysong bar Wysong's unjust enrichment claim, we need not address Delta's first three assignments of error. In its remaining assignment of error, Delta contends that the trial court improperly denied its motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Delta bases its assignment of error on the contention that the jury's verdict is contrary to law and the greater weight of the evidence. We disagree. Generally, the trier of fact, in this case the jury, must resolve issues of credibility and determine the relative strength of competing evidence. *See Upchurch v. Upchurch*, 128 N.C. App. 461, 495 S.E.2d 738, *disc. review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998). Here, the trial court submitted two issues to the jury regarding Delta's claim for payment on account. Judge Lamm appropriately instructed the jury that Delta bore the burden of proof for each element. Accordingly, Delta must demonstrate by the greater weight of the evidence 1) the fact that Wysong owed Delta money on account and 2) the amount of money owed by Wysong. While Delta's evidence included bills for services rendered and not paid, Wysong presented evidence that Delta's billing methods were unreliable and inaccurate. Thus, the jury's verdict is not necessarily contrary to law. It may simply reflect the jury's scepticism as to the reliability or credibility of Delta's evidence or witnesses. Therefore, the trial court properly denied Delta's motions.

[10] However, "[o]ur Supreme Court has recognized that proof of an injury to a party's legal rights entitles that party to nominal damages at least." *Cole v. Sorie*, 41 N.C. App. 485, 489, 255 S.E.2d 271, 274, *disc. review denied*, 298 N.C. 294, 259 S.E.2d 911 (1979). "The princi-

ple that the violation of a legal right entitles a party to at least nominal damages has been applied to establish that '[i]n a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least.' " *Cole v. Sorie*, 41 N.C. App. at 490, 255 S.E.2d at 274 (*quoting Bowen v. Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1936)). In the instant case, the jury concluded that Wysong breached its promise to pay for services rendered. Therefore, Delta was entitled to recover at least nominal damages. As the jury instructions did not include an instruction that a finding in favor of the plaintiff on the first issue required an award of at least nominal damages, such as one dollar, we remand this case to the trial court and instruct it to enter judgment awarding at least nominal damages.

In summary, the existence of valid contracts precludes Wysong's action for unjust enrichment. The trial court's determination that Wysong's motion to amend came "rather late" in the case leads us to conclude that the motion was properly denied. Furthermore, as the instant case is not an exception to the general rule against enforcing contractual attorney's fees clauses absent statutory authorization, we find no error in the trial court's award of costs. The trial court properly interpreted the contracts between the parties, and because the instant case is not appropriate for the "common knowledge" exception, Delta's motion for directed verdict was properly granted. In addition, we choose not to expand the "continuing course of treatment doctrine" to the providing of professional engineering services. Thus, Wysong's negligence claims were properly dismissed. Finally, because the jury determines matters of weight and credibility afforded evidence and Wysong offered evidence that Delta's billing methods were inaccurate, we find that the jury's verdict is not contrary to the law as claimed by Delta. Therefore, we reverse in part and affirm in part and remand this case to the trial court for entry of judgment consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. DOCK CLAYTON BRITT, DEFENDANT

No. COA97-1551

(Filed 2 February 1999)

1. **Arson— indictment for arson—improper conviction for burning uninhabited house**

The crime of burning an uninhabited house, N.C.G.S. § 14-62, is not a lesser-included offense of the crime of arson. Therefore, a defendant indicted for arson could not properly be convicted of burning an uninhabited house.

2. **Homicide— first-degree murder—instruction on second-degree not required**

The evidence in this first-degree murder prosecution showed that defendant acted with premeditation and deliberation so that defendant was not entitled to an instruction on the lesser-included offense of second-degree murder where defendant relied on an alibi defense, and eyewitnesses testified that defendant walked calmly and deliberately into the victim's mobile home with a rifle in one hand and a plastic jug filled with liquid in the other; the victim was heard to cry, "No, don't," followed by a loud thud; seconds later, defendant calmly walked away with the rifle in his hand and, as the mobile home became engulfed in a fire accelerated by a liquid fuel, turned back to have a look before he went on his way; and the victim died from chest and head wounds inflicted with a hammer and a knife.

3. **Criminal Law— ruling on evidence—statements "self-serving"—not expression of opinion**

The trial court did not impermissibly express an opinion on the evidence when it explained that it was sustaining the State's objections to hearsay statements made by defendant because they were "self-serving."

Appeal by defendant from judgments entered 4 April 1997 by Judge E. Lynn Johnson in Bladen County Superior Court. Heard in the Court of Appeals 5 October 1998.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine Crawley Fodor, for defendant.

LEWIS, Judge.

Defendant was indicted for arson but was prosecuted for, and convicted of, burning an uninhabited house in violation of N.C. Gen. Stat. § 14-62 (1993). He was also convicted of first-degree murder.

The State's evidence, except where otherwise noted, showed the following. In February 1996, defendant and his wife, Willena, were living in Clarkton. They had separate jobs. Willena worked from 7:00 a.m. to 3:30 p.m., and defendant worked from 11:00 p.m. to 7:30 a.m. The couple was having marital problems which dated to at least 1995. In October 1995, Willena had told defendant she thought they needed to separate, but they did not.

On 18 February 1996, a Sunday, Willena placed a telephone call from her home to the Nakima home of her mother, Florence, and her stepfather, Henry Waymon Gore. Waymon was in the process of remodeling a mobile home just over two miles from where Willena and defendant lived. Willena asked if she could rent the mobile home once it was finished, and Waymon agreed.

Willena did not tell defendant that she planned to move out. Just a day or two later, however, defendant asked her whether she thought she was going to like her new home. Willena was surprised by defendant's remark. When she was interviewed by an SBI agent later that week, Willena stated that defendant had told her that if anyone tried to interfere with their marriage, "[t]hey would pay."

On Wednesday, 21 February 1996, around 11:30 p.m., Willena called Waymon and again asked him about the mobile home. Waymon said he would have it ready for her by the first of the month. During the telephone conversation, Florence told Willena that both she and her husband would be working at the mobile home the next day.

When defendant went to work that night, he was dressed, as was his custom, in blue jeans, a blue Wrangler shirt, a camouflage jacket, and a black baseball cap. He had no fresh scratches on his neck when he went to work.

Willena went to work before 7:00 a.m. on Thursday, 22 February 1996, the day of the murder. Waymon drove from his house to the mobile home around the same time.

Defendant got off work at 7:30 a.m. A little before 9:00 a.m., defendant testified, he stopped by the mobile home where Waymon was working and talked with him a few minutes about a hunting trip. Florence was not there. Defendant later told investigators he had not stopped by the mobile home and spoken to Waymon that day; when he testified at trial, he said that he lied during the previous conversation.

Florence left for the mobile home between 8:00 and 8:30 a.m. and arrived there between 9:00 and 9:30 a.m, parking the car at the end of the mobile home closest to the street. She went in and helped Waymon with some work. She eventually returned to the car to take a break. She sat in the passenger seat with the door ajar.

About fifteen minutes passed. Florence noticed defendant walking towards the mobile home from a nearby railroad track. He had a gun in his left hand and a plastic jug filled with liquid in his right hand. The gun had a silver barrel with a black stock. Defendant was wearing blue jeans, a "green army jacket," and a black cap.

Around the same time, a neighbor, Kelly McQuage, was hanging clothes in her yard when she saw a man walk to Waymon's mobile home from the railroad tracks. The man was wearing "work clothes," including a blue or dark green shirt and a dark baseball cap. According to McQuage, he was holding a rifle or shotgun in his left hand. When he reached the corner of the mobile home, he bent down and picked something up or put something down. He then walked around the mobile home and out of McQuage's line of sight.

From the passenger seat, Florence saw defendant pass directly in front of her car and enter the mobile home, carrying the gun and the jug. The two did not make eye contact; the right side of defendant's body was facing Florence. She saw a scratch, which appeared to be fresh, on the right side of his neck. She was too scared to move until defendant had gone inside the mobile home. She then got out of her car and walked around the end of the trailer to see if she could see anyone. She could not, but she did hear Waymon say, "No, don't." There was a loud thud.

Florence ran as fast as she could to a house about 100 to 125 feet away. She burst through the front door and told the people in the

house, including Virginia Hainsey, who is acquainted with the Britts and the Gores, that defendant had gone into the mobile home with a gun. Hainsey looked out the window and saw a man, whom she is "ninety-nine percent sure" was defendant, walking from the mobile home. He was wearing a camouflage shirt, dark pants, and a dark baseball cap. He was carrying a gun in his right hand. He went back across the railroad tracks, paused, looked back in the direction of the mobile home, turned, and walked through a clearing in the direction of his house. He was carrying a gun with a bright barrel and a darker stock. According to Hainsey, defendant "wasn't in any hurry."

Florence and Hainsey ran to the mobile home. It was on fire. Flames shot through the windows, and the front door blew out. No one could get inside.

Later, after the fire had been extinguished, Waymon's body was found in the mobile home. A claw hammer was on the floor near his feet. An autopsy revealed that Waymon sustained seven blows to the head and that his skull was fractured in three places. Medical expert testimony suggested that these blows could have been struck with the claw hammer. He also sustained five stab wounds to the chest, two of which pierced his heart. Testimony was that these wounds were probably inflicted with a knife. The chest and head wounds, in combination, caused his death.

The fire began, it was determined, when someone poured a liquid accelerant like gasoline onto the floor of the mobile home and across the victim and ignited it. The mobile home and the victim's body were burned extensively.

Later that day, when the police searched defendant's house, they found the blue jeans and shirt defendant had worn to work soaking in the washing machine. They also found his black cap and camouflage jacket. They did not find defendant's work belt, which is where he kept a pocketknife. The door to the gun cabinet was ajar, and a .22 caliber rifle with a silver barrel and black stock was missing from the premises. Willena had just cleaned that gun and closed the gun cabinet door the night before the murder.

Subsequently, Willena discovered a tape recorder, with an apparent phone bugging attachment, in a small hole in the utility room at her house. A tape in the recorder contained several of Willena's phone conversations, conversations that transpired prior to her discussions with Florence and Waymon about moving into the mobile home.

Willena was unaware that her conversations had been taped. Defendant testified that he had hooked up the recorder in November 1995 and used it sporadically through January 1996 because he suspected Willena of infidelity.

Defendant's testimony was that, around 10:00 a.m. the day of the murder, he started driving around looking for the family dog, which had been missing for several weeks. After forty minutes, defendant stated, he returned to his house, lay down on a tanning bed for thirty minutes, and took a shower. According to defendant, he first learned of the murder from his brother, Kenneth, who came to the house and told him he was a suspect. Defendant testified that his relationship with the victim, his stepfather-in-law, had been friendly, although he had not spoken to the victim in the two months preceding his death.

An SBI agent saw defendant around 3:30 p.m. that day. Just as Florence had told him, defendant had a fresh scratch on the right side of his neck. Defendant testified that he had scratched his neck that night at work. He further testified that he had not seen Willena or Florence after receiving the scratch, and he agreed with the prosecutor that, without having seen him, Florence could not have known about the scratch.

[1] We agree with defendant that his conviction for burning an uninhabited house should be vacated. The version of G.S. 14-62 in effect at the time of these events provided in relevant part,

> If any person shall wantonly and willfully set fire to or burn or cause to be burned . . . any uninhabited house, . . . whether the same . . . shall then be in the possession of the offender, or in the possession of any other person, he shall be punished as a Class F felon.

N.C. Gen. Stat. § 14-62 (1993). Because defendant was indicted for arson, and not burning an uninhabited house, his conviction of burning an uninhabited house is valid only if that crime is a lesser included offense of arson. N.C. Gen. Stat. § 15-170 (1983); *State v. Riera*, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970).

One crime is a lesser included offense of another if all the essential elements of the lesser offense are also essential elements of the greater offense. *State v. Hudson*, 345 N.C. 729, 732, 483 S.E.2d 436, 439 (1997). An "essential element" of a crime is a fact that must be proved beyond a reasonable doubt to convict a defendant of that crime.

The crime of arson is the willful and malicious burning of the dwelling house of another person. *State v. Vickers*, 306 N.C. 90, 99-100, 291 S.E.2d 599, 606 (1982), *overruled on other grounds by State v. Barnes*, 333 N.C. 666, 430 S.E.2d 223, *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 336 (1993). Here, "dwelling house" means an inhabited house. *Vickers*, 306 N.C. at 100, 291 S.E.2d at 606. Thus, it is an essential element of the crime of arson that the burned house be inhabited.

Obviously, it is *not* an essential element of arson that the burned house be uninhabited. It *is* an essential element of the crime of burning an uninhabited house that the house be uninhabited. *See* G.S. § 14-62; *State v. Gulley*, 46 N.C. App. 822, 824, 266 S.E.2d 8, 9 (1980). Proof beyond a reasonable doubt that the house was uninhabited when it was burned is required to convict a defendant of burning an uninhabited house in violation of G.S. 14-62. Because defendant's indictment did not charge him with all the elements of burning an uninhabited house, his conviction of that crime must be vacated.

[2] We disagree with defendant, however, that he should have a new trial on the charge of first-degree murder. The jury was presented with two theories of first-degree murder: murder committed with premeditation and deliberation, and murder committed in the perpetration of a felony in which a deadly weapon was used. *See* N.C. Gen. Stat. § 14-17 (Cum. Supp. 1997). It convicted defendant on both theories. Defendant assigns error to the trial court's jury instruction on the felony murder rule, and to its failure to instruct on second-degree murder as a lesser included offense of first-degree murder with premeditation and deliberation.

We need not reach defendant's argument regarding the felony murder rule, because defendant's conviction predicated on the theory of murder with premeditation and deliberation was without error.

Second-degree murder is a lesser included offense of first-degree premeditated and deliberate murder; it lacks the elements of premeditation and deliberation. *See* G.S. § 14-17. Due process requires an instruction on a lesser included offense only if a jury could rationally find the defendant guilty of the lesser offense and not guilty of the greater. *Hopper v. Evans*, 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982); *State v. Larry*, 345 N.C. 497, 516-18, 481 S.E.2d 907, 919, *cert. denied*, — U.S. —, 139 L. Ed. 2d 234 (1997). Whether a jury instruction on second-degree murder was required in this case depends on

the quality of the evidence supporting the elements of premeditation and deliberation.

"Premeditation means that the act was thought out beforehand for some length of time, however short . . . ." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835 (1994), *cert. denied*, — U.S. —, 139 L. Ed. 2d 134 (1997). "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 this case, defendant presented little more than alibi evidence. He claimed he was elsewhere, alone, when the murder occurred. There was eyewitness evidence to the contrary. This evidence depicts defendant as walking calmly and deliberately toward Waymon Gore's mobile home with a rifle in one hand and a jugful of unidentified liquid in the other. Defendant walked right by Florence Gore and into the mobile home. Florence heard no altercation. She heard only Waymon's cry, "No, don't!" followed by a loud thud. Seconds later, as calmly and deliberately as he came, defendant walked away with the rifle in his hand. As the mobile home quickly became engulfed in a fire accelerated by some liquid fuel, defendant turned back to have a look before he went on his way. The evidence further showed that defendant killed Waymon Gore in an uncommonly vicious manner.

This evidence establishes that defendant acted with premeditation and deliberation when he murdered Waymon Gore. In the face of all the circumstantial evidence of premeditation and deliberation, the fact that defendant and Waymon Gore may have had a prior friendly relationship, standing alone, did not warrant an instruction on second-degree murder. This is particularly so because defendant's case rested entirely on an alibi defense. *See State v. Larrimore*, 340 N.C. 119, 157-58, 456 S.E.2d 789, 809-10 (1995).

[3] Finally, defendant argues that the trial judge impermissibly expressed an opinion during the trial, that the trial court's statements undermined the credibility of defendant's evidence, and that a new trial is required. The statements in question were made by the trial judge when he sustained objections by the State to the introduction of hearsay statements, of which defendant was the declarant, by witnesses for the defense. The trial court explained that it was sustaining the objections because the statements that the defense attempted

to elicit were "self[-]serving." On two occasions, the trial judge offered more elaborate explanations to the jury:

> Ladies and Gentlemen of the Jury, we have a rule of evidence in respect to declarations by the Defendant, at least at this stage of the trial, that is commonly described as being self serving [sic]. And those objections are sustained on that rule of evidence.
>
> . . . .
>
> Ladies and Gentlemen of the Jury, let me explain to you the rule—self serving [sic] rule just for your benefit, because there have been numerous rulings on that.
>
> The rule of evidence of self serving [sic] declarations of a Defendant is based upon the theory of not permitting a Defendant to place evidence of his position through third parties because those statements or declarations would not be subject to examination by the opposing side. And that's the underlying theory behind it.

The propriety of the court's evidentiary rulings is not before us. It is the statements made by the trial court in connection with those rulings which, defendant claims, characterized his declarations as "self[-]serving," undermined his credibility and the credibility of all the defendant's evidence, and unfairly prejudiced him.

The trial court made several evidentiary rulings by uttering little more than the phrase, "self[-]serving." When the trial judge gave the jury a more detailed explanation of his rulings, he made it clear that they were based on a purported rule of evidence, the rule of evidence of self-serving declarations of defendants. We find no reasonable possibility that defendant would have been acquitted had the trial judge not said, "self[-]serving." *See* N.C. Gen. Stat. § 15A-1443 (1997).

Defendant's conviction of burning an uninhabited house, 96 CRS 1413, is vacated.

No error as to defendant's conviction of first-degree murder, 96 CRS 1412.

Judges EAGLES and HUNTER concur.

BEECHRIDGE DEVELOPMENT COMPANY LLC, PLAINTIFF v. LAURENCE E. DAHNERS; ELEANOR S. DAHNERS; TERRY R. KITSON; PAULA A. SHERMAN; DAVID B. CRAIG, TRUSTEE; BANCPLUS MORTGAGE CORPORATION; JANE F. BURRILL; JOHN S. BURRILL; TIM, INC., TRUSTEE; NATIONSBANK OF NORTH CAROLINA, N.A.; AND ORANGE WATER AND SEWER AUTHORITY; DEFENDANTS

No. COA98-348

(Filed 2 February 1999)

1. **Easements— subdivision plat—"public easement"—improper use of extrinsic evidence**

The trial court erred by using extrinsic evidence to determine the grantor's intent in creating a "public easement" on a recorded subdivision plat without first determining whether this intent could be ascertained from within the four corners of the plat.

2. **Easements— subdivision plat—"public easement"—use for sewer line precluded**

The term "public easement" on a recorded subdivision plat unambiguously precluded use of the easement for a sanitary sewer line to serve adjacent property where the plat also contained a "sanitary sewer easement" on another portion of the subdivision, since the plat itself indicates that there is a difference between the two types of easements.

Judge GREENE dissenting.

Appeal by certain defendants from judgment entered 24 October 1997 by Judge Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 27 October 1998.

Northen Blue, LLP, by David M. Rooks, III, for plaintiff-appellee.

Beemer, Savery & Hadler, PA, by Mary Elizabeth Jones, for appellants Dahners, Kitson, Sherman, and Burrill.

LEWIS, Judge.

Plaintiff acquired an undeveloped tract south of the Morgan Creek Hills subdivision in Chapel Hill and wished to use the "public easement" on a portion of the Morgan Creek Hills property for the installation of a sanitary sewer line to service the development of this tract. This "public easement" was denominated as such in a plat

recorded on 7 October 1966 in the Orange County Registry, titled "Final Plat Section One of Morgan Creek Hills Subdivision." The easement was one of two running along the outer edges of the subdivision that were labeled on the plat, the other being a "sanitary sewer easement" on the northern portion of the property.

Plaintiff filed an amended complaint for declaratory judgment on 9 January 1997, seeking "a declaration by the [trial court] that the 'Public Easement' shown on the plat recorded at Plat Book 15, Page 119, Orange County Registry is an offer of dedication of an easement for public use which OWASA [(Orange Water and Sewer Authority)] might accept pursuant to its statutory authority." On 3 September 1997, the trial court ordered the case placed on the trial calendar for the term commencing 20 October 1997. Plaintiff filed a motion for summary judgment on 4 September, with a notice of hearing on the motion set for 20 October. On 20 October, the trial court conducted a non-jury trial with the parties' consent and made findings of fact and conclusions of law in favor of plaintiff. From this judgment, defendants Dahners, Kitson, Sherman, and Burrill appeal.

[1] Among appellants' six arguments, we need address only those regarding the trial court's use of the evidence to determine the scope of the "public easement" on the plat. In making its findings of fact, the trial court relied on the public records in evidence to find that: the preliminary plat submitted to the Town showed a thirty-foot wide storm and sanitary sewer easement which is the subject of this proceeding; the Chapel Hill Board of Aldermen approved the preliminary plat at its meeting of 12 September 1966 with the stipulation that the easement in question also be designated as a public right-of-way; the town manager erroneously notified the developer of the Morgan Creek Hills subdivision that the preliminary plat had been approved with conditions including a requirement that the "[e]asements shown on the plan as storm and sanitary sewer easements should be shown as public easements in accordance with the preliminary plan [sic]"; and, because of this error, the plat that was recorded by the developer described the easement at issue as a public easement and not a storm and sanitary sewer easement with public right-of-way, as the Board of Aldermen actually required. With only the town's records available as evidence at trial and no testimony from the grantor other than the printed plat, the trial court then concluded that "Morgan Creek Hills [sic] Land Company intended the recording of the Plat to be an offer of dedication of the Easement described on the Plat as a public easement for acceptance as a sanitary sewer easement." At no point in its

judgment, however, did the trial court determine whether the term "public easement" was ambiguous. To use extrinsic evidence to determine the grantor's intent without first determining whether this intent could be ascertained from within the four corners of the plat constitutes reversible error, as will be set out below.

Appellants argue that in determining the purpose and extent of an easement, the trial court should be guided by the method provided in our case law:

> First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

Swaim v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786-87 (1995) (quoting I Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina*, § 15-21 (4th ed. 1994)), *aff'd per curiam*, 343 N.C. 298, 469 S.E.2d 553 (1996). We agree with appellants and their assertion that the trial court did not properly follow these steps.

[2] In this action, the trial court proceeded to the second step of the analysis above and considered attendant circumstances without first determining if the conveyance itself, the plat, was precise in its terms. "When the language . . . is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit." *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). Here, the language of the final plat clearly and unambiguously indicated that the Morgan Creek Land Company wished to create a "sanitary sewer easement" on the northern portion of the subdivision and a "public easement" on the southern side of the property. Had the developer's chosen terms been "less than precise," the court could have considered attendant circumstances, as well as the manner in which the easement has been used since the time of its dedication. *Swaim*, 120 N.C. App. at 864, 463 S.E.2d at 786. Even then, it would seem difficult to ascertain the grantor's intent in creating the

"public easement" by examining only the town's requests to the grantor and ignoring the plain language of what the grantor provided and the town approved in return. The plat and the dedication therein were recorded in 1966 and apparently have since been unchallenged until now.

Plaintiff cited no cases or statutes and presented no evidence at trial or on appeal to indicate that, from a legal perspective, the phrase "public easement" is so ambiguous as to require judicial interpretation. Plaintiff did not argue that a private developer's use of a public easement to service an adjacent subdivision is an appropriate public use of such an easement. At no point during the trial or appeal did plaintiff present a theory under N.C. Gen. Stat. § 136-96 (1993) that it has a right to at least part of the easement as the owner of adjacent land because the easement was not "actually opened and used by the public within 15 years from and after the dedication," and was created by a corporation which is no longer in existence. Essentially, its only argument was that an error occurred behind the scenes, and that an examination of evidence other than the plat itself will explain why this public easement is in fact a sanitary sewer easement.

Plaintiff cites this Court's decision in *Sampson v. City of Greensboro*, 35 N.C. App. 148, 240 S.E.2d 502 (1978), to support the notion that this "public easement" should be converted into a sanitary sewer easement. In that case, a plat contained a signed certificate stating, "The undersigned hereby acknowledge this plat and allotment to be _____ free act and deed and hereby dedicate to public use as streets, playgrounds, parks, open spaces, and easements forever all areas so shown or indicated on said plat." *Id.* at 149, 240 S.E.2d at 503. The defendant city sought to install a sanitary sewer along the easement, and plaintiffs argued that if the property had been properly dedicated (which they claimed it had not), the easement was intended to be for a storm sewer and not a sanitary sewer. Both the trial court and this Court ruled in defendant's favor.

The facts of *Sampson* clearly are distinguishable from the situation before us now. First, the conversion of a storm sewer easement to a sanitary sewer easement requires a much smaller inferential leap than does the conversion of a public easement to a sanitary sewer easement, as the plaintiff here sought. Furthermore, it is much more difficult for a private developer to argue that he is providing a public use, as permitted by the language of the dedication, than it is for a city or other government entity. "A public use is a use by and for the gov-

ernment and the general public, not for particular individuals or estates." *City of Statesville v. Roth*, 77 N.C. App. 803, 807, 336 S.E.2d 142, 144 (1985). Finally, and of great significance to plaintiff's case here, a Greensboro ordinance cited in *Sampson* at 150, 240 S.E.2d at 503, stated:

> All property shown on the plat as dedicated for a public use shall be deemed to be dedicated for any other public use authorized by the city charter or any general, local, or special law pertaining to the city when such other use is approved by the city council in the public interest.

Plaintiff has made us aware of no ordinance in Chapel Hill that would permit what was clearly dedicated as a public easement to be transformed into a sewer easement to service a private developer's adjacent tract of land.

There is at least one similarity between these facts and those in *Sampson*, and that is the presence of dedicatory language on the plat itself. In this case, the relevant language reads as follows: "Know all men by these presents, that we hereby acknowledge this plat and allotment to be our free act and deed and that we do hereby dedicate to public use as streets and easements forever all areas as shown on said plat." Below this statement appear the signatures of the vice president of, presumably, the developer's company; the town manager; the chairman of the planning board; and the town clerk. It is unclear why the town would express in writing its assent to the plat as drawn and allow the public easement to remain in an incorrect form for over thirty years if it were labeled improperly by the developer.

The plain language of the Morgan Creek Hills plat shows a sanitary sewer easement on the northern portion of the property and a public easement on the southern portion. This indicates that there is a difference between the two types of easements, and because there is such a distinction on the plat itself, there is no reason to consider the term "public easement" as embracing "sanitary sewer easement." As such, there was no ambiguity to warrant the trial court's examination of any extrinsic evidence to determine the grantor's intent. We are not asked, and do not attempt, to specifically enumerate those things that can or cannot go under, through, upon or above a public easement. We limit our holding to the facts before us in this case, where it seems clear from the language of the plat that sanitary sewer lines may be installed on a "sanitary sewer easement" but not for

these purposes on a "public easement." Because we consider this plat to show an unambiguous grant of a public easement on the southern portion of the Morgan Creek Hills subdivision, and because the interpretation of an unambiguous easement is a question of law requiring no examination of extrinsic evidence, *see Leonard v. Pugh*, 86 N.C. App. 207, 210, 356 S.E.2d 812, 814 (1987), we reverse the trial court's holding in favor of plaintiff.

Reversed.

Judge HORTON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I respectfully dissent from the majority opinion, because I believe the plat creating the "public easement" at issue in this case is either ambiguous or entirely silent as to the scope of the easement created.

Where an easement has been created by a "perfectly precise" express conveyance, the terms of the conveyance control the scope of the easement. *Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991). If the terms of the creating instrument are ambiguous as to the easement's scope, " 'the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant.' " *Swaim v. Simpson*, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786 (1995) (quoting I Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 15-21 (4th ed. 1994) [hereinafter *Webster's Real Estate Law*]), *aff'd per curiam*, 343 N.C. 298, 469 S.E.2d 553 (1996).

> [I]f the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope . . . of the easement. However, in this . . . situation, a reasonable use is implied. The authors assume extrinsic evidence is admissible to determine what is a reasonable use.

I *Webster's Real Estate Law* § 15-21 (citations omitted). Our courts have stated that "reasonable uses" are "to be determined in the light of the situation of the property, . . . the surrounding circumstances, . . . [and] the purposes for which the easement was granted." *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963).

Accordingly, I agree with the authors of *Webster's Real Estate Law* that extrinsic evidence is necessary and admissible for the court's determination of what constitutes a "reasonable use" where the conveyance is silent as to the easement's scope.

In this case, one portion of the plat was labeled "public easement" and another portion was labeled "sanitary sewer easement." As the phrase "public easement" could encompass a variety of public uses, the plat is either ambiguous or "silent as to the easement's scope." In either case, the trial court was within its authority to consider the "surrounding circumstances," including the purpose for which the easement was granted, in determining the "public easement's" scope. Furthermore, I believe the fact that the plat also provided for a separate "sanitary sewer easement" is merely one of the "surrounding circumstances" the trial court had to consider in determining the scope of the "public easement." Accordingly, having found defendants' remaining arguments unpersuasive, I would affirm the trial court.

STATE OF NORTH CAROLINA v. DOUGLAS BERWIN BENNETT

No. COA98-266

(Filed 2 February 1999)

Crimes, Other— damaging occupied property by incendiary device—insufficient evidence of measurable damage—remand for judgment for attempt

The State's evidence was insufficient to support defendant's conviction of maliciously damaging occupied property by an incendiary device in violation of N.C.G.S. § 14-49.1 because it failed to show measurable damage where it tended to show that defendant ignited his blue jeans outside his jail cell and that the fire left a burned spot which was only slightly visible after it was stripped and waxed. However, by finding defendant guilty of the charged offense, the jury necessarily found that defendant committed all of the elements of the lesser offense of an attempt to maliciously damage occupied property by an incendiary device, and the case is remanded for entry of judgment for the lesser offense.

Judge JOHN dissenting.

Appeal by defendant from judgment entered 15 October 1997 by Judge Michael E. Beale in Anson County Superior Court. Heard in the Court of Appeals 19 November 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Danielle M. Carman, for defendant-appellant.

WALKER, Judge.

The defendant was convicted of maliciously damaging occupied real property by using an incendiary device under N.C. Gen. Stat. § 14-49.1 and was sentenced to an active term of 120 to 153 months. The State's evidence tended to show the following: On 10 February 1997, Deputy Wayne Hasenmayer of the Anson County Sheriff's Department went to defendant's mother's home to attempt to serve an arrest warrant on defendant for damaging real property. Defendant was standing outside the home wearing blue jeans and a t-shirt. Hasenmayer noticed the defendant smelled strongly of alcohol. When Hasenmayer asked defendant to come with him, defendant stated that he was not going to jail and pushed the deputy away. Hasenmayer sprayed defendant with pepper spray and defendant ran away. Hasenmayer chased defendant for approximately 500 feet before both men tripped in some weeds. They struggled on the ground before Hasenmayer handcuffed defendant.

Hasenmayer transported defendant to the Anson County Jail where they arrived at about 11:15 p.m. Hasenmayer attempted to decontaminate defendant by using a water hose to wash off the pepper spray, but defendant was uncooperative. Hasenmayer testified that defendant was "angry with everybody at that point." Hasenmayer and another officer patted defendant down and placed him in cell number one which is in the single cell section of the jail. Hasenmayer then left to resume his duties.

At about 11:30 p.m., Hasenmayer was dispatched back to the jail to assist with a fire that had been reported. Hasenmayer testified that there was smoke throughout the jail but that it was heaviest in the single cell section of the jail. He helped move some of the inmates including defendant out of the areas where the smoke was too thick. In front of cell number one, where defendant had been placed,

Hasenmayer found the remains of a pair of blue jeans that had been burned, although they were no longer on fire. He collected what remained of the jeans and placed them in a plastic bag. He noticed there was a scorched mark on the concrete floor where the jeans had burned. He also found a red lighter on top of the commode in cell number one. Hasenmayer testified that defendant was wearing sweat pants when he was moved out of his cell, not the jeans he had on when arrested.

Jailer Tracy Wilhoit testified that he and Hasenmayer had patted defendant down before leaving him in the cell and had emptied his pockets of everything that defendant "wasn't supposed to have." After placing defendant in the cell, Wilhoit returned to the front of the jail. Out of the window at the jailer's station, he saw a blaze in front of defendant's cell approximately three or four feet high. He put the fire out with an extinguisher and he proceeded to evacuate the affected portion of the jail.

Jail Administrator Doris Tillman testified that there were 38 inmates in the jail at the time of the fire along with jailers and other law enforcement officers. She testified further that the jail had a cement tile floor, concrete walls, and steel doors. The burned spot in front of the cell was cleaned, stripped and waxed after the fire. Tillman testified, "It's still small stains on the floor but you couldn't know. You can tell it has been burn (sic), but if you don't know it was burnt then you don't know whether the stain is still there or not."

Defendant first contends that the trial court erred by denying his motions for dismissal due to insufficient evidence made at the close of State's evidence and at the end of all the evidence. He argues that there was insufficient evidence to prove the elements of the offense under N.C. Gen. Stat. § 14-49.1: defendant willfully and maliciously damaged real property which was occupied at the time by using an incendiary device.

When reviewing 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," but substantial evidence must exist to show the essential elements of the crime charged and that the defendant was the perpetrator of the crime. *State v. Elliot*, 344 N.C. 242, 266, 475 S.E.2d 202, 212 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 312 (1997).

Defendant first argues that the State presented insufficient evidence that the jail was damaged to a measurable degree. After a careful review of the record in this case, we agree.

The State presented evidence from Hasenmayer who testified that there was a "spot on the floor" that had been "burnt and scorched." In addition, Jail Administrator Tillman testified that "I just had to have certain spots stripped over and waxed over where it was burnt at" and that the stains were not visible unless the observer knew where to look.

N.C. Gen. Stat. § 14-49.1 was amended in 1993 so that it now reads as follows:

> Any person who willfully and maliciously damages any real or personal property of any kind or nature, being at the time occupied by another, by the use of any explosive or incendiary device or material is guilty of a felony punishable as a Class D felony.

N.C. Gen. Stat. § 14-49.1 (1993). The amendment removed "attempts to damage" from the statute which now requires there be measurable damage in order to be convicted under this provision. *See* 1993 N.C. Sess. Laws ch. 539, § 1150.

Since the legislature removed the prohibition against an attempt to damage from the statute, the level of damage now required to fall within the purview of this statute must be at least a measurable amount. In this case, the evidence only shows that a mark was left which, after the ward was stripped and waxed, was slightly visible. Thus, we find that the State's evidence shows the defendant's actions to be no more than an attempt to damage the jail since there was no measurable damage resulting from his actions.

Typical cases under this statute have involved explosions which damaged or destroyed houses, vehicles, and other property. *See e.g.*, *State v. Sellers*, 289 N.C. 268, 221 S.E.2d 264 (1976) (vehicle destroyed); *State v. Conrad*, 275 N.C. 342, 168 S.E.2d 39 (1969) (vehicle destroyed and nearby house damaged); *State v. Little*, 286 N.C. 185, 209 S.E.2d 749 (1974) (building damaged by explosion). The State argues that the degree of damage is not relevant, *citing State v. Bindyke*, 25 N.C. App. 273, 212 S.E.2d 666, *reversed on other grounds*, 288 N.C. 608, 220 S.E.2d 521 (1975). In *Bindyke*, conspirators burned the mayor's lawn by using gasoline in milk jugs. This case is distinguishable, however, because the burning of the lawn apparently resulted in measurable damage which was not at issue in the case.

Accordingly, because the State's evidence of damage to the jail does not rise to the level of measurable damage contemplated by the statute, we must vacate defendant's conviction under N.C. Gen. Stat. § 14-49.1.

However, the State presented sufficient evidence to support a conviction for the attempt to commit this crime. Even though "attempts to damage" was removed from the statute, the defendant can properly be convicted for an attempt to commit this crime which is punishable under N.C. Gen. Stat. § 14-2.5 at one classification lower than the offense charged. *See* N.C. Gen. Stat. § 14-2.5 (Cum. Supp. 1997). "By statute in North Carolina, an indictment charging a completed offense is deemed sufficient to support a conviction for an attempt to commit the crime charged. . . . This statute applies even though the completed crime and the attempt are not in the same statute." *State v. Slade*, 81 N.C. App. 303, 306, 343 S.E.2d 571, 573, *disc. review denied*, 318 N.C. 419, 349 S.E.2d 604 (1986) (citations omitted); *See* N.C. Gen. Stat. § 15-170 (1983).

By finding the defendant guilty of the charged offense, the jury necessarily found facts that would support a conviction on all of the essential elements of the lesser offense. *See State v. McCoy*, 79 N.C. App. 273, 339 S.E.2d 419 (1986). Because we hold that there was insufficient damage as a matter of law to support a conviction under N.C. Gen. Stat. § 14-49.1, the case is remanded for entry of judgment and appropriate sentencing for the offense of attempted malicious damage to occupied property by use of an incendiary device, punishable as a Class E felony. *See e.g.*, *McCoy*, 79 N.C. App. at 276, 339 S.E.2d at 421; *State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416, *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998).

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

Vacated and remanded.

Judge McGEE concurs.

Judge JOHN dissents.

Judge JOHN dissenting.

The majority reasons that legislative deletion of "attempt," *see* 1993 N.C. Sess. Laws ch. 539, § 1150, from N.C.G.S. § 14-49.1 (1997),

now requires evidence of significant measurable damage for a defendant to be convicted of violation of the statute and that evidence of such damage was not presented in the case *sub judice*. I do not agree and therefore respectfully dissent.

The majority cites no case law or statutory authority to support its imposition of a substantial measurable damage element to complete an offense under G.S. § 14-49.1. Concededly, the cases relied upon by the majority indeed involved serious damage, but the extent and nature of damage was not an issue therein. Moreover, the evidence in the instant case was not of an attempt, but rather of ignition by defendant of his blue jeans, resulting in scorching and staining of the jail floor and filling the jail with heavy smoke requiring evacuation of five inmates. *See State v. McAlister*, 59 N.C. App. 58, 60, 295 S.E.2d 501, 502 (1982), *disc. review denied*, 307 N.C. 471, 299 S.E.2d 226 (1983) (completion of offense distinguished from attempt, *i.e.*, an act done with specific intent to commit a crime but which falls short of actual commission); *see also State v. Shaw*, 305 N.C. 327, 344, 289 S.E.2d 325, 334 (1982) (actual burning completes crime; no evidence of an attempt to burn which failed); and *State v. Cockerham*, 129 N.C. App. 221, 225-26, 497 S.E.2d 831, 833-34, *disc. review denied*, 348 N.C. 503, S.E.2d (1998) (matches nearby and gasoline thrown on individual but never ignited supported attempt to injure maliciously with incendiary material). This evidence was sufficient for the jury to find that damage, albeit not "substantial," occurred. *See State v. Oxendine*, 305 N.C. 126, 129-30, 286 S.E.2d 546, 548 (1982) (evidence of heavy smoke and burn patches on wall sufficient to constitute "burning" for arson even though damage minor and repairable).

In short, I do not believe that the permanency and extent of damage constitute elements of the offense proscribed by G.S. § 14-49.1. Hence, evidence herein that the floor stain was almost completely removed and that smoke from the fire at issue was cleared within approximately thirty minutes was not dispositive as a matter of law to show no damage had occurred. Accordingly, I vote no error.

JAMES A. CRUTCHFIELD, PLAINTIFF v. DIANE SMITH CRUTCHFIELD, DEFENDANT

No. COA98-534

(Filed 2 February 1999)

1. Divorce— equitable distribution—unreasonable delay—sanctions—discretion of court—appellate review

Whether to impose sanctions and which sanctions to impose under N.C.G.S. § 50-21(e) for unreasonable delay or attempted delay of an equitable distribution proceeding are decisions vested in the trial court and reviewable on appeal for abuse of discretion. In applying this standard, the appellate court will uphold a trial court's order of sanctions unless it is manifestly unsupported by reason.

2. Divorce— equitable distribution—unreasonable delay—sanctions—attorney fees

The trial court did not abuse its discretion in ordering defendant wife to pay $1,500 of plaintiff husband's attorney fees in an equitable distribution proceeding as a sanction for delays and attempts to delay "which were prejudicial to the plaintiff" based upon competent evidence of additional attorney fees incurred because defendant and her counsel failed to attend hearings.

3. Divorce— equitable distribution—request for unequal distribution—findings of supported distributional factors

The trial court in an equitable distribution proceeding should have made specific findings of fact as to each distributional factor upon which evidence was presented since plaintiff husband requested an unequal distribution; however, defendant wife was not prejudiced by the court's failure to do so where she asked for, and received, an equal distribution of the marital property.

4. Divorce— equitable distribution—classification and valuation—conclusiveness on appeal

The trial court's classification and valuation of jewelry in an equitable distribution proceeding were conclusive on appeal where there was evidence to support them.

Appeal by defendant from judgment entered 22 September 1997 by Judge E. J. Harviel in Alamance County District Court. Heard in the Court of Appeals 6 January 1999.

Frederick J. Sternberg, for plaintiff-appellee.

John W. Lunsford, for defendant-appellant.

LEWIS, Judge.

Plaintiff and defendant were divorced by judgment dated 10 June 1996. On 22 September 1997, Judge E. J. Harviel entered an equitable distribution judgment, and defendant assigns and argues three errors from the judgment. We affirm the trial court's judgment.

Defendant first assigns error to the trial court's order of attorney fees to the plaintiff. Plaintiff moved for sanctions under N.C. Gen. Stat. § 50-21(e) on 11 March 1997. By order dated 24 March 1997, Judge Spencer Ennis awarded plaintiff attorney fees pursuant to N.C. Gen. Stat. § 50-21(e) (1997), which provides in pertinent part:

> Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:
>
> (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
>
> (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.
>
> . . . .
>
> The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the . . . delay, including a reasonable attorneys' fee . . . .

The court reserved its ruling on the amount of sanctions and ordered plaintiff to submit an affidavit of additional "attorney's fees incurred by the Plaintiff as a result of the Defendant's willful obstruction and unreasonable delay" or attempt thereof. Plaintiff's attorney submitted an affidavit which included a record of the total attorney fees incurred in the case as well as a list of the $2404.80 in fees allegedly resulting from the delay.

In the equitable distribution judgment, Judge Harviel found as a fact that plaintiff was entitled to partial attorney's fees as a sanction for willful delay or attempted delay that prejudiced her. Judge Harviel ordered defendant to pay plaintiff "$1,500.00 as a partial allowance on attorney's fees pursuant to G.S. 50-21(e) . . . ." Defendant contends first that this award is in excess of what plaintiff should have been awarded as delay-related fees, and second that the court cannot award fees because the judge failed to find any prejudice under N.C. Gen. Stat. § 50-21(e)(2) to plaintiff resulting from such delays. We address these arguments in the logical rather than presented order; first, whether sanctions were properly imposed, and second whether the amount was excessive.

Generally, a trial judge has discretion to determine the propriety and select the method of sanctions. *See Bumgarner v. Reneau*, 332 N.C. 624, 630, 422 S.E.2d 686, 690 (1992) (affirming that sanctions under Rule 37 for discovery violations are within the sound discretion of the trial court); *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993) (stating that the determination of what sanction, if any, to impose under Rule 41(d) and N.C. Gen. Stat. 1-109 lies within the sound discretion of the trial court). An award of sanctions for a discovery violation under Rule 37 "will not be overturned on appeal absent an abuse of discretion," *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). Rule 11 sanctions are slightly different in that imposition of sanctions is reviewable *de novo*, but the choice of sanction is reviewable under an abuse of discretion standard. *See Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989); *Page v. Roscoe, LLC*, 128 N.C. App. 678, 680, 497 S.E.2d 422, 424 (1998).

[1] We have not previously addressed the standard of review for sanctions imposed under section 50-21(e). The abuse of discretion standard is applied to the imposition and selection of sanctions under Rule 37. See *Bumgarner*, 332 N.C. at 631, 422 S.E.2d at 690; *Graham*, 121 N.C. App. at 465, 466 S.E.2d at 294. Section 50-21(e)(1) includes Rule 37 violations as sanctionable conduct. We hold, therefore, that whether to impose sanctions and which sanctions to impose under G.S. § 50-21(e) are decisions vested in the trial court and reviewable on appeal for abuse of discretion. In applying an abuse of discretion standard, this Court will uphold a trial court's order of sanctions under section 50-21(e) unless it is "manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

[2] Among the trial court's findings of fact in this case was:

> 17. That the Plaintiff shall be entitled to a partial allowance on his Attorney's Fees from the Defendant pursuant to the Order of the Court dated March 24, 1997 pursuant to G.S. 50-21(e) of the North Carolina General Statutes as sanctions for the Defendant's wilful [sic] obstruction and unreasonable delay or attempt to obstruct or unreasonably delay discovery proceedings and any equitable distribution proceedings which were prejudicial to the Plaintiff; that the sum of $1,500.00 is a reasonable sum to be assessed herein upon review of the itemization of time expended herein by the Attorney for the Plaintiff.

This finding of fact indicates that the trial judge found delays and attempts to delay "which were prejudicial to the Plaintiff." Competent, record evidence of additional attorney fees incurred because defendant and her counsel failed to attend hearings supports this fact. Finding of fact #17 satisfies the requirement of section 50-21(e)(2). The amount of fees awarded is reasonable on this record, and we find no abuse of discretion in either the imposition or the amount of the sanction. Defendant's assignment of error is overruled.

[3] Defendant next contends that the trial court should have made specific findings regarding each of the twelve section 50-20(c) factors since plaintiff requested an unequal distribution. *See* N.C. Gen. Stat. § 50-20(c) (1997). Defendant personally signed the parties' pre-trial order which by its own terms "stipulated" that "the defendant contends that an equal distribution of marital property would be equitable." Plaintiff, however, listed several factors and presented evidence in support of an unequal distribution. The trial court made a finding of fact that after considering the section 50-20(c) evidence, an equal distribution of marital property would be equitable. Defendant is correct that the trial court should have made specific findings of fact as to each factor upon which evidence was presented. *See* N.C. Gen. Stat. § 50-20(j) (1997); *Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988). As in *Chandler v. Chandler*, 108 N.C. App. 66, 73, 422 S.E.2d 587, 592 (1992), the "court made insufficient findings to show that it considered the evidence that was presented under the distributional factors of N.C.G.S. § 50-20(c)." However, defendant makes no argument, showing, or claim that she was prejudiced in any way by this omission. "[T]o obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial . . . ."

Starco, Inc. v. AMG Bonding and Ins. Services, Inc., 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996). *See* N.C. Gen. Stat. § 1A-1, Rule 61 (1990). Defendant asked for, and received, an equal distribution of marital property. As such, her assignment of error is overruled.

[4] Finally, defendant contends the trial court committed reversible error in classification and valuation of items of jewelry. She asserts that although the trial court is in the best position to determine credibility of witnesses, an appellate court should be free to change values and classifications of property. This argument clearly lacks merit. In appellate review of a bench equitable distribution trial, the findings of fact regarding value are conclusive if there is evidence to support them, even if there is also evidence supporting a finding otherwise. *See Chandler*, 108 N.C. App. at 73, 422 S.E.2d at 592. The trial court has discretion in distributing marital property, and "the exercise of that discretion will not be disturbed in the absence of clear abuse." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). "This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures." *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386, *rev. denied*, 323 N.C. 174, 373 S.E.2d 111 (1988). Here, there was evidence to support both the trial court's valuation and classification of the jewelry. Defendant's final assignment of error is meritless.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. GENE MOORE

No. COA98-360

(2 February 1999)

1. Appeal and Error— preservation of issues—no objection—plain error not asserted in assignments of error

Defendant waived even plain error review in an action in which he was found guilty of criminal contempt for failing to abide by a preliminary injunction regarding operation of adult businesses where he did not object at the hearing to the adequacy of the notice of the specific charges against him and did not

specifically and distinctly contend plain error in his assignments of error.

2. Appeal and Error— decision by previous Court of Appeals panel—binding

Defendant's contention that the preliminary injunction which he was accused of violating was void because it did not comply with the provisions of N.C.G.S. § 1A-1, Rule 65(d) was overruled because a similar argument by defendant in *Onslow County v. Moore*, 129 N.C. App. 376, was rejected without discussion by another panel of the Court of Appeals. One panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case.

3. Obscenity— operation of sexually oriented business—violation of injunction—sufficiency of evidence

There was substantial evidence to show defendant's operation of a sexually oriented business was in willful violation of a preliminary injunction where defendant stated to an undercover officer that he was the owner of the three businesses at issue and stipulated that the video which he personally sold to the officer had an emphasis on specified sexual activities or specified anatomical areas as those terms are defined by the ordinance.

4. Obscenity— sexually oriented business—freedom of expression

An ordinance prohibiting sexually oriented businesses from operating within a thousand feet in any direction from a residence, house of worship, public school, playground, or other adult or sexually oriented business was not vague or overbroad and did not violate defendant's rights to freedom of expression guaranteed by the First Amendment to the United States Constitution. The ordinance has been held to be a valid regulation of the place and manner of expression only and not violative of the First Amendment; moreover, defendant stipulated that the video he sold to the undercover officer met the specific definitions of the ordinance, so that he had no uncertainty about the applicability of the ordinance to him.

5. Trials— mistrial—nonjury proceeding—excluded evidence

The trial court did not err in a nonjury proceeding by denying defendant's motion for a mistrial after the State attempted to offer evidence of previous convictions and the court sustained

> defendant's objection and advised defendant that the excluded evidence would not be considered. Where the judge sits without a jury, it is presumed that the judge disregards any incompetent evidence.

Appeal by defendant from judgment entered 4 September 1997 by Judge Jay D. Hockenbury in Onslow County Superior Court. Heard in the Court of Appeals 4 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Gail E. Weis, for the State.

Jeffrey S. Miller and John W. Ceruzzi, for defendant-appellant.

MARTIN, Judge.

On 21 September 1992, Onslow County adopted an "Ordinance to Regulate Adult Businesses and Sexually Oriented Businesses." Article IV of the ordinance defines "sexually oriented business" as

> any business activity, club or other establishment within which the exhibition, showing rental or sale of materials distinguished or characterized by an emphasis on material depicting, describing or exhibiting specified anatomical areas or relating to specified sexual activities is permitted. Sexually oriented businesses shall include, but are not limited to: adult arcades, adult bookstores, adult motion picture theaters, adult theaters, massage parlors, and/or adult video rental/sale stores as defined by this ordinance.

Such businesses are prohibited from operating within 1,000 feet in any direction from a residence, house of worship, public school or playground, or other adult or sexually oriented business.

Defendant is owner and operator of three businesses, "Video Star," "Baby Dolls," and "Private Pleasures," located at 5527 Richlands Highway in Onslow County. On 5 December 1995, Onslow County initiated an action against defendant seeking, by injunctive relief and an order of abatement, to enforce compliance with the ordinance. By order dated 18 January 1996, *nunc pro tunc* 15 December 1995, Judge Louis B. Meyer found that defendant was operating a sexually oriented business in violation of the ordinance and entered a preliminary injunction commanding defendant to bring his business into compliance with, and prohibiting him from violating, the ordinance.

Upon motion of Onslow County alleging defendant's willful violation of the terms of the preliminary injunction, an order was issued 29 July 1997 requiring defendant to appear and show cause why he should not be held in criminal contempt. At the hearing, held 4 September 1997, the State offered evidence tending to show that defendant owns the three businesses, which are located fifty to seventy-five feet from a private residence. A deputy sheriff testified that while working in an undercover capacity, he entered the "Video Star" on 11 July 1997 and purchased a sexually explicit video which defendant stipulated "had an emphasis on specified sexual activities and specified anatomical areas as those terms are defined by Article 7 [sic] of the Onslow County Ordinances entitled 'Sexually Oriented Businesses.' " On 25 July 1997 the same undercover officer visited "Private Pleasures" where he paid fifty dollars to have a nude female employee dance in an erotic manner for thirty minutes. On 26 July 1997 the officer testified that he entered "Baby Dolls" and paid fifty dollars to have a nude female employee perform sexual touching for thirty minutes.

The trial court found defendant guilty of criminal contempt for his failure to abide by the terms of the preliminary injunction. Defendant was publicly censured, fined $500.00, and sentenced to thirty days in jail. Defendant appeals.

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[1] By his first two assignments of error, defendant contends the show cause order was insufficient to give notice of the specific charges against him. The show cause order required that he show cause why he should not be held in criminal contempt for his failure to abide by the terms of the preliminary injunction, in that he "has continued to operate sexually oriented businesses on the premises owned by the Defendant at 5527 Richlands Highway, which premises is within 1,000 feet of a residence." Defendant argues that his constitutional due process rights entitle him to reasonable notice of the specific charges against him, and that he "has no way of knowing which of the various types of sexually oriented businesses he is accused of operating because the order to show cause does not specify the acts allegedly committed."

Having failed to object at the hearing as to the adequacy of the charge against him, defendant has not preserved this issue for appeal. N.C.R. App. P. 10(b)(1) provides, in pertinent part:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection

> or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

Nor has defendant preserved the issue for plain error review by "specifically and distinctly" contending plain error in his assignments of error as required by N.C.R. App. P. 10(c)(4). "[W]here a defendant fails to assert plain error in his assignments of error . . . he has waived even plain error review." *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998).

[2] Next, defendant argues the preliminary injunction which he was accused of violating is void because it does not comply with the provisions of G.S. § 1A-1, Rule 65(d). He contends the order failed to "set forth the reasons for its issuance," was not "specific in terms," and did not "describe in reasonable detail . . . the act or acts enjoined or restrained." N.C. Gen. Stat. § 1A-1, Rule 65(d) (1990).

A similar argument, advanced by defendant in his appeal in *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780 (1998), has been rejected without discussion by another panel of this Court. "We have carefully reviewed Moore's remaining assignments of error and find them to be without merit." *Id.* at 389, 499 S.E.2d at 789. "Subsequent actions are precluded when a court of competent jurisdiction has already reached a final judgment on the merits of a controversy." *State v. Lewis*, 63 N.C. App. 98, 102, 303 S.E.2d 627, 630 (1983), *affirmed*, 311 N.C. 727, 319 S.E.2d 145 (1984). One panel of this Court "may not overrule the decision of another panel on the same question in the same case." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). This assignment of error is overruled.

[3] Next, defendant complains the evidence was insufficient to show that he wilfully operated a sexually oriented business in knowing violation of the preliminary injunction. The sufficiency of the evidence, however, has not been preserved for review because defendant failed to move for dismissal at trial. N.C.R. App. P. 10(b)(3) (1998); *State v. Richardson*, 341 N.C. 658, 462 S.E.2d 492 (1995); *State v. Futrell*, 112 N.C. App. 651, 436 S.E.2d 884 (1993). Nonetheless, defendant argues that G.S. § 15A-1446(d)(5) provides appellate review of the sufficiency of the evidence even when there is no objection or motion at trial. However, our Supreme Court has specifically held: " '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.' " *Richardson* at 677, 462 S.E.2d at 504 (quoting *State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987)). Nor has defendant preserved this issue for plain error review. N.C.R. App. P. 10(c)(4); *State v. Gary, supra.*

Even assuming the sufficiency of the evidence was properly before us, our review of the evidence, considered in the light most favorable to the State, *State v. Bates*, 313 N.C. 580, 330 S.E.2d 200 (1985), reveals substantial evidence to show defendant's operation of a sexually oriented business in willful violation of the preliminary injunction. Indeed, defendant's statement to the undercover officer that he was the owner of the three businesses and his stipulation that the video which he personally sold to the officer "had an emphasis on specified sexual activities or specified anatomical areas as those terms are defined" by the ordinance, provide substantial evidence that defendant wilfully operated a sexually oriented business in violation of the preliminary injunction.

[4] By his next assignment of error, defendant challenges the constitutionality of the ordinance, contending it is vague and overbroad and violates his rights to freedom of expression guaranteed by the First Amendment to the United States Constitution. The constitutionality of the Onslow County "Ordinance to Regulate Adult Businesses and Sexually Oriented Businesses" has been previously considered by this Court in *Maynor v. Onslow County*, 127 N.C. App. 102, 488 S.E.2d 289, *appeal dismissed*, 347 N.C. 268, 493 S.E.2d 458, *cert. denied*, 347 N.C. 400, 496 S.E.2d 385 (1997). We stated:

> [I]t is clear from the County Commission's resolution that the Ordinance was not intended to restrict any communication or protected speech or to deny adults access to the distributors of sexually oriented entertainment. The Ordinance is an attempt to regulate the location and the access to these materials. "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating [an] ordinance[ ]." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310, 321, *reh'g denied*, 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976). It is within the constitutional powers of a county or municipality to adopt regulations which limit the areas in which adult entertainment establishments may operate. *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d

140, 145 (4th Cir. 1991); *Young*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, *reh'g denied*, 475 U.S. 1132, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986).

Id. at 106-07, 488 S.E.2d at 292. We held the ordinance to be a valid "regulation of the place and manner of expression only and . . . not violative of the First Amendment." *Id.* at 108, 488 S.E.2d at 293. *See Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780 (1998) (holding ordinance does not violate First Amendment). Moreover, having stipulated that the video he sold to the undercover officer met the specific definitions of the ordinance, defendant had no uncertainty about the applicability of the ordinance to him and, therefore, his objections based on vagueness are also overruled. *Id.*

[5] Finally, defendant assigns error to the denial of his motion for mistrial, made after the State attempted to offer evidence of defendant's previous convictions for operating a sexually oriented business. Although the trial court sustained defendant's objection to the evidence and excluded it, defendant contends the State's proffer of the evidence so tainted the proceeding as to irreparably prejudice him. We disagree. The trial court advised defendant that the excluded evidence would not be considered and, where the court sits without a jury, it is presumed that the judge disregarded any incompetent evidence. *In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004, 98 L.Ed.2d 646 (1988). Defendant has not rebutted the presumption and has shown no prejudice. A mistrial should be granted only for " 'such serious improprieties as would make it impossible to attain a fair and impartial verdict,' " *State v. Sanders*, 347 N.C. 587, 601, 496 S.E.2d 568, 577 (1998) (quoting *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987)), and a trial court's ruling on a motion for a mistrial is not reviewable on appeal unless there is a clear showing of gross or manifest abuse of discretion. *State v. Sorrells*, 33 N.C. App. 374, 235 S.E.2d 70, *disc. review denied*, 293 N.C. 257, 237 S.E.2d 539 (1977). No abuse of discretion has been shown by defendant and this assignment of error is overruled.

Defendant's remaining assignment of error has been abandoned. N.C.R. App. P. 28(a); *State v. Rhyne*, 124 N.C. App. 84, 478 S.E.2d 789 (1996).

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, PLAINTIFF v. NORMA L. HAGLER AND HOWARD HAGLER, DEFENDANTS

No. COA98-505

(Filed 2 February 1999)

Insurance— UIM coverage—umbrella policy—exclusion

The trial court correctly granted summary judgment for plaintiff in a declaratory judgment action to determine obligations under a comprehensive insurance policy which included a personal auto policy with a personal catastrophe liability endorsement; the endorsement provided additional liability coverage in excess of the liability limits provided in the personal auto policy but did not apply to damages arising out of personal injury to the insured or a member of the insured's household; defendant Mr. Hagler executed a selection-rejection form choosing a combined UM-UIM coverage at limits of $100,000/$300,000; the Haglers were involved in a single vehicle accident in which Mrs. Hagler was injured; plaintiff paid its liability limits of $100,000 under the personal auto policy; and defendants contended that Mrs. Hagler was entitled to UIM coverage under the endorsement of the comprehensive policy, arguing that execution of the selection/rejection form as to the underlying policy would not be effective as to the coverage provided under the endorsement. The excess coverage in this case is provided under an endorsement to the Personal Auto Policy and is merely one of a number of endorsements attached to the policy; it is not a separate policy and plaintiff was not required to have the Haglers execute another selection/rejection form in connection with the coverage provided under the endorsement.

Appeal by defendants from judgment entered 13 March 1998 by Judge Russell G. Walker, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 7 January 1999.

On 25 July 1997, American Manufacturers Mutual Insurance Company (plaintiff) filed this declaratory judgment action against defendants Norma L. Hagler and Howard Hagler (the Haglers) to seek a determination of its obligations to the Haglers under a comprehensive policy of insurance which provided coverage to the Haglers for the period from 17 March 1995 through 17 March 1996. Included within the comprehensive policy were a Personal Auto Policy, Personal Catastrophe Liability Endorsement—North Carolina (Endorsement), and Homeowner's Policy. The Personal Auto Policy had liability limits of $100,000 per person and $300,000 per occurrence. The Endorsement provided additional automobile liability coverage in the amount of $1,000,000 in excess of the liability limits provided in the Personal Auto Policy but did not apply, among other things, to "any damages arising out of personal injury to [insured] or a member of [the insured's] household" and "any amounts payable under any Uninsured Motorists [hereinafter UM] or Underinsured Motorists Coverage [hereinafter UIM]."

When Mr. Hagler applied for insurance coverage, he executed a Selection/Rejection Form (the Form) identical (except for cosmetic differences) to the form issued by the North Carolina Rate Bureau and approved by the Commissioner of Insurance. The Form stated that "UM and UM/UIM bodily limits up to $1,000,000 per person and $1,000,000 per accident, are available." The Form also provided that "my selection or rejection of coverage below is valid and binding on all insureds and vehicles under the policy unless a named insured makes a written request to the company to exercise a different option." Mr. Hagler chose Combined UM/UIM coverage at limits of $100,000/$300,000 for bodily injury and $100,000 for property damage. There is no evidence in the record that Mrs. Hagler made any such written request to exercise a different option.

On 12 October 1995, the Haglers were involved in a single vehicle accident. Mr. Hagler was driving a rented vehicle along Interstate 675 in Ohio at the time of the accident and Mrs. Hagler was a passenger. Mrs. Hagler was thrown from the vehicle and severely injured. Plaintiff paid its liability limits of $100,000 under the Personal Auto Policy to Mrs. Hagler. Mrs. Hagler contended that she was also entitled to UIM coverage under the Endorsement of the comprehensive policy issued by plaintiff. Plaintiff and the Haglers filed motions for summary judgment. The trial court granted summary judgment for plaintiff and denied summary judgment for the Haglers. The Haglers appealed.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., for plaintiff appellee.

Pinto Coates Kyre & Brown, P.L.L.C., by Richard L. Pinto and Martha P. Brown, for defendant appellants.

HORTON, Judge.

On appeal, the Haglers argue that the exclusion in the Endorsement is void because it is in conflict with the statutes governing motor vehicle liability insurance. They contend that N.C. Gen. Stat. § 20-279.21(b)(3) and (b)(4) requires that, if a policy of insurance (1) offers liability coverage in excess of the minimum limits required by the Act, and (2) contains UM coverage, then the policy must also provide UIM coverage. N.C. Gen. Stat. § 20-279.21(b)(3) and (4) (Cum. Supp. 1997). According to the Haglers, the Endorsement included in their comprehensive insurance policy meets the above criteria, is akin to an "umbrella" policy, and must therefore provide UIM coverage to the Haglers. Furthermore, the Haglers argue that they never selected or rejected UIM coverage under the Endorsement; therefore, they have UIM coverage equal to the amount liability coverage under the Endorsement.

The question before us is whether the Endorsement described above is a *separate* "owner's policy of liability insurance," or merely a part of the comprehensive policy issued to the Haglers. We hold that the Endorsement in question was merely a part of a larger comprehensive policy, that the Form executed by Mr. Hagler was sufficient to reject UIM coverage in excess of $100,000 per person per occurrence, and that the trial court properly entered summary judgment for plaintiff.

I. Underinsured Motorist Coverage Generally

The North Carolina Financial Responsibility Act (the Act) requires that an "owner's policy of liability insurance" include a description of all vehicles covered by the policy, and provide minimum liability coverage of $25,000/$50,000 for personal injury or death, and $15,000 for property damage. N.C. Gen. Stat. § 20-279.21(b)(1) & (2). The Act further requires that all such liability policies provide protection from uninsured drivers. N.C. Gen. Stat. § 20-279.21(b)(3). If the insurance policy in question offers liability coverage in excess of the minimum limits set forth above and includes UM coverage, then the policy must also provide UIM cover-

age in an amount not less than the minimum liability limits and not more than $1,000,000, as selected by the policy owners. N.C. Gen. Stat. § 20-279.21(b)(4).

With regards to selection or rejection of UIM coverage, the Act provides:

> If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. Once the option to reject underinsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless a named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.
>
> Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

N.C. Gen. Stat. § 20-279.21(b)(4).

II. UIM Coverage in Separate, or Umbrella, Policies

In *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 461 S.E.2d 317, *reh'g denied*, 342 N.C. 197, 463 S.E.2d 237 (1995), our Supreme Court framed an issue of first impression as follows: "[W]hether a multiple-coverage fleet insurance policy which includes umbrella coverage must offer UIM coverage equal to the liability limits under its umbrella coverage section." *Id.* at 603, 461 S.E.2d at 320. After analyzing the purposes of "umbrella" coverage and the North Carolina Financial Responsibility Act, as well as the applicable statutory provisions, our Supreme Court held that the insurer was required to offer UIM coverage to its policy owner in the umbrella section of the fleet policy. In the *Isenhour* case there was no evidence that the insured had rejected either UM or UIM coverage in writing or selected a different limit.

In *Piazza v. Little*, 129 N.C. App. 77, 497 S.E.2d 429, *disc. review allowed*, 348 N.C. 500, 510 S.E.2d 653 (1998), this Court held in accordance with the reasoning of *Isenhour* that UM and UIM coverage would be available to an insured under the provisions of a *separate* umbrella policy. In *Piazza*, we noted that, although the umbrella coverage in *Isenhour* was provided under one section of a multiple coverage fleet policy, the preamble to the *Isenhour* policy provided that: " '[t]his entire document constitutes a multiple coverage insurance policy. . . . *Each Coverage Part so constituted becomes a separate contract of insurance.*' (Emphasis added)." *Piazza*, 129 N.C. App. at 81, 497 S.E.2d at 431.

We also note that the *Isenhour* Court relied heavily on the decision of the United States District Court for the Northern District of Ohio, in *Krstich v. United Services Auto Ass'n*, 776 F. Supp. 1225 (N.D. Ohio 1991). In *Krstich*, the "umbrella" coverage at issue was provided by a *separate* insurance policy. Applying North Carolina law, the *Krstich* Court concluded that an excess liability umbrella policy must provide UIM coverage. *Id.* at 1234.

III. Selection of UIM Coverage

In this case, there is no dispute that Mr. Hagler executed the Selection/Rejection form for UIM and UM coverage and chose limits of $100,000/$300,000 for bodily injury. The Haglers argue, however, that execution of the Selection/Rejection form as to the underlying policy of automobile insurance would not be effective as to the coverage provided under the Endorsement. In *Piazza*, we held that "[the policy owner's] execution of a selection/rejection form in connection with the underlying policy neither rejected nor waived UIM coverage in the umbrella policy." *Piazza*, 129 N.C. App. at 83, 497 S.E.2d at 433. The vital distinction between *Isenhour*, *Krstich*, *Piazza*, and the case before us is that these cited cases involved two separate policies of insurance, one of which provided "umbrella" coverage. In this case, however, the excess coverage in question is provided under an Endorsement to the Personal Auto Policy issued to the Haglers. It is entitled "Personal Catastrophe Liability Endorsement—North Carolina," and is merely one of a number of endorsements attached to the policy. It is not a separate policy, and therefore plaintiff was not required to have the Haglers execute another Selection/Rejection Form in connection with the coverage provided under the Endorsement. Furthermore, the Endorsement also clearly excluded any damages which arose out of personal injuries to the insured or a

member of the insured's household. The Haglers do not contend that Mrs. Hagler was not a member of Mr. Hagler's household.

The Haglers selected UM and UIM coverages in the amount of $100,000 per person and $300,000 per occurrence, and plaintiff has paid the sum of $100,000 to Ms. Hagler. No further coverage was available to Ms. Hagler under the policy issued by plaintiff, and summary judgment was properly entered for plaintiff by the trial court.

Affirmed.

Judges WYNN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. CHARLES RAY HILL, DEFENDANT

No. COA98-421

(Filed 2 February 1999)

1. **Probation and Parole— probation violation—lawful excuse rule**

Under the "lawful excuse rule," a defendant's probation may not be revoked if he can demonstrate a lawful excuse for violating his probationary conditions.

2. **Probation and Parole— probation violation—lawful excuse—consideration of evidence—findings**

A trial court must consider and evaluate evidence brought forth by a probationer in a probation revocation proceeding which demonstrates a lawful excuse for his violation; moreover, the trial court must make findings of fact which clearly show that it considered and evaluated such evidence.

3. **Probation and Parole— probation revocation—lawful excuse evidence—absence of findings**

The trial court erred in revoking defendant's probation for failure to comply with restitution and community service conditions of his probation where the court refused to consider and evaluate evidence offered by defendant's attorney, consisting of medical reports and doctors' statements, that defendant's health problems prevented him from both providing restitution and completing his community service requirements, and the court

failed to find as a fact that defendant did not have a lawful excuse for his violation.

Appeal by defendant Charles Ray Hill from judgment entered 1 December 1997 by Judge Dennis Winner in Mitchell County Superior Court. Heard in the Court of Appeals 7 January 1999.

Watson & Hunt, P.A., by Charlie A. Hunt, Jr., for defendant-appellant.

Michael F. Easley, Attorney General, by David L. Elliott, Associate Attorney General, for the State.

WYNN, Judge.

On 14 November 1996, Charles Ray Hill pled guilty to four counts of obtaining property by false pretense and was placed on supervised probation under a suspended sentence. As part of the conditions of probation, the trial court ordered Hill to make monetary restitution in excess of $27,000 and to perform community service.

On 29 May 1997, Hill's probation officer filed a violation report alleging arrearage in the monetary conditions of Hill's probation. Thereafter, at a hearing before Superior Court Judge Dennis Winner, Hill admitted his failure to comply with the restitution and community service conditions placed upon his probation. Hill, however, testified that he was unable to work because of back, arthritis, and vision problems. Hill further testified that he had no regular income and had a disability claim pending with the Social Security Administration. Based on this testimony, Judge Winner continued prayer for judgment until 1 December 1997 to see if Hill's Social Security Disability benefits would be granted, and if so, whether Hill applied them to the outstanding arrearage. Judge Winner, however, conditioned this continuance on the specific condition that Hill complete his community service.

At the 1 December 1997 hearing, Hill's probation officer informed the court that Hill: (1) completed only twenty-seven of his one hundred hours of community service; (2) failed to comply with any of the restitution order; and (3) had been classified as disabled by the Social Security Administration and had begun receiving payments therefrom. In response, Hill's attorney informed the court that although Hill had received a $2,000 lump-sum payment and was to receive $427 a month, this money was needed by Hill to pay his rent and other

expenses. Hill's attorney then informed the court that Hill was assigned to work as an attendant at the Mitchell County Solid Waste Department and had to discontinue his employment after three or four days due to health problems. To support this contention, Hill's attorney offered the court pertinent medical reports and doctors' statements. The court, however, summarily revoked Hill's probation without looking at the proffered reports and statements.

Before reaching the pertinent issue on appeal, we note that defendant has violated rule 28(b)(5) of the North Carolina Rules of Appellate Procedure by failing to refer to the assignments of error and identify their numbers and the pages at which they appear on the record. When a party or attorney fails to comply with the appellate rules, rule 25(b) permits an appellate court to impose sanctions of the type and manner prescribed by rule 34 for frivolous appeals. Prior to imposing such sanctions, however, rule 34 mandates that the appellate "court shall order the person subject to sanction to show cause in writing or in oral argument or both why a sanction should not be imposed." Neither action is necessary in this case because we choose not to impose sanctions; instead, we will utilize our discretion under rule 2 to reach the merits of this appeal.

The sole issue on appeal is whether the trial court committed reversible error by failing to consider defendant's disability evidence prior to revoking his probation. We begin by noting that "[p]robation is an act of grace by the State to one convicted of a crime." *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725, *disc. rev. denied*, 301 N.C. 99, 273 S.E.2d 304 (1980). Further, a proceeding to revoke probation is not bound by strict rules of evidence and an alleged violation of a probationary condition need not be proven beyond a reasonable doubt. *See State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). Rather, "all that is required . . . is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *State v. Robinson*, 248 N.C. 282, 285-86, 103 S.E.2d 376, 379 (1958); *Freeman*, 47 N.C. App. at 175, 266 S.E.2d at 725.

[1] Although the aforementioned rules provide the trial court with substantial latitude in probation revocation proceedings, the trial court is nonetheless bound by certain parameters. Of particular import to the case *sub judice* are those parameters associated with the "lawful excuse" rule. The "lawful excuse" rule, which has its genesis in *State v. Robinson*, 248 N.C. 282, 103 S.E.2d 376 (1958), pro-

vides that a probationer's sentence may not be revoked if he can demonstrate a lawful excuse for violating his probationary conditions. *See Duncan*, 270 N.C. at 245, 154 S.E.2d at 57 (stating that probation can be revoked if the evidence demonstrates that the defendant has violated, without lawful excuse, a valid condition of his probation); *Robinson*, 248 N.C. at 287, 103 S.E.2d at 380 (same). The policy behind this rule is simple: the judicial discretion afforded judges in probation revocation proceedings "implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and is 'directed by the reason and conscience of the judge as to a just result'." *Duncan*, 270 N.C. at 245, 154 S.E.2d at 57 (*quoting Langnes v. Green*, 282 U.S. 531, 541, 75 L. Ed. 520, 526 (1931).). Accordingly, fairness dictates that in some instances a defendant's probation should not be revoked because of circumstances beyond his control.

In applying the "lawful excuse" rule, a trial court is mandated to consider facts brought forth by the defendant which demonstrate that he has a lawful excuse for his probation violation. *State v. Smith*, 43 N.C. App. 727, 259 S.E.2d 805 (1979). For example, in *Smith*, this Court vacated an order revoking probation after determining that the trial court failed to consider and evaluate evidence brought forth by the defendant demonstrating a lawful excuse for violating a probationary condition. *Id.* Indeed, we stated that "the defendant is entitled to have the trial judge make findings of fact which clearly show that he has considered and evaluated [evidence that the defendant's violation was not willful]." *Id.* at 732, 259 S.E.2d at 808.

This conclusion is supported by United States Supreme Court jurisprudence. In *Black v. Romano*, 471 U.S. 606, 612, 85 L. Ed. 2d 636, 641 (1985), for example, the United States Supreme Court stated that a "parolee or probationer is entitled to an opportunity to show not only that he did not violate the conditions, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition." In another case, the Court stated that "where the probationer has made all reasonable efforts to pay the fine or restitution, yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." *Bearden v. Georgia*, 461 U.S. 660, 668-69, 76 L. Ed. 2d 221, 228 (1983). The Court continued: "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." *Id.* at 669, 76 L. Ed. 2d at 228.

[2] In summation, both North Carolina and United States Supreme Court jurisprudence hold that a trial court must consider and evaluate evidence brought forth by the probationer which demonstrates a lawful excuse for his violation. Moreover, the trial court is required to make findings of fact which clearly show that it considered and evaluated such evidence.

[3] In the case *sub judice*, the trial court failed in both of the aforementioned respects. Indeed, Hill's attorney offered to provide the trial court with evidence demonstrating that Hill's health problems prevented him from both providing restitution and completing his community service requirements. The trial court, however, refused to consider and evaluate this evidence. Further, the trial court failed to find as fact that defendant did not have a lawful excuse for his violation. Therefore, we hold that the trial court erred and remand this matter so that the trial court may make the proper inquiry and findings of fact.

Vacated and Remanded.

Judges HORTON and EDMUNDS concur.

LINDA R. SHARP, PLAINTIFF v. CAROLE S. GAILOR, WOMBLE CARLYLE SANDRIDGE & RICE, GAILOR & ASSOCIATES, MARILYN FORBES, KAREN BRITT PEELER, A. ELIZABETH BARNES, JOHN HESTER, AND LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA, DEFENDANTS

No. COA98-284

(Filed 2 February 1999)

Attorneys— malpractice—failure to state a claim upon which relief could be granted

The trial court did not err by granting a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in a legal malpractice action arising from an equitable distribution case where plaintiff's claims for dereliction of professional duty were time barred by N.C.G.S. § 1-15(c), the actions cited by plaintiff as fraudulent do not allege the elements of either actual or constructive fraud, allegations of breach of fiduciary duty were nothing more than claims of ordinary legal malpractice which were time barred, and professional

services are expressly excluded from the definition of commerce in N.C.G.S. § 75-1.1(b).

Appeal by plaintiff from judgment entered 28 October 1997 by Judge Clifton W. Everett, Jr. in Dare County Superior Court. Heard in the Court of Appeals 17 November 1998.

Linda R. Sharp, pro se.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr., for defendants-appellees Carole S. Gailor; Womble Carlyle Sandridge & Rice, PLLC; Gailor & Associates, PLLC; Marilyn Forbes; and A. Elizabeth Barnes.

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and Roger A. Askew, for defendants-appellees Karen Britt Peeler, John Hester, and Lawyers Mutual Liability Insurance Company of North Carolina.

LEWIS, Judge.

Plaintiff filed her original complaint in this case on 26 November 1996 and an amended complaint on or about 27 May 1997. According to her amended complaint, plaintiff separated from her husband on 23 January 1984. She hired D. Keith Teague, Esq. to represent her in the ensuing action for equitable distribution. Mr. Teague withdrew on 3 July 1989. He was replaced by defendant Carole Gailor, Esq., who was then a partner with defendant Womble Carlyle Sandridge & Rice ("Womble Carlyle"). On or about 21 September 1989, plaintiff, Gailor, and Womble Carlyle entered into a retainer agreement under which Gailor and Womble Carlyle were to represent plaintiff in the equitable distribution case.

An equitable distribution hearing was held from 5 August 1991 to 11 August 1991 before a referee in Dare County. Plaintiff was apparently represented by defendants Gailor, Marilyn Forbes, Esq., and A. Elizabeth Barnes, Esq.; it appears that Ms. Forbes and Ms. Barnes were associates with Womble Carlyle. Judgment in the equitable distribution was entered 19 April 1993, and some associates with Womble Carlyle, including defendant Barnes, prepared an appellate brief and record and filed it on 4 October 1993. In an opinion filed 18 October 1994, a unanimous panel of this Court affirmed the order of equitable distribution, and the Supreme Court subsequently denied discretionary review. *Sharp v. Sharp*, 116 N.C.

App. 513, 449 S.E.2d 39, *disc. review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994).

Plaintiff's amended complaint alleges, in eleven separate counts, misfeasance and nonfeasance by the defendants in connection with plaintiff's equitable distribution case. On defendants' motion, the trial court dismissed all of plaintiff's claims for failure to state a claim upon which relief can be granted. *See* N.C.R. Civ. P. 12(b). Plaintiff appeals.

Our review of the trial court's decision is limited to those arguments which plaintiff has chosen to make in her appellate brief.

> The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs.

N.C.R. App. P. 28(a).

Plaintiff's first argument is that her claims for legal malpractice should have withstood defendants' motion to dismiss. North Carolina General Statutes section 1-15(c) (1996) provides,

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action . . . .

Plaintiff filed her complaint on 26 November 1996. Her legal malpractice claims are barred unless they are supported by acts or omissions occurring after 26 November 1993.

On pages eight and nine of her brief, plaintiff argues that the following acts and/or omissions by some of the defendants, alleged in her amended complaint as having occurred after 26 November 1993, constitute legal malpractice: (1) The failure of defendants Gailor, Womble Carlyle, Barnes, and Forbes to correct material errors in the appeal they had prepared and filed with this Court on 4 October 1993; (2) billing plaintiff for the preparation of her appeal; (3) reviewing the opinion this Court filed 18 October 1994, in the case *Sharp v. Sharp*; (4) billing plaintiff for reviewing this Court's opinion in *Sharp v. Sharp*; (5) preparing a motion for discretionary review on 22 November 1994; (6) failing to ask this court for a rehearing; and (7)

defendant Gailor's "fail[ing] to follow the judgment handed down and affirmed by the NC [sic] Court of Appeals" and "ma[king] a 'deal' which was not favorable to Plaintiff with the attorney for Plaintiff's ex-husband" on 6 March 1995. For this last item, plaintiff cites Paragraphs 5C, 5D, and 5E of her Eleventh Count, titled "Fraud."

Items (2) through (6) are clearly not actionable as legal malpractice; nothing in any of these acts or omissions, as alleged, is a dereliction of professional duty. Neither is item (1) an omission constituting legal malpractice. There is no provision in the Rules of Appellate Procedure which permits an appellant to unilaterally correct or augment his brief after it has been filed. Nor is there any rule in this state that expressly authorizes an appellant to *move* an appellate court for permission to correct or augment his brief. In fact, Rule of Appellate Procedure 28(g), which permits a party to supply an appellate court with a memorandum of additional authority discovered by the party after the brief is filed, expressly *prohibits* the use of the memorandum "for additional argument." Thus, once plaintiff's appellate brief in the case *Sharp v. Sharp* was filed, nothing could be done to "correct" it; the matter was out of defendants' hands. Any malpractice claim based on the erroneous preparation of that brief is based on acts or omissions that occurred on or before October 1993, so the claim is barred by G.S. 1-15(*c*).

As noted above, item (7) is presented as a claim of fraud in plaintiff's complaint. The paragraphs cited by plaintiff, however, do not allege the elements of either actual or constructive fraud. *See Terry v. Terry*, 302 N.C. 77, 82-83, 273 S.E.2d 674, 677 (1981). Plaintiff comes closer to alleging constructive fraud than actual fraud, but what is missing is any allegation that Gailor took advantage of her position of trust *for the purpose of benefiting herself. See Barger v. McCoy Hilliard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997). Thus, the acts alleged in item (7) fail to state a claim for fraud.

Plaintiff next argues that her claims of breach of fiduciary duty are claims for which relief can be granted. The acts and omissions upon which her claims of breach of fiduciary duty are based include the following: failing to protect real property marital assets "by filing a lis pendens" [sic], failing to pursue a timely settlement of the equitable distribution case, entering into pretrial stipulations to plaintiff's detriment, failing to offer material evidence in plaintiff's favor, delaying plaintiff's trial, failing to review the credentials of an expert witness hired to testify on plaintiff's behalf, failing to ensure the

presence of an expert witness at trial, failing to prepare an adequate appellate brief. As these examples show, plaintiff's claims of breach of fiduciary duty are nothing more than claims of ordinary legal malpractice, which, as we have said, are barred by the statute of limitations.

Finally, plaintiff alleges that her claims of unfair and deceptive trade practices are claims for which relief can be granted. These claims are not recognized by statute. While the General Assembly has declared unfair and deceptive practices "in or affecting commerce" to be unlawful, N.C. Gen. Stat. § 75-1.1(a) (1994), it has expressly excluded the rendition of professional services "by a member of a learned profession" from the definition of "commerce." G.S. 75-1.1(b). Plaintiff argues that we should "giv[e] her the right to sue under the state's Unfair and Deceptive Trade Practices Act," but as judges, we should not and will not rewrite a law enacted by our state legislature.

Affirmed.

Judges GREENE and HUNTER concur.

FARON L. DANIEL, PLAINTIFF v. KATHLEEN MARY DANIEL, DEFENDANT

No. COA98-88

(Filed 2 February 1999)

Divorce— absolute divorce complaint—answer denying allegations—summary judgment

Defendant wife's verified answer generally denying the allegations of plaintiff husband's verified complaint for absolute divorce was insufficient to raise a genuine issue of material fact, and the trial court properly granted plaintiff's motion for summary judgment on his divorce claim.

Appeal by defendant from judgment signed 17 December 1997 by Judge Jerry F. Waddell in Pamlico County District Court. Heard in the Court of Appeals 5 January 1999.

Peter Mack, Jr., for plaintiff-appellee.

David H. Rogers, for defendant-appellant.

GREENE, Judge.

Kathleen Daniel (Defendant) appeals from the trial court's order granting of Faron Daniel's (Plaintiff) motion for summary judgment.

On 8 August 1997, Plaintiff filed a verified complaint with the Clerk of Court in Pamlico County seeking an absolute divorce. In his complaint, Plaintiff alleges, *inter alia*: (1) "3. The parties were intermarried on July 1, 1989 and are still intermarried"; (2) "5. For more than one year next preceding the institution of this action the parties have lived continuously separate and apart from each other, to wit: June 8, 1996"; (3) "6. At the time the parties separated it was the intention of the Plaintiff to live thereafter permanently separate and apart from the Defendant"; and (4) "9. That the Plaintiff is entitled and should be granted an absolute divorce from the Defendant." Plaintiff also requested that his verified complaint be "taken as an affidavit upon which the [trial] Court may base all of its orders in this case."

On 5 September 1997, Defendant filed a verified motion to dismiss, answer, and counterclaim (collectively, answer) wherein she states, *inter alia*, "P# 5, 6 and 9 of the Complaint are denied." Defendant also moved to dismiss Plaintiff's complaint and filed a counterclaim for alimony, child custody of both children, and child support. In addition, Defendant requested that her answer "be allowed and taken as Defendant's affidavit in support of her allegations and statements upon which may be based all Orders of this Court."

On 30 September 1997, Plaintiff moved for summary judgment on his request for an Absolute Divorce,[1] and his motion was granted on 17 December 1997, *nunc pro tunc*, 24 October 1997. Defendant filed notice of appeal on 20 November 1997, assigning error to the trial court's determination that there was no triable issue of material fact with respect to Plaintiff's claim for Absolute Divorce.

The dispositive issue is whether Defendant's answer generally denying the allegations of Plaintiff's complaint for Absolute Divorce is sufficient to raise a genuine issue of material fact.

A party moving for summary judgment has the burden of establishing the lack of any genuine issue of material fact and that he is entitled to a judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c)

1. Plaintiff supported his motion for summary judgment with an affidavit that is not part of the record on appeal, and his verified complaint.

(1990); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985); N.C.G.S. § 50-10(d) (1995) (summary judgment appropriate for absolute divorce based on one year separation). If the moving party meets this burden, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial." N.C.G.S. § 1A-1, Rule 56(e) (1990) (emphasis added). "If [the nonmovant] does not so respond, summary judgment, if appropriate, shall be entered against him." *Id.* A verified pleading may be treated as an affidavit for summary judgment purposes if it: (1) is made on personal knowledge; (2) sets forth such facts as would be admissible into evidence; and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein. N.C.G.S. § 1A-1, Rule 56(e) (1990); *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972).

In this case, Plaintiff's verified complaint satisfies the requisite criteria to be treated as an affidavit, and establishes the parties had lived continuously separate and apart for one year, with the intention of Plaintiff to live permanently separate and apart. The affidavit/complaint raises no issues of material fact and establishes Plaintiff's entitlement to an Absolute Divorce based on a one-year separation with an intention on the part of Plaintiff to remain separate and apart.[2] *See Earles v. Earles*, 29 N.C. App. 348, 349, 224 S.E.2d 284, 286 (1976) ("[T]here must be both a physical separation and an intention on the part of at least one of the parties to cease matrimonial cohabitation."). Defendant, therefore, had the burden of bringing forth specific facts showing there was a genuine issue for trial or in the absence of such a showing, that Plaintiff was not entitled to judgment. In her verified answer, which is treated as an affidavit because it satisfies the requisite criteria, Defendant simply made a general denial of the pertinent allegations of Plaintiff's complaint. This general denial is insufficient to "set forth [the] specific facts" at issue for trial, as required by Rule 56(e), and Defendant thus failed to rebut Plaintiff's motion for summary judgment. *See Amoco Oil Co.*

2. Of course Plaintiff had the burden of also showing that he and/or Defendant had resided in North Carolina for a period of six months next preceding the commencement of the divorce action. N.C.G.S. § 50-6 (1995); *Bruce v. Bruce*, 79 N.C. App. 579, 580, 339 S.E.2d 855, 856, *disc. review denied*, 317 N.C. 701, 347 S.E.2d 36 (1986). Plaintiff alleges and Defendant admits in her answer that she had been a resident of North Carolina for six months next preceding the filing of the divorce complaint. Thus there is no genuine issue of fact on this issue.

v. Griffin, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602 (an answer reaffirmed by an affidavit "which only generally denies the allegations of the complaint fails to raise a genuine issue of fact"), *disc. review denied*, 316 N.C. 374, 342 S.E.2d 889 (1986). Accordingly, the trial court properly granted Plaintiff's motion for summary judgment on his claim for Absolute Divorce.

Affirmed.

Judges JOHN and HUNTER concur.

STATE OF NORTH CAROLINA v. BOBBY LESHAN BYRD

No. COA98-387

(Filed 2 February 1999)

Firearms and Other Weapons— discharging firearm into occupied property—general intent crime—acting in concert—transferred intent

The offense of discharging a firearm into occupied property is a general intent crime so that it was not error for the trial court to inform jurors that acting in concert and transferred intent instructions applied to that offense.

Appeal by defendant from judgments dated 28 July 1997 by Judge E. Lynn Johnson in Johnston County Superior Court. Heard in the Court of Appeals 5 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Paul Pooley, for defendant-appellant.

GREENE, Judge.

Bobby L. Byrd (Defendant) appeals from his jury conviction of three counts of discharging a firearm into occupied property.

The State's evidence at trial tended to show that on 26 September 1996, Defendant, Marcus Stowe, Gregory Byrd, David Byrd, Stufaria Byrd, Walter Walker, and Jerry Spurgeon were at the residence of Lisa

Tunstall in Smithfield, North Carolina. Some of the people at the residence were drinking alcohol, some were watching television, and some were using cocaine. While there, an unidentified man came to converse with Marcus Stowe and then left in a black Ford Escort automobile. Shortly after the conversation, Defendant and the other six men left the house riding in a purple "low rider" Nissan truck and headed toward Blount Street in Smithfield to have a conversation with David Turrentine and Derrick Williams. En route, the purple low rider met the black Escort at a Community Action Center, and both vehicles proceeded to Blount Street. Upon their arrival on Blount Street, the unidentified man exited the Escort with a .9 millimeter rifle and started shooting at David Turrentine and Derrick Williams. Turrentine returned fire, and Defendant along with four of the other men, jumped out of the Nissan truck and began shooting at Turrentine.

Detectives from the Smithfield Police Department investigating the shooting testified that two automobiles and four residences on Blount Street were struck by bullets twenty-six times, six bullet casings were found outside of three residences, a total of ten bullet holes were discovered on the inside of three occupied residences, and two bullet casings were found inside of two occupied residences. The police officers also found a .9 millimeter rifle, a .22 millimeter handgun, and an AK-47 assault rifle in a trash can near Blount Street directly after the shooting.

Defendant testified that although he was at Lisa Tunstall's residence on 26 September 1996, he left with David Byrd, Carol Benton, Tina Byrd, Zandra Byrd, and two children in the black Escort to go to Blount Street to take Tina and Zandra Byrd to a friend's house. According to Defendant, once they arrived on Blount Street, he saw David Turrentine standing in his front yard pointing a gun at the Escort. Defendant further testified that once he heard gunshots, he exited the vehicle, ran between the houses on Blount Street, and then ran to a store where he called a taxicab to take him to his girlfriend's house. Defendant denies he either possessed or discharged a firearm on 26 September 1996.

After the defense rested, the trial court instructed the jury on all of the crimes for which Defendant was charged. Included were the following instructions on transferred intent and acting in concert: "[I]f the Defendant . . . intended to harm one person but actually harmed a different person, the legal effect would be the same as if he

had harmed the intended victim."; and "If two or more persons act together with a common purpose to commit discharging a firearm into occupied property and are actually or constructively present at the time the crime is committed, each of them is held responsible for the acts of the others." The trial court informed the jurors that because the discharging into occupied property charge was a general intent crime, the acting in concert and the transferred intent instructions applied to that offense.

The dispositive issue is whether the offense of discharging a firearm into occupied property is a specific intent crime.

Defendant argues the crime of discharging a firearm into occupied property is a specific intent crime and thus it was error to charge the jury on transferred intent[1] and acting in concert.[2] We disagree.

Discharging a firearm into occupied property is the intentional discharge of a firearm into an occupied building, with knowledge that such building is occupied or reasonable grounds to believe that the building might be occupied. *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973). There is no requirement that the defendant have a specific intent to fire *into* the occupied building, only that he, alone or acting in concert with others, (1) intentionally discharged the firearm *at* the occupied building with the bullet(s) entering the occupied building, *State v. Wheeler*, 321 N.C. 725, 727, 365 S.E.2d 609, 610-11 (1988), or (2) intentionally discharged the firearm at a person with the bullet(s) entering an occupied building, *State v. Fletcher*, 125 N.C. App. 505, 513, 481 S.E.2d 418, 423, *disc. review denied*, 346 N.C. 285, 487 S.E.2d 560, *and cert. denied*, — U.S. —, 139 L. Ed. 2d 299 (1997). Thus, discharging a firearm into occupied property is a general intent crime, *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873, *and reh'g denied*, 515 U.S. 1183, 132 L. Ed. 2d 913 (1995), and the instructions

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1. Defendant asserts an alternative argument in support of his contention that the transferred intent instruction was error. He contends this instruction is proper only when an unintended victim suffers harm. Our Court has rejected that contention. *State v. Fletcher*, 125 N.C. App. 505, 512-13, 481 S.E.2d 418, 423, *disc. review denied*, 346 N.C. 285, 487 S.E.2d 560, *and cert. denied*, — U.S. —, 139 L. Ed. 2d 299 (1997).

2. The law applicable to this case is that "one may not be criminally responsible under the theory of acting in concert for a crime . . . which requires a specific intent, unless he is shown to have the requisite specific intent." *State v. Blankenship*, 337 N.C. 543, 558, 447 S.E.2d 727, 736 (1994), *overruled by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997) (holding that *Blankenship* was effective from 29 September 1994 until the *Barnes'* certification date of 3 March 1997).

were not in error. *See State v. Pierce*, 346 N.C. 471, 493-94, 488 S.E.2d 576, 589-90 (1997) (finding no error in trial court's acting in concert jury instruction because defendant's charged offense was not a specific intent crime).

No error.

Judges JOHN and HUNTER concur.

LASSIE M. SHARPE, PLAINTIFF v. DAVID ERIC WORLAND, GREENSBORO ANESTHESIA ASSOCIATES, P.A., WESLEY LONG COMMUNITY HOSPITAL, INC., JOHN DOES I THROUGH XXV, AND JANE DOES I THROUGH XXV, DEFENDANTS

No. COA98-557

(Filed 2 February 1999)

Appeal and Error— appealability—discovery order—hospital—impaired physician program documents

A discovery order in a medical malpractice action requiring defendant hospital to produce documents concerning defendant physician's participation in an impaired physician program did not affect a substantial right and was not immediately appealable where the order was not enforced by sanctions; the trial court ordered protective measures to insure that the material would be restricted to the parties and their experts; and there were reasonable grounds for the trial court to determine that an alleged privilege pursuant to N.C.G.S. § 90-21.22(a) did not apply to defendant hospital or had been waived when defendant physician voluntarily provided the information to defendant hospital for other purposes.

Appeal by defendants Worland, Greensboro Anesthesia Associates, P.A., and Wesley Long Community Hospital, Inc., from order entered 24 February 1998 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 4 January 1999.

Faison & Gillespie, by O. William Faison and John W. Jensen for plaintiff-appellee.

Carruthers & Roth, P.A., by Richard L. Vanore and Norman F. Klick, Jr., for defendant-appellants Worland and Greensboro Anesthesia Associates, P.A.

Elrod Lawing & Sharpless, P.A., by Joseph M. Stavola, for defendant-appellant Wesley Long Community Hospital, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington, for North Carolina Physicians Health Program, Inc., amicus curiae.

MARTIN, Judge.

Plaintiff filed this action seeking damages for alleged medical negligence on the part of defendants David Eric Worland, M.D., (Worland), Greensboro Anesthesia Associates, P.A., and Wesley Long Community Hospital, Inc., (Hospital). In the course of discovery, plaintiff sought production by defendant Hospital of "all documents related to all complaints and incident reports" and "all minutes of any meetings" relating to co-defendant Worland, pursuant to North Carolina Rules of Civil Procedure 30(b)(5) and (6). Defendant Hospital moved for a Protective Order prohibiting the production of documents concerning Worland's participation in the Physician's Health Program on the grounds that such information was protected from disclosure by G.S. § 90-21.22(e) (1997). This statute applies to doctors participating in an impaired physician program pursuant to a peer review agreement with "the North Carolina Medical Society and its local medical society components, and with the North Carolina Academy of Physician Assistants for the purpose of conducting peer review activities." N.C. Gen. Stat. § 90-21.22(a) (1997). The confidentiality of non-public information concerning participation in this program is protected as follows:

> Any confidential patient information and other nonpublic information acquired, created, or used in good faith by the Academy or a society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician or impaired physician assistant programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations

acquired or developed solely in the course of participating in any agreements pursuant to this section.

N.C. Gen. Stat. § 90-21.22(e) (1997). After hearing oral arguments and reviewing the requested material *in camera*, the trial court denied plaintiff's motion for a protective order and required defendant Hospital to produce all documents "concerning Defendant Worland's participation in the Physician's Health Program." The order also required that the documents "be sealed and not be disclosed or published in any manner by plaintiffs' [sic] counsel or their representatives, other than for review by potential expert witnesses." Defendants gave notice of appeal from the order; plaintiff has moved to dismiss their appeal.

Defendants claim a right to an immediate appeal pursuant to G.S. §§ 1-277 and 7A-27 (1997), despite the interlocutory nature of the discovery order, arguing that the compelled discovery of allegedly privileged material implicates a substantial right. We find no interference with a substantial right and dismiss their appeal.

Appeal flows from either a final judgment or an interlocutory order which affects a substantial right. N.C. Gen. Stat. §§ 1-277(a), 7A-27 (1997). Generally, an order compelling discovery is not a final judgment, nor does it affect a substantial right; therefore, it is not immediately appealable prior to final judgment. *Wilson v. Wilson*, 124 N.C. App. 371, 374, 477 S.E.2d 254, 256 (1996) ("As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment."); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 353 S.E.2d 425 (1987); *Casey v. Grice*, 60 N.C. App. 273, 298 S.E.2d 744 (1983). However, when the order is enforced by sanctions pursuant to N.C.R. Civ. P. 37(b), the order is appealable as a final judgment. *Walker v. Liberty Mut. Ins. Co., supra; Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E.2d 386 (1982); *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976). In the present case there were no sanctions associated with the order for production.

Relying on *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E.2d 67 (1964), defendants nevertheless claim that compelled disclosure of this allegedly privileged material interferes with a substantial right by immediately defeating the statutory grant of confidentiality. In *Lockwood*, the North Carolina Supreme Court determined that a sub-

stantial right was implicated, entitling the plaintiff to an immediate appeal, where the patient-physician privilege "undoubtedly" applied, and compelling the physician to testify concerning privileged matters at a deposition would immediately destroy the privilege. *Id.* at 757, 136 S.E.2d at 69.

Application of *Lockwood* is inappropriate in this case. The trial court reviewed the material *in camera*, found no applicable privilege, and ordered protective measures to insure the material would be restricted to the parties and their experts. There were reasonable grounds for the trial court to determine that the alleged privilege did not apply to defendant Hospital, or that the privilege had been waived when defendant Worland voluntarily provided the information to defendant Hospital for other purposes. It is within the broad discretion of the trial court to determine whether a privilege applies, and therefore whether to grant a protective order. *See Williams v. State Farm Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 312 S.E.2d 905 (1984) (Matters of discovery are generally within the discretion of the trial court, and its ruling will not be disturbed absent a showing of abuse of discretion). The mere assertion of a privilege does not create an automatic right of appeal from a discovery order. *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 677, 474 S.E.2d 408 (1996). Absent the imposition of sanctions enforcing the order, no substantial right has been implicated by the trial court's order requiring production of the materials.

We decline to exercise our discretionary authority to treat this interlocutory appeal as a petition for writ of certiorari and to address defendants' arguments on the merits, *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 353 S.E.2d 425 (1987).

Appeal dismissed.

Chief Judge EAGLES and Judge McGEE concur.

WILLIAM CONRAD TROSCH, GUARDIAN AD LITEM FOR MINOR, MARK STRANGE, AND MARY W. STRANGE, PETITIONERS v. STATE FARM AUTOMOBILE INSURANCE COMPANY, RESPONDENT

No. COA98-499

(Filed 2 February 1999)

Insurance— automobile insurance—UIM coverage—bodily injury coverage exceeding minimum

The requirement of N.C.G.S. § 20-279.21(b)(4) that UIM coverage be available when an automobile liability policy has coverage exceeding the minimum limits refers to bodily injury coverage only and does not apply if only the property damage limits exceed the minimum.

Appeal by petitioners from judgment entered 18 March 1998 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 January 1999.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for petitioner appellants.

Kennedy Covington Lobdell & Hickman, L.L.P., by Wayne P. Huckel and Sara W. Higgins, for respondent appellee.

HORTON, Judge.

This is an action for declaratory judgment in which petitioners sought a determination that underinsured motorist (UIM) coverage was available to them under an automobile liability insurance policy issued by State Farm Mutual Automobile Insurance Company (respondent). The policy in question was issued in the names of Mary W. Strange (Mrs. Strange) and Henry L. Strange (Mr. Strange) (collectively the Stranges), for the period from 4 June 1994 through 4 December 1994 and had minimum bodily injury liability limits of $25,000/$50,000, $25,000 for property damage, and $1,000,000 uninsured motorist coverage. At all times relevant hereto, Mark Strange (Mark) lived with his mother, Mary W. Strange, in Rowan County. David M. Morris (David) also lived in the Strange household and had an automobile liability policy issued by respondent which was identical to the Strange policy.

On 21 July 1994, Mark, the minor son of the Stranges, was riding in an automobile owned by his father, Mr. Strange, and driven by

David, when Mark was involved in an automobile accident and seriously injured, resulting in large medical bills. The parties stipulated that the Stranges never selected or rejected UIM coverage on an approved form although the respondent mailed selection/rejection forms to its policyholders annually. At the trial court, petitioners contended that their policy affords Mark $1,000,000 in UIM coverage less any setoff. The trial court concluded as a matter of law that the Strange policy did not provide UIM coverage on the date in question and entered judgment to that effect. Petitioners appealed.

N.C. Gen. Stat. § 20-279.21(b)(4) (Cum. Supp. 1997) provides that an owner's policy of liability insurance "[s]hall . . . provide [UIM] coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection . . . ." All parties agree that the Strange policy afforded uninsured motorist [UM] coverage. The question before this Court is whether the Strange policy was written at limits which exceed the minimum limits stated in N.C. Gen. Stat. § 20-179.21(b)(2) of "twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and fifteen thousand dollars ($15,000) because of injury to or destruction of property of others in any one accident . . . ."

Petitioners agree that their policy has the minimum limits for bodily injury liability, but contend that, because their property damage coverage is $25,000, they have more than a minimum liability policy and qualify for UIM coverage. Petitioners then argue that because they never specifically rejected UIM coverage on an approved form, they have UIM coverage as a matter of law in an amount equal to their UM coverage of $1,000,000. We disagree.

There is no language in the statute tying property damage coverage to the existence of UIM coverage. N.C. Gen. Stat. § 20-179.21(b)(4) provides in part that "[UIM] coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for *bodily injury* caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted." (Emphasis added). UIM coverage is to be in an amount "not to be less than the financial responsibility amounts for *bodily injury* liability as set forth in

G.S. 20-279.5 . . . ." *Id.* (emphasis added). Furthermore, in *Morgan v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 200, 497 S.E.2d 834, *aff'd per curiam*, 349 N.C. 288, 507 S.E.2d 38 (1998), as in the case *sub judice*, the policy in question had limits of $25,000/$50,000 for bodily injury and $25,000 for property damage. In pertinent part, this Court held that, "since the policy in question only provided the minimum statutory-required coverage of $25,000/$50,000, the policy was not required to provide UIM coverage under section 20-279.21(b)(4)." *Id.* at 205, 497 S.E.2d at 837.

We hold, therefore, that the requirement of N.C. Gen. Stat. § 20-279.21(b)(4) that UIM coverage be available when an automobile liability insurance policy has coverage exceeding the minimum limits refers to *bodily injury* coverage only, and does not apply if only the property damage limits exceed the minimum.

Although we have carefully considered all other arguments advanced by petitioners, we find them unpersuasive. The trial court correctly decided that there was no UIM coverage available to petitioners under the policy in question.

Affirmed.

Judges WYNN and EDMUNDS concur.

VINCENT HART AND DEBORAH HART, PLAINTIFF V. F.N. THOMPSON CONSTRUCTION CO., DEFENDANT

No. COA98-569

(Filed 2 February 1999)

Appeal and Error— appealability—denial of motion to dismiss—procedural issues

Defendant could not immediately appeal an order denying defendant's motion to dismiss for lack of personal jurisdiction, insufficient process, and insufficient service of process where the appeal presents procedural issues with respect to plaintiffs' compliance with the Rules of Civil Procedure for issuance and service of process and does not involve insufficient minimum contacts with North Carolina to establish personal jurisdiction as a matter of due process.

Appeal by defendant from order entered 18 February 1998 by Judge Forrest A. Ferrell in Mecklenberg County Superior Court. Heard in the Court of Appeals 4 January 1999.

Pamela A. Hunter for plaintiff-appellees.

Templeton & Raynor, P.A., by Michael J. Rousseaux, for defendant-appellant.

MARTIN, Judge.

Plaintiffs filed this action against "F.N. Thompson Construction Company" seeking damages for personal injury due to alleged negligence. The summons and a copy of the complaint were served upon the Secretary of State of North Carolina, were mailed by the Secretary of State by certified mail addressed to "F.N. Thompson Construction Company, 201 Clanton Road, Charlotte, N.C., 28217", and were receipted for by one Mary Gibbs, an employee of F.N. Thompson Construction Company at that address.

Defendant moved to dismiss the action for lack of personal jurisdiction, G.S. § 1A-1, Rule 12(b)(2); for insufficiency of process, G.S. § 1A-1, Rule 12(b)(4); for insufficiency of service of process, G.S. § 1A-1, Rule 12(b)(5); and for failure to state a claim upon which relief can be granted, G.S. § 1A-1, Rule 12(b)(6). In support of its motion, F.N. Thompson Company asserted that although it is engaged in the construction business, it does not hold itself out as "F.N. Thompson Construction Company"; rather it is a North Carolina general partnership doing business under a Certificate of Assumed Name indicating that its general partners are two Delaware corporations whose offices are located in Alabama. It further asserted that neither general partner had been served with process in the manner prescribed by law. The trial court denied the motion to dismiss and defendant appeals.

For the reasons stated in *Berger v. Berger*, 67 N.C. App. 591, 313 S.E.2d 825, *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984), we dismiss defendant's appeal as interlocutory. Appeal flows from either a final judgment or an interlocutory order which affects a substantial right which will be lost if the appeal is not considered prior to a final judgment. N.C. Gen. Stat. § 1-277(a); N.C. Gen. Stat. § 7A-27. Ordinarily an order denying a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b) is considered interlocutory and not affecting a substantial right, and consequently there is no right of immediate appeal

therefrom. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). However, an immediate right to appeal from an order denying a motion to dismiss exists pursuant to G.S. § 1-277(b) which provides 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 or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C. Gen. Stat. § 1-277(b). This Court has interpreted G.S. § 1-277(b) as allowing an immediate right of appeal only when the jurisdictional challenge is substantive rather than merely procedural. In *Berger v. Berger*, *supra*, we held that:

> While G.S. 1-277(b) appears to authorize such right, it is our duty on appeal to examine the underlying nature of defendant's motion: If defendant's motion raises a due process question of whether his contacts within the forum state were sufficient to justify the court's jurisdictional power over him, then the order denying such motion is immediately appealable under G.S. 1-277(b). If, on the other hand, defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b).

Berger, 67 N.C. App. at 595, 313 S.E.2d at 828-29; *see also* J. Brad Donovan, The Substantial Right Doctrine and Interlocutory Appeals, 17 Campbell L. Rev. 71, 99 (1995). The basis of defendant's appeal in the present case does not allege insufficient minimum contacts with North Carolina to establish personal jurisdiction as a matter of due process; rather the appeal presents procedural issues with respect to plaintiffs' compliance with the Rules of Civil Procedure for issuance and service of process under Rules 12(b)(4) & (5). Therefore, defendant's appeal is premature and must be dismissed.

Appeal dismissed.

Chief Judge EAGLES and Judge McGEE concur.

TEDDY L. RIGGINS, EMPLOYEE, PLAINTIFF v. ELKAY SOUTHERN CORPORATION, EMPLOYER, KEMPER RISK MANAGEMENT SERVICES, CARRIER, DEFENDANTS

No. COA98-855

(Filed 2 February 1999)

Workers' Compensation— amount of compensation unresolved—further evidence—interlocutory order—not immediately appealable

An opinion and award of the Industrial Commission which settles preliminary questions of compensability but leaves unresolved the amount of compensation to which plaintiff is entitled and expressly reserves final disposition of the matter pending receipt of further evidence is interlocutory and not immediately appealable.

Appeal by defendants from opinion and award filed 28 January 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 January 1999.

Plaintiff filed a claim seeking workers' compensation benefits for injury to his back and knee that he allegedly sustained on or about 14 August 1993 while lifting a steel basket in the course of his employment with defendant-employer, Elkay Southern Corporation. Defendants denied that the claim was compensable. Following a hearing on 21 February 1997, a deputy commissioner concluded that plaintiff sustained an injury by accident arising out of and in the course of his employment on 14 August 1993. The deputy commissioner further concluded that plaintiff is entitled to have defendants provide for all medical treatment arising from this injury to the extent the treatment tends to effect a cure, give relief or lessen plaintiff's disability. The deputy commissioner also concluded that plaintiff is entitled to temporary total disability as a result of the injury; however, because there was insufficient evidence in the record to determine the dates for which plaintiff was entitled to receive temporary total or temporary partial disability compensation, the deputy commissioner ordered the parties "to confer on these issues." In the event the parties could not agree, they were allowed to submit additional evidence so the deputy could decide the issue.

The Full Commission reached the same conclusions. In addition, the Full Commission reserved the issue of the amount of permanent partial disability, if any, to which plaintiff is entitled for subsequent

determination. The Full Commission ordered plaintiff to go to an orthopedic surgeon and submit himself for an examination, evaluation, and recommendation of treatment. The Full Commission stated that if the surgeon had no recommendation of treatment, then plaintiff should apply for a permanent partial disability rating. Defendants appeal.

Roger Newman for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Winston L. Page, Jr. and M. Reid Acree, Jr., for defendant-appellants.

EAGLES, Chief Judge.

Neither party addresses the issue of whether the opinion and award is appealable at this time. An appeal from an opinion and award of the Industrial Commission is taken "under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." G.S. 97-86. Consequently, an appeal of right lies only from a final order or decision of the Industrial Commission, one that determines the entire controversy between the parties. *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 598-99, 482 S.E.2d 544, 545, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 550 (1997). An opinion and award that settles preliminary questions of compensability but leaves unresolved the amount of compensation to which the plaintiff is entitled and expressly reserves final disposition of the matter pending receipt of further evidence is interlocutory. *Fisher v. E. I. Du Pont De Nemours*, 54 N.C. App. 176, 177-78, 282 S.E.2d 543, 544 (1981); *Nash v. Conrad Industries*, 62 N.C. App. 612, 618, 303 S.E.2d 373, 377, *aff'd*, 309 N.C. 629, 308 S.E.2d 334 (1983); *Beard v. Blumenthal Jewish Home*, 87 N.C. App. 58, 61-62, 359 S.E.2d 261, 263 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988).

The present opinion and award on its face reserves issues for further determination. There is nothing in the record to indicate that all of the matters in this case have been resolved. It is our duty to dismiss an appeal *sua sponte* when no right of appeal exists. *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). We therefore dismiss this appeal as interlocutory.

Appeal dismissed.

Judges McGEE and HORTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 FEBRUARY 1999

BODWELL v. POLY PROCESSING, INC. No. 98-564	Henderson (96CVS630)	Affirmed
BRIGANCE v. N.C. BAPTIST HOSP., INC. No. 98-4	Forsyth (95CVS8137)	Reversed and Remanded
BROWN v. TYLER No. 98-883	Craven (97SP47)	Dismissed
DAVIS v. MEGA FORCE TEMPORARIES No. 98-512	Ind. Comm. (229328)	Affirmed
DEERMAN v. BEVERLY CALIFORNIA CORP. No. 98-135	Buncombe (97CVS2952)	Appeal Dismissed
DUKES v. HARLEYSVILLE MUT. INS. CO. No. 98-486	Ind. Comm. (421655)	Affirmed
DUNN v. CONOVER WOODWORKING, INC. No. 98-695	Ind. Comm. (482527)	Affirmed
FOSTER v. LANIER No. 98-298	Rowan (86CVD1092)	Affirmed in part, Reversed in part and Remanded
GENERAL ACCIDENT INS. CO. v. MSL Enter., INC. No. 98-130	Orange (97CVS743)	Reversed and Remanded
HENDERSON v. HENDERSON No. 98-877	Guilford (97CVD5919)	Dismissed
HOFFNER v. DIAMOND EXHAUST & EQUIP. No. 97-1608	Guilford (97CVS1158)	Reversed
HOLCOMB v. PEPSI-COLA CO. No. 98-761	Ind. Comm. (44169)	Affirmed
IN RE DAVENPORT No. 98-168	Perquimans (97J1)	Affirmed
IN RE GRANT No. 98-682	Buncombe (97J316)	No prejudicial error

IN RE JENNINGS No. 98-1173	Guilford (93J313)	Affirmed
IN RE MARTINAT No. 98-528	Burke (97J42)	Affirmed
IN RE MUTZ No. 98-871	Catawba (97J47) (93J88) (94J187)	Affirmed
IN RE WILL OF COLE No. 98-301	Durham (97E331)	As to the Propounder's appeal, no error. As to the Caveator's appeal, no error.
MINTON v. KINCAID FURNITURE CO. No. 98-625	Ind. Comm. (322472)	Affirmed
NELSON v. NELSON No. 98-317	Stokes (97CVD300)	Affirmed in part, Vacated in part
PEPSI-COLA BOTTLING CO. v. CORNELISON No. 98-489	Mecklenburg (97CVS8168)	Affirmed
PRISM LAB., INC. v. KLOTZ No. 98-93	Mecklenburg (97VS16154)	Reversed
RHYNEHARDT v. KOURY CORP. No. 98-968	Guilford (97CVS6622)	Affirmed
SIGMON v. SIGMON No. 98-749	McDowell (97CVD406)	Appeal Dismissed
STATE v. BARROW No. 98-834	Washington (97CRS1809)	No Error
STATE v. COFIELD No. 98-389	Harnett (94CRS10991) (94CRS10992) (94CRS10993) (94CRS10994)	No Error
STATE v. COLLINS No. 98-817	Hyde (97CRS516) (97CRS517)	No Error
STATE v. DAVIS No. 98-689	Pasquotank (96CRS4769)	No Error
STATE v. FORD No. 98-674	Alamance (97CRS3844)	No Error

STATE v. HARGROVES No. 98-959	Sampson (97CRS10963)	No Error
STATE v. HODGES No. 97-1084	Avery (95CRS1211)	No Error
STATE v. MITCHELL No. 98-898	Wake (95CRS14248) (95CRS71451)	No Error
STATE v. MOORE No. 98-832	Washington (97CRS1810)	No Error
STATE v. MOORE No. 98-833	Washington (97CRS1808)	No Error
STATE v. PINKLETON No. 98-971	Moore (97CRS11539) (97CRS11540)	No Error
STATE v. ROBINSON No. 98-805	Yancey (96CRS870) (96CRS871)	No Error
STATE v. ROSS No. 98-852	Beaufort (96CRS1494) (96CRS1495) (96CRS1496)	No Error
STATE v. SPRUILL No. 98-645	Washington (97CRS278)	No Error
STATE v. STEPHENS No. 98-514	Columbus (95CRS8002) (95CRS8003)	No Error
STATE v. WILLIS No. 98-445	Cumberland (96CRS9401)	No Error
VAIL v. ANGLIN No. 97-1511	Mecklenburg (94CVS14736)	Affirmed in part, Reversed in part, and Remanded

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER v. CALCO ENTERPRISES, A NORTH CAROLINA PARTNERSHIP, NORTH CAROLINA EQUIPMENT COMPANY, PAUL E. CASTELLOE, RECEIVER BY COURT APPOINTMENT, RONALD H. GARBER, RECEIVER BY COURT APPOINTMENT, MARY H. CALTON, EXECUTRIX OF THE ESTATE OF W.C. CALTON, W.C. CALTON, JR., EXECUTOR OF THE ESTATE OF W.C. CALTON, RESPONDENTS

No. COA98-687

(Filed 16 February 1999)

1. Judges— one judge overruling another—Rule 12 motion to dismiss—matters outside pleadings—not converted to summary judgment—subsequent summary judgment ruling—no error

A trial court did not err when granting a motion for summary judgment in a condemnation action by a natural gas company where defendant had appealed to superior court from the clerk of superior court, plaintiff had filed a Rule 12 motion to dismiss which was denied, and plaintiff subsequently filed a motion for summary judgment which was granted by a different judge. Although defendant argued that the earlier motion to dismiss was a motion for summary judgment because the trial judge considered the case file and briefs of counsel, that earlier motion alleged that defendant had no standing to contest the clerk's judgment and standing is treated differently because it is an aspect of subject matter jurisdiction. The trial court is not restricted to the face of the pleadings in making its determination on the issue of subject matter jurisdiction and the question of subject matter jurisdiction may be raised at any time. Accordingly, the original ruling did not preclude plaintiff from raising the jurisdictional issue before the second judge.

2. Jurisdiction— standing—condemnation—month-to-month tenant

A month-to-month tenant had standing to challenge an eminent domain taking as arbitrary and capricious where the North Carolina Equipment Company (NCEC) had leased land from Calco Enterprises, a partnership formed to purchase land and lease it to NCEC; Calco and NCEC had continued their arrangement after the expiration of the written lease; the agreement was not recorded; and petitioner Transcontinental Gas Pipe Line Corporation (Transco) filed a petition to condemn the real estate in question pursuant to its power of eminent domain. N.C.G.S.

§ 40A-28(c) does not prohibit NCEC's appeal because NCEC was made a party from the outset of the proceedings and, while the interest of a month-to-month tenant generally merits no compensation due to the difficulty of calculating the award, the actual owner of the property here (Calco) is only a legal entity created for the convenience of NCEC, the tenant. Denying NCEC standing effectively denies the party whose genuine interest is at stake the opportunity to protect that interest in court.

3. Jurisdiction— standing—eminent domain—letter terminating tenancy

A letter from a gas pipeline company purporting to terminate a month-to-month tenant's (NCEC) leasehold under N.C.G.S. § 40A-28(d) did not eliminate the standing of the tenant to challenge the taking under National Advertising Co. v. North Carolina Dept. of Transportation, 124 N.C. App. 620, because the plaintiff in National, unlike this case, had no interest in the property at the time it commenced its action for inverse condemnation.

4. Eminent Domain— gas pipeline—public purpose—not arbitrary and capricious

The trial court correctly granted summary judgment for Transcontinental Gas Pipe Line Corporation (Transco) in an eminent domain action on the issues of public purpose and arbitrariness and capriciousness. Condemning property for the transport of natural gas between states and for the distribution of natural gas within North Carolina is authorized by N.C.G.S. § 62-190 and a condemnation will not be invalidated when the taking is not arbitrary and capricious and is necessary to accomplish the purpose even where less intrusive means of accomplishing the purpose exist.

5. Eminent Domain— appeal to clerk—summary judgment—permitted

The North Carolina Equipment Company (NCEC) was not deprived of its statutory right to appeal from an order of the clerk of superior court to superior court by an order granting summary judgment. Because the appeal comes before the trial court as a civil matter de novo, N.C.G.S. § 1A-1, Rule 56 permits summary judgment. N.C.G.S. § 40A-28(c).

6. Eminent Domain— pursuance of alternatives—summary judgment

The trial court did not err by granting summary judgment for petitioner-pipeline company (Transco) in an eminent domain proceeding where the core of respondent's argument was that Transco did not pursue alternatives and that the taking was excessive and in bad faith. To prevail on its summary judgment motion, respondent would have to establish that there was no evidence in opposition to its allegation of bad faith; in fact, there was substantial evidence to contradict respondent's claim and to support petitioner's contention that it was acting in good faith.

Judge WYNN concurring.

Appeal by respondent North Carolina Equipment Company from order entered 24 February 1998 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 14 January 1999.

Womble Carlyle Sandridge & Rice, PLLC, by Michael E. Ray and Lynn Watson Neumann, for petitioner-appellee.

Hill, Evans, Duncan, Jordan & Davis, PLLC, by William W. Jordan and Joseph P. Gram, for respondent-appellant North Carolina Equipment Company.

EDMUNDS, Judge.

Transcontinental Gas Pipe Line Corporation (Transco) is a Delaware corporation engaged in the business of transporting and delivering natural gas via pipeline from the Gulf of Mexico to the Northeastern United States. In order to expand its Kernersville delivery point, Transco filed a petition to condemn certain real property pursuant to its power of eminent domain under N.C. Gen. Stat. § 62-190 (1989) and Chapter 40A.

The property at issue is .210 acres of land owned by Calco Enterprises (Calco). Calco is a partnership formed to purchase land and lease it to North Carolina Equipment Company (NCEC). Calco and NCEC signed a five-year lease agreement dated 31 May 1988, which described a 3.156 acre tract in Forsyth County. In addition, Calco owned 6.2 acres adjacent to the property described in the written lease. NCEC and Calco also orally agreed for NCEC to lease the 6.2 acre tract for the term of the written lease. When the written

lease expired, Calco and NCEC continued their arrangement. The .210 acres of land in dispute are part of the 6.2 acre tract.

Because the agreement between Calco and NCEC was not recorded, Transco only discovered its existence during discussions with Calco prior to institution of this suit. On 2 July 1996, Transco petitioned to condemn the .210 acres, naming Calco, NCEC, and others as party opponents. NCEC initially responded by seeking just compensation, then later amended its response to the petition to allege that Transco's actions were arbitrary, capricious, and an abuse of discretion. On 29 July 1996, the Clerk of Superior Court appointed Commissioners to appraise the property and determine the compensation to be paid by Transco for the .210 acres. The Commissioners reported the value of the property to be $9,200. NCEC filed exceptions to the appraisal and to the Clerk's order of 29 July 1996. When the Clerk of Superior Court entered judgment overruling NCEC's exceptions on 29 August 1996, NCEC appealed that judgment to Superior Court on 9 September 1996. On 3 January 1997, Transco filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12 (1990), which Judge H. W. Zimmerman, Jr., ultimately denied on 10 February 1997.

On 7 February 1997, in its response to Transco's motion to dismiss, NCEC admitted that Transco had paid the judgment amount of $9,200 into the court. On 14 February 1997, Transco sent a letter to NCEC purporting to terminate NCEC's leasehold at the earliest date permitted by applicable law. On 27 August 1997, Transco filed a motion for summary judgment. NCEC thereafter responded and filed its own motion for summary judgment, supported by affidavits. On 24 February 1998, finding no genuine issue of material fact and that Transco was entitled to judgment as a matter of law, Judge Peter M. McHugh granted Transco's motion for summary judgment. From this order, NCEC appeals.

[1] Respondent-appellant NCEC first contends that the trial court committed reversible error when it granted Transco's motion for summary judgment after a previous motion to dismiss had been denied by another judge. We disagree. NCEC argues that the earlier motion to dismiss was in fact a motion for summary judgment because the trial judge considered matters beyond those in the pleadings. The trial judge's order, in fact, recites that the case file and briefs of counsel had been reviewed. "Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for

failure to state a claim, the motion shall be treated as one for summary judgment. . . ." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 229 (1985). Thus, under most situations, consideration of the court file, briefs, and attached affidavits would indeed convert a motion to dismiss into a motion for summary judgment pursuant to Rule 56. Where such conversion occurs, reconsideration of a motion for summary judgment by a second judge is precluded by the well-established rule in North Carolina that: (1) no appeal lies from one superior court judge to another; (2) one superior court judge may not correct another's errors of law; and (3) ordinarily one judge may not modify, overrule, or change the judgment of another superior court judge previously made in the same action. *See Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

However, in this case, Transco's original motion to dismiss alleged that NCEC had no standing to contest the clerk's judgment. Standing is treated differently than most other issues because it is an aspect of subject matter jurisdiction. *See Union Grove Milling and Manufacturing Co. v. Faw*, 109 N.C. App. 248, 426 S.E.2d 476, *disc. review allowed*, 333 N.C. 578, 429 S.E.2d 577, *and aff'd per curiam*, 335 N.C. 165, 436 S.E.2d 131 (1993). In determining the issue of subject matter jurisdiction on a motion to dismiss, the court is not restricted to the face of the pleadings in making its determination. *See Cline v. Teich for Cline*, 92 N.C. App. 257, 374 S.E.2d 462 (1988). Furthermore, the question of subject matter jurisdiction may be raised at any time, even on appeal. *See Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986). "If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case. . . ." *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988). Accordingly, the original ruling did not preclude Transco from raising the jurisdictional issue before the second judge, who properly considered Transco's motion. This assignment of error is overruled.

[2] Transco again raises the issue of standing on appeal, contending that NCEC is a month-to-month tenant that lacks standing to challenge the taking as arbitrary and capricious. Under the facts of this case, we do not agree. Chapter 40A details the power of eminent domain in North Carolina. N.C. Gen. Stat. § 40A-28(c) (1984) confers standing upon "[a]ny party to the proceedings," and grants such party the power to "file exceptions to the clerk's final determination on any exceptions to the report and [to] appeal to the judge of superior court

having jurisdiction." Here, NCEC was made a party from the outset of these proceedings initiated by Transco. Thus, the statute does not prohibit NCEC's appeal.

This Court has also said that "[t]he gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court." *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *disc. review denied in part*, 299 N.C. 741, 267 S.E.2d 671, *and aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980). With regard to a zoning proceeding, this Court stated that a party must "own the affected property or have some interest in it" to challenge the proceeding. *See Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 613, 322 S.E.2d 655, 657 (1984) (barring the zoning challenge of a month-to-month tenant whose challenge was initiated after the leasehold was terminated). The Court must therefore determine NCEC's interest, if any, in the condemned property.

Here, there was no written and thus no recorded instrument that represented NCEC's interest in the property condemned. However, Transco had actual notice that NCEC was in possession of and paid rent for the condemned property. "[W]hen a tenant enters into possession under an invalid lease and tenders rent which is accepted by the landlord, a periodic tenancy is created. . . . The period of the tenancy is determined by the interval between rental payments." *Kent v. Humphries*, 303 N.C. 675, 679, 281 S.E.2d 43, 46 (1981). Accordingly, we conclude that NCEC had a present possessory interest, namely, a month-to-month periodic tenancy, and that Transco was on notice of that interest. Thus, the key to deciding whether NCEC has standing in this suit is whether a month-to-month tenancy sufficiently solidifies the adversarial role so that the issues before the court are brought forth and clearly articulated. *See Texfi*, 44 N.C. App. 268, 261 S.E.2d 21.

Usually, a lessee has standing to litigate its portion of the total award upon condemnation. *See Durham v. Realty Co.*, 270 N.C. 631, 155 S.E.2d 231 (1967). However, the interest of a month-to-month tenant generally merits no compensation due to the difficulty of calculating its portion of an award. *See* 26 Am. Jur. 2d *Eminent Domain* § 259 (1996). Whether a month-to-month tenant has standing, not merely to challenge the apportionment of a condemnation award, but to challenge the condemnation proceeding itself as arbitrary,

capricious, and an abuse of discretion, is an issue of first impression in North Carolina. Therefore, we look to the applicable statutes for guidance.

Chapter 40A defines "owner" as "*any* person having an interest or estate in the property." N.C. Gen. Stat. § 40A-2(5) (1984) (emphasis added). Section 40A-25, dealing with private condemnations, is equally absolute and allows "all or any of the persons whose estates or interests are to be affected by the proceedings" to answer and show cause against granting the petition. N.C. Gen. Stat. § 40A-25 (1984). If our legislature had intended to give a diminished status to month-to-month tenancies, it could have expressly done so. While Calco is the actual owner of the property, it is only a legal entity created for the convenience of NCEC. Denying NCEC standing to pursue this case effectively denies the party whose genuine interest is at stake the opportunity to protect that interest in court. Accordingly, limited to the facts of this case, we find that NCEC's interest in the property is sufficient to maintain standing.

[3] Transco contends that pursuant to powers granted it by N.C. Gen. Stat. § 40A-28(d) (1984), the letter of 14 February 1997 terminated NCEC's tenancy and thereby eliminated its standing. We disagree. Transco cites *National Advertising Co. v. North Carolina Dept. of Transportation*, 124 N.C. App. 620, 478 S.E.2d 248 (1996) in support of its argument. However, *National* is distinguishable from the instant case. In *National*, the Department of Transportation purchased property on which an advertising sign was located, then terminated the month-to-month lease. After the effective date of termination, the sign owner initiated an action for inverse condemnation. The trial court dismissed the sign owner's suit for lack of standing, holding that the interest in land was properly terminated *prior to* the filing of the action. Unlike the instant case, the plaintiff in *National* had no interest in the property at the time it commenced its action for inverse condemnation. We, therefore, overrule Transco's assignment of error.

[4] Establishing standing is just one step across the legal threshold that each litigant must cross in order to have the merits of his or her case heard. As this Court observed in *Texfi*, "One may have standing to assert a claim which the Court in its final analysis decides has no merit." *Texfi*, 44 N.C. App. at 269, 261 S.E.2d at 23. Accordingly, in evaluating the trial court's decision to grant Transco's motion for summary judgment, we must next determine whether any genuine

issue of material fact existed and whether Transco was entitled to judgment as a matter of law.

> Property may be condemned only for a public purpose, and the Judicial Branch of the government determines whether a taking is for a public purpose. The Legislative Branch decides the political question of the extent of the taking, and the courts cannot disturb such a decision unless the condemnee proves the action is arbitrary, capricious, or an abuse of discretion.

City of Charlotte v. Cook, 348 N.C. 222, 225, 498 S.E.2d 605, 607-08 (1998) (citations omitted). Here, the legislature has defined the extent of a permissible taking. *See* N.C. Gen. Stat. § 40A-3(a)(1) (Cum. Supp. 1997). Thus, the issues before this Court are whether the trial judge properly concluded that (1) the taking was for a public purpose and (2) the taking was neither arbitrary and capricious nor an abuse of discretion.

(1) Public purpose

Whether a condemnor's intended use of property is for public use or benefit is a question of law for the courts. *See Carolina Telephone and Telegraph Co. v. McLeod*, 321 N.C. 426, 429, 364 S.E.2d 399, 401 (1988). The concept is flexible and adaptable to changes in society and governmental duty. *See id.* Transco condemned this property for the transport of natural gas between states and the distribution of natural gas within North Carolina. Doing so is authorized by N.C. Gen. Stat. § 62-190. The trial court properly concluded that the taking was for a public purpose.

(2) Arbitrary and capricious and abuse of discretion

"The words 'arbitrary' and 'capricious' have similar meanings, generally referring to acts done without reason or in disregard of the facts." *State ex rel. Utilities Comm. v. Mackie*, 79 N.C. App. 19, 28, 338 S.E.2d 888, 895 (citing *In re Housing Authority of Salisbury*, 235 N.C. 463, 70 S.E.2d 500 (1952)), *disc. review allowed*, 316 N.C. 557, 344 S.E.2d 16, *disc. review on additional issue allowed*, 316 N.C. 557, 344 S.E.2d 17 (1986), *and aff'd as modified*, 318 N.C. 686, 351 S.E.2d 289 (1987). Determination of whether conduct is arbitrary and capricious or an abuse of discretion is a conclusion of law. *See, e.g., Dept. of Transportation v. Overton*, 111 N.C. App. 857, 861, 433 S.E.2d 471, 474, *disc. review allowed*, 335 N.C. 237, 439 S.E.2d 144 (1993), *and disc. review improvidently granted*, 336 N.C. 598, 444 S.E.2d 448 (1994).

NCEC alleges that Transco's failure to seek variances from the setback requirements of local zoning ordinances led to condemnation of excess property and that Transco's public purpose could have been achieved through less intrusive means. However, for the condemnation to have been arbitrary, capricious, and an abuse of discretion, a court must find, as a matter of law, that the acts were done without reason or in disregard of the facts. *See In re Housing Authority*, 235 N.C. 463, 70 S.E.2d 500 (1952). Even where less intrusive means of accomplishing the public purpose exist, a condemnation will not be invalidated when the taking is not arbitrary and capricious and is necessary to accomplish the purpose. *See Charlotte v. Cook*, 348 N.C. 222, 498 S.E.2d 605 (where the court upheld a fee simple condemnation even though an easement would have potentially sufficed). Therefore, we hold that the trial court properly decided Transco's taking was not arbitrary and capricious nor an abuse of discretion.

Because Transco's taking was for a public purpose and was neither arbitrary and capricious nor an abuse of discretion, the trial court found that Transco was entitled to judgment as a matter of law on the substantive issues. We cannot say this finding is erroneous. Thus, these assignments of error are overruled.

[5] NCEC next contends that the order granting summary judgment deprived NCEC of its statutory right to appeal. Under the provisions of N.C. Gen. Stat. § 40A-28(c) (1984), "A judge in session shall hear and determine all matters in controversy and, . . . shall determine any issues of compensation to be awarded in accordance with the provisions of Article 4 of this Chapter." However, once the matter is appealed, it comes before the judge *de novo*. *See Durham v. Davis*, 171 N.C. 305, 88 S.E. 433 (1916). The parties did not dispute the facts before the court, and the matters in controversy were matters of law. Because the appeal comes before the trial court as a civil matter *de novo*, Rule 56 of the North Carolina Rules of Civil Procedure permits summary judgment. Accordingly, this assignment of error is overruled.

[6] NCEC finally contends that the court erred in denying its motion for summary judgment. We disagree. The core of NCEC's argument is that Transco condemned excess property in order to comply with a zoning setback requirement, that Transco could have, but did not, pursue alternatives such as a variance, and that the taking was therefore excessive and in bad faith. North Carolina courts have given private condemnors discretion in acquiring property reasonably neces-

sary to carry on the enterprise, absent a showing of bad faith or abuse of discretion. *See Power Co. v. Wissler*, 160 N.C. 269, 76 S.E. 267 (1912); 26 Am. Jur. 2d *Eminent Domain* §§ 30, 31 (1996). To prevail on its summary judgment motion, NCEC would have to establish that there is no evidence in opposition to its allegation that Transco was condemning the property in bad faith. In fact, there was substantial evidence to contradict NCEC's claim and to support Transco's contention that it was acting in good faith. This assignment of error is overruled.

Affirmed.

Judge HORTON concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring with separate opinion.

Although I agree with the majority's resolution of this matter, I separately concur because I do not believe that we needed to consider the merits of the North Carolina Equipment Company's ("NCEC") claim. Specifically, I find that NCEC lacked standing to contest the condemnation because as a month-to-month tenant it lacked a constitutionally sufficient interest in the property.

When analyzing issues of standing, this Court must focus on "whether the litigant is entitled to have the court decide the merits of the dispute of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d. 343, 348 (1975). Indeed, standing does not focus upon the merits of the action, but rather is a necessary preliminary jurisdictional requirement which demonstrates that a litigant is entitled to judicial action. *See Allen v. Wright*, 468 U.S. 737, 750, 82 L. Ed. 2d 556 (1984).

Constitutionally, a plaintiff can only have standing if it satisfies the "case or controversy" requirement of Article III of the Constitution of the United States. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 35 L. Ed. 2d 536 (1973). Under Supreme Court precedent, a plaintiff satisfies the Article III standing requirement if it meets a three-pronged test: (1) the plaintiff must have suffered "injury in fact"; (2) there must be a casual connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *See Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 559, 119 L. Ed. 2d 351, 354 (1992). The plaintiff bears the burden of establishing these three elements. *See Burton v. Central Interstate LLRWC Comm'n*, 23 F.3d 208, 209 (8th Cir. 1994).

Additionally, the Supreme Court has articulated three prudential limits on standing. First, courts should not adjudicate abstract questions of wide public significance which amount to generalized grievances. *See Valley Forge v. Americans United*, 454 U.S. 464, 474, 70 L. Ed. 2d 700, 709 (1982). Second, the plaintiff's complaint must fall within the zone of interest to be protected or regulated by the statute in question. *Id.* Lastly, the plaintiff must assert his own legal rights and interests, and cannot rest his claim on the legal rights of others. *Id.* It is this last prudential concern that is at issue in the case *sub judice*.

"Ordinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255, 97 L. Ed. 1586 (1953). There are two reasons for this limitation. First, courts should not unnecessarily adjudicate such rights, and it may be that the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. *See Ashwander v. TVA*, 297 U.S. 288, 345-48, 80 L. Ed. 688 (1936). Second, our judicial system depends upon effective advocacy which is best achieved when the party with the greatest stake in the outcome of a judicial decision litigates it. *See Singleton v. Wulff*, 428 U.S. 106, 49 L. Ed. 2d 826 (1976). That is, our judicial system is best served when the third party itself acts as a proponent for its own rights. *Id.* I note that the two exceptions to this rule—when the parties rights are inextricably bound and when the third party cannot assert his own right—are inapplicable here.

In the case *sub judice*, Calco, the owner of the condemned property is the real party in interest. Admittedly, NCEC, as a month-to-month tenant on the property, has some interest in whether Calco's property is properly condemned. This interest, however, is *de minimis* and therefore does not confer standing upon NCEC.

This case is similar to *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320 (1975), where the defendant-lessee contended that an ordinance was unconstitutionally applied to him because it equated to a taking of his property for a public purpose without compensation. Our Supreme Court, in rejecting this argument, stated that because the lessee had only a three-year lease term, "[t]he interference by the city

with defendant's vested rights in his leasehold was . . . minimal." *Id.* at 375, 211 S.E.2d at 326. Accordingly, if a three-year lease term is considered too minimal to constitute a compensable interest, NCEC's one-month term is undoubtedly a *de minimis* interest. Although the Court in *Joyner* failed to address the issue of standing, the fact that the Court considered a three-year lease term to constitute a minimal interest is persuasive in the case *sub judice*. Specifically, it implicitly holds that a party with a leasehold interest does not have a constitutional interest in the lessors property.

In sum, I would find that NCEC lacks a sufficient interest in the property and in reality is attempting to assert Calco's rights in this action. Therefore, NCEC is not the real party in interest and the lower court's decision should be affirmed on the basis of NCEC's lack of standing.

STATE OF NORTH CAROLINA v. ANDREW LEE MONK

No. COA98-277

(Filed 16 February 1999)

1. **Constitutional Law— double jeopardy—probation revocation hearing**

Defendant was neither subjected to successive criminal prosecutions for the same offense nor subjected to multiple punishments for the same offense where he was on probation for an unrelated drug offense when he was charged with first-degree statutory rape, taking indecent liberties with a minor, attempted murder, and assault with a deadly weapon; defendant's probation officer filed a probation violation report; and a probation violation hearing was held but continued and judgment on the alleged violation was not entered prior to trial. It has been held that the double jeopardy clause of the Fifth Amendment to the U.S. Constitution does not prevent the prosecution of a defendant for the substantive offense used as the basis of revocation of probation.

2. **Appeal and Error— preservation of issues—new arguments on appeal**

Defendant's arguments on appeal were not considered where they differed from the argument presented to the trial court.

3. Criminal Law— joinder of offenses—assault and attempted murder based on HIV status—joined with first-degree statutory rape and indecent liberties

The trial court did not abuse its discretion in joining for trial charges of assault with a deadly weapon and attempted murder based on defendant's HIV status with charges of first-degree statutory rape and taking indecent liberties with a minor. The cases at issue were based on the same act, were connected, and constituted parts of a single plan, as required for joinder by N.C.G.S. § 15A-926(a).

4. Trials— calendar—attempted murder charge added after printing

The trial court did not abuse its discretion in a prosecution for attempted murder, assault, statutory rape, and indecent liberties by allowing the State to add the attempted murder charge to the trial calendar (which included the other offenses) after the calendar had been printed.

5. Evidence— attempted murder and assault charges—HIV status—admissible

The trial court did not err in a prosecution for first-degree statutory rape, taking indecent liberties with a minor, attempted murder, and assault with a deadly weapon by allowing the State to introduce evidence that defendant has AIDS where the evidence of defendant's HIV status was relevant to the State's charges of attempted murder and assault with a deadly weapon and, although the charges were dismissed at the close of the evidence, they had not been dismissed when the trial court considered the admissibility of the evidence. Moreover, defendant failed to show that the admission of the evidence was unfairly prejudicial.

6. Criminal Law— HIV positive defendant—protective handware for jury to examine exhibits

The trial court did not abuse its discretion in a prosecution for first-degree statutory rape, taking indecent liberties with a minor, and attempted murder and assault based on defendant's positive HIV status by instructing the jury that it could use protective handwear to examine defendant's clothes. The instructions do not show that the trial court had an opinion as to defendant's HIV status and the instruction giving jurors the option of wearing rubber gloves if they wished to handle personal items

introduced as exhibits was a proper exercise of reasonable control over the presentation of the evidence.

7. Evidence— criminal defendant—house arrest—chain of circumstances

The trial court did not err in a prosecution for first-degree statutory rape, indecent liberties, assault, and attempted murder by admitting the victim's testimony that defendant was on house arrest at the time of the offense and an officer's testimony that the victim had told him that defendant was wearing a band around his ankle with a small box on it. The evidence on house arrest was relevant to the victim's account of the crime and served to enhance the natural development of the facts; it was not unfairly prejudicial because the State neither presented evidence nor argued that defendant had been convicted of a prior crime and the testimony was not used to prove the character of defendant.

Appeal by defendant from judgments entered 9 July 1997 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 19 November 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ellen B. Scouten, for the State.

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

McGEE, Judge.

Defendant was convicted of first degree statutory rape and taking indecent liberties with a minor on 9 July 1997.

The State's evidence tended to show that the twelve-year-old victim lived in Guilford County, North Carolina with her parents, sister, and three foster children. Defendant, age thirty-six, lived four houses down from the victim with his twelve-year-old son and his parents. The victim often went to defendant's residence to play with defendant's son.

The victim took Christmas cookies to defendant's residence on 15 December 1996. Defendant was the only person at home. The victim talked with defendant for about fifteen minutes. Defendant told the victim that he "was on house arrest and that he couldn't . . . have sexual activities with other women," and that "if he was [his son's] age,

he would tear [the victim] up." The victim testified she immediately got up to leave, and that defendant followed her as she walked towards his front door to exit. Defendant grabbed the victim from behind, and began touching her breasts and vagina. Defendant forced the victim into his bedroom, held her down on his bed, pulled off her pants and forced her to have sexual intercourse with him. The victim testified she did not know how long defendant was "on top of [her]" before she screamed and defendant went into his bathroom. The victim ran out of defendant's house and to her own home.

Defendant's mother subsequently informed police officers that defendant had tested positive for the human immunodeficiency virus (HIV), and that he has acquired immune deficiency syndrome (AIDS). The victim has since undergone periodic testing for HIV and is on AZT treatment but has thus far tested negative for HIV.

At the time defendant was charged with the present offenses, he was on probation for an unrelated drug offense. One condition of his probation was that he not commit a crime. After defendant was charged with the present offenses, defendant's probation officer filed a probation violation report based upon the new charges. A probation violation hearing for defendant was held on 30 January 1997. The hearing was continued and judgment was never entered on defendant's alleged probation violation prior to trial of the present offenses.

Defendant filed a pretrial motion to dismiss the charges on 26 June 1997, on grounds that the probation violation hearing barred a subsequent prosecution of defendant for the substantive offenses based on double jeopardy. The trial court denied defendant's motion on 30 June 1997.

Defendant was sentenced to a minimum of 420 months and a maximum of 513 months in prison for the first degree statutory rape, and a minimum of 26 months and a maximum of 32 months for taking indecent liberties with a minor.

Defendant appeals.

I.

[1] Defendant argues the trial court erred in denying defendant's motion to dismiss for violation of double jeopardy. We disagree.

"The Double Jeopardy Clause . . . provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *United States v. Dixon*, 509 U.S. 688, 695-96, 125 L. Ed. 2d 556,

567 (1993) (quoting U.S. Const. amend. V). "This protection applies both to successive punishments and to successive prosecutions for the same criminal offense." *Dixon* at 696, 125 L. Ed. 2d at 567 (citation omitted). "The same-elements test . . . inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *Dixon* at 696, 125 L. Ed. 2d at 568. Our Supreme Court has held that " '[t]he Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense[.]' " *State v. Ballenger*, 123 N.C. App. 179, 180, 472 S.E.2d 572, 572-73 (1996) (citation omitted), *cert. denied*, 118 S.Ct. 68, 139 L. Ed. 2d 29 (1997).

A probation violation hearing is not a criminal prosecution. *State v. Pratt*, 21 N.C. App. 538, 204 S.E.2d 906 (1974). In *Pratt*, our Court stated:

> A proceeding to revoke probation is not a criminal prosecution but is a proceeding solely for the determination by the court whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered; and while notice in writing to defendant, and an opportunity for him to be heard, are necessary, the court is not bound by strict rules of evidence, and all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the defendant had, without lawful excuse, willfully violated a valid condition of probation.

Id. at 540, 204 S.E.2d at 907 (citations omitted).

In *State v. Campbell*, 90 N.C. App. 761, 370 S.E.2d 79, *disc. review denied*, 323 N.C. 367, 373 S.E.2d 550 (1988), defendant pled guilty to felonious sale and delivery of a Schedule II controlled substance in 1986 and was given a three year suspended sentence and placed on probation for three years. In August, 1987 he was convicted of two counts "of felonious sale and delivery of a Schedule II controlled substance." *Id.* at 762, 370 S.E.2d at 80. For his 1987 convictions, defendant was sentenced to ten years in prison and his probation was revoked. Defendant's 1987 convictions served as the basis for defendant's probation revocation. *Id.* Our Court affirmed defendant's conviction, and held that the statute "which allow[ed] the court to activate defendant's suspended probationary sentence and to run it

consecutively to another sentence," did not violate the double jeopardy clause. *Id.* at 764, 370 S.E.2d at 80-81.

Similar to *Campbell*, the facts of the present case do not show that defendant was subject to multiple punishments for the same offense. In *State v. Young*, 21 N.C. App. 316, 204 S.E.2d 185 (1974), our Court stated that:

> Although revocation of probation results in the deprivation of a probationer's liberty, *the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty.* The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence, but to the truth of the accusation of a violation of probation.

Id. at 320, 204 S.E.2d at 187 (emphasis added) (citation omitted).

Other courts have held that the double jeopardy clause of the Fifth Amendment to the U.S. Constitution does not prevent the prosecution of a defendant for the substantive offense used as the basis of revocation of the defendant's probation. *See U.S. v. Whitney*, 649 F.2d 296 (5th Cir. 1981); *State v. McDowell*, 699 A.2d 987 (Conn. 1997).

Following our reasoning in *Pratt* and *Young*, we hold that defendant was neither subject to successive criminal prosecutions for the same offense, nor subject to multiple punishments for the same offense. Thus, defendant's double jeopardy argument must fail. We find no error.

II.

[2] Defendant argues the trial court erred in denying defendant's motions to dismiss the charges of attempted murder and assault with a deadly weapon prior to the introduction of evidence, as well as defendant's motion to sever. Defendant was indicted for: (1) first degree statutory rape, (2) taking indecent liberties with a minor, (3) attempted murder, and (4) assault with a deadly weapon. Defendant filed a motion to dismiss the charges of attempted murder and assault with a deadly weapon on 30 June 1997, as well as a motion to sever these offenses from the sex offenses for trial. Defendant's motions were denied. After the State had presented its evidence, the trial court dismissed the charges of attempted murder and assault with a deadly weapon.

Defendant set forth in a pretrial motion entitled "Separation of Powers" that the State's theory for the charges of assault with

a deadly weapon and attempted murder was that defendant attempted to infect the victim with the HIV virus. The State contended at trial that this was, in fact, its theory of defendant's guilt as to these charges, and that this theory was set forth in "the bill of indictment . . . 96 Crs 20203."

Defendant filed a pretrial motion to dismiss these charges on the ground that there was no statutory authority for the offenses. Defendant argued that "whether the AIDS Virus or any disease is a weapon" is a matter of public policy to be determined by the General Assembly, and thus prosecution of defendant for assault with a deadly weapon and attempted murder would "usurp the law making powers of the Legislature and would thus be in violation of the North Carolina Constitution."

Defendant now sets forth new arguments on appeal. He contends that the State failed to forecast sufficient evidence to support the charges and he argues that if the motion to dismiss had been granted pretrial, the State would have had no "argument for the admissibility of the unfairly [prejudicial] evidence of the defendant's HIV status." We decline to consider defendant's additional arguments in that they differ from the argument defendant presented to the trial court. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the *specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (emphasis added); *see also State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (stating "[d]efendant may not swap horses after trial in order to obtain a thoroughbred upon appeal") (citation omitted). Furthermore, defendant failed to include in the record on appeal copies of the indictments or warrants for the charges of assault with a deadly weapon and attempted murder, thus preventing this Court from determining whether the indictments properly alleged the use of a deadly weapon and preventing effective review. *See State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977) (stating that once an *indictment properly alleges* the use of a deadly weapon in a crime, "[w]hether the state can prove the allegation is, of course, a question of evidence which cannot be determined until trial.") *Id.* at 640, 239 S.E.2d at 411.

[3] Defendant also argues the trial court erred in joining for trial the charges of assault with a deadly weapon and attempted murder along with the charges of first degree statutory rape and taking indecent liberties with a minor. Defendant's argument is without merit.

N.C. Gen. Stat. § 15A-926(a) (1997) states:

> (a) Joinder of Offenses.— Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

"If the consolidated charges have a transactional connection, the decision to consolidate the charges is left to the 'sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion.'" *State v. Weathers*, 339 N.C. 441, 447, 451 S.E.2d 266, 269 (1994) (citation omitted). "A defendant is not prejudiced by the joinder of two crimes unless the charges are 'so separate in time and place . . . as to render the consolidation unjust and prejudicial to defendant.'" *State v. Howie*, 116 N.C. App. 609, 615, 448 S.E.2d 867, 871 (1994) (citations omitted).

The cases at issue "[were] based on the same act," were "connected together," and "constitut[ed] parts of a single . . . plan[,]" as is required for joinder by N.C. Gen. Stat. § 15A-926(a). No evidence in the record tends to suggest that the trial court abused its discretion in joining the cases for trial. We find no error.

III.

[4] Defendant argues the trial court erred in allowing the State to add the attempted murder charge to the trial calender for the week of 30 June 1997, after the court calendar had been printed. We disagree.

During pretrial motions, the following exchange took place regarding the State's failure to include the attempted murder charge on the trial calender for the week of 30 June 1997:

> MR. CARROLL: Your Honor, before we get too much further into it, I've got an oral motion concerning the case I want to make at some point. It's just an administrative type thing.
>
> THE COURT: What's your motion?
>
> MR. CARROLL: We mentioned yesterday, your Honor, that the attempted murder indictment was inadvertently left off the calendar.
>
> . . .

> The case number, your Honor, is 97 Crs 23007. The defendant is charged with attempted murder in that bill of indictment. I had contemplated that that would be on the calendar. It was left off just by clerical error, and I told Mr. Jones the case was going to be on the calendar. I'm sure that he assumed that all the charges would be on there as well. This case number is on all of his motions, and I would ask the Court's permission to allow us to add that to the calendar. At this point, I know you haven't heard the severance motion, but just for the purpose of hearing these motions.
>
> THE COURT: Allowed.
>
> MR. JONES: We'll enter our objection.

Pursuant to N.C. Gen. Stat. § 7A-49.3(a) (1995), the district attorney retains the authority to prepare the calendar of cases for trial. However, N.C. Gen. Stat. § 7A-49.3(c) states that "[n]othing in this section shall be construed to affect the authority of the court in the call of cases for trial." Our Supreme Court has held that "the ultimate authority over managing the trial calendar is retained in the court," even though the statute gives the district attorney the authority to calender cases for trial. *Simeon v. Hardin*, 339 N.C. 358, 376, 451 S.E.2d 858, 870 (1994).

Pursuant to N.C. Gen. Stat. § 7A-49.3(c) and *Simeon*, the trial court correctly exercised its "ultimate authority" in considering the State's request to add the attempted murder charge to the trial calendar. We find no error.

IV.

[5] Defendant argues the trial court erred in denying his motion to prohibit the State from introducing evidence that defendant has AIDS. We disagree.

Defendant filed a pretrial motion on 26 June 1997 requesting that evidence of defendant's HIV status be excluded as unfairly prejudicial. The motion was denied 1 July 1997. The State's theory as to the charges of attempted murder and assault with a deadly weapon was that defendant attempted to murder the victim and assaulted her with a deadly weapon by attempting to infect her with the HIV virus.

Defendant argues that Rules 401 and 403 of the North Carolina Rules of Evidence require evidence of his HIV status be excluded. " 'Relevant evidence' means evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C.R. Evid. 403. The evidence of defendant's HIV status was relevant to the State's charges of attempted murder and assault with a deadly weapon. Although these charges were dismissed at the close of the evidence, they had not been dismissed when the trial court considered the admissibility of the evidence of defendant's HIV status.

Defendant argues that "[o]ur Courts have observed that a person's HIV status is likely to prejudice him in the eyes of the jury." Defendant contends his argument is supported by *State v. Knight*, 340 N.C. 531, 459 S.E.2d 481 (1995) and *State v. Degree*, 114 N.C. App. 385, 442 S.E.2d 323 (1994). In *Knight*, the trial court admitted evidence that the *victim*, not the defendant, was HIV-positive. Defendant argued the trial court erred in refusing to allow him to question prospective jurors during *voir dire* about "whether the victim's HIV-positive status would affect their ability to be fair and impartial." *Knight* at 556, 459 S.E.2d at 497. Our Supreme Court affirmed the trial court's ruling prohibiting *direct* questions about HIV during jury selection. The Court stated that "[t]he possibility of juror prejudice against defendant from the victim's HIV-positive status does not rise to the level of fundamental unfairness in the instant case." *Id.* at 558, 459 S.E.2d at 498.

In *Degree*, defendant was on trial for rape and moved for a mistrial upon learning that an empaneled juror may have learned from a newspaper article that defendant had AIDS. *Degree* at 391, 442 S.E.2d at 326. Our Court found no error in the trial court's denial of defendant's motion for a mistrial and stated that "[i]t was reasonable to conclude that [the juror at issue] did not read the article and had formed no opinion that would jeopardize the defendant's right to a fair trial." *Degree* at 393, 442 S.E.2d at 327.

Defendant's mother and the victim both testified that defendant has AIDS. This testimony was necessary to support the charges of attempted murder and assault with a deadly weapon. The case law cited by defendant provides no guidance to us in determining defendant's argument that the fact that a defendant has AIDS will automatically and unfairly prejudice defendant in the eyes of the jury. The defendant in *Knight* argued that "the issues concerning AIDS . . . are

extremely controversial and arouse the passions and prejudice of many members of our society." *Knight* at 556, 459 S.E.2d at 497. Our Supreme Court rejected this argument, stating that "[t]he possibility of juror prejudice" did not "rise to the level of fundamental unfairness[.]" *Id.* at 558, 459 S.E.2d at 498. Similarly, defendant has failed to show that the admission of the evidence regarding defendant's HIV status was unfairly prejudicial. We find no error.

V.

[6] Defendant argues the trial court erred in instructing the jury that it could use protective handwear to examine defendant's clothes. Defendant contends this suggested to the jury "that the court believed the testimony about the defendant's HIV status." Defendant also argues the trial court's instructions were prejudicial in that they "reinforced the notion that the defendant has AIDS." We disagree.

The trial court instructed the jury as follows:

> THE COURT: All right. Members of the jury, the State has rested. There have been a number of State's Exhibits that have been received into evidence that have not been passed among you for your inspection. However, they had been presented to you during the course of the testimony and during the course of the introduction of those exhibits. If at this time there are any of you who desire to more closely examine those exhibits that have not been passed among you, what I am going to do is to have those exhibits displayed over here on this counter area, and if one or more of you so choose, or all of you, you can come over and take a look at the exhibits. We have rubber gloves, if you choose to put on rubber gloves if you want to handle any of those exhibits.

N.C. Gen. Stat. § 15A-1222 (1997) states that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1232 (1997) further provides that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to . . . explain the application of the law to the evidence."

There is nothing in the above statement by the trial court which violates either of these statutory provisions. The instructions do not show that the trial court had an opinion as to defendant's HIV status. The exhibits that the trial court gave members of the jury the option to handle included: (1) rape kit specimens of the victim, (2) items of

the victim's clothing, (3) items of defendant's clothing, (4) defendant's bed sheets, and (5) defendant's washcloth. The trial court's instruction giving jurors the option of wearing rubber gloves if they wished to handle these personal items was a proper exercise of "reasonable control" over the presentation of evidence. *See* N.C.R. Evid. 611(a) (stating "[t]he court shall exercise reasonable control over the mode and order of . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of the truth"); *see also State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986) (stating "the manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge," and "his control of the case will not be disturbed absent a manifest abuse of discretion").

VI.

[7] Defendant argues the trial court erred in allowing the State to introduce evidence that defendant was on house arrest at the time of the offenses.

The victim testified that defendant was on house arrest at the time of the offense. Patrol Officer Karl Wolf testified that the victim told him that defendant was "wearing a band around his ankle, black in color, with a small box on it." Officer Wolf did not use the term "house arrest." Defendant argues that this testimony was irrelevant and should have been excluded under Rule 401 of the North Carolina Rules of Evidence. Defendant also contends the testimony that defendant was on house arrest, even if relevant, was "unfairly prejudicial to the defendant, and should have been excluded under Rule 403 [of the North Carolina Rules of Evidence]." We disagree, and hold that the testimony that defendant was on house arrest was part of the " 'chain of circumstances' " which established "the context of the crime." *See State v. Robertson*, 115 N.C. App. 249, 256-57, 444 S.E.2d 643, 647 (1994) (citation omitted).

The victim testified as to the events during and after the sexual assault as follows:

> A: [I]t seemed like forever that he was on top of me. He was moving up and down. Then I screamed. I don't know if he heard a car door slam from one of the neighbors. I'm not really sure what set him off, but he had ran into the bathroom across the hallway, which is right across the hallway.
>
> Q: Could you see him in the bathroom?

A: I saw him run into the bathroom, but he closed the door. I didn't see what he was doing in the bathroom. Then I pulled my pants up, and I looked at the bed . . . [a]nd then I walked—I ran to the door, and I opened the front door and then I put my hand on the, on the storm or sliding door, whatever was right there, the second door. And then he came out and he was washing himself with the maroon wash cloth.

Q: Where was he washing himself?

A: Uh, in his penis area. Then he asked me if I was okay, and I didn't answer him. I—I ran out of their yard. I opened the door and ran out of their yard to across the street, and started running towards the corner, because I had found out earlier he was on house arrest.

MR. JONES: Objection.

THE COURT: Overruled. Go ahead.

A: He had asked me if I was gonna tell anybody while I was running across the street. I didn't say anything. I ran to the corner, because I knew he couldn't go past the corner with the ankle bracelet he had on his ankle. And after I got towards the corner, I walked home, walked the rest of the way.

In *Robertson*, our Court found no error in the trial court's admission of defendant's statement to the victim that "he was going to hurt [her] like he hurt [another individual]." *Robertson* at 257, 444 S.E.2d at 648. This statement implicated defendant in another assault in which defendant had been acquitted. We held that the statement "formed an 'integral and natural part' of the victim's account of the crime and was 'necessary to complete the story of the crime for the jury.'" *Id.* (citation omitted). *See also State v. Rose*, 339 N.C. 172, 189-90, 451 S.E.2d 211, 220-21 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d. 818 (1995) (holding no error in admission of evidence that defendant had previously escaped from prison and committed thefts, because this evidence was part of "chain-of-events evidence" leading to the current murder charge). In *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), our Supreme Court found no error by the trial court when it admitted evidence of marijuana possession when defendant was arrested on other drug charges. Defendant was later found not guilty of the marijuana possession charges. Our Supreme Court held that defendant's possession of marijuana constituted a

link in the "chain of circumstances" of the drug offenses. *Id.* at 548, 391 S.E.2d at 174. The Court stated:

> [A]dmission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, has been approved in many other jurisdictions following adoption of the Rules of Evidence. This exception is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception. Such evidence is admissible if it " 'forms part of the history of the event or serves to enhance the natural development of the facts.' "

Id. at 547, 391 S.E.2d at 174 (citations omitted).

The evidence that defendant was on "house arrest" was relevant to the victim's account of the crime and "serve[d] to enhance the natural development of the facts." *Id.* The evidence was not unfairly prejudicial to defendant because the State neither presented evidence nor argued that defendant had been convicted of a prior crime; and further, the testimony was not used "to prove the character of [defendant] in order to show that he acted in conformity therewith[,]" which is prohibited, subject to exceptions, by Rule 404(b). N.C.R. Evid. 404(b).

The trial court did not err.

No error.

Judges JOHN and WALKER concur.

STATE OF NORTH CAROLINA v. KIMBERLY BRAXTON FRITSCH AKA KIMBERLY RAINS FRITSCH

No. COA97-1382

(Filed 16 February 1999)

1. **Evidence— felonious child abuse and involuntary manslaughter—admissible—complaints of abuse—injuries—admissible**

The trial court did not abuse its discretion in a prosecution for felonious child abuse and involuntary manslaughter by denying defendant's motions in limine and allowing introduction of evidence pertaining to complaints of abuse or neglect of the victim by defendant and evidence pertaining to injuries suffered by the victim, including diaper rash, bedsores, unclean or sanitary appearance, and insect bites.

2. **Evidence— relevance—prejudicial impact—child abuse—victim's condition worse than other children**

The trial court did not err in a prosecution for felonious child abuse and involuntary manslaughter by allowing the State to present the testimony of a teacher, two social workers, and the director of a facility for children with disabilities that they had witnessed children with the victim's condition before but had never seen anyone in such poor condition as this victim.

3. **Evidence— photographs—autopsy—child abuse victim**

The trial court did not err in a prosecution for felonious child abuse and involuntary manslaughter by admitting autopsy photographs which, although grotesque, were used to illustrate the assertion of the pathologist that the victim was extremely malnourished. The photographs were relevant and not cumulative.

4. **Homicide; Child Abuse and Neglect— manslaughter and child abuse—malnourishment—evidence insufficient**

The trial court erred in a prosecution for involuntary manslaughter and felonious child abuse by denying defendant's motions to dismiss where defendant was convicted of misdemeanor child abuse and involuntary manslaughter. The State's evidence failed to demonstrate that defendant willfully or through culpable negligence deprived the victim of food and nourishment or that the victim's death was proximately caused by defendant's actions or inaction.

Appeal by defendant from judgment entered 26 March 1997 by Judge W. Allen Cobb, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 17 September 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Grady L. Balentine, for the State.

Wheatly, Wheatly, Nobles & Weeks, P.A., by Stephen M. Valentine, for defendant-appellant.

HUNTER, Judge.

Defendant was indicted for the felonious child abuse and involuntary manslaughter of her seven-year-old minor daughter (the victim), who died on 1 January 1996 at her home in Carteret County, North Carolina. Following a jury trial, defendant was convicted of misdemeanor child abuse and involuntary manslaughter and sentenced within the presumptive range provided for by the Structured Sentencing Act of sixteen to twenty months imprisonment.

Prior to trial, defendant filed five separate motions *in limine* seeking to exclude certain evidence from being introduced by the State, including (1) testimony that the victim's malnutrition was caused by defendant withholding food from the victim; (2) testimony regarding defendant's lifestyle; (3) testimony regarding injury to defendant's other child; (4) testimony regarding investigations of child abuse and neglect by defendant against the victim made by the Carteret County Department of Social Services (DSS); and, (5) testimony concerning certain injuries or conditions suffered by the victim, including diaper rash, bed sores, unclean or unsanitary appearance, and insect bites. Following arguments by counsel, the trial court allowed defendant's first three motions *in limine*, but denied the remaining two.

The evidence at trial tended to show defendant was the mother of the victim, who was born on 15 July 1988. From the time of her birth until sometime in 1992, the victim's pediatrician was Dr. William Stanley Rule. According to Dr. Rule, as a result of her premature birth, the victim suffered from numerous problems, including a swollen left kidney that did not function, urinary tract infections, pulmonary problems, hearing loss and visual problems. In addition, the victim had a severe case of cerebral palsy accompanied by mental retardation. As a result of these medical problems, the victim had never learned to talk or move around on her own. Her mental age

never exceeded that of an infant. She could not chew her own food and had substantial difficulty getting food into her body. At no time during her lifetime did she weigh more than twenty-seven pounds.

From June 1989 until January 1992, and then again from April 1993 until shortly before her death in January 1996, the victim was enrolled in the Newport Developmental Center (the Newport Center), a facility which provides schooling for children with disabilities. In September 1994, in response to a complaint filed by the Newport Center alleging improper care by defendant, DSS requested that Dr. Rule perform a child medical evaluation of the victim in order to determine whether there were any signs of abuse or neglect. Specifically, DSS asked Dr. Rule to determine whether the victim was receiving proper care and nourishment, and whether certain pressure sores on her body were normal for someone with her disability or if they indicated a problem of abuse or neglect. In response to this request, Dr. Rule examined the victim on 2 September 1994. At that time, defendant reported the victim was not suffering from any acute problems and was eating well. Dr. Rule then noted that the victim's development, intellectual performance and communication skills were below that of a normal six-year-old girl. Furthermore, he observed several instances of skin irritation, including a diaper rash, lesions and pressure ulcers. Dr. Rule then concluded by stating:

> The pressure [ulcer] and evidence of prior similar lesions, along with [the] chronic diaper rash . . . possible sign[s] of caloric intake, [and] apparent lack of consistent medical, home and medical follow-up of problems, all raise valid concerns regarding the child's care . . . . Cerebral palsy could possibly explain the child's size and growth status, but I still believe the situation is suspect. . . . The skin lesions and her diaper rash . . . I felt were indicative of . . . poor care. I thought that the weight of the child was something that should raise concern.

As a result of its investigation, DSS substantiated this allegation of neglect and prepared an intervention plan in order to help defendant remedy the victim's condition. This intervention plan included having regular weight-checks done of the victim; choosing a regular doctor that would treat the victim on a continuing basis; having the victim's progress monitored by a home health agency, or some other similar organization; having respite services available to the victim's family, which involved a person coming to the victim's home to help care for her so defendant and her family would have a break from the

pressures of caring for a disabled child; having the victim attend the Newport Center on a regular basis; and, having defendant obtain a regular job and become independent. DSS' involvement with this substantiated complaint of neglect ended in May 1995.

Thereafter, in October 1995, DSS received another complaint of neglect from the Newport Center, specifically referring to pressure sores on the victim's body and the victim's low weight. DSS again investigated the complaint, and observed the victim to be extremely dirty and odoriferous, with crusted dirt between her toes and in various folds of her skin. Furthermore, the victim was emaciated, had pressure sores on various parts of her body, and had a bad case of diaper rash. In response to questioning by DSS, defendant stated that the areas on the victim's body resembling pressure sores were in fact ant bites and that she was treating the ant bites with a topical medication recommended by her doctor. DSS then scheduled a physical for the victim on 18 October 1995. When the victim arrived for her appointment, she was diagnosed with an ear infection and an upper respiratory infection, and was sent home after rescheduling her physical for 24 October 1995. However, defendant did not take the victim to her scheduled physical, and again missed a scheduled physical on 2 November 1995. After that date, DSS made several unsuccessful attempts to contact defendant about the victim's condition, and the need for defendant to have a physical examination of the victim completed. When DSS finally talked with defendant, she assured them she would make an appointment to have a physical examination of the victim done, and confirmed that the victim had not been enrolled at the Newport Center in several months. Thereafter, DSS substantiated the neglect complaint on 20 December 1995 on the grounds of lack of proper care and lack of proper medical care of the victim. DSS then scheduled a home visit after the holidays, but the victim died on 1 January 1996.

According to defendant, as a result of the victim's condition, she was only able to eat pureed food, which defendant prepared by pureeing the same food eaten by the rest of the family in a blender and serving to the victim in a baby bottle with a specially adapted nipple. Defendant contends the victim's emaciated condition was due to an eating disorder associated with her severe cerebral palsy and mental retardation, and not caused by any sort of neglect on her part. In support of this proposition, defendant presented the expert testimony of Dr. Richard Stevenson, a pediatrician specializing in the area of developmental disabilities in children. After reviewing the victim's

medical records, but without having ever examined the victim herself, Dr. Stevenson testified that:

> [The victim's] ability to eat was limited by the severity of her disability, so that she could only take in a certain number of calories. I think that she became malnourished and stay[ed] malnourished chronically. I think that malnutrition was then complicated by medical factors. Most importantly, I think her bed sores, and that the combination of medical nutrition and the bed sores, as well as intervening colds and other things like that, lead to a vicious circle of continued malnutrition, increased weakness and eventually, death.

Dr. Stevenson further testified that a study published in the *New England Journal of Medicine* revealed that forty-three percent of children suffering from similar combinations of disabilities as the victim die before reaching the age of five and seventy percent die before the age of ten.

An autopsy was performed on the victim's body on 2 January 1996 by Dr. John Leonard Almeida, Jr., a pathologist. In his opinion, the victim's death was due to "starvation malnutrition," and he found no evidence of a blockage or any other condition which would have prevented the victim from ingesting or digesting food. In fact, approximately one quart of food was found in the victim's stomach. Dr. Almeida concluded that the starvation malnutrition of the victim caused a distention of her stomach which compressed the thoracic cavity, making it difficult for her to breathe, and eventually led to her death.

Defendant moved to dismiss the charges at the close of the State's evidence and again at the close of all the evidence. Both motions were denied by the trial court. The jury then returned a verdict finding defendant guilty of misdemeanor child abuse and involuntary manslaughter, and defendant moved to have the verdict set aside. The trial court denied this motion, and defendant was sentenced to sixteen to twenty months imprisonment.

I.

[1] Defendant's first two assignments of error relate to the trial court's denial of certain motions *in limine* concerning (1) the introduction of evidence pertaining to complaints of abuse or neglect of the victim by defendant which were substantiated by DSS in 1994 and 1995, and (2) the introduction of evidence pertaining to certain

injuries suffered by the victim, including diaper rash, bed sores, unclean or unsanitary appearance, and insect bites.

A ruling on a motion *in limine* is within the sound discretion of the trial court, and will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Hightower*, 340 N.C. 735, 746-47, 459 S.E.2d 739, 745 (1995). Furthermore, past incidents of mistreatment are admissible to show intent in child abuse cases. *State v. West*, 103 N.C. App. 1, 9-11, 404 S.E.2d 191, 197-98 (1991). Here, the State argues that this evidence was admitted not to show defendant's propensity to commit the crime, but rather to show that she had knowledge of the degree of care that was expected towards the victim but failed to follow recommendations made by DSS. After careful review, we find that the trial court did not abuse its discretion in denying defendant's motions *in limine* and allowing the introduction of this evidence.

II.

[2] Next, defendant contends the trial court committed prejudicial error by overruling her objections to certain testimony that the victim's physical condition appeared worse than the condition of other children. Specifically, the State was permitted, over defendant's objections, to present the testimony of Doris Oglesby, the director of the Newport Center; Ruth Varner, a teacher at the Newport Center; Pam Stewart, a DSS social worker; and, Dan Sullivan, a DSS social worker. Each of these witnesses testified they had witnessed children with the victim's condition before but had never seen someone in such a poor condition as the victim. Without citing any case authority for her proposition, defendant essentially contends this testimony was highly prejudicial and should have been excluded under Rule 403.

The decision of whether to exclude relevant evidence under Rule 403 for its prejudicial effect is a matter within the sound discretion of the trial court. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). Here, the trial court determined that the evidence was relevant to show defendant had not provided adequate care to the victim, and found that its probative value outweighed any prejudicial effect. After careful review, we find the trial court did not abuse its discretion by admitting this testimony.

III.

[3] Next, defendant contends the trial court erred by allowing the State to introduce seven autopsy photographs which are described by

defendant as "utterly grotesque and horrible." Defendant contends these photographs were cumulative, and were introduced solely for the purpose of inflaming the jury.

The photographs at issue were introduced by the State during the direct examination of Dr. Almeida, the pathologist who performed the autopsy of the victim, and were used to illustrate Dr. Almeida's assertion that the victim was extremely malnourished. As our Supreme Court has held, even "gory, gruesome, horrible, or revolting" photographs are admissible so long as they are used to illustrate the testimony of a witness and are not excessive or repetitive. *State v. Phillips*, 328 N.C. 1, 15, 399 S.E.2d 293, 300, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). After careful review, we find that these photographs, although admittedly grotesque in nature, were relevant, not cumulative, and, therefore, properly admitted.

IV.

[4] Finally, defendant contends the trial court erred by not granting her motions to dismiss the charges at the close of the State's evidence and at the close of all the evidence on the basis that there was insufficient evidence of the crimes charged. In considering a motion to dismiss based on insufficient evidence, the question for the trial court to consider is "whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). Furthermore, the issue of whether the State has presented substantial evidence of the crime charged is a question of law for the trial court. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). "The trial court's function is to determine whether the evidence allows a *'reasonable inference'* to be drawn as to the defendant's guilt of the crimes charged." *Id.* at 67, 296 S.E.2d at 652 (emphasis in original).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988). However, if the evidence is sufficient to raise only a suspicion or conjecture about whether the accused committed the alleged crime, the motion should be allowed, even if the suspicion of defendant's guilt is strong. *State v. Earnhardt*, 307 N.C. at 66, 296 S.E.2d at 652.

In this case, defendant was indicted for felonious child abuse and involuntary manslaughter. Following its deliberations, the jury returned verdicts of guilty of misdemeanor child abuse and involuntary manslaughter. Therefore, we must determine whether the State's evidence was sufficient to submit these issues to the jury.

Before addressing the details of this case, it is helpful to discuss how some courts have handled similar cases dealing with criminal charges being brought against parents for the starvation or malnutrition of their children. In general, it has been stated that:

> [I]n order that a person who withholds food, clothing, or shelter from another may be found criminally liable under general statutes defining murder or manslaughter, it must be shown that (1) such person owed a duty to furnish food, clothing, or shelter; (2) the conduct of such person in not furnishing food, clothing, or shelter was wilful or done with malicious intent, or constituted culpable negligence; and (3) the lack of food, clothing, or shelter was the proximate cause of, or a cause contributing proximately to, the death. A number of cases support the view that ordinarily, there is a case of murder where death is the direct consequence of a wilful and malicious omission of a parent to feed his or her child, but that if the omission is not wilful, and arises out of neglect only, it is manslaughter.

John D. Perovich, J.D., Annotation, *Homicide by Withholding Food, Clothing, or Shelter*, 61 A.L.R.3d 1207, 1209-1211 (1975) (citations omitted). As we will discuss, we believe that the last two elements—those dealing with the criminal culpability of the defendant and the proximate cause of the victim's death—have not been met in this case, and therefore the trial court erred in denying defendant's motions to dismiss.

As previously stated, defendant was indicted for felonious child abuse and involuntary manslaughter, and convicted of misdemeanor child abuse and involuntary manslaughter. Upon review, we must determine whether the State presented substantial evidence of each element of the crimes charged sufficient to defeat defendant's motions to dismiss. In order to sustain a charge for felonious child abuse pursuant to N.C. Gen. Stat. § 14-318.4, the State is required to present substantial evidence that the defendant is:

> (a) [1] A parent or any other person providing care to or supervision [2] of a child less than 16 years of age [3] who intentionally inflicts any serious physical injury upon or to the child or who

> intentionally commits an assault upon the child which results in any serious physical injury to the child . . . .

N.C. Gen. Stat. § 14-318.4(a) (1993). The State's burden of proof is a little less severe to sustain a charge of misdemeanor child abuse under N.C. Gen. Stat. § 14-318.2, which requires a showing by substantial evidence that the defendant is:

> (a) [1] [A] parent [2] of a child less than 16 years of age, or any other person providing care to or supervision of such child, [3] who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means . . . .

N.C. Gen. Stat. § 14-318.2(a) (Supp. 1997). Furthermore, in order to support a charge of involuntary manslaughter pursuant to N.C. Gen. Stat. § 14-18, the State must show by substantial evidence that the defendant committed:

> [An] "unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission."

State v. Wingard, 317 N.C. 590, 600, 346 S.E.2d 638, 645 (1986).

As previously noted, it is generally understood that in cases involving starvation or malnutrition of children by their parents or guardians, three elements must exist: (1) the defendant must have a duty to adequately feed and nourish the child; (2) the defendant must refuse to feed and nourish the child, either wilfully or by his/her culpable negligence; and, (3) the defendant's actions, or inactions, must proximately result in the child's death. *See* Perovich, *supra*, at 1209-1211; *see also Bliley v. State*, 160 So. 2d 507, 508-509 (1964).

In *State v. Mason*, 18 N.C. App. 433, 197 S.E.2d 79, *cert. denied*, 283 N.C. 669, 197 S.E.2d 878 (1973), the only other North Carolina case concerning a conviction for involuntary manslaughter for the starvation death of a child, the decedent child was found in extremely squalid living conditions and the autopsy revealed findings consistent with starvation. The stomach and proximal intestine contained no food and there was no evidence of any other significant disease. Other evidence introduced at trial indicated a pattern by the defendants of failing to properly provide food, care and medical attention to the victim.

In the present case, the decedent child lived in a properly heated, well stocked home with several healthy, well-fed children. The autopsy revealed approximately one quart of food in the child's stomach and there was evidence of several significant medical conditions (i.e. non-functioning kidney, brain atrophy). Additional evidence presented at trial tended to show that, although she was not always timely about her visits to the doctor, defendant had last taken the victim in for a physical examination on 18 October 1995 and that the physician expressed no alarm at the child's condition. In fact, there is no evidence that any of the treating or examining physicians ever recommended hospitalization or feeding the victim through the insertion of a gastrostomy tube. Friends and family members testified they were in contact with defendant and the victim up until the day of the victim's death, and at no point were they overly concerned with the victim's well being. Defendant fed the child the day before she died leaving no evidence linking malnutrition to denial of food to the victim by defendant.

After careful review, we find the State has failed to present substantial evidence of either felonious or misdemeanor child abuse, or of involuntary manslaughter. The State's evidence fails to demonstrate that defendant wilfully, or through her culpable negligence, deprived the victim of food and nourishment. Furthermore, the State failed to present substantial evidence that the victim's death was proximately caused by defendant's actions, or inaction. At best, the State's evidence raised a suspicion that defendant did not adequately feed and nourish the victim, but that does not rise to the level of substantial evidence required to submit the case to the jury. *See Bliley* at 509 (where the Alabama Supreme Court, in reviewing the mother's manslaughter conviction of death by malnutrition, held that neglect must be established as the immediate cause of death and that there be positive proof of withholding sufficient food to maintain life). As such, the trial court erred in denying defendant's motions to dismiss the charges made at the close of the State's evidence and at the close of all the evidence.

Reversed.

Judges WYNN and McGEE concur.

Judge Wynn concurred in the result of this opinion prior to 1 October 1998.

STATE OF NORTH CAROLINA v. WILLIAM RICHARD GARTLAN

No. COA98-518

(Filed 16 February 1999)

1. Criminal Law— abandonment of attempted murder— instruction denied—no error

The trial court did not err in a prosecution for attempted murder by denying defendant's request for jury instructions on the defense of abandonment. The evidence showed that defendant intended to kill his children; in furtherance of that purpose, while the children were in their beds at night, he started his car with the garage door closed and all of the children were exposed to carbon-monoxide poisoning, exhibiting physical symptoms from the exposure. Only after defendant observed his younger daughter turning blue did he decide that he could no longer continue; defendant's actions amounted to more than mere preparation to commit murder and he could not legally abandon the crime of attempted murder after committing these overt acts.

2. Evidence— opinion that defendant's statement voluntary— admission not prejudicial error

There was no prejudicial error in a prosecution for attempted murder in the trial court admitting a detective's opinion testimony that defendant's statements during an interview were voluntary and that the defendant understood his Miranda rights and the nature of the interview. Although the testimony was improper because it involved the issue of whether a legal standard had been met, there was other competent evidence regarding defendant's actions and demeanor after the attempted murder which supported the fact that he understood his rights and voluntarily confessed.

3. Evidence— lay opinion—testimony regarding officers' ability to evaluate defendant's appearance

The trial court did not err in an attempted murder prosecution by admitting opinion testimony from officers regarding their ability to evaluate defendant's appearance. The first detective's statement was made on redirect examination after defense counsel examined him as to whether he had any medical training or background and, as to the next detective, the prosecution anticipated such cross-examination and asked the detective on direct

examination whether he needed a medical background in order to make observations about defendant's appearance. These statements were not prejudicially argumentative.

4. Homicide— attempted murder—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss charges of attempted murder of his children by leaving the car running in the garage with the door closed while they slept in their beds. There was substantial evidence of each element of attempted murder and of defendant being the perpetrator of the crime.

5. Criminal Law— mistrial—polygraph

The trial court did not err in an attempted murder prosecution by denying defendant's motion for a mistrial where a detective testified that he had told defendant during interrogation that it was his opinion that defendant was lying and another detective testified that defendant was asked to take a polygraph. The request to take a polygraph was neutral on its face and the testimony regarding the fact that a detective told defendant that he was lying combined with the statement regarding the polygraph does not create an inference that defendant took a polygraph and failed on the issue of guilt. It is significant that this evidence came from two different witnesses; moreover, the court took the appropriate action by giving a corrective instruction.

Appeal by Defendant from judgment entered 7 April 1997 by Superior Court Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals on 14 January 1999.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for the Defendant.

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

WYNN, Judge.

Sometime during the night of 19 August 1996, defendant William Richard Gartlan, an ordained minister with no criminal history, was awakened by his older daughter who informed him that his younger daughter was crying. In fact, the defendant's younger daughter was semiconscious and non-responsive. Additionally, his older daughter was experiencing difficulty breathing, and his son was completely unconscious.

The source of these difficulties was traced to the family's car which was running with the garage door closed. After turning off the car, defendant called 911. The emergency personnel treated them for carbon-monoxide poisoning. They were taken to the hospital and later released.

The next day, while being interviewed at the police station by Detective Bayliff, the defendant cried and confessed to attempting to kill himself and his three children by running his automobile in the closed garage. He stated that he had been depressed and that "he could not kill himself because the kids would be alone and have no one to take care [of] them. This was a way they could all be together." However, the defendant changed his mind after seeing his younger daughter turn blue with breathing difficulty.

The defendant signed a written statement prepared by Detective Saul which included the following concluding remarks:

> I knew the police would eventually ask what happened. I decided I would just tell the event that happened and just leave out the part about who started the car. In closing, I would like to say that I did do this; but, no words can say how sorry I am for it.

Additionally, a social worker called the police station on August 21 after the defendant told her:

> I know that I did this to myself and to the children what I've been accused of by the police and everyone else. But I guess I just wanted to convince myself that I did not do it.

The defendant was indicted for three counts of attempted first-degree murder. Following his conviction of these crimes, he brought this appeal contending that the trial court erred by: (1) failing to give instructions on the defense of abandonment, (2) admitting improper lay opinion testimony, and (3) denying his motions for dismissal, mistrial, and suppression of evidence. We find no prejudicial error.

I.

[1] The defendant first contends that the trial court erred in denying his written request for jury instructions on the defense of abandonment of the attempted murder crimes. We disagree.

"The elements of an attempt to commit any crime are: (1) an intent to commit the substantive offense, and (2) an overt act done

for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). Specifically, a person commits the crime of attempted first-degree murder if: (1) he or she intends to kill another person unlawfully and (2) acting with malice, premeditation, and deliberation does an overt act calculated to carry out that intent, which goes beyond mere preparation, but falls short of committing murder. *See State v. Cozart*, 131 N.C. App. 199, 505 S.E.2d 906 (1998).

"In North Carolina, an intent does not become an attempt so long as the defendant stops his criminal plan, or has it stopped, prior to the commission of the requisite overt act." *Miller*, 344 N.C. at 669, 477 S.E.2d at 922. An overt act for an attempt crime,

> must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory.

State v. Price, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971).

Consequently, "[a] defendant can stop his criminal plan short of an overt act on his own initiative or because of some outside intervention." *Miller*, 344 N.C. at 669, 477 S.E.2d at 922. "However, once a defendant engages in an overt act, the offense is complete, and it is too late for the defendant to change his mind." *Id.*

The Court in *Miller* further stated that "[a]n abandonment occurs when an individual voluntarily forsakes his or her criminal plan prior to committing an overt act in furtherance of that plan." *Id.* at 670, 477 S.E.2d at 922. Thus, contrary to the defendant's contention, the Court in *Miller* did not abolish the common law defense of abandonment in North Carolina; rather, the Court clarified the limited application of the defense by holding that a person could not abandon an attempt crime once an overt act is committed with the requisite mental intent—a common-sense application because the crime of attempt is at that point already completed.

In the present case, the evidence showed that the defendant intended to kill his children. In furtherance of this purpose, while the children were in their beds at night, he started his car with the garage door closed. As a result, all of the children were exposed to carbon-monoxide poisoning. The children exhibited physical symptoms from the exposure—discoloration, difficulty breathing, semiconscious-

ness, and unconsciousness. Consequently, all of the children required medical treatment for carbon-monoxide poisoning. Only after the defendant observed his younger daughter turning blue did he decide that he could no longer continue with his plan to kill his children.

Certainly, defendant's actions amounted to more than mere preparation to commit murder. Following *Miller*, we conclude that after committing these overt acts, the defendant could not legally abandon the crime of attempted murder. Accordingly, we hold that the trial court did not err in failing to give the instructions on the defense of abandonment.

II.

The second issue on appeal is whether the trial court erred in allowing into evidence opinion testimony regarding: (1) the defendant's confessions and (2) the defendant's appearance. We hold that the admission of this evidence did not amount to prejudicial error in this case.

[2] First, the defendant contends that the trial court erred in admitting Detective Bayliff's opinion testimony that defendant's statements during the interview were voluntary and that the defendant understood his *Miranda* rights and the nature of the interview.

"Any witness 'who has had a reasonable opportunity to form an opinion' may give an opinion on a person's mental capacity." *State v. Daniels*, 337 N.C. 243, 263, 446 S.E.2d 298, 311 (1994) (quoting *State v. Evangelista*, 319 N.C. 152, 162, 353 S.E.2d 375, 383 (1987)). However, a witness may not "testify that a legal standard has or has not been met." *Id.* Thus, a witness can testify "as to whether the defendant had the capacity to understand certain words on the *Miranda* form, such as 'right' or 'attorney' but he may not testify as to whether the defendant had the capacity to waive his rights." *Id.*

In the case *sub judice*, Detective Bayliff's testimony concerning the voluntariness of defendant's statements during the interview were improper because this testimony involved the issue of whether a legal standard had been met. Further, the detective's testimony regarding whether the defendant understood his *Miranda* rights was tantamount to asking whether the defendant had the capacity to waive his rights. As a result, this too was improper testimony.

However, "every error is not so prejudicial as to warrant a new trial." *State v. Harrelson*, 54 N.C. App. 349, 350, 283 S.E.2d 168, 170

(1981). "Defendant must show that the error complained of was prejudicial and thereby affected the result adversely to him." *Id.* In *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), *vacated in part on other grounds*, 428 U.S. 904, 96 S.Ct. 321, 49 L.E.2d 1211 (1976), our Supreme Court held that it was harmless error for the trial court to permit the interrogating officers to testify that in their opinion the defendant understood his rights.

Further, this Court, relying on *Patterson*, held in *State v. Shook*, 38 N.C. App. 465, 248 S.E.2d 425 (1978) that it was harmless error for the trial court to admit an officer's testimony that the defendant appeared to understand what he was doing in waiving his rights and making a statement. The errors by the trial court in *Patterson* and *Shook*, were not prejudicial because there was other competent evidence that the defendants in those cases understood what they were doing.

In the present case, like *Patterson* and *Shook*, there is other competent evidence regarding the defendant's actions and demeanor after the attempted murder which support the fact that he understood his rights and voluntarily confessed. For instance, the defendant drove himself to the police station and he was coherent with had no signs of carbon-monoxide poisoning such as nausea, headache, memory loss, or confusion. Given this evidence, we find the trial court's admission of Officer Bayliff's statements to be harmless error.

[3] Next, defendant contends that the trial court erred in overruling his objection to the opinion testimony regarding the officers' ability to evaluate his appearance. We find no error.

Specifically, the defendant points to the following questions asked by the prosecutor of Detective Saul:

> Q. Now, Detective Saul based upon your years experience as a police officer, do you feel that you need to have specific medical background or psychiatric background to be able to observe a human being such as Mr. Gartlan for the time that you did observe him and be able to determine for yourself whether or not he appears normal?
>
> A. I don't feel like I need that just to look at someone and give my opinion as to whether they're normal or not.

Additionally, defendant points to a similar line of questioning of Detective Ledford in which he was asked:

Q. You've been involved in a good many interviews in your years as a police officer, have you not?

A. Yes, I have.

Q. Seen a good many different types of people?

A. Wide variety of people.

Q. And do you have any specialized medical or psychiatric background?

A. I do not.

Q. Do you feel you need it to observe people and whether or not how they appear to you?

A. Through years of police experience I've observed a number of people in all types of behavior, and I do not feel I need any other thing than experience.

Defendant contends that these were argumentative statements and therefore should not have been allowed. In support of his argument, he cites *State v. Lovin*, 339 N.C. 695, 454 S.E.2d 229 (1995) (holding the objection was properly sustained to the detective's cross examination as to whether the defendant was led to believe during the course of the interview that he did not need a lawyer on the grounds that the question was argumentative) and *State v. Pope*, 24 N.C. App. 217, 210 S.E.2d 267 (1974) (holding the cross-examination question of victim's brother was argumentative. The question concerned the brother's realization that if he had anything to do with starting the argument with the defendant leading to victim's death, the brother's family might hold him responsible for victim's death.).

However, the holdings of *Lovin* and *Pope* are not controlling in this case because the statements in the case *sub judice* were made in a different context. First, Detective Saul's statement was made on redirect examination after the defense counsel examined him as to whether he had any medical training or background. After Detective Saul's cross examination, the prosecution, in anticipation of such cross examination, asked Detective Ledford on direct examination whether he needed a medical background in order to make observations about the defendant's appearance. In this context, we conclude that these statements were not prejudicially argumentative. Accordingly, we reject defendant's second argument.

III.

[4] Defendant next contends that the trial court erred in denying his motion to dismiss because the State failed to meet its burden of producing substantial evidence of the essential elements of attempted murder.

When a defendant moves for dismissal, "the trial court [must] determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). In determining whether the State's evidence is substantial, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. *See State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Rogers*, 109 N.C. App. 491, 504, 428 S.E.2d 220, 228 (1993) (quoting *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)). Therefore, "[t]he State's evidence must do more than raise merely a suspicion or conjecture as to the existence of the necessary elements of the charged offense." *State v. Stanley*, 310 N.C. 332, 340, 312 S.E.2d 393, 397-98 (1984).

In the present case, the defendant's older daughter testified that the defendant was the last one to drive the car prior to the incident and that there was only a single key to the car which was given to the officers on that night. Further, the defendant confessed to the crime during his interview with Detective Bayliff. Thereafter, the defendant signed a written statement which included a confession. Additionally, a social worker testified as to defendant's incriminating statements made to her.

Although the defendant presented expert testimony to suggest that he was under the influence of carbon-monoxide poisoning at the time of his confessions, none of the expert witnesses examined the defendant prior to his confessions. Moreover, there is evidence that immediately following the incident, the defendant was coherent and seemed to be under no such influence.

Examining the evidence in the light most favorable to the State, we find substantial evidence of each element of attempted murder and of the defendant being the perpetrator of the crime. Accordingly,

we hold that there was no error in the trial court's denial of defendant's motion to dismiss.

IV.

[5] Next, defendant contends the trial court erroneously denied his motion for a mistrial. He asserts that during his trial, the State improperly presented the following evidence: (1) Detective Bayliff's testimony that he told the defendant during the interrogation that it was his opinion that the defendant was lying, and (2) Detective Leford's testimony that prior to defendant's interview with Bayliff the defendant was asked to take a polygraph. According to the defendant, the cumulative effect of this evidence was to cause the jury to believe that the defendant had taken a polygraph and had failed on the question of his guilt.

"The [trial] judge must declare a mistrial upon the defendant's motion 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." N.C. Gen. Stat. § 15A-1061 (1988). In essence, "[a] mistrial is appropriate only when there are such improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Harris*, 323 N.C. 112, 125, 371 S.E.2d 689, 697 (1988).

Under North Carolina law, the results of a polygraph test are inadmissible in any trial. *See State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961). "However, every reference to a polygraph test does not necessarily result in prejudicial error." *State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976).

For instance, in *Harris*, *supra*, our Supreme Court held that a witness' statement that the defendant was asked to take a polygraph was neutral on its face and did not constitute an abuse of the trial court's discretion in denying the defendant's motion for a mistrial.

In the present case, like *Harris*, Detective Ledford's testimony concerns a request to submit to a polygraph which is neutral on its face. Further, Detective Bayliff's testimony regarding the fact that he told the defendant during the interview that he was lying combined with Detective Ledford's statement does not create an inference that the defendant took a polygraph and failed on the issue of guilt.

Significantly, this evidence came from two different witnesses. Moreover, the trial judge following Detective Ledford's inadvertent

reference to the polygraph took the appropriate action to prevent any such inference by giving these instructions:

> Ladies and gentlemen, that reference by the detective is inadmissible for any purpose. You may not consider it for any purpose in the furtherance of your deliberations.

If any possible prejudice resulted from the testimony at issue, the trial court's cautionary instructions removed this prejudice; therefore, no improprieties exist which made it impossible for the defendant to attain a fair and impartial verdict. Thus, the trial court committed no prejudicial error in denying defendant's request for a new trial.

Finally, we summarily hold that there is no merit to defendant's contention that the trial court erred by not suppressing his confessions on the grounds that these confessions were not voluntarily made and resulted from carbon-monoxide poisoning.

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

No prejudicial error.

Judges HORTON and EDMUNDS concur.

IN THE MATTER OF: THE APPEAL OF CHARLES D. OWENS AND JOHN F. PADGETT D/B/A FOREST CITY ASSOCIATES FROM THE DECISION OF THE RUTHERFORD COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING PROPERTY TAXATION FOR 1994

No. COA98-270

(Filed 16 February 1999)

Taxation— valuation—capitalization rate—findings not sufficient

A decision of the North Carolina Property Tax Commission appraising certain commercial warehouses was reversed and remanded where the Commission used the income capitalization appraisal method but failed to specify in its final decision the capitalization rate utilized and there was an absence in the record of evidence sustaining the rate apparently employed by the Commission. On remand, the Commission was to rely on the

existing record and hear additional arguments as it deemed appropriate.

Appeal by Rutherford County from the final decision of the North Carolina Property Tax Commission entered 14 November 1997. Heard in the Court of Appeals 22 October 1998.

County of Rutherford, by County of Rutherford Attorney Laura J. Bridges and Shelley T. Eason, for appellant.

J. Thomas Davis, for appellee.

JOHN, Judge.

Appellant County of Rutherford (the County) appeals a final decision of the North Carolina Property Tax Commission (the Commission) appraising certain commercial warehouses owned by appellees Charles D. Owens, Jr. (Owens), and John F. Padgett (Padgett) (jointly "Taxpayers"). The County argues the Commission erred by: 1) rendering findings of fact, conclusions of law and an order "unsupported by competent, material and substantial evidence in view of the entire record;" 2) denying the County's motion for dismissal at the close of Taxpayers' evidence; and 3) "denying the County's motion for discovery sanctions and in ordering the matter to be heard on its merits." For the reasons set forth herein, we reverse the decision of the Commission.

Relevant facts and procedural history include the following: In 1994, the County conducted a reappraisal and reassessment of Taxpayers' small industrial park in Rutherford County. Taxpayers appealed the County's assessment to the Rutherford County Board of Equalization and Review which affirmed the County's appraisal. On 20 October 1994, Taxpayers appealed to the Property Tax Commission and filed required Applications for Hearing 21 November 1994.

At the 26 September 1997 hearing before the Commission, the primary issue was the valuation of nine (9) parcels (the property) in Taxpayers' industrial park upon each of which had been constructed a prefabricated metal warehouse. Taxpayers leased the warehouses to commercial tenants at a rate of approximately $1.50 per square foot per month.

Taxpayers maintained to the Commission that the County's values were too high because they were based upon "replacement cost

and the income approach," and that a more accurate valuation would be "what it had cost [the Taxpayers] to build" the buildings. The income approach was inappropriate, Taxpayers continued, because sales of highly comparable properties in Rutherford County were lacking, thus precluding determination of a proper capitalization rate for use of the income approach of appraisal. Finally, Taxpayers concluded, no reasonable person would purchase the property at the County's values because the maximum rent obtainable would not produce sufficient income to justify such a purchase, *i.e.*, unimproved property could be purchased and identical new buildings placed thereon for a sum less than the County's valuation of the property.

The County conceded direct comparable sales evidence was lacking and that the comparable sales approach to valuation "was given the least amount of consideration." Instead, it was the County's position that the property "highly lend[s itself] to a cost approach methodology but [should be] adjusted through the income approach." In its final analysis, and "in reconciling [the] valuation estimate, [the County] placed most emphasis on the income approach because of the nature of the property" as income producing.

In applying the income approach of valuation, the County

> capitalize[d the] buildings based upon mortgage equity capitalization principles which [is a yield capitalization method and] takes into consideration typical financing of buildings.

Specifically, County expert witness Charles Long (Long) stated:

> We use a 75 percent loan to value ratio with 25 percent of the balance. The equity position that the—the investor will assume will be their portion at a 12 percent equity yield rate. . . . This is also based on a typical 25-year term at eight and one-quarter percent borrowing rate. And again, one other component to consider in that rate is a 10-year holding period, which is the typical amount of time the investor would hold that building before considering a sale. When you take those elements into consideration, that gives a basis of ten and a half percent (10.5%) for a capitalization rate. Then we added, based on the age of the—of the building . . . twenty-five one-hundredths of a percent for each age that the building exists. So a brand new building will be ten and a half percent (10.5%), a two to three-year old building 10.75 percent, and then adding one-quarter of one percent for each two years of age that a building existed.

Long further testified on cross-examination as follows:

> Q: And that equity capitalization rate requires comparable sales, doesn't it, to determine?
>
> A: You can—you can determine that equity capitalization rate through comparable sales and that must be highly comparable. . . . They are not required; however, they can be proven in the marketplace as to what the equity yield is. And you can get that information just from lending practices.
>
> Q: Well, are you familiar with what is termed the American Institute of Real Estate Appraisers [and their textbook, The Appraisal of Real Estate]?
>
> A: That's correct.
>
> . . . .
>
> Q: Doesn't it say in the volume that I have—that equity capitalization rates are derived from comparable sales by dividing the pretax—pretax cash flow of each sale by the equity invested?
>
> A: That is what that says in that section, that's correct.
>
> Q: Now, you've already testified though that you had a lack of comparable sales in regard to this type property, isn't that correct?
>
> A: That's correct.
>
> Q: So your capital rate would be distorted in regard to whatever means that you used to get those comparable sales necessary to capitalize—to make your capitalization rate?
>
> A: No, the information that we used was secondary information; and those equity capitalization rates were derived using comparable sales.
>
> Q: . . . That means [the information] came from other areas other than Rutherford County, isn't that correct?
>
> A: That's correct.

On 14 November 1997, the Commission announced its final written decision, providing in relevant part that:

> 5. The County's appraisal of [Taxpayers'] properties substantially exceeded the true value in money of the properties as of January 1, 1994.

6. Of the three appraisal methods recognized by the Commission, cost approach, comparable sales approach, and income approach, the Commission finds that no probative evidence was offered regarding the comparable sales and cost approaches. Even though the Commission considered all three of the appraisal methods, the Commission relied on the income approach to determine the values of the subject properties.

7. Under the income approach method, the value of property is determined by dividing the net income by an appropriate capitalization rate. The Taxpayer presented evidence showing the monthly rental income regarding each of the subject properties. . . . After accepting the Taxpayer's income as market income and adjusting the annual gross income of the properties for expenses and vacancy, the resulting net income was capitalized into an indication of market value for each of the subject properties.

The following table reflects the Commission's final appraisal of the nine parcels, as well as the corresponding values asserted by Taxpayers and the County.

Bldg #	Tax Parcel #	Square Footage	Annual Rent in Dollars	County Value in Dollars	Taxpayer Value in Dollars	Commission Value in Dollars
23	245-1-1H	60,000	90,000.00	580,700.00	441,000.00	450,000.00
5	245-1-55	30,000	42,999.96	254,700.00	190,000.00	215,000.00
14	245-1-68	30,000	37,500.00	272,300.00	190,000.00	187,560.00
2	245-1-69	20,000	24,999.96	156,200.00	120,000.00	125,000.00
3	245-1-71	20,000	24,999.96	166,200.00	120,000.00	125,000.00
4	245-1-71A	25,000	37,500.00	201,900.00	151,900.00	187,560.00
17	245-1-1F	30,000	45,000.00	296,600.00	210,000.00	225,000.00
15	245-1-1E	67,500	84,375.00	614,000.00	420,470.00	421,867.00
15A	245-1-2C	25,000	30,000.00	231,500.00	155,730.00	187,560.00

The County timely appealed to this Court 11 December 1997. On appeal, the County in the main asserts that its

> substantial rights . . . have been prejudiced because the Commission's findings, inferences, conclusions or decisions are . . . [u]nsupported by competent, material and substantial evidence in view of the entire record as submitted.

We conclude the County's argument has merit.

Our review of a final decision of the Commission is governed by N.C.G.S. § 105-345.2(b) (1997), which states:

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Upon challenge to a decision of the Commission under subsection (5) above, we are to review the "whole record." N.C.G.S. § 105-345.2(c) (1997); *see also Mao/Pines Assoc. v. New Hanover Bd. of Equalization*, 116 N.C. App. 551, 556, 449 S.E.2d 196, 199 (1994). The "whole record" test is not a tool of judicial intrusion; "instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

In addition, certain other principles apply: (1) a reviewing court is neither free to weigh the evidence presented to the Commission nor to substitute its own evaluation of the evidence for that of the Commission; (2) *ad valorem* tax assessments are presumed to be correct; and (3) "the correctness of tax assessments, the good faith of tax assessors and the validity of their actions are presumed." *In re McElwee*, 304 N.C. 68, 75, 283 S.E.2d 115, 120 (1981).

The General Assembly requires all property in this State be appraised for *ad valorem* tax purposes in accordance with N.C.G.S. § 105-283 (1997) which provides in pertinent part:

[a]ll property . . . shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the

> words, "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Under N.C.G.S. § 105-317(a) (1997), the following specific factors are to be considered in arriving at "true value":

> Whenever any real property is appraised it shall be the duty of the persons making appraisals:
>
> . . . .
>
> (2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

The County contends it complied with the foregoing provisions in employing an income approach to the valuation of the property. We have previously commented "the income approach is the most reliable method in reaching the market value of investment property." *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 474, 458 S.E.2d 921, 924, *aff'd*, 342 N.C. 890, 467 S.E.2d 242 (1996). "The income approach to value is based on the principle that something is worth what it will earn." *In re Southern Railway*, 313 N.C. 177, 185, 328 S.E.2d 235, 241 (1985).

> The capitalized value of a given income stream varies directly with the amount of income and inversely with the capitalization rate . . . and [s]light variations in the capitalization rate can result in large variations in value.

Id.

The parties agree that there are two principal income capitalization appraisal methods—direct capitalization and yield capitalization. Indeed, both parties cite and rely upon a textbook produced by the Institute of Appraisers, *The Appraisal of Real Estate*. Although not binding upon this Court, this source summarizes the two methods of capitalization as follows:

> Direct capitalization is . . . used to convert an estimate of a single year's income expectancy, or an annual average of several years' income expectancies, into an indication of value in one direct step—either by dividing the income estimate by an appropriate income rate or by multiplying the income estimate by an appropriate factor. . . . The rate or factor selected represents the relationship between income and value observed in the market and is derived through comparable sales analysis.
>
> . . . .
>
> Yield capitalization is . . . used to convert future benefits to present value by discounting each future benefit at an appropriate yield rate or by developing an overall rate that explicitly reflects the investment's income pattern, value change, and yield rate. . . . The method is profit-or yield-oriented, simulating typical investor assumptions with formulas that calculate the present value of expected benefits assuming specified profit or yield requirements.
>
> . . . .
>
> Direct capitalization is simple and easily understood. The capitalization rate or factor is derived directly from the market. . . . Yield capitalization, on the other hand, tends to be complex, requiring the use of special tables, calculators, or computer programs [and the] formulas and factors [used] can be obtained from financial tables. . . .

According to the testimony of Long, the County utilized a mortgage-equity capitalization approach, a variety of yield capitalization, to value the property. In the absence of evidence of direct comparable sales within Rutherford County, the County determined the capitalization rate by looking to "the marketplace as to what the equity yield [was]. And [the County derived] that information just from lending practices." The only comparable sales information was from areas outside Rutherford County and was "secondary information," and not "highly comparable." Ultimately, the County established the appropriate capitalization rate as being between ten and one-half percent (10.5%) and twelve and three-quarters percent (12.75%), depending upon the age of the warehouse.

Taxpayers did not address an appropriate capitalization rate in their evidence in view of their contention that valuation should

be based upon the cost of constructing the improvements on the property.

In its final decision, the Commission indicated it valued the property by "dividing the net income by an appropriate capitalization rate." The Commission thus relied upon the direct capitalization method, *see Appraisal of Real Estate*, rather than the yield capitalization approach employed by the County or the cost approach advocated by Taxpayers. However, the Commission's final decision fails to disclose the specific capitalization rate it utilized. Moreover, review of the "whole record," *see* G.S. § 105-345.2(c), does not reveal any evidence supporting the ultimate capitalization rate apparently employed by the Commission.

Taxpayers maintain the Commission's capitalization rate may be determined mathematically by dividing the annual income produced by a particular parcel into the corresponding appraisal value assigned to that parcel by the Commission. Such calculations suggest a twenty percent (20%) rate was utilized by the Commission. Notwithstanding, "[i]t is difficult, if not impossible, for an appellate court to divine the decision making process of an administrative agency unless the agency clearly sets it out in its order." *Southern Railway*, 313 N.C. at 183, 328 S.E.2d at 240.

Taxpayers respond by pointing to the testimony of Padgett who noted Taxpayers sought an annual gross return of twenty-one percent (21%) on their investment, and who expressed the opinion that an investor would require a similar return if purchasing the property. However, as stated in Taxpayers' brief:

> [Under the direct capitalization approach], the capitalization rate or factor is derived directly from the market and no distinction is made between return on and return of capital. Direct capitalization does not explain value in terms of *specific investor assumptions*.

Appraisal of Real Estate (emphasis added).

Significantly, the capitalization rate under the direct capitalization approach is "derived through comparable sales analysis," *see id.*, and both the County and Taxpayers acknowledge that "highly comparable" sales information was lacking in the instant case. Moreover, the Commission found that "no probative evidence was offered regarding the comparable sales and cost approaches." Accordingly, we cannot "divine the decision making process" of the Commission,

Southern Railway, 313 N.C. at 183, 328 S.E.2d at 240, in particular its choice of an "appropriate" capitalization rate, nor may we substitute our own "evaluation of the evidence for that of the [Commission]." *McElwee*, 304 N.C. at 75, 283 S.E.2d at 120.

We therefore uphold the County's argument that the Commission's findings are unsupported by "competent, material and substantial evidence in view of the entire record," G.S. § 105-345.2(b)(5), in view of its failure to specify in its final decision the "appropriate" capitalization rate utilized, and in view of the absence in the record of evidence sustaining the rate apparently employed by the Commission. Accordingly, the final decision of the Commission is reversed and this matter remanded to the Commission for entry of a new final decision containing findings of fact supported by evidence in the record. On remand, the Commission shall rely upon the existing record and hear additional arguments as it deems appropriate. *See* G.S. § 105-345.2(b) ("court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings"); *see also Brock v. Tax Commission*, 290 N.C. 731, 737, 228 S.E.2d 254, 258 (1976) (where Commission's findings are not supported by competent, material and substantial evidence, "the case will be remanded for further proceedings").

Prior to conclusion, we note the County also argues that the Commission erred in denying the County's motion for dismissal at the close of Taxpayers' evidence, and that the Commission abused its discretion by failing to impose sanctions and hearing Taxpayers' appeal on the merits in light of Taxpayers' willful failure to comply with a discovery order. Suffice it to state we have carefully reviewed the record and determined these contentions are unfounded.

Reversed and remanded.

Judges GREENE and McGEE concur.

RANDOLPH R. FEW, JR. AND XPRESS AUTOMOTIVE GROUP, INC., PLAINTIFFS v. HAMMACK ENTERPRISES, INC. F/K/A MUFFLER XPRESS AND BRAKE CENTERS, INC., CARLTON L. HAMMACK AND J. ELLIOTT HANEY, JR., DEFENDANTS

RANDOLPH R. FEW, JR. AND XPRESS AUTOMOTIVE GROUP, INC., PLAINTIFFS v. HAMMACK ENTERPRISES, INC. F/K/A MUFFLER XPRESS AND BRAKE CENTERS, INC., AND CARLTON L. HAMMACK, DEFENDANTS

No. COA98-597

(Filed 16 February 1999)

1. Arbitration and Mediation— agreement in terms—admissible

N.C.G.S. § 7A-38.1(1) does not prohibit the admission of the outcome of a mediation settlement conference before a judge making the determination of whether settlement was reached and of the terms of that settlement. A mediator is both competent and compellable to testify or produce evidence on whether the parties reached a settlement agreement and as to the terms of the agreement, where the judge is making that determination, but the statute does prohibit the admission of evidence of statements made and conduct occurring in a mediated settlement conference before the finder of fact where the finder of fact is making a determination on the merits of either the present or a future substantive claim. An order sanctioning defendants was remanded for a hearing to determine whether defendants agreed to settlement free from either fraud or mutual mistake and specifically whether defendants agreed to the terms enumerated in a revised Mediated Settlement Agreement.

2. Arbitration and Mediation— sanctions—authority

Although the Mediation Rules do not expressly provide for sanctions under any circumstance other than failure to attend without good cause, the trial courts have inherent authority to impose sanctions for willful failure to comply with the rules of court. If the trial court on remand finds that defendants agreed to the enumerated terms of the revised Mediation Settlement Agreement it may, either in addition to or instead of imposition of sanctions for refusal to follow court rules, enter an order requiring defendants to specifically perform the oral contract immortalized by the revised Settlement Agreement.

Appeal by defendants Hammack Enterprises, Inc. and Carlton L. Hammack from order filed 5 December 1997 and from judgment filed 5 December 1997 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 12 January 1999.

Hutson Hughes & Powell, P.A., by James H. Hughes and Paul A. Arena, for plaintiff-appellees.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for defendant-appellants Hammack Enterprises, Inc. and Carlton L. Hammack.

GREENE, Judge.

Hammack Enterprises, Inc. (Hammack, Inc.) and Carlton L. Hammack (Mr. Hammack) appeal from the trial court's Order striking the Answer and Counterclaims filed by Hammack, Inc., Mr. Hammack, and J. Elliot Haney, Jr. (Haney) (collectively, Defendants) and from the trial court's Judgment in favor of Randolph R. Few, Jr. and Xpress Automotive Group, Inc. (collectively, Plaintiffs).

On 19 December 1996, Plaintiffs filed a Complaint against Defendants for breach of contract, fraud, conspiracy to commit fraud, unfair and deceptive trade practices, and conspiracy to commit unfair and deceptive trade practices. Defendants filed their Answer and Counterclaims on 19 March 1997. On 12 May 1997, pursuant to the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions 1(A)(1), 1999 Ann. R. N.C. 59 [hereinafter "Mediation Rules"], the trial court ordered Plaintiffs and Defendants to participate in a mediated settlement conference. On 2 September 1997, the mediator's "Report of Mediator," prepared pursuant to Mediation Rules 6(B)(4), 1999 Ann. R. N.C. 64 (requiring the mediator to "report to the court in writing whether or not an agreement was reached by the parties" and how the action will be concluded), was received by the Trial Court Administrator. The "Report of Mediator" noted that the parties had reached "agreement on all issues" and that a Confession of Judgment voluntarily dismissing the claims against Haney was to be filed by the parties. The mediator then prepared a "Mediated Settlement Agreement," which stated:

> [Mr. Hammack and Hammack, Inc.] will sign a Confession of Judgment to [Plaintiffs] in the amount of Five Hundred Thousand Dollars ($500,000.00). Plaintiff[s] shall file a Voluntary Dismissal with Prejudice as to [Haney].

Following a letter from Plaintiffs noting that, at the mediated settlement conference, the parties had actually agreed to file a Consent Judgment with terms that would make it nondischargeable in bankruptcy, the mediator prepared a revised "Mediated Settlement Agreement," and sent a letter to the parties stating:

> I am enclosing a new revised Mediated Settlement Agreement reflecting the use of a Consent Judgment rather than a Confession of Judgment to effectuate the settlement agreement reached last month as a result of the mediated settlement conference, and also reflecting the protection against bankruptcy agreement and the dismissal of the claim against defendant Haney and the dismissal of all counterclaims as agreed upon.

This revised "Mediated Settlement Agreement" enclosed with the mediator's letter provided, in part:

> 2. This matter has been settled by Consent Judgment, said Judgment to be prepared by the attorney for [Plaintiffs]. The terms of said Consent Judgment to be as follows: [Mr.] Hammack and [Hammack, Inc.] are liable to [Plaintiffs] in the amount of $500,000.00. Consent Judgment to be drafted in a manner that will prevent said Judgment from being dischargeable in Bankruptcy. Upon entry of said Consent Judgment, a Voluntary Dismissal with Prejudice of [Haney] is to [be] filed by Plaintiff[s] and Defendants shall file Voluntary Dismissals with Prejudice [of] all Counterclaims.
>
> 3. Issues not settled by this Agreement are: None.

Plaintiffs signed the revised "Mediated Settlement Agreement" and drafted a Consent Judgment which incorporated the allegations of fraud in their Complaint as findings of fact. Both the revised "Mediated Settlement Agreement" and the proposed Consent Judgment were forwarded by Plaintiffs to Defendants. Defendants informed Plaintiffs in October that they would not sign the revised "Mediated Settlement Agreement" or the proposed Consent Judgment.

On 21 November 1997, Plaintiffs filed a motion to enforce the revised "Mediated Settlement Agreement" entered by the parties and to impose sanctions against Defendants. A hearing was held on Plaintiffs' motions on 4 December 1997. At that hearing, counsel for Defendants contended Plaintiffs' motions "ignore[d] the confidentiality protections of mediated settlement conferences and [sought] to

introduce in the cause statements made [and] conduct occurring during the mediated settlement conference, in derogation of N.C.G.S. [§] 7A-38.1(*l*)." Defendants' counsel further informed the trial court he was "not going to go back into the mediated settlement conference and say anything about anybody's conduct or any statements that they made in reference to these matters, . . . because [I am] not going to waive the protections of the confidentiality rule of mediated settlement conferences."

Following the 4 December 1997 hearing, the trial court found:

> [At the mediated settlement conference, the parties agreed to] enter into a consent judgment in the amount of $500,000.00, to be drafted by [P]laintiffs in such a way as to prevent said judgment from being dischargeable in bankruptcy. Said judgement [sic] was to include findings of fact and conclusions of law regarding [P]laintiffs' claim for fraud. All other claims by the parties would be dismissed.
>
> . . . .
>
> . . . Thereafter, the mediator reported to the Court that all issues in the case had been settled and issued a mediated settlement agreement to [P]laintiffs for signature. Plaintiffs and [P]laintiffs' counsel executed said mediated settlement agreement and forwarded it to counsel for [D]efendants on September 8, 1997.
>
> . . . .
>
> . . . [C]ounsel for [D]efendants informed counsel for [P]laintiffs in the latter part of October that [D]efendants would not execute either the mediated settlement agreement or the consent judgment.
>
> . . . [D]efendants have offered no reason to this court for their refusal to sign either the mediated settlement agreement or the consent judgment.
>
> . . . The court finds that [D]efendants refusal to sign said documents was unwarranted and constitutes a willful and grossly negligent failure to comply with Rule 4C of the Mediated Settlement Conference Rules in Superior Court Civil Actions resulting in substantial interference with the business of the court.

Based on these and other findings, the trial court concluded:

> [T]he parties reached a settlement of all issues in which [Mr.] Hammack and [Hammack, Inc.] would enter into a consent judgment in the amount of $500,000.00, to be drafted in such a way as to prevent said judgment from being dischargeable in bankruptcy. Said judgement [sic] was to include findings of fact and conclusions of law regarding [P]laintiffs' claim for fraud. All other claims by the parties would be dismissed.

Accordingly, the trial court ordered: (1) Defendants' Answer and Counterclaims be stricken, (2) Plaintiffs' Complaint against Haney be dismissed; and (3) "a judgment shall be entered by this court making findings of fact and conclusions of law on the basis of fraud against [Mr.] Hammack and [Hammack, Inc.] in the amount of $500,000.00 . . . ." The trial court thereafter, "[o]n consideration of the undisputed allegations contained in [P]laintiffs' complaint," found as fact the allegations of fraud contained in Plaintiffs' Complaint, and entered judgment in favor of Plaintiffs in the amount of $500,000.00.

The issues are whether: (I) evidence of an agreement (and its terms) reached by the parties at a mediated settlement conference is admissible; and (II) the trial court had the authority to strike Defendants' Answer and Counterclaims for failure to execute the revised "Mediated Settlement Agreement."

I

[1] Section 7A-38.1, which "require[s] parties to superior court civil actions and their representatives to attend a pretrial, mediated settlement conference," provides:

> Inadmissibility of negotiations.—Evidence of statements made and conduct occurring in a mediated settlement conference shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference.

N.C.G.S. § 7A-38.1(*l*) (1995). Defendants contend this provision prevents the parties and the mediator from revealing whether an agreement was reached at the mediated settlement conference. We disagree.

"The cardinal principle of statutory construction is that the intent of the legislature is controlling." *Nationwide Mutual Ins. Co. v.*

Mabe, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996). To ascertain our General Assembly's legislative intent, we look at "the phraseology of the statute [as well as] the nature and purpose of the act and the consequences which would follow its construction one way or the other." *Id.* We will not adopt an interpretation that would result in injustice "when the statute may reasonably be otherwise consistently construed with the intent of the act." *Id.* Finally, whenever possible, we will construe a statute "so as to avoid absurd consequences." *Id.*

Construing section 7A-38.1(*l*) consistently with its nature and purpose, we hold that section 7A-38.1(*l*) does not prohibit the admission of the outcome of a mediation settlement conference before a judge making the determination of whether settlement was reached and of the terms of that settlement. Section 7A-38.1(*l*) was enacted to prevent a chilling effect on settlement negotiations by allowing parties to freely make settlement offers without fear that these offers would be revealed to a subsequent finder of fact as some evidence of liability on either the present or a future substantive claim. *See* John G. Mebane, III, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts*, 71 N.C. L. Rev. 1857, 1872 (1993) ("For mediation to be effective, the parties must feel completely free to tell their sides of the story without worrying that such statements will later be used against them."); Kenneth R. Feinberg, *Mediation— A Preferred Method of Dispute Resolution*, 16 Pepp. L. Rev. S5, S28-29 (1989) (noting that confidentiality is critical to the success of mediation because the parties must "feel free to advance tentative solutions and to make statements without fear that they will later be used as a basis for liability or as a measure of damage"). We find additional support for this position in our Rules for Court-Ordered Arbitration, which were initially adopted by our Supreme Court in 1986. *See Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 475, 500 S.E.2d 732, 739 (1998) (noting that "a mediator is of the same kind, character, and nature as an arbitrator"); Rules for Court-Ordered Arbitration 5, 1999 Ann. R. N.C. 52 (subsection (c) provides that "[n]o reference may be made to prior arbitration proceedings *in the presence of a jury* without consent of all parties to the arbitration and the court's approval"; subsection (d) provides that no evidence of prior arbitration proceedings is admissible "*in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration*, without the consent of all parties to the arbitration and the court's approval"; subsection (e) provides that the arbitrator "may not be deposed or called

as a witness to testify concerning anything said or done in an arbitration proceeding *in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration*" (emphases added)). Accordingly, we do *not* read section 7A-38.1(*l*) as prohibiting the admission of testimony or other evidence[1] of the *outcome* of the mediation settlement conference before a judge making the determination of whether settlement was reached and of the terms of that settlement.[2] It follows that, in this limited context, evidence of an agreement, and the terms of that agreement, reached by the parties during a mediated settlement conference is admissible.

Section 7A-38.1(*l*) also provides: "No mediator shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference in any civil proceeding for any purpose, except proceedings for sanctions under this section . . . ." N.C.G.S. § 7A-38.1(*l*). For the reasons noted above, we hold that a mediator is both competent and compellable to testify or produce evidence on whether the parties reached a settlement agreement, and as to the terms of the agreement, where the judge is making that determination. In any event, in "proceedings for sanctions," the mediator is both competent and compellable to testify or produce evidence to allow the trial court to determine whether sanctions are appropriate.

We do not fault Defendants' counsel's caution, however, in failing to present evidence on this matter, in light of the broad (and previously unconstrued) language of section 7A-38.1(*l*). We therefore vacate the trial court's Order sanctioning Defendants and remand for a hearing, at which both parties may present evidence, to determine whether Defendants, free from either fraud or mutual mistake, agreed to settlement, and specifically whether Defendants agreed to the terms enumerated in the revised "Mediated Settlement Agreement." *Cf. Becker v. Becker*, 262 N.C. 685, 690, 138 S.E.2d 507, 511 (1964) (allowing parties to challenge a consent judgment by showing that agreement was reached only as a result of fraud or mutual mistake).

1. The "Report of Mediator," which noted that Plaintiffs and Defendants had reached "agreement on all issues," and the two versions of the "Mediated Settlement Agreement" prepared by the mediator constitute admissible evidence in this context.

2. Of course, section 7A-38.1(*l*) does prohibit the admission of evidence of statements made and conduct occurring in a mediated settlement conference before the finder of fact where the finder of fact is making a determination on the merits of either the present or a future substantive claim.

II

[2] Defendants further contend that, even assuming they agreed to the enumerated terms of the revised "Mediated Settlement Agreement," the trial court lacked authority to sanction them for failure to execute that agreement. We disagree.

Trial courts have authority, pursuant to Rule 5 of the Mediation Rules, to impose "any appropriate monetary sanction" on a person required to attend a mediated settlement conference who fails to attend without good cause. Mediation Rules 5, 1999 Ann. R. N.C. 63; *Triad Mack Sales & Service v. Clement Bros. Co.*, 113 N.C. App. 405, 438 S.E.2d 485 (1994) (affirming the trial court's order striking the defendant's answer for failure to attend a mediated settlement conference pursuant to Rule 5, which, at that time, provided that failure to attend without good cause could result in "any lawful sanction"). The Mediation Rules do not expressly provide for sanctions under any other circumstance. *See* Mediation Rules, 1999 Ann. R. N.C. 59-67. Even absent an express grant of authority, however, trial courts have inherent authority to impose sanctions for wilful failure to comply with the rules of court. *Lee v. Rhodes*, 227 N.C. 240, 242, 41 S.E.2d 747, 749 (1947) (noting that the trial court "was not without power to deal with" a plaintiff's bad faith withdrawal of consent to settlement); *Lomax v. Shaw*, 101 N.C. App. 560, 563, 400 S.E.2d 97, 98 (1991) (affirming trial court's order, pursuant to its inherent authority, striking the defendants' answer where the defendants "offered no plausible excuse as to why they did not execute [a previously agreed upon] consent judgment"). Accordingly, the trial court has inherent authority to sanction a party for wilful failure to comply with the Mediation Rules.

In this case, the trial court entered an order striking Defendants' Answer and Counterclaims for their "unwarranted refusal" to sign the revised "Mediated Settlement Agreement" memorializing the agreement of the parties, finding that Defendants' refusal constituted "a willful and grossly negligent failure to comply with Rule 4C of the Mediated Settlement Conference Rules in Superior Court Civil Actions resulting in substantial interference with the business of the court." Rule 4C provides in part: "If an agreement is reached in the conference, parties to the agreement *shall* reduce its terms to writing and sign it along with their counsel." Mediation Rules 4C, 1999 Ann. R. N.C. 63 (emphasis added). Although any agreement reached must be reduced to a signed writing, the failure of the parties to reduce

their agreement to a signed writing does not preclude a finding that the parties indeed reached agreement at the mediated settlement conference. Indeed, it is well settled that parties may orally enter a binding agreement to settle a case. *See* 15A Am. Jur. 2d *Compromise and Settlement* § 10, at 782 (1976) ("[N]o particular form of agreement and no writing is ordinarily essential to a valid compromise."); *cf. Manufacturing Co. v. Union*, 20 N.C. App. 544, 548, 202 S.E.2d 309, 312 (noting that parties may orally consent to a consent judgment), *cert. denied*, 285 N.C. 234, 204 S.E.2d 24 (1974); *Nickels v. Nickels*, 51 N.C. App. 690, 693-94, 277 S.E.2d 577, 579 ("[S]ignatures of parties or their attorneys [on a consent judgment are] not necessary if consent is made to appear."), *disc. review denied*, 303 N.C. 545, 281 S.E.2d 392 (1981). If, on remand, the trial court determines that Defendants orally agreed to settlement and to the terms enumerated in the revised "Mediated Settlement Agreement," it may again enter an order imposing sanctions for Defendants' refusal to comply with Rule 4C of the Mediation Rules. We note that striking a party's answer is a severe sanction which should only be imposed where the trial court has considered less severe sanctions and found them to be inappropriate. *See Triad Mack Sales & Service*, 113 N.C. App. at 409, 438 S.E.2d at 488. Furthermore, if, on remand, the trial court finds that Defendants agreed to the enumerated terms of the revised "Mediated Settlement Agreement," it may, either in addition to or instead of the imposition of sanctions for refusal to follow court rules, enter an order requiring Defendants to specifically perform the oral contract memorialized by the revised "Mediated Settlement Agreement." *See State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 137, 493 S.E.2d 793, 797 (1997) (noting that although a trial court may not enter a consent judgment to which the parties no longer agree or with terms to which the parties did not agree, it may enter a judgment specifically enforcing "the terms found in the parties' settlement agreement").

In summary, we vacate the Order of the trial court sanctioning Defendants and remand for a hearing, at which both parties may present evidence, to determine whether, and under what terms, Defendants agreed to settle this case. Because the Judgment of the trial court is based on the "undisputed" allegations of Plaintiffs' Complaint, and because these allegations are undisputed only because Defendants' Answer and Counterclaims were stricken as a sanction in the trial court's Order, we likewise vacate the Judgment of the trial court. Accordingly, we need not address Defendants' remaining contentions, as they may not recur on remand.

Vacated and Remanded.

Judges JOHN and HUNTER concur.

STATE OF NORTH CAROLINA v. JOHN HENRY McALLISTER, JR.

No. COA98-232

(Filed 16 February 1999)

Evidence— impeachment—victim's juvenile adjudications

The trial court did not abuse its discretion in a prosecution which resulted in an indecent liberties conviction by excluding evidence of the victim's juvenile adjudications where the court stated that N.C.G.S. § 8C-1, Rule 609 had been considered and found that the probative value of the evidence was far outweighed by the prejudice and the creation of ancillary issues. Despite the language used by the court, it is clear from the record that the court understood the standard to be applied under Rule 609 and believed that the evidence was not necessary for a fair determination of the issue of guilt or innocence.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 12 September 1997 by Judge James D. Llewellyn in Pender County Superior Court. Heard in the Court of Appeals 25 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Amy R. Gillespie, for the State.

Nora Henry Hargrove for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant was charged with first-degree kidnapping, first-degree rape, first-degree sexual offense, and taking indecent liberties with a child. Evidence was presented at trial by the State as follows:

The prosecuting witness testified that on 28 November 1996, she went to a friend's house where she encountered defendant. Defendant pushed her onto the floor, forced her to remove her clothes,

placed his "private part" next to hers, touched her private part with his hand, and placed his finger in her "private part."

Other witnesses testified that the prosecuting witness recounted the incident to her mother, a police officer, and medical personnel at the hospital. Evidence was also presented showing that the prosecuting witness had been an "A/B" student prior to the attack and that her grades had dropped since the attack.

A jury found defendant guilty of taking indecent liberties with a minor but not guilty of rape or sexual offense. The trial court sentenced defendant to a minimum of thirty-nine months and a maximum of forty-seven months in prison. Defendant appeals.

Defendant argues that the trial court erred by excluding evidence of the victim's juvenile adjudications. He contends that the trial court applied the wrong standard in making its ruling, abused its discretion, and denied him his constitutional right to confront the witnesses against him. We disagree.

Prior to trial, defendant filed a motion seeking the production of juvenile files pertaining to the prosecuting witness. The trial court initially denied the motion. During the trial, defendant requested that the trial court reconsider its ruling and allow him to cross-examine the prosecuting witness concerning any juvenile adjudications. The trial court reversed its prior ruling to the extent that it would allow defendant to cross-examine the prosecuting witness concerning the juvenile adjudications. Further argument of counsel, however, revealed that the offenses for which the prosecuting witness was adjudicated delinquent occurred after she was sexually assaulted by defendant. Therefore, the trial court again reversed itself and ruled that defendant would not be allowed to cross-examine the prosecuting witness about the adjudications.

Rule 609(a) of the North Carolina Rules of Evidence provides as a general rule that "[f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter." N.C.R. Evid. 609(a). However, Rule 609(d) provides an exception to the general rule:

> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the

> accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

N.C.R. Evid. 609(d). While evidence of juvenile adjudications is generally not admissible, the trial court *may* admit evidence of juvenile adjudications of a witness if the offense would be admissible to attack the credibility of an adult, *and* the trial court is satisfied that admission of the evidence is necessary for a fair determination of guilt or innocence. The final decision is within the discretion of the trial court as to whether admission of the evidence is necessary for a fair determination of guilt or innocence. *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989).

In making its ruling in this case, the trial court stated that Rule 609 had been considered and found "that the probative value of the evidence of the juvenile petitions and convictions is far outweighed by the prejudice that may be committed and the creation of ancillary issues." Despite the language used by the trial court in making the ruling, it is clear from an examination of the record that the trial court understood the standard to be applied under Rule 609 and that the trial court believed the evidence was not necessary for a fair determination of the issue of guilt or innocence.

Furthermore, defendant has failed to show that the trial court abused its discretion by excluding the evidence of the juvenile adjudications. The offenses for which the prosecuting witness was adjudicated delinquent were committed after she was sexually assaulted and after she had made her initial accusations against defendant. The trial court's decision to exclude the evidence was reasonable in light of the fact that at the time the victim made her initial accusations, she was a thirteen-year-old child with good grades and no history of criminal activity.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal trial to confront the witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347 (1974). "However, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process[.]" *State v. Fortney*, 301 N.C. 31, 36, 269 S.E.2d 110, 113 (1980). Indeed, there is no right to ask a witness irrelevant questions. *Id.*

In *Davis*, the defendant sought to cross-examine the witness concerning his juvenile court probation and the possibility that the state of Alaska had some power over him as a result of his probationary status. The United States Supreme Court held that the trial court denied the defendant's right to confront witnesses by refusing to allow the cross-examination. *See also State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997) (holding that the trial court erred by refusing to let the defendant ask a witness for the State about pending criminal charges and whether the witness expected or was promised anything in regard to the charges in exchange for his testimony).

In this case, defendant was not attempting to show that the State had any power over the prosecuting witness or that she was biased against him. Instead, he sought to simply impeach her credibility with evidence of offenses committed well after the commission of the offense for which he was charged and well after she made her initial accusations against defendant. The trial court's determination that the evidence was not necessary for a fair determination of guilt or innocence was essentially a determination that the evidence was not relevant. *See* N.C.R. Evid. 401 (stating that "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Since he had no right to elicit irrelevant evidence on cross-examination, defendant was not denied his constitutional right to confront the witnesses against him. The trial court did not err by refusing to allow defendant to cross-examine the prosecuting witness about her juvenile adjudications.

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

No error.

Judge HUNTER concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I respectfully dissent from the majority opinion because I believe the trial court erred in excluding evidence of the prosecuting witness's juvenile adjudications for impeachment purposes.

A criminal defendant's right to impeach a witness with "evidence of a juvenile adjudication . . . , [the conviction of which] would be admissible to attack the credibility of an adult," and which is "necessary for a fair determination of the issue of guilt or innocence," N.C.G.S. § 8C-1, Rule 609(d) (1992), is guaranteed by the Confrontation Clause of the United States Constitution. *See Davis v. Alaska*, 415 U.S. 308, 319, 39 L. Ed. 2d 347, 355 (1974) (holding that the Confrontation Clause of the United States Constitution entitles a criminal defendant to question a crucial witness concerning the witness's juvenile adjudications where necessary to reveal "a possible bias" of that witness); *State v. Whiteside*, 325 N.C. 389, 401, 383 S.E.2d 911, 918 (1989) (noting that Rule 609(d) was enacted to satisfy the requirements of *Davis*). Admissible evidence under Rule 609(d) includes juvenile adjudications that "undermine[] credibility only indirectly by showing a criminal character and, thus, a propensity which is only generally linked to truthfulness." 28 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6138, at 278-79 (1993) [hereinafter *Wright & Gold on Federal Practice and Procedure*].

> [Where] the prosecution witness is crucial, the Rule 609 evidence is convincing, and there is no other comparably effective way to attack [the witness's] credibility, . . . subdivision (d) [of Rule 609] should not bar the evidence since these circumstances suggest that the evidence is "necessary for a fair determination of the issue of guilt or innocence."

Id. at 279.

In this case, such circumstances are undoubtedly presented. The testimony of the prosecuting witness was crucial to the State's case against defendant. Neither medical evidence nor physical evidence of a sexual assault was presented by the State. Dr. Dalbec, the physician who examined the prosecuting witness on the day of the alleged assault, gathered evidence for a North Carolina sexual assault evidence kit in accordance with standard procedure. Dr. Dalbec testified that he had checked the prosecuting witness "head to toe" for physical damage, and that "there were no areas that she told me were tender, and I looked for bruises or scrapes or abrasions, swelling, and I didn't find anything." Although Dr. Dalbec collected hair samples, vaginal and anal smears and swabs, and saliva from the prosecuting witness for subsequent testing at a forensic lab, no subsequent testing was conducted. The prosecuting witness was the only witness to the alleged crime; the remaining State's witnesses testified to what

the prosecuting witness had told them. The State also elicited testimony, from a "lifelong friend" of the prosecuting witness, that she was "a truthful person." In addition, the evidence of the prosecuting witness's juvenile adjudications was a matter of record, and there was no other equally convincing method of impeaching her testimony. Accordingly, evidence of her juvenile adjudications, which would have been admissible if committed by an adult, was necessary for a fair determination of defendant's guilt or innocence. Indeed, when applying this Rule 609(d) standard, the trial court came to this conclusion. Accordingly, it was a violation of defendant's rights under the Confrontation Clause to exclude the prosecuting witness's juvenile adjudications in this case.

The majority opinion makes two separate arguments to support the trial court's exclusion of these adjudications. First, it states that the trial court "understood the standard to be applied under Rule 609 and . . . believed the evidence was not necessary for a fair determination of the issue of guilt or innocence." *State v. McAllister*, 132 N.C. App. 300, 302, 511 S.E.2d 660 (1999). My review of the record, however, reveals that the trial court found:

> [T]he focal point of the trial in progress is the testimony of the prosecuting witness and victim, therefore, her character for the truth is directly an issue, and the Court finds that the ends of justice would best be served if . . . defendant's counsel [is] allowed to cross examine the prosecuting witness/victim . . . as to these three offenses as they would be admissible if the prosecuting witness was an adult, and *the Court does determine that it is necessary, this to be necessary for a determination of the issues of guilt or innocence in this case.*

(emphasis added). The trial court then changed its ruling and refused to allow evidence of the prosecuting witness's juvenile adjudications for impeachment after erroneously finding:

> [Rule] 404 sets a guideline, but not a directive for the Court's ruling and makes the ruling under Rule 609 totally discretionary with the Court, and the Court having considered that both of these statutes, having not done so before now, finds that the probative value of the evidence of the juvenile petitions and [adjudications] is far outweighed by the prejudice that may be committed and the creation of ancillary issues.

The Rule 609(d) "necessary for a fair determination" standard is not the equivalent of the Rule 403 "probative value versus prejudicial

effect" standard, and the application of one does not satisfy the requirements of the other. *See* 28 *Wright & Gold on Federal Practice and Procedure* § 6138, at 276-77; *see also Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (noting that where one statute deals with a subject in detail or with reference to a particular situation and another statute deals with the same subject in general and comprehensive terms, the particular statute is generally controlling). In addition, the trial court believed that Rule 404 was relevant to its determination on this issue. According to North Carolina's foremost commentator on evidence, however:

> [S]everal statutes, including . . . N.C.R. Evid. 404(b), were amended [in 1994] to permit a trial judge to order that a record of a juvenile offense that would be a Class A-E felony be admitted under Rule 404(b) or to prove an aggravating factor at sentencing. Admission under Rule 609(d) is not mentioned and the amendments, on their face, would not seem to affect the application of [Rule 609(d)].

1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 98, at 305, n. 262 (5th ed. 1998) [hereinafter *Brandis & Broun on North Carolina Evidence*] (citations omitted). I agree that Rule 404(b), ordinarily used by the State to enter into evidence juvenile adjudications of a criminal defendant, does not alter the requirements of Rule 609(d), enacted to protect a criminal defendant's constitutional right to confront the witnesses against him.

The majority opinion's second ground for upholding the trial court's exclusion of the prosecuting witness's juvenile adjudications is that these adjudications were "irrelevant" because the delinquent behavior occurred after the date of the crime alleged in this case. *McAllister*, 132 N.C. App. at 302, 551 S.E.2d at 662. These adjudications go to the prosecuting witness's character for truthfulness, however, and are therefore relevant for the jury's consideration regardless of when they occurred. *See* 1 *Broun & Brandis on North Carolina Evidence* § 98, at 303 (noting that the crime does not have to have a rational relation to truthfulness to be admissible for impeachment of the witness's credibility under Rule 609). The State's argument that the prosecuting witness "acted out" as a result of the alleged assault by defendant is for the jury's consideration; it does not make her juvenile adjudications irrelevant on the issue of her credibility as a matter of law. While Rule 609 generally makes any conviction over ten years

old inadmissible for impeachment, N.C.G.S. § 8C-1, Rule 609(b), it contains no prohibition limiting the admissibility of convictions that occurred *after* the date of the alleged crime. Indeed, convictions of adult offenders that occurred after the date of the alleged offense have been admitted by our courts for impeachment purposes as a matter of course. *See, e.g., State v. Cunningham*, 97 N.C. App. 631, 389 S.E.2d 286 (allowing, for impeachment purposes, admission of a conviction which occurred *after* the alleged crime for which the defendant was being tried), *disc. review denied*, 326 N.C. 802, 393 S.E.2d 905 (1990). As subsection (d) of Rule 609 allows juvenile adjudications to be admitted "if conviction of the offense would be admissible to attack the credibility of an adult," a witness's juvenile adjudications occurring *after* the date of the defendant's alleged crime should likewise be admissible.

In summary, I believe the trial court's exclusion of the prosecuting witness's juvenile adjudications, after finding admission of these adjudications to be necessary for a fair trial, violated defendant's constitutional right to confront the witnesses against him. In any event, even if the trial court itself had not found admission of the prosecuting witness's juvenile adjudications to be necessary, the circumstances of this case make exclusion of these juvenile adjudications a constitutional error and an abuse of the trial court's discretion. Accordingly, I would remand for a new trial.

AL PATRICK O'CARROLL, ADMINISTRATOR OF THE ESTATE OF WILLIAM C. O'CARROLL, PLAINTIFF v. TEXASGULF, INC., DEFENDANT

No. COA98-443

(Filed 16 February 1999)

1. Wrongful Death— worker in collapsed trench—defendant's knowledge of inherent danger—directed verdict denied

The trial court did not err in a wrongful death action arising from the collapse of the trench in which decedent was working by denying plaintiff's motion for a directed verdict where there was no dispute that the trenching was inherently dangerous, but there was a dispute with respect to whether defendant knew or should have known that the trench was inherently dangerous.

2. Stipulations— wrongful death—inherently dangerous trenching—submission to jury erroneous

The trial court erred in a wrongful death action arising from the collapse of a trench in which decedent was working by submitting to the jury the issue of whether decedent was engaged in an inherently dangerous activity. Because defendant admitted or stipulated in its argument before the court in opposition to plaintiff's directed verdict motion that the trenching was inherently dangerous at the time of decedent's death, it was both unnecessary and improper to submit the issue to the jury. Plaintiff was entitled to a new trial because the jury's answer to one of the issues may have been based on a finding that the trench was not inherently dangerous.

3. Trials— argument of counsel—opposing counsel's agenda—no gross impropriety

There was no abuse of discretion in a wrongful death action where the trial court failed to intervene ex mero motu when defense counsel argued in closing that plaintiff's attorney had an agenda of obtaining money. The argument was improper but did not rise to the level of gross impropriety.

Appeal by plaintiff from judgment filed 4 September 1997 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 5 January 1999.

Twiggs, Abrams, Strickland & Trehy, P.A., by Douglas B. Abrams, and Dill, Fountain, Hoyle & Pridgen, by William S. Hoyle, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson and Michael W. Mitchell, for defendant-appellee.

GREENE, Judge.

Al Patrick O'Carroll (Plaintiff), administrator of the Estate of William C. O'Carroll (Decedent), appeals from the jury's determination that Decedent's death was not caused by the negligence of Texasgulf, Inc. (Defendant).

On 18 January 1991, Decedent, who was employed by Roberts Industrial Contractors (Roberts) as a pipe welder, was crushed to death when the trench in which he was working collapsed.

Defendant obtained Roberts as an independent contractor to perform excavation and welding work at its phosphate mine near Aurora, North Carolina. Roberts had held itself out to Defendant as having expertise in excavation work, and had performed independent contract work for Defendant previously. This particular excavation contract called for the removal and replacement of a pipe under a road at Defendant's facility, and was to be completed in two stages so as not to interrupt the traffic on the road. Although Defendant did not participate in, supervise, or "police" the work performed by Roberts, the contract specifically required Roberts to comply with Defendant's Plantsite Excavation Rules, which required the walls of any trench deeper than five feet to have "suitable sloping and benching of the side walls of the excavation and/or installation of support systems such as shoring or shields." Roberts completed the first phase of the project safely, and Defendant had observed that Roberts properly sloped the walls of the first trench.

Upon commencement of the second phase on 17 January 1991, Bruce Coward (Coward), Roberts' foreman for all excavation work, discovered additional pipes and contacted Defendant to determine whether the newly discovered pipes could be removed. The next morning, two employees of Defendant, Sam Fulmer (Fulmer) and Mitchell Jackson (Jackson), arrived at the work site and confirmed that the newly discovered pipes could be removed. Fulmer and Jackson did not see evidence that anyone actually had worked in the trench, but before departing the work site on that morning, recommended that more slope be placed on the walls of the second trench because part of the earth had "sloughed off into the trench."

After Fulmer and Jackson left, Coward removed the newly discovered pipes and continued digging the trench until it reached a final depth of approximately twelve feet. Roberts then lowered the second section of pipe into the trench, and fit it into the protruding end of the first section of pipe. Decedent then entered the trench to weld the two sections of pipe together. Because Roberts failed to properly slope or otherwise install shoring or shields, the second trench collapsed shortly after Decedent entered, crushing him to death.

The federal Mine Safety & Health Administration investigated the accident, and issued a citation against Roberts for violating the Mine Safety and Health Act. Defendant did not receive a citation for the accident.

On 16 December 1992, Plaintiff filed a wrongful death action against Roberts, John B. Roberts, individually, and Defendant, but settled all claims with Roberts and John B. Roberts. In his complaint against Defendant, Plaintiff alleged negligence, wanton misconduct, strict liability, and absolute liability, and sought punitive damages. On 11 February 1994, Defendant moved for summary judgment, and the trial court granted the motion on 6 April 1994. Plaintiff appealed to this Court, arguing only his negligence claim against Defendant under the doctrine of nondelegable duty. In an opinion filed 6 June 1995, this Court reversed the grant of summary judgment, holding there were genuine issues of material fact as to whether the trench was inherently dangerous and whether Defendant "knew that the trench was inherently dangerous." *O'Carroll v. Roberts Industrial Contractors*, 119 N.C. App. 140, 457 S.E.2d 752, *disc. review denied*, 341 N.C. 420, 461 S.E.2d 760 (1995). At the trial on remand, the trial court denied both Plaintiff's and Defendant's motions for directed verdict.[1] After the evidence was complete, the jury was submitted three issues. The first issue read: "Was the death of [Decedent] caused by the negligence of [Defendant]?" The jury resolved this issue in favor of Defendant, answering "No," and did not reach the second (contributory negligence) and third (damages) issues.

In his closing argument to the jury, Defendant's counsel stated: (1) "How come Texasgulf is having to defend itself in this case? Because Doug Abrams, the Plaintiff's lawyer, has an agenda. His agenda is, 'I want to get this jury thinking about the little guy versus the big guy; the estate of Billie O'Carroll versus Texasgulf.' . . . Doug Abrams' agenda is money"; (2) "What's the agenda? Doug Abrams' agenda is, 'But you told them to keep the road open. It's your fault' "; (3) "That's the agenda folks. Is that fair? How does that make you feel?"; (4) "They can't have it both ways, but that's the agenda, folks"; (5) "But that's the agenda. That's the plaintiff's lawyer's agenda. . . . He's going to want to talk to you about money. He wants you to be thinking about money. That's what he wants. That's his agenda"; and (6) "And when Mr. Abrams is up here arguing to you last, and talking about money, and talking to you about the law, think about the agenda." Plaintiff failed to object to any of these statements.

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1. At the hearing on Plaintiff's motion for directed verdict, Defendant admitted that the trenching was inherently dangerous at the time of Decedent's death and the trial court acknowledged, "that's not an issue for the jury."

In its instructions to the jury on the first issue, the trial court informed the jurors in pertinent part: (1) a landowner employing an independent contractor to perform work which the landowner knows, or should know "is inherently dangerous or will create an inherently dangerous condition on the premises is under a non-delegable duty to exercise reasonable care to keep the premises safe for all persons thereon, including employees of the independent contractor"; (2) "Our law defines inherently dangerous activity as work to be done from which serious adverse consequences will arise unless preventative measures are adopted and that which has a recognizable and substantial danger inherent in the work"; (3) "With respect to trenching this non-delegable duty of care arises when the trenching done by the independent contractor becomes inherently dangerous and the landowner knows, or . . . should have known, of the dangerous propensities of the particular trench or trenching activity in question"; and (4) "All of the evidence tends to show that at the time of [Decedent's] death that the portion of the trench in which he was working was unsafe and inherently dangerous." The trial court further explained the contentions of both Plaintiff and Defendant, and reminded the jury that Plaintiff had the burden of proving the negligence of Defendant. The trial court ended its instructions on this issue by stating:

> If you find by the greater weight of the evidence that [Decedent's] death was caused by inherently dangerous activity on [Defendant's] premises, of which [Defendant] knew, or in the exercise of reasonable care should have known, and [Defendant] failed to exercise the care of a reasonable and prudent person under those circumstances to protect occupants of the premises from harm, and that this failure was a proximate cause of [Decedent's] death, then it would be your duty to answer this first issue yes in favor of [Plaintiff].

The dispositive issues are whether: (I) the trial court properly denied Plaintiff's motion for directed verdict; (II) the jury instructions on the first issue correctly informed the jury of the law and their responsibility with respect to the inherently dangerous nature of the trenching;[2] and (III) Defendant's counsel's closing argument was so

2. We do not address Plaintiff's ultra-hazardous activity arguments relating to the directed verdict motion and the jury instructions because trenching is not an ultra-hazardous activity. Indeed, blasting is presently the only recognized ultra-hazardous activity in this state. *Woodson v. Rowland*, 329 N.C. 330, 350-51, 407 S.E.2d 222, 234 (1991). In any event, Plaintiff's abandonment of his strict liability claim, *O'Carroll v.*

grossly improper as to require the trial court to intervene *ex mero motu*.

As a general proposition, an owner[3] has a nondelegable duty with respect to the exercise of an inherently dangerous[4] activity and the employment of an independent contractor to perform this activity does not absolve the owner of his duty to third parties. *See Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 235 (1991); *see also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71, at 512 (5th ed. 1984) [hereinafter *Prosser on Torts*].

More precisely, an owner's liability to third parties within the scope of this nondelegable duty rule requires a showing that: (1) the activity causing the injury was, at the time of the injury, inherently dangerous, *Woodson*, 329 N.C. at 356, 407 S.E.2d at 238; (2) the owner knew, at the time of the injury, of the inherent dangerousness of the activity, *or* knew or should have known, from the circumstances preceding the injury, that the work would likely create an inherently dangerous situation,[5] *id.*; Stuart M. Speiser et al., *The American Law of Torts* § 4:28, at 699 (1983) [hereinafter *Speiser on Torts*] (question is whether the work "is likely to create a peculiar risk of harm during its progress"); *Prosser on Torts* § 71, at 512 (employer liable if "in the course of the work, injurious consequences might be expected to result 'unless means are taken to prevent them' "); and (3) the owner failed to take or ensure that reasonable precautions were taken to avoid the injury and this negligence was a proximate cause of the plaintiff's injuries, *Woodson*, 329 N.C. at 352, 407 S.E.2d at 235 (owner has "a continuing responsibility to ensure that adequate safety precautions are taken" to prevent injury); *but see Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 405-06, 436 S.E.2d 145, 149

Roberts Industrial Contractors, 119 N.C. App. 140, 143, 457 S.E.2d 752, 755 (issue not argued before Court was abandoned), *disc. review denied*, 341 N.C. 420, 461 S.E.2d 760 (1995), precludes him from now reasserting the ultra-hazardous argument, *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234 (ultra-hazardous activity gives rise to strict liability).

3. The use of the word "owner" in this opinion includes anyone who employs an independent contractor to perform an inherently dangerous activity.

4. "[I]t is generally understood that an activity will be characterized as [inherently dangerous] if it can be performed safely provided certain precautions are taken, but will, in the ordinary course of events, cause injury to others if these precautions are omitted." *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998).

5. Because all trenching is not inherently dangerous, it follows that the excavation of one portion of a trench may be inherently dangerous but the excavation of another portion may not be inherently dangerous.

(1993) (owner not responsible for negligence of contractor collaterally related to inherently dangerous activity), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994).

Although the determination of whether an activity is inherently dangerous is often a question of law, *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998), whether a particular *trenching* situation constitutes an inherently dangerous activity *usually* presents a question of fact and should be addressed on a case by case basis,[6] *Woodson*, 329 N.C. at 354, 407 S.E.2d at 236; *Speiser on Torts* § 4:28, at 699 (whether the work is likely to create a peculiar risk of harm is "ordinarily a question to be resolved by the trier of fact"); *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 260-61, 17 S.E.2d 125, 129-130 (1941) (holding that digging a trench in a heavily populated area is inherently dangerous as a matter of law). The focus must be on "the particular trench being dug and the pertinent circumstances surrounding the digging." *Woodson*, 329 N.C. at 356, 407 S.E.2d at 237.

I

[1] Plaintiff first contends he was entitled to a directed verdict because: (1) Roberts was engaged in an inherently dangerous activity; (2) Defendant knew or should have known that the activity was inherently dangerous; (3) Defendant failed to take precautions to prevent harm to Decedent; and (4) this negligence was a proximate cause of Decedent's death.

Directed verdicts for the party with the burden of proof are rarely granted. *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979). "This is so because, even though proponent succeeds in the difficult task of establishing a clear and uncontradicted prima facie case, there will ordinarily remain in issue the credibility of the evidence adduced by proponent." *Id.* Nonetheless, "where credibility is manifest as a matter of law," a directed verdict for the party with the burden of proof is proper "if the evidence so clearly establishes the fact[s] in issue that no reasonable inferences to the contrary can be drawn." *Id.*

In this case, although there was no dispute between the parties as to whether the trenching was inherently dangerous at the time of its collapse, there is a dispute with respect to whether Defendant knew

6. Of course, the issue of whether the trenching is inherently dangerous is always subject to resolution by summary judgment or directed verdict.

or should have known that the trench was inherently dangerous. Because we do not believe the evidence in this case clearly supports the single inference that Defendant knew or should have known of the inherent dangerousness of the trench at the time of Decedent's death, the trial court properly denied Plaintiff's motion for directed verdict.

II

[2] Plaintiff complains of the trial court's jury instructions regarding inherently dangerous activities, contending the instruction allowed the jury to find that Roberts was not engaged in an inherently dangerous activity. We agree.

Although the trial court peremptorily instructed the jury that all the evidence tended to show that the trench was inherently dangerous at the time of Decedent's death, the jury nonetheless was free to reject the credibility of the evidence on this issue, and find that the trenching was not inherently dangerous at the time of the injury. *Electro Lift v. Equipment Co.*, 270 N.C. 433, 437, 154 S.E.2d 465, 467 (1967) (a proper peremptory instruction requires the jury to answer the issue in the affirmative if they "find from the greater weight of the evidence the facts to be as all the evidence tends to show," and if the jury does not so find they must answer in the negative); *Crisp v. Insurance Co.*, 256 N.C. 408, 411, 124 S.E.2d 149, 152 (1962) (a peremptory instruction must leave it to the jury to determine the credibility of the testimony). Because Defendant admitted or stipulated, in its argument before the trial court in opposition to Plaintiff's directed verdict motion, that the trenching was inherently dangerous at the time of Decedent's death, it was both unnecessary and improper to submit this issue to the jury. *See Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972) (judicial admissions "dispense with proof and save time"); *Nationwide Homes v. Trust Co.*, 267 N.C. 528, 534, 148 S.E.2d 693, 698 (1966) (stipulated facts "are deemed established as fully as if determined by the verdict of a jury"); 73 Am. Jur. 2d *Stipulations* § 1 (1974) (stipulation is an "agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys"). Because the jury's answer to the first issue may have been based on a finding that the trench was not inherently dangerous, a finding inconsistent with Defendant's admission, Plaintiff is entitled to a new trial.[7]

7. Although the issue is not raised in this appeal, a claim against an owner who engages an independent contractor to perform an inherently dangerous activity is better resolved with the use of three jury issues, rather than one, as was used in this case.

III

[3] Plaintiff also contends Defendant's counsel's closing jury argument, wherein he accused Plaintiff's attorney of having an agenda of obtaining money, was improper and entitles Plaintiff to a new trial.

We agree with Plaintiff that Defendant's counsel's argument to the jury suggesting that Plaintiff's attorney had an agenda was improper. Plaintiff, however, did not object to this argument at trial, and our review is limited to discerning whether the statements were so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu*. *State v. Larrimore*, 340 N.C. 119, 158-59, 456 S.E.2d 789, 810 (1995). We do not believe the argument rises to the level of gross impropriety, and thus the trial court did not abuse its discretion by failing to intervene *ex mero motu*. *Compare id.* (statements that opposing counsel was casting up smoke screens, smog, and dirt because he did not want the jury to see the truth were not grossly improper) *with State v. Miller*, 271 N.C. 646, 659-60, 157 S.E.2d 335, 345-46 (1967) (statement that counsel "knew [defendant] was lying the minute he said that" was grossly improper and the trial court erred by not forbidding such argument immediately).

We have reviewed Defendant's cross-assignments of error carefully, and overrule them.

New Trial.

Judges JOHN and HUNTER concur.

Those three issues might read as follows: (1) Was the activity inherently dangerous?; (2) Did defendant know or should have known of the inherent dangerousness of the activity?; and (3) Was plaintiff's injury caused by the negligence of defendant?

STATE OF NORTH CAROLINA v. GARY DARNELL HAMILTON, DEFENDANT

No. COA98-526

(Filed 16 February 1999)

1. Larceny— sufficiency of evidence—fingerprints

The trial court did not err by denying defendant's motion to dismiss charges of breaking or entering, felonious larceny, and felonious possession of stolen goods where a Belk's store was found with a hole in the roof and $24,000 of merchandise missing, defendant's fingerprints were recovered from the top of an awning more than eleven feet above the ground, the store manager testified that the building had received no roofing work at all in recent months and that no one had permission to enter the building through the roof, and defendant was acquainted with the modus operandi of such a crime as evidenced by a prior conviction of a rooftop breaking or entering.

2. Burglary and Unlawful Breaking or Entering— felonious intent—no other explanation

The trial court did not err by denying defendant's motions to dismiss charges of breaking or entering where a Belk's store was found with a hole in the roof and $24,000 in merchandise missing, no evidence of any other reason for breaking or entering through the hole in the roof was offered or suggested, and the manager discovered the thousands of dollars of missing merchandise the same day the hole was discovered. If the evidence presents no other explanation for breaking into the building and there is no showing of the owner's consent, intent to commit a felony inside may be inferred from the circumstances surrounding the occurrence.

3. Evidence— prior crime or act—prior similar conviction—admissible

The trial court did not err in a prosecution for breaking or entering, felonious larceny, and felonious possession of stolen goods by admitting evidence of a prior conviction for a similar rooftop breaking or entering. The crimes were similar in that they both involved cutting a hole in the roof of a department store in eastern North Carolina and removing large amounts of jewelry from display counters. The elapsed time of two years and nine months affects only the weight of the evidence, not its admissibility.

4. Burglary and Unlawful Breaking or Entering— breaking or entering—lesser included offenses—misdemeanor breaking or entering—first-degree trespass

The trial court did not err in a prosecution for felonious breaking or entering and felonious larceny by not instructing the jury on the lesser included offenses of misdemeanor breaking or entering and first-degree trespass. The mere possibility that a jury might reject part of the prosecution's evidence does not require submission of a lesser included offense; here, there is no evidence that might convince a rational trier of fact that defendant scaled a wall, attained a roof, forced a hole in it, and entered a Belk store for some reason other than larceny.

Appeal by defendant from judgment and commitment entered 29 June 1995 by Judge Ernest B. Fullwood in Sampson County Superior Court. Heard in the Court of Appeals 27 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General J. Philip Allen, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

LEWIS, Judge.

Defendant was indicted on 3 April 1995 for felonious breaking or entering, felonious larceny, felonious possession of stolen goods, and as a habitual felon. The jury convicted defendant of felonious breaking or entering, acquitted him of felonious larceny, and was not instructed as to felonious possession of stolen goods. Defendant argues three assignments of error, each of which we overrule.

The evidence tended to show that the store manager of Belk in Clinton arrived at the store at approximately 8:30 a.m. on 29 April 1993 and found the doors undisturbed and the alarm system armed. As the manager walked through the store, he discovered a hole measuring approximately two feet by three feet in the roof of the store. Merchandise worth approximately $24,000.00, including large amounts of jewelry and clothing, was missing. Police officers determined that the perpetrator gained access to the building by two plastic milk crates stacked on an electrical box near the rear entrance of the building. The perpetrator then climbed up a downspout to an awning that covered the rear entrance of the building. From the awning, the perpetrator climbed to the roof. Defendant's fingerprints

were found on top of the awning, eleven feet, four inches from the ground. Defendant had previously been convicted of and served an active sentence for breaking or entering and larceny of the Sears store in Greenville on 25 July 1990. That crime also involved a rooftop hole as means of entry to the store and the theft of a large amount of jewelry.

[1] Defendant first argues that the trial court should have granted his motions to dismiss the charges. Defendant claims there was not enough evidence to show that he broke or entered the store and not enough evidence to support a finding of felonious intent. As to both contentions, we disagree.

When the trial court rules on a motion to dismiss, the prosecution must be given "every reasonable inference" of the evidence presented. *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 434 (1997). "If the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the members of the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt." *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981). Circumstantial and direct evidence are each considered in weighing whether the evidence is substantial so as to survive the defendant's motion. *See State v. Capps*, 61 N.C. App. 225, 227, 300 S.E.2d 819, 820, *disc. review denied*, 308 N.C. 545, 304 S.E.2d 239 (1983). Generally, questions of the sufficiency of the evidence must be determined on a case by case basis. *See State v. Blake*, 319 N.C. 599, 605, 356 S.E.2d 352, 355 (1987).

In this case, the prosecution relied on fingerprint evidence found high above the ground and within the crime scene to defeat defendant's motions to dismiss. When relying on fingerprint evidence to defeat a motion to dismiss, the prosecution must present substantial evidence of circumstances from which the jury could find the print "could only have been impressed at the time the crime was committed." *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975). Here, defendant's fingerprints were recovered from the top of the Belk awning more than eleven feet above the ground. The store manager testified that the building had received "no roofing work at all" in recent months and that no one had permission to enter the building through the roof. Defendant was acquainted with the modus operandi of such a crime as evidenced by his prior conviction of a rooftop breaking or entering. We hold that the surrounding circumstances combined with the fingerprint evidence were sufficient to send the case to the jury. *See Cross*, 345 N.C. at 718, 483 S.E.2d at 435 (holding

that where fingerprints were uniquely positioned on a car door, "the fingerprint evidence, standing alone, was sufficient to send this case to the jury"); *State v. Williams*, 95 N.C. App. 627, 628, 383 S.E.2d 456, 457 (1989) (holding that fingerprints on window of room with missing television constituted sufficient evidence to submit case to jury); *State v. Bradley*, 65 N.C. App. 359, 362, 309 S.E.2d 510, 512 (1983) (holding that fingerprints in non-public portion of building where defendant was not an employee support reasonable inference of guilt and submission of case to jury).

[2] Defendant also contends that his motions to dismiss should have been granted because there was insufficient evidence of his intent to commit a felony inside Belk. We disagree. If the evidence presents no other explanation for breaking into the building, and there is no showing of the owner's consent, intent to commit a felony inside " 'may be inferred from the circumstances surrounding the occurrence.' " *See State v. Myrick*, 306 N.C. 110, 115, 291 S.E.2d 577, 580 (1982) (quoting *State v. Thorpe*, 274 N.C. 457, 464, 164 S.E.2d 171, 176 (1968)). *See also In re Cousin*, 93 N.C. App. 224, 226, 377 S.E.2d 275, 276 (1989). No evidence of any other reason for breaking or entering through the hole in the roof was offered or suggested, and the manager discovered thousands of dollars of merchandise missing the same day the hole was discovered. Therefore, we hold that the evidence was sufficient to support an inference that defendant broke or entered Belk with felonious intent. The trial court did not err in denying defendant's motions to dismiss.

[3] Second, defendant contends that the trial court erred in allowing the jury to hear evidence of defendant's prior conviction for a similar rooftop breaking or entering. The trial court twice instructed the jury that they were hearing evidence of defendant's Sears conviction only for the purpose of identification. Prior crimes are admissible under Rule 404(b) so long as they are "relevant to any fact or issue other than defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). Evidence of the prior crime must be sufficiently similar to the crime charged and not too remote in time such that it is more prejudicial than probative under Rule 403. *See State v. Reid*, 104 N.C. App. 334, 348, 410 S.E.2d 67, 75 (1991), *rev'd on other grounds*, 334 N.C. 551, 434 S.E.2d 193 (1993).

> "Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the

> crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged."

State v. Riddick, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986), (quoting *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 367 (1954)). The passage of time affects the weight of the evidence, not its admissibility, when the evidence is offered to show identity. *See State v. Carter*, 338 N.C. 569, 589, 451 S.E.2d 157, 168 (1994) (holding offense 8 years prior admissible), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). Finally, whether to exclude evidence under Rule 403 is a decision vested with the trial court and will not be disturbed unless it is "manifestly unsupported by reason." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Here, we hold that the trial court did not err in allowing evidence of defendant's prior conviction before the jury. The court gave a proper limiting instruction telling the jury to consider the evidence only for identity. *See State v. Lemons*, 348 N.C. 335, 353, 501 S.E.2d 309, 320 (1998). The crimes were similar as they both involved cutting a hole in the roof of a department store in eastern North Carolina and removing large amounts of jewelry from display counters. The elapsed time of two years and nine months affects only the weight of the evidence, not its admissibility. We believe the prior crime was sufficiently similar to the crime charged, and there was no abuse of discretion by the trial court in allowing this evidence to go before the jury. Accordingly, this assignment of error is overruled.

[4] Finally, defendant contends that the trial court committed plain error in failing to instruct the jury on the lesser included offenses of misdemeanor breaking or entering and first-degree trespass. This Court reviews a jury charge to which defendant failed to object for error that was "so fundamental as to amount to a miscarriage of justice." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). We detect no such error here.

First, defendant is correct in his contention that first-degree trespass is a lesser included offense of felony breaking or entering. To be a lesser included offense, each essential element in the lesser offense must also be in the greater crime. *State v. Love*, 127 N.C. App. 437, 438, 490 S.E.2d 249, 250 (1997). N.C. Gen. Stat. section 14-159.12 pro-

vides that a person is guilty of first-degree trespass when "without authorization, he enters or remains . . . [o]n premises of another . . . or [i]n a building of another." N.C. Gen. Stat. § 14-159.12 (1993). By contrast, felony breaking or entering requires a defendant "break[] or enter[] any building with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54(a) (1993). Misdemeanor breaking or entering occurs when a defendant "wrongfully breaks or enters any building." N.C. Gen. Stat. § 14-54(b) (1993). The essential elements of first-degree trespass are present in the charge of and indictment for felony breaking or entering.

However, our inquiry does not end with a determination that the noted crimes are indeed lesser included offenses. An instruction on a lesser included offense must be given, even without a request from defendant, only if there is evidence to support his conviction of the less grievous offense. *See State v. Richmond*, 347 N.C. 412, 431, 495 S.E.2d 677, 687, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 88 (1998). The trial court is not, however, obligated to give a lesser included instruction if there is "no evidence giving rise to a reasonable inference to dispute the State's contention." *State v. McKinnon*, 306 N.C. 288, 301, 293 S.E.2d 118, 127 (1982). The mere possibility that a jury might reject part of the prosecution's evidence does not require submission of a lesser included offense. *See State v. Barnette*, 96 N.C. App. 199, 202, 385 S.E.2d 163, 164 (1989).

Defendant points to *State v. Worthey*, 270 N.C. 444, 446, 154 S.E.2d 515, 516 (1967), as support for his contention. There, the Supreme Court held that misdemeanor breaking or entering should have been submitted as a lesser included offense because "evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony." *Id.* The defendant testified at his trial that he had gone inside the premises to meet an employee and had been using the restroom facilities while waiting for the employee to give him a ride. Indeed, in *Worthey*, no items were removed from the premises. Defendant also cites *State v. Patton*, 80 N.C. App. 302, 306, 341 S.E.2d 744, 746-47 (1986). In *Patton*, this Court held that since no items were missing from the subject premises and the only evidence of the defendant's intent was the fact that he broke and entered, a misdemeanor instruction was required. *See id.*

Both of these cases are readily distinguishable. Defendant did not testify or present any evidence that he broke or entered for any non-felonious purpose. The indictment alleges larceny, and no other

explanation was given for the unauthorized entry into the store. The trial court need not submit misdemeanor breaking or entering instructions on these facts. *See State v. Merritt*, 120 N.C. App. 732, 743, 463 S.E.2d 590, 596 (1995) (holding that misdemeanor breaking and entering must be submitted as lesser included offense in first-degree burglary case only "if there is substantial evidence the defendant broke and entered for some non-felonious reason other than that alleged in the indictment."), *disc. review denied*, 342 N.C. 897, 467 S.E.2d 738 (1996).

Furthermore, in this case items were missing from the subject premises after defendant broke or entered. This Court similarly distinguished *Worthey* in *State v. Berry.* Because items were removed from the home in *Berry*, "[a]ll the evidence was to the effect that whoever broke into [the] house intended to take the television set." *State v. Berry*, 58 N.C. App. 355, 358, 293 S.E.2d 650, 652 (1982), *aff'd*, 307 N.C. 463, 298 S.E.2d 386 (1983). Therefore, we held there was no evidence of misdemeanor breaking or entering, but rather only evidence of felonious breaking or entering. *See id.*

Here, there is no evidence that might convince a rational trier of fact that defendant scaled the wall, attained the roof, forced a hole in it, and entered the Belk store for some reason other than larceny. Defendant offered no alternative reason, and items indeed were stolen from the premises. Therefore, there was no need to instruct the jury on the lesser included offenses of misdemeanor breaking or entering or first degree trespass. This assignment of error is overruled.

No error.

Judges WALKER and TIMMONS-GOODSON concur.

HORNER v. BYRNETT

[132 N.C. App. 323 (1999)]

KAREN M. HORNER, EXECUTRIX OF THE ESTATE OF ROBERT HENRY DOUTHART, PLAINTIFF v. JEFFREY W. BYRNETT, DEFENDANT

No. COA98-533

(Filed 16 February 1999)

1. Criminal Conversation— punitive damages—evidence sufficient

The trial court did not err by denying defendant's motion for JNOV on the issue of punitive damages on a criminal conversation claim where the evidence was undisputed that during the course of plaintiff's marriage, defendant engaged in sexual intercourse with plaintiff's wife and that, before becoming intimate, defendant and plaintiff's wife met several times to discuss the harm that a sexual relationship would cause and yet willfully engaged in the injurious conduct. The same sexual misconduct necessary to establish the tort of criminal conversation may also sustain an award of punitive damages.

2. Damages and Remedies— relationship between compensatory and punitive damages—punitive award not excessive

The trial court did not abuse its discretion by denying defendant's motion for a new trial on the issue of punitive damages on a criminal conversation claim where the jury awarded plaintiff one dollar in compensatory damages and $85,000 in punitive damages. Nominal damages may support an award of punitive damages and the fact that the punitive amount greatly exceeded the compensatory amount does not by itself warrant a new trial.

Appeal by plaintiff from orders entered 11 September 1997 and 1 December 1997 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 6 January 1999.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Wiley P. Wooten and Thomas R. Peake, II, for plaintiff-appellee.

Barbara R. Morgenstern for defendant-appellant.

TIMMONS-GOODSON, Judge.

Jeffrey W. Byrnett ("defendant") appeals from an order denying his motion for judgment notwithstanding the verdict ("JNOV") or,

alternatively, for a partial new trial on the issue of punitive damages arising out of the claim by Robert Henry Douthart ("plaintiff") for criminal conversation. The relevant facts are not in dispute.

Plaintiff's wife and defendant began a sexual relationship in August of 1992, which continued until June of 1993, with a brief interruption in November and December of 1992. Plaintiff's wife became depressed when the affair ended and was eventually hospitalized for depression and alcoholism. Plaintiff learned of the affair during his wife's hospitalization, and the couple separated on or around 13 September 1994.

Plaintiff filed a complaint against defendant on 9 April 1996 seeking damages for alienation of affections and criminal conversation. On 17 May 1996, defendant filed an answer wherein he denied the allegations concerning alienation of affections but admitted to having an adulterous affair with plaintiff's wife. Upon motion of the plaintiff, partial summary judgment on the issue of criminal conversation was entered for plaintiff on 8 July 1996.

The remaining issues came on for trial before a jury, and at the close of plaintiff's evidence, defendant moved for directed verdicts, arguing that plaintiff had not established the tort of alienation of affections and that he had not shown his right to punitive damages for either tort. The trial court granted defendant's motion pertaining to the issue of punitive damages for alienation of affections but denied defendant's other motions. The jury returned a verdict in favor of plaintiff and awarded $1.00 in compensatory damages for alienation of affections and criminal conversation and $85,000.00 in punitive damages for criminal conversation.

Defendant filed a motion for JNOV or, in the alternative, for a partial new trial. Following a hearing, the trial court entered an order denying defendant's motion on 11 September 1997. Defendant thereafter filed a motion for reconsideration, which the the court denied on 1 December 1997. Defendant filed timely notice of appeal.

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[1] In his first argument, defendant contends that the trial court erred by denying his motion for JNOV on the issue of punitive damages for criminal conversation. Defendant argues that there was insufficient evidence to support an award for punitive damages, because there was no proof that his conduct was outrageous or aggravated. Having carefully considered this argument in light of the North

Carolina case law regarding damages for criminal conversation, we must disagree.

Appellate review of a trial court's ruling upon a motion for JNOV is identical to that of a ruling upon a motion for directed verdict. *In re Buck*, 130 N.C. App. 408, 410, 503 S.E.2d 126, 129 (1998). As our Supreme Court has stated,

> A motion for directed verdict [or JNOV] tests the sufficiency of the evidence to take the case to the jury. In making its determination of whether to grant the motion, the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence. If, after undertaking such an analysis of the evidence, the trial judge finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied.

Abels v. Renfro Corp., 335 N.C. 209, 214-15, 436 S.E.2d 822, 825 (1993) (citations omitted). If there is more than a scintilla of evidence supporting each element of the nonmoving party's claim, the motion for directed verdict or JNOV should be denied. *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998).

It is well-established that punitive damages "are awarded as punishment due to the outrageous nature of the wrongdoer's conduct." *Juarez-Martinez v. Deans*, 108 N.C. App. 486, 495, 424 S.E.2d 154, 159-60 (1993). As such, punitive damages are "not allowed as a matter of course, but they may be awarded only when there are some features of aggravation, as when the act is done wilfully and evidences a reckless and wanton disregard of plaintiff's rights." *Scott v. Kiker*, 59 N.C. App. 458, 462, 297 S.E.2d 142, 146 (1982). Keeping these principles in mind, we turn to the issue of whether evidence sufficient to establish the tort of criminal conversation is, likewise, sufficient to maintain a claim for punitive damages.

In the past, our courts have held that a jury may consider the issue of punitive damages for criminal conversation based solely upon evidence that the defendant committed adultery—engaged in sexual intercourse—with the plaintiff's spouse. *See Powell v. Strickland*, 163 N.C. 393, 79 S.E. 872 (1913); *Johnson v. Allen*, 100 N.C. 131, 5 S.E. 666 (1888). Defendant argues, however, that recent decisions by this Court require more than proof of adultery to support

an award of punitive damages. In particular, defendant points to our holdings in *Gray v. Hoover*, 94 N.C. App. 724, 381 S.E.2d 472 (1989), and *Shaw v. Stringer*, 101 N.C. App. 513, 400 S.E.2d 101 (1991), wherein we considered whether the plaintiffs presented sufficient evidence to support an award of punitive damages for criminal conversation.

In *Gray*, this Court articulated the following basis for upholding the award of punitive damages to the plaintiff:

> We likewise conclude there was sufficient evidence to support the award of punitive damages. Punitive damages may be awarded "where the conduct of the defendant was willful, aggravated, malicious, or of a wanton character." *Sebastion [v. Kluttz]*, 6 N.C. App. [201,] 220, 170 S.E.2d [104,] 116 [1969]. Here, defendant's phone calls in which defendant told plaintiff he was having sex with plaintiff's wife and was going to take plaintiff's business is some evidence in support of the punitive damages award. Additionally, the defendant's act of driving up in front of plaintiff's business, blowing the horn, and then in the presence of plaintiff kissing plaintiff's wife, unbuttoning her blouse and then putting his hand inside certainly amounts to evidence sufficient for a jury to determine defendant's conduct was "willful, aggravated, malicious, or of a wanton character." *Id.*

Gray, 94 N.C. App. at 730-31, 381 S.E.2d at 475-76. In *Shaw*, we again upheld an award of punitive damages, stating the following reasoning for our decision:

> The argument based upon a proper objection is that it was error to submit and charge upon the issue because no evidence of aggravating conduct warranting punitive damages was presented. The argument has no merit. Aggravation, malice and willfulness were indicated by evidence to the effect that after being asked not to do so defendant persisted in visiting plaintiff's wife in the marital household and violating plaintiff's conjugal rights and even laughed when plaintiff's wife told him that plaintiff had learned of their affair.

Shaw, 101 N.C. App. at 517, 400 S.E.2d at 103.

On the surface, *Gray* and *Shaw* appear to hold that adultery, without more, is not sufficiently aggravating to entitle the plaintiff to punitive damages for criminal conversation. However, neither decision squarely speaks to the issue presented in the instant case. Insofar as

there was other evidence of aggravation, malice, and willfulness in both cases, this Court was not called upon to resolve whether adultery alone warrants an instruction and/or award of punitive damages in an action for criminal conversation. Furthermore, we note that neither *Gray* nor *Shaw* overrules, limits, or criticizes earlier case law awarding punitive damages based solely upon adultery. *See Powell*, 163 N.C. 393, 79 S.E. 872; *Johnson*, 100 N.C. 131, 5 S.E. 666. Accordingly, we hold that the same sexual misconduct necessary to establish the tort of criminal conversation may also sustain an award of punitive damages. We find support for our holding in Professor Lee's discussion on the issue:

> Criminal conversation . . . does not require a showing of malice. For this tort, the question is not whether the plaintiff has shown malice beyond what is needed to establish the tort, but what evidence suffices to show the kind of reckless conduct justifying punitive damages. In fact, the appellate cases prove that the sexual intercourse that is necessary to establish the tort also supports an award of punitive damages: as long as there is enough evidence of criminal conversation to go to the jury, the jury may also consider punitive damages. . . . [W]hen the plaintiff proves sexual relations between the defendant and spouse, then it seems to take little else to establish both the tort and the right to punitive damages.

1 Suzanne Reynolds, Lee's North Carolina Family Law § 5.48(C) (5th ed. 1993) (citing *Johnson*, 100 N.C. 131, 5 S.E. 666; *Powell*, 163 N.C. 393, 79 S.E. 872; *Shaw*, 101 N.C. App. 513, 400 S.E.2d 101).

In the present case, the evidence is undisputed that during the course of plaintiff's marriage, defendant engaged in sexual intercourse with plaintiff's wife. The evidence further shows that before becoming intimate, defendant and plaintiff's wife met several times to discuss the harm that a sexual relationship would cause, and yet, they willfully engaged in the injurious conduct. Thus, the evidence was sufficient to go to the jury on the issue of criminal conversation, *see Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619 (1938) (setting forth the elements of criminal conversation), and the jury was also entitled to consider the issue of punitive damages. The trial court, therefore, did not err in denying defendant's motion for JNOV on the issue of punitive damages.

[2] Next, defendant argues that the trial court erred in denying his motion for a partial new trial, because "there is no rational relation-

ship between the amount of compensatory damages and punitive damages awarded by the jury." Because the award of punitive damages was not excessive under North Carolina law, this argument also fails.

The rule is well-settled that a motion for a new trial under Rule 59 of the North Carolina Rules of Civil Procedure is "addressed to the sound discretion of the trial judge," whose ruling is not reviewable on appeal, "absent manifest abuse of discretion. *Blow v. Shaughnessy*, 88 N.C. App. 484, 493-94, 364 S.E.2d 444, 449 (1988). Hence, we will not reverse a trial court's decision denying a new trial, unless "an abuse of discretion is clearly shown resulting in a substantial miscarriage of justice." *Travis v. Knob Creek, Inc.*, 84 N.C. App. 561, 563, 353 S.E.2d 229, 230, *rev'd on other grounds*, 321 N.C. 279, 362 S.E.2d 277 (1987).

In *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992), our Supreme Court upheld this Court's holding that " '[o]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages.' " *Id.* (quoting *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991)). The amount of punitive damages to be awarded the plaintiff " 'rests in the sound discretion of the jury although the amount assessed is not to be excessively disproportionate to the circumstances of contumely and indignity present in the case.' " *Juarez-Martinez*, 108 N.C. App. at 495-96, 424 S.E.2d at 160 (quoting *Carawan v. Tate*, 53 N.C. App. 161, 165, 280 S.E.2d 528, 531 (1981)).

Here, the jury awarded plaintiff $1.00 in compensatory damages and $85,000.00 in punitive damages for criminal conversation. Defendant contends that the punitive damages award was excessive as a matter of law, because it does not bear a rational relationship to the amount of compensatory damages awarded. However, under the rule articulated in *Hawkins*, 331 N.C. 743, 417 S.E.2d 447, and in view of our holding in *Jennings v. Jessen*, 103 N.C. App. 739, 407 S.E.2d 264 (1991), we must disagree.

In *Jennings*, the jury awarded the plaintiff $200,000.00 in compensatory damages and $300,000.00 in punitive damages for alienation of affections. This Court reversed the award of compensatory damages based on our determination that the evidence was insufficient to support the award. Nevertheless, we concluded that the $300,000.00 punitive damages award was supported by the evidence

and, thus, could "stand alone." *Id.* at 744-45, 407 S.E.2d at 267. In rendering this decision, we relied on the rule stated in *Hawkins*, 101 N.C. App. 529, 400 S.E.2d 472, that nominal damages may support an award of punitive damages. We held that the plaintiff had established her claim and was, at least, entitled to nominal damages; therefore, "*Hawkins* compels the conclusion that the order awarding plaintiff punitive damages must be affirmed." *Id.* at 745, 407 S.E.2d at 267.

As we previously held, plaintiff produced sufficient evidence to submit the issue of punitive damages to the jury, and since plaintiff received $1.00 in compensatory damages, the test for awarding punitive damages under *Hawkins* was met. It was within the jury's discretion to determine the amount of punitive damages to award the plaintiff, and the fact that this amount greatly exceeded the amount awarded in compensatory damages does not, by itself, warrant a new trial. *See id.* Therefore, we hold that the trial judge did not abuse its discretion in denying defendant's motion for a new trial on the issue of punitive damages.

Having examined defendant's remaining arguments in view of the foregoing analysis, we conclude that they do not amount to reversible error.

No error.

Judges LEWIS and WALKER concur.

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

No. COA97-638

(Filed 16 February 1999)

Damages and Remedies— punitive damages—necessary aggravating factor

The necessary aggravating factor was present to support an instruction on the issue of punitive damages in an action arising from workplace harassment and the trial court properly denied defendants' motions for judgment nov, a new trial, or remittitur where plaintiff offered plenary evidence to establish a prima facie claim of intentional infliction of emotional distress, one of the

elements of such a claim being extreme and outrageous conduct by defendant or a third party which is then imputed to defendant. Moreover, it would seem that Duke's liability was based on more than mere ratification and it cannot be said as a matter of law that the punitive damage awards against defendant Dixon for $5,000 and against defendant Duke for $500,000 were an abuse of discretion where it was uncontroverted that Duke has a net worth of millions while its employee, Dixon, is virtually judgment proof.

Judge McGEE concurring in part and dissenting in part.

Defendants appealed from an order entered 15 November 1996 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. This appeal was heard in this Court on 15 January 1998, and the opinion was filed on 7 July 1998. Plaintiff and defendants petitioned for rehearing. Both petitions were granted by order of this Court entered 9 September 1998, and the matter was heard on the petitions to rehear without additional briefs or oral argument.

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

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Guy F. Driver, Jr. and Barbara R. Lentz, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Only the facts necessary for determination of the issue on rehearing are set out here. For a more complete statement of the facts of this case, see this Court's previous opinion at 130 N.C. App. 47, 502 S.E.2d 15. Plaintiff Sarah Joan Watson initiated this action against defendants Bobby Dixon (Dixon) and Duke University (Duke) on 22 October 1992, alleging claims for intentional infliction of emotional distress, negligent infliction of emotional distress, negligent hiring, negligent retention and assault. By order dated 18 July 1995, plaintiff's claims against Duke for assault, negligent infliction of emotional distress, and negligent hiring, as well as plaintiff's claim against Dixon for negligent infliction of emotional distress, were dismissed. Plaintiff's remaining claims against Duke for intentional infliction of emotional distress and negligent retention, and against Dixon for assault and intentional infliction of emotional distress, were tried before Judge A. Leon Stanback, Jr. and a duly empaneled jury during the 23 September 1996 civil session of Durham County Superior Court.

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

Thereafter, defendants made oral motions for judgment notwithstanding the verdict (j.n.o.v.) or, in the alternative, for a new trial, which were summarily denied. On 28 October 1996, defendant filed written motions for j.n.o.v. or, in the alternative, for a new trial, or in the alternative, for a remittitur as to damages. These motions were heard on 7 November 1996, and by order entered 15 November 1996, Judge Stanback denied defendants' motions. Defendants appealed.

In this Court's decision filed 7 July 1998, we affirmed that part of the trial court's judgment on plaintiff's claims against Dixon for intentional infliction of emotional distress and against Duke for ratification. However, we reversed and remanded for determination of the amount of punitive damages to be awarded against Dixon and Duke. Plaintiff and defendants petitioned for rehearing, and by orders entered 9 September 1998, we allowed these petitions, without additional briefing or oral argument, for the limited purpose of addressing the propriety of the punitive damage awards against Dixon and Duke. In all other respects, the original opinion of this Court filed 7 July 1998 is adopted and reaffirmed.

On rehearing, plaintiff contends that defendants are not entitled to reversal of the punitive damage awards against Dixon and Duke since defendants invited error in the trial court by joining in plaintiff's request that a separate punitive damage issue be submitted to the jury as to each defendant. Defendants contend that a retrial on the sole issue of punitive damages would violate the United States and North Carolina Constitutions and existing North Carolina case law. Indeed, defendants argue that precedent compels this Court to limit the award against Duke.

We are well aware of the recent change in North Carolina's Punitive Damages Statute, Chapter 1D of our General Statues, which

requires that "[t]he same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages." N.C. Gen. Stat. § 1D-30 (1997). We note, however, that this provision of section 1D-30 does not govern the instant case, as this case originated prior to the enactment of the subject restriction on the trial of compensatory and punitive damages. We are also aware of the line of cases wherein it has been held that "when an employer's liability is solely derivative under a theory of vicarious liability, such as respondeat superior or ratification, the liability of the employer cannot exceed the liability of the employee." *Poole v. Copland*, Inc., 125 N.C. App. 235, 246, 481 S.E.2d 88, 95 (1997), *rev'd on other grounds*, 348 N. C. 260, 498 S.E.2d 602 (1998); *see also Thompson v. Lassiter*, 246 N.C. 34, 38, 97 S.E.2d 492, 496 (1957); *Pinnix v. Griffin*, 221 N.C. 348, 351, 20 S.E.2d 366, 369 (1942). However, we do not believe that this precedent is prohibitive of the award of punitive damages in the present case—$5,000 against Bobby Dixon and $500,000 against Duke.

This matter originally came before us on appeal from an order of the trial court denying their motion for j.n.o.v or, in the alternative, for a new trial, or in the alternative, for a remittitur as to damages. A motion for judgment notwithstanding the verdict is properly denied where the court finds more than a scintilla of evidence to support each element of the non-moving party's case. *Lyon v. May*, 119 N.C. App. 704, 707, 459 S.E.2d 833, 836 (1995). Moreover, it is well settled that a motion for a new trial is granted in the sole discretion of the trial court. *Edwards v. Hardy*, 126 N.C. App. 69, 71, 483 S.E.2d 724, 726 (1997). Finally, the trial court is vested with the discretion to reduce the verdict on its own motion so long as the party in whose favor it was rendered does not object. *Redevelopment Comm. v. Holman*, 30 N.C. App. 395, 397, 226 S.E.2d 848, 849 (1976). This Court has previously held, "[a] discretionary ruling by the trial judge should not be disturbed on appeal unless the appellate court is convinced by the cold record that the ruling probably amounted to a substantial miscarriage of justice." *Boyd v. L. G. DeWitt Trucking Co.*, 103 N.C. App. 396, 406, 405 S.E.2d 914, 921 (1991). After a thorough examination of all of the parties' contentions and North Carolina case law, we hold that there was sufficient evidence to support the punitive damages awarded against Dixon and Duke, and therefore, wholly affirm that award.

"[P]unitive damages are awarded above and beyond actual damages and intended to punish[.]" *Maintenance Equipment Co. v. Godley Builders*, 107 N.C. App. 343, 354, 420 S.E.2d 199, 205 (1992).

Accordingly, "the jury is allowed to consider the circumstances of defendants' conduct and financial position when setting the [amount of a punitive damage] award." *Id.* It is well settled that the determination of whether punitive damages should be awarded, and the amount of the award rests within the sound discretion of the jury. *Stone v. Martin*, 85 N.C. App. 410, 419, 355 S.E.2d 255, 260 (1987). Hence, many punitive damage awards have been upheld although they were significantly disproportionate to the award of compensatory damages. *See Maintenance Equipment Co.*, 107 N.C. App. at 354, 420 S.E.2d at 205.

The evidence tends to show that plaintiff and Dixon were both employed with Duke in the Sterile Processing of the Medical Center, when Watson began to experience difficulty with Dixon's harassing behavior. Dixon's behavior consisted of crank telephone calls, rubbing his body against Watson, touching her breasts, confining Watson to a room against her will, drawing a picture of Watson depicting her with a penis, making obscene comments about her, scaring Watson in an area where rapes had occurred, and making scary comments about her long drive home on dark roadways. This conduct continued for about seven or eight months (from approximately August 1991 to late March 1992), during which plaintiff experienced bouts of crying, vomiting, and inability to sleep, until finally she suffered a nervous breakdown. As a result, plaintiff has been diagnosed with depression and post-traumatic stress disorder.

Dixon had a reputation amongst the Sterile Department management as one who joked and played around a lot, and intimidated new employees. However, Duke had never taken any serious disciplinary action to address this problem. When Dixon began to harass plaintiff, she reported his behavior to her supervisor, Eunice Haskins Turrentine, the Assistant Director of Sterile Processing, Vickie Barnette, Employee Relations Representative, Oscar Rouse, and Duke Police Officer Sarah Minnis. However, little if anything was done about Dixon's harassing behavior until around 20 March 1992, when Bill Dennis, Director of Material Management, spoke with Dixon about his reported behavior, and separated plaintiff and Dixon in the work environment. Plaintiff was thereafter transferred to first shift, a low stress position, but after less than a week in her new position, plaintiff went out of work on leave and did not return to work until 1 June 1992, and worked part-time until mid-July 1992, when she returned to work full-time. Plaintiff and Dixon both were still employed with Duke at the time of trial.

During defendants' case in chief, Dixon contended that he had not intentionally harassed Watson, and Duke maintained that the university had responded as best it could in light of the circumstances. Many of Duke's personnel deny receiving reports of Dixon's behavior, or testified that Watson told them that she wanted to keep her complaints confidential.

We held in our 7 July 1998 opinion and reaffirm now that plaintiff offered plenary evidence to establish a *prima facie* claim of intentional infliction of emotional distress, one of the constituent elements of such a claim being "extreme and outrageous" conduct by defendant or a third party which is then imputed to defendant. Accordingly, the necessary aggravating factor was present to support an instruction on the issue of punitive damages to the jury. *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 438, 378 S.E.2d 232, 236-37 (1989).

In the instant case, we must note that the jury drafted a rather terse letter to Duke denouncing its indifference to plaintiff's plight and suggesting that they abide by those policies that were in place to address workplace harassment. Although the jury did exonerate Duke of negligent retention, in its letter, the jury specifically remarked upon Duke's somewhat reckless indifference to plaintiff's complaints and the policies the university had in place for addressing such complaints. It would seem then that Duke's liability in this instance is based upon more than mere ratification. Moreover, it is uncontroverted that Duke has a net worth of millions, while its employee, Bobby Dixon, is virtually judgment proof. It would take a far greater punitive damage award to punish a thriving entity, than one of its lower echelon employees. In light of the egregious nature of Duke's behavior and its superior financial status, we cannot say that as a matter of law the punitive damage awards against Dixon for $5,000 and Duke for $500,000 was an abuse of discretion. Because there was more than a scintilla of evidence to support the punitive damage awards against Duke and Dixon and the "cold record" in this case does not show that the trial court's ruling "probably amounted to a substantial miscarriage of justice," *Boyd*, 103 N.C. App. at 406, 405 S.E.2d at 921, that ruling is affirmed.

Affirmed.

Judges LEWIS and McGEE concur.

Judge McGEE concurring in part and dissenting in part.

I agree with the majority opinion that there is direct evidence to support punitive damages against both Bobby Dixon and Duke University. However, I respectfully dissent from the majority opinion affirming a punitive damage award against Duke in the amount of $500,000 when the jury itself found Duke not liable for negligent retention of its employee Bobby Dixon but liable only for ratification of the actions of its employee. As we stated in our prior opinion, it is well settled that the liability of the employer under a theory of vicarious liability, such as *respondeat superior* or ratification, cannot be in excess of that of the employee. *See Pinnix v. Griffin*, 221 N.C. 348, 20 S.E.2d 366 (1942); *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957); *Poole v. Copland, Inc.*, 125 N.C. App. 235, 481 S.E.2d 88 (1997), *rev'd and remanded on other grounds*, 348 N.C. 260, 498 S.E.2d 602 (1998). The jury set the punitive damages award against Dixon at $5,000 and present case law of our Courts limits Duke's liability to an equal amount.

MARGARET VANASEK, ADMINISTRATRIX OF THE ESTATE OF JEFFREY VANASEK, AND MARGARET VANASEK, PLAINTIFF v. DUKE POWER COMPANY, CITY OF CHARLOTTE, J.M. BUTLER, R.C. STAHNKE, UNKNOWN OFFICER #1, UNKNOWN FIREMAN #1, AND UNKNOWN FIREMAN #2, DEFENDANTS

No. COA98-607

(Filed 16 February 1999)

Cities and Towns— public duty doctrine—dangling power line—police and fire officers—no special duty

The trial court properly granted a Rule 12(b)(6) dismissal and summary judgment for the City of Charlotte and its police officers and firemen on the public duty doctrine in a negligence action arising from a dangling live power line after an ice storm. There is no allegation in the complaint that the City defendants made a promise to decedent on which he relied, or that decedent had any special relationship with the City defendants. Plaintiff's contention that the downed power line constituted an ultrahazardous circumstance is immaterial, because North Carolina does not recognize a high risk exception to the public duty doctrine.

Appeal by plaintiff from order filed 30 June 1997 by Judge Ronald K. Payne and from order filed 8 January 1998 by Judge Raymond A. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 1999.

DeVore, Acton, & Stafford, PA, by Fred W. DeVore, III, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by F. Lane Williamson, for defendant-appellees.

GREENE, Judge.

Margaret Vanasek (Plaintiff), both individually and as the administratrix of the estate of Jeffrey Vanasek (Decedent), appeals from the trial court's orders dismissing her complaint against the City of Charlotte, J.M. Butler, R.C. Stahnke, Unknown Officer #1, Unknown Fireman #1, and Unknown Fireman #2 (collectively, City Defendants).

In April of 1997, Plaintiff filed a complaint against Duke Power Company (Duke Power) and City Defendants, alleging that a power line located at 809 McAlway Road, Charlotte, North Carolina, snapped during an ice storm on Friday, 2 February 1996, leaving a broken line charged with over 7000 volts of electricity dangling a few feet above the ground. Nearby homeowners contacted Charlotte's police department, and two officers "were dispatched to the scene and located the broken wire." The officers had the dispatcher notify Duke Power that the lines were down at that location, and left the scene "without providing any type of barrier or visible warning around or near the live wire to protect unsuspecting citizens from accidentally touching the wire." The fire department responded as well, and two firemen allegedly "located the downed power line but also left the premises without providing any type of barrier or visible warning around or near the live wire to protect unsuspecting citizens from accidentally touching the wire." Finally, the Plaintiff alleges that on Monday, 5 February 1996, Decedent, an employee of Time Warner, drove to 809 McAlway Road to repair the cable television lines in that area. Decedent parked his truck near the downed electrical line and while "apparently walking to the back of his truck to retrieve his tools, his hand brushed against the wire sending a high voltage electrical current through his body killing him."

In Count I of the complaint, Plaintiff alleges that City Defendants negligently failed to properly train its officers and firemen, negli-

gently failed to provide warnings to the public of the downed power line, and negligently abandoned a "live" downed power line. In Count II of the complaint, Plaintiff alleges that City Defendants are negligent *per se* under N.C. Gen. Stat. § 160A-296, a statute requiring municipalities to keep their streets free from dangerous obstructions. Count III of Plaintiff's complaint alleges that the acts of City Defendants were "willful or wanton or done in total disregard for the rights and safety of others."

Pursuant to motions filed by City Defendants, the trial court dismissed Counts I, II, and III of Plaintiff's complaint. Plaintiff subsequently voluntarily dismissed her claims against Duke Power and appealed from the trial court's dismissal of her claims against City Defendants.

The issue is whether the public duty doctrine requires the dismissal of Plaintiff's negligence, gross negligence, and/or negligence *per se* claims.

The public duty doctrine provides that a municipality ordinarily acts for the benefit of the general public when exercising its police powers, and therefore cannot be held liable for negligence or gross negligence in performing or failing to perform its duties. *Sinning v. Clark*, 119 N.C. App. 515, 518, 459 S.E.2d 71, 73 (holding that the municipality and its agents had no liability for allegedly negligent inspections conducted pursuant to the building code), *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995); *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 406, 442 S.E.2d 75, 79 (holding that the public duty doctrine bars claims of gross negligence, recklessness, and wilful and wanton conduct, and only ceases to apply "where the conduct complained of rises to the level of an intentional tort"), *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994). The public duty doctrine is based on the following premise:

> The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a . . . general duty of protection in the law of tort . . . could and would inevitably determine how the limited police resources . . . should be allocated . . . .

Braswell v. Braswell, 330 N.C. 363, 371, 410 S.E.2d 897, 901-02 (1991) (holding that sheriff had no liability for failure to furnish police protection to plaintiff) (quoting *Riss v. City of New York*, 240 N.E.2d 860,

860-61 (N.Y. 1968)), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). If a negligence claim survives application of the public duty doctrine, the municipality may nonetheless be insulated from liability by virtue of governmental immunity. *See Stafford v. Barker*, 129 N.C. App. 576, 584, 502 S.E.2d 1, 5 (holding that a municipality's waiver of governmental immunity does not affect the public duty doctrine inquiry), *disc. review denied*, 348 N.C. 695, — S.E.2d — (1998).

Our courts recognize a "narrowly applied" exception to the public duty doctrine where there is a "special duty" between the municipality and "a particular individual." *Davis v. Messer*, 119 N.C. App. 44, 56, 457 S.E.2d 902, 909, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995). A "special duty" exists where the municipality " 'promis[es] protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.' " *Id.* (quoting *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902); *see Hull v. Oldham*, 104 N.C. App. 29, 37, 407 S.E.2d 611, 616 (holding that the public duty doctrine barred claims for negligence where "neither the sheriff nor the deputies gave any advice *to the victims* on which they relied to their detriment but instead misinformed relatives of the perpetrator of the crimes" (emphasis added)), *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991). A "special duty" may also exist by virtue of a "special relationship," such as that between "a state's witness or informant . . . [and] law enforcement officers." *Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 199, 499 S.E.2d 747, 751 (1998). A "special relationship" depends on "representations or conduct by the police which cause the victim(s) to detrimentally rely on the police such that the risk of harm as the result of police negligence is something more than that to which the victim was already exposed." *Hull*, 104 N.C. App. at 38, 407 S.E.2d at 616.[1] Finally, a "special duty" may be created by statute; provided there is an express statutory provision vesting individual claimants with a private cause of action for violations of the statute.[2]

1. Although our cases have discussed a "special relationship" as a separate exception to the public duty doctrine, *see Braswell*, 330 N.C. at 371, 410 S.E.2d at 902, the "special relationship" exception is actually a subset of the "special duty" exception, 2 Sandra M. Stevenson, *Antieau on Local Government Law* § 35.06[3] (2d ed. 1998) (listing "special relationship" as a subcategory of the "special duty" exception). In other words, a "special relationship" is one basis for showing the existence of a "special duty." *See Hunt*, 348 N.C. at 197, n.2, 499 S.E.2d at 75, n.2 (noting that most jurisdictions refer to either "special duty" or "special relationship" as one exception).

2. Our caselaw generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute. *See, e.g., Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225 (1995) (holding that

See Stone v. N.C. Dept. of Labor, 347 N.C. 473, 482, 495 S.E.2d 711, 714, *reh'g denied*, 348 N.C. 79, 502 S.E.2d 836, *and cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (1998) (holding that breach of a statutory duty requiring workplace inspections does not give rise to a cause of action against the municipality where the statute does not provide a private cause of action); *Hunt*, 348 N.C. 192, 499 S.E.2d 747 (holding that breach of a regulatory duty requiring go-kart inspections does not give rise to a cause of action against the municipality where the regulation does not provide a private cause of action).

We note that a minority of jurisdictions have created an additional exception to the public duty doctrine for "high risk" situations, allowing a negligence claim to proceed where the plaintiff shows that "local government officials knew or should have known the plaintiff or members of his class would be exposed to an unusually high risk if care was not taken by local government personnel, even without proof of reliance by the plaintiff." 2 Sandra M. Stevenson, *Antieau on Local Government Law* § 35.06[3] (2d ed. 1998); *see, e.g., Haley v. Town of Lincoln*, 611 A.2d 845, 849 (R.I. 1992) ("egregious conduct" exception); *Hansen v. City of St. Paul*, 214 N.W.2d 346, 349 (Minn. 1974) ("inherently dangerous condition" exception). North Carolina courts, however, have not excepted "high risk" situations from the public duty doctrine. *See Hull*, 104 N.C. App. at 38-39, 407 S.E.2d at 616 (holding, without specifically addressing the evident high risk, that even where the police department allegedly had "actual knowledge of imminent danger from an identified individual at an identified location," the public duty doctrine required dismissal of the plaintiffs' negligence claims). Indeed, the creation of any public duty doctrine exceptions beyond those specifically recognized by our Supreme Court is a matter better left to that Court or to our General Assembly.

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section 42-25.9, which provides that "in any action brought by a tenant . . . under this Article, the landlord shall be liable to the tenant," allows a private cause of action); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985) (holding that "Chapter 95 . . . contains no right of private action"); *Clinton v. Wake County Bd. of Education*, 108 N.C. App. 616, 424 S.E.2d 691 (holding that section 115C-326(b) "only contemplates the possibility of a suit against an employee" and therefore contains "no independent right of action against a school board"), *disc. review denied*, 333 N.C. 574, 429 S.E.2d 570 (1993). *Cf. Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 62 L. Ed. 2d 146, 152 (1979) ("The question whether a [federal] statute creates a [private] cause of action, either expressly or by implication, is basically a matter of statutory construction."); *Cort v. Ash*, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 36 (1975) (listing relevant factors for determining "whether a private remedy is implicit in a [federal] statute not expressly providing one").

In this case, Plaintiff's allegations involve the exercise of City Defendants' police powers; therefore, the public duty doctrine is implicated. Plaintiff does not allege any intentional misconduct on the part of City Defendants which would survive application of the public duty doctrine. Instead, Plaintiff contends that her negligence claims fall within the exception to the public duty doctrine because City Defendants owed Decedent a "special duty." We disagree.

There is no allegation in the complaint that City Defendants made a promise to Decedent on which he relied, or that Decedent had any "special relationship" with City Defendants. Plaintiff's contention that the downed power line constituted an "ultrahazardous circumstance" is immaterial, because North Carolina does not recognize a "high risk" exception to the public duty doctrine. Although Plaintiff is correct that cities have a statutorily imposed "duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions," *see* N.C.G.S. § 160A-296(a)(2) (1994), fire chiefs have a statutorily imposed duty to "seek out and have corrected all places and conditions dangerous to the safety of the city and its citizens from fire," *see* N.C.G.S. § 160A-292 (1994), and Charlotte's ordinances impose a duty on Charlotte's fire department to carry out its "mission [of] minimiz[ing] the risk of fire and other hazards to the life and property of the citizens of Charlotte . . . [by] provid[ing] effective fire prevention," *see* Charlotte, N.C., Code § 8-1 (1998), these provisions do not impose a "special duty" on City Defendants. Even assuming City Defendants breached these provisions, each imposes a general duty to the public at large and none provide a private cause of action for individual claimants.[3] We must therefore conclude that City Defendants owed Decedent no "special duty."[4]

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3. We acknowledge the existence of a long line of cases allowing individual plaintiffs to proceed with negligence suits against a municipality pursuant to section 160A-296(a)(2). *See, e.g., Clark v. Scheld*, 253 N.C. 732, 117 S.E.2d 838 (1961); *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 293 S.E.2d 235 (1982). The public duty doctrine was neither raised nor addressed in those cases, however, and, in any event, we are bound by the Supreme Court's recent holding in *Stone*. *See Mahoney v. Ronnie's Road Service*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997) (noting that this Court is bound by the holdings of our Supreme Court).

4. We do not address Plaintiff's additional contention that any "special duty" owed to the homeowners who called the police department would also provide an exception for guests of those homeowners, because Plaintiff's complaint does not allege that Decedent was a guest of anyone to whom a "special duty" may have been owed.

Accordingly, as Plaintiff's allegations do not bring her claims of negligence, gross negligence, or negligence *per se* within the recognized "special duty" exception to the public duty doctrine, the trial court properly dismissed Counts I, II, and III of Plaintiff's complaint.

Affirmed.

Judges JOHN and HUNTER concur.

HUDSON-COLE DEVELOPMENT CORPORATION, PLAINTIFF v. CHARLES G. BEEMER, ESQ., DEFENDANT AND THIRD-PARTY PLAINTIFF v. MELLOTT TRUCKING AND SUPPLY CO., INC. AND CHATHAM FINANCIAL GROUP LIMITED PARTNERSHIP, THIRD-PARTY DEFENDANTS

No. COA98-283

(Filed 16 February 1999)

1. Appeal and Error— appealability—interlocutory order—possibility of inconsistent verdicts

A motion to dismiss an appeal was denied by the Court of Appeals where a third party defendant's Rule 12(b)(6) motion to dismiss was granted; the dismissal operated as a final judgment as to that cause of action; and there was the possibility of inconsistent verdicts.

2. Fraud— negligent misrepresentation—reasonable reliance

A Rule 12(b)(6) dismissal was properly granted on a third-party complaint for negligent misrepresentation of a security interest where the assignment of that interest was recorded and described the partial nature of the interest and the third-party plaintiff did not allege that he was in any way prevented from learning the truth. Furthermore, his reliance on the misrepresentation in the subordination agreement was unreasonable as a matter of law in that he attached a copy of the assignment to his answer and third-party complaint and relied on its terms in defending against the original plaintiff's claims.

Appeal by defendant and third-party plaintiff from order entered 4 December 1997 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 26 October 1998.

Adams Kleemeier Hagan Hannah & Fouts, A Professional Limited Liability Company, by M. Jay Devaney and David S. Pokela, for defendant and third-party plaintiff-appellant Charles G. Beemer, Esq.

Carruthers & Roth, P.A., by Arthur A. Vreeland, for third-party defendant-appellee Chatham Financial Group Limited Partnership.

TIMMONS-GOODSON, Judge.

Defendant and third-party plaintiff Charles G. Beemer ("Beemer") appeals from an order dismissing his claims against third-party defendant Chatham Financial Group Limited Partnership ("Chatham") for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. In addition, Beemer appeals from an order of the trial court refusing to certify the order of dismissal as immediately appealable under Rule 54 of the Rules of Civil Procedure. For the reasons hereinafter stated, we conclude that Beemer failed to allege facts sufficient to avoid dismissal under Rule 12(b)(6) and affirm the order of the trial court.

Hudson-Cole Development Corporation (hereinafter "Hudson-Cole") filed suit against Beemer on 10 April 1997 alleging negligence, breach of contract, breach of fiduciary duty, and malpractice in executing a subordination agreement. The claims alleged in the complaint arose out of the following facts: By agreement executed on 31 December 1985, Hudson-Cole sold Cole Park Shopping Center ("the shopping center") to Chatham. In return, Chatham executed a promissory note in the principal amount of $450,000, which was secured by deed of trust recorded 23 January 1986 in Book 490 of the Chatham County Registry. Beemer served as Hudson-Cole's attorney in the transaction and was named as the trustee on the deed of trust.

On 28 January 1988, Hudson-Cole executed an Assignment of Security Interest in Note and Deed of Trust in favor of Mellott Trucking and Supply Company ("Mellott"). This document was duly recorded in Book 522 on Page 911 of the Chatham County Registry, and it purported to transfer part of Hudson-Cole's interest in the 31 December 1985 note and deed of trust to Mellott.

On 29 April 1994, Chatham negotiated with General American Life Insurance Company ("General American") to refinance Chatham's

purchase of the shopping center. Under the terms of the new financing agreement, General American would loan Chatham the amount of $1,900,000 in return for a secured interest in the shopping center. As a condition of the loan, Chatham needed to obtain an agreement by Hudson-Cole to subordinate its priority security interest in the shopping center in favor of General American's interest. Chatham's attorney drafted a proposed subordination agreement and, without notifying Hudson-Cole, General American, Mellott and Chatham solicited Beemer to execute the agreement on behalf of Hudson-Cole. Without first obtaining authorization from Hudson-Cole, Beemer executed the subordination agreement giving General American a priority security interest in the shopping center.

In response to Hudson-Cole's complaint, Beemer filed an answer and third-party complaint naming Mellott and Chatham as third-party defendants. Beemer's third-party complaint alleges that if he is liable to Hudson-Cole for executing the subordination agreement, Mellott and Chatham are liable to him under Rule 14 of the Rules of Civil Procedure. As the basis for his claims, Beemer maintains that Mellott and Chatham induced him to execute the agreement by falsely representing that Mellott was the "holder and sole lawfull [sic] owner" of the $450,000 promissory note and deed of trust dated 31 December 1985.

In their answers, Mellott and Chatham moved to dismiss the third-party complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. The trial court heard the motions and entered an order on 4 December 1997 dismissing Beemer's claims against Chatham. By motion to amend, Beemer requested that the trial court certify the 4 December 1997 order as a "final judgment" under Rule 54(b) of the Rules of Civil Procedure and determine that there is no just reason for delaying appellate review of the order. The trial court denied the motion, and Beemer appeals.

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[1] On appeal, Beemer first assigns as error the trial court's failure to certify the 4 December 1997 order as a final judgment under Rule 54(b) of our Civil Procedure Rules. Beemer contends that the order dismissing the claims against Chatham, although interlocutory, is subject to immediate appeal, because a substantial right will be lost if the present appeal is not allowed. It is Beemer's position that the substantial right affected by the challenged order is the right to "have all claims arising from the same series of transactions resolved in

one proceeding." Chatham, on the other hand, contends that the 4 December 1997 order does not affect a substantial right and, thus, moves to dismiss this appeal as premature. We will address Beemer's assignment of error and Chatham's motion simultaneously.

Where, as here, an order entered by the trial court does not dispose of the entire controversy between all parties, it is interlocutory. *Abe v. Westview Capital*, 130 N.C. App. 332, 502 S.E.2d 879 (1998). As a general rule, a party is not entitled to immediately appeal an interlocutory order. *Id.* However, there are two situations in which an appeal of right lies from an order that is interlocutory. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). The first situation is where the order represents a " 'final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Id.* (quoting N.C.R. Civ. P. 54(b)). Secondly, a party may appeal an interlocutory order where delaying the appeal will irreparably impair a substantial right of the party. *Abe*, 130 N.C. App. at 334, 502 S.E.2d at 881.

Rule 54(b) of our Rules of Civil Procedure provides that in an action involving multiple parties, the trial court may, in its discretion, enter a final judgment as to fewer than all of the parties. *Hoots v. Pryor*, 106 N.C. App. 397, 417 S.E.2d 269 (1992). "Such a judgment, though interlocutory for appeal purposes, shall then be subject to review if the trial judge certifies that there is no just reason for delay." *Id.* at 401, 417 S.E.2d at 272. In the instant case, the order allowing Chatham's Rule 12(b)(6) motion to dismiss operates as a final judgment regarding the cause of action against Chatham. Because the trial court declined to certify the order under Rule 54(b), Beemer's right to an immediate appeal, if one exists, depends on whether the order affects a substantial right.

As previously stated, Beemer contends that the order in question prejudices his right to "have all claims arising from the same series of transactions resolved in one proceeding." However, this Court, in *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987), held that "simply having all claims determined in one proceeding is not a substantial right." *Id.* at 7, 362 S.E.2d at 816. Avoiding separate trials of different issues does not qualify as a substantial right, but preventing separate trials of the same factual issues does constitute a substantial right. *Id.* The rationale behind this rule is as follows:

> [W]hen common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982)).

Applying the above principles to the facts of the case *sub judice*, we conclude that the present appeal is properly before us on the grounds that delaying the appeal will prejudice Beemer's substantial right to have the same factual issues tried before a single jury. Beemer's third-party claims assert that Mellott and Chatham fraudulently and/or through negligent misrepresentation induced him to execute the subordination agreement about which Hudson-Cole complains of Beemer. In defense of these claims, Mellott and Chatham both allege that Beemer was contributorily negligent in executing the agreement. If Beemer is not permitted immediate review of the order dismissing his claims against Chatham, he may ultimately face a second trial on the issue of whether he too acted negligently in executing the subordination agreement. Due to the possibility of inconsistent verdicts should this case be tried in two separate proceedings, we hold that Beemer's appeal of the order in question is not premature and deny Chatham's motion to dismiss the appeal.

[2] Turning now to the merits of Beemer's appeal, we consider whether the trial court properly allowed the Rule 12(b)(6) motion to dismiss Beemer's third-party complaint as against Chatham. Under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, a cause of action should be dismissed where the complaint fails to state a claim upon which relief may be granted. N.C.R. Civ. P. 12(b)(6). "[A] Rule 12(b)(6) motion tests the legal sufficiency of the pleading against which it is directed." *Derwort v. Polk County*, 129 N.C. App. 789, 791, 501 S.E.2d 379, 380-81 (1998). In deciding a motion to dismiss under Rule 12(b)(6), the trial court must accept the allegations of the complaint as true. *Miller v. Henderson*, 71 N.C. App. 366, 322 S.E.2d 594 (1984). "[W]hen the factual allegations [of a complaint] fail as a matter of law to state the substantive elements of some legally recognized claim," a Rule 12(b)(6) motion is properly allowed.

Derwort, 129 N.C. App. at 791, 501 S.E.2d at 381. Similarly, where the complaint alleges facts that defeat the claim, the claim should be dismissed. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988).

As noted above, the third-party complaint alleges that Chatham committed fraud and negligent misrepresentation in obtaining Beemer's signature executing the subordination agreement on behalf of Hudson-Cole.

> The essential elements of actionable fraud are as follows: (1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with intention that it should be acted upon; (5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and (6) that there resulted in damage to the injured party.

Rosenthal v. Perkins, 42 N.C. App. 449, 451-52, 257 S.E.2d 63, 65 (1979). "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan*, 322 N.C. at 206, 367 S.E.2d at 612. As to either tort, however, when the party relying on the false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence. *Rosenthal*, 42 N.C. App. 449, 257 S.E.2d 63. Moreover, where the facts are insufficient as a matter of law to constitute reasonable reliance on the part of the complaining party, the complaint is properly dismissed under Rule 12(b)(6). *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

In the present case, Beemer contends that Chatham, whose counsel prepared the subordination agreement, intentionally concealed or failed to disclose the falsity of the representation in the agreement that Mellott was the "holder and sole lawfull [sic] owner" of the $450,000 promissory note and deed of trust dated 31 December 1985. However, the "Assignment of Security Interest in Note and Deed of Trust," which was recorded 22 January 1986 with the Chatham County Register of Deeds in Deed Book 490, Page 120, accurately describes the partial nature of the interest held by Mellott as a result of the assignment. Beemer does not allege that he was in any way

prevented from learning the truth about Mellott's interest. Furthermore, given that he attached a copy of the Assignment to his answer and third-party complaint and relied on its terms in defending against Hudson-Cole's claims, we hold that Beemer's reliance on the misrepresentation in the subordination agreement was unreasonable as a matter of law. The trial court, therefore, properly dismissed Beemer's claims against Chatham under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

For the foregoing reasons, we affirm the order of the trial court dismissing the third-party complaint as against Chatham.

Affirmed.

Chief Judge EAGLES and Judge SMITH concur.

LARITA WASHINGTON, CYNTHIA WASHINGTON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR TENNELL WASHINGTON AND JERMAINE WASHINGTON, PLAINTIFFS v. VIRGINIA WIGGINS HORTON, DEFENDANT

No. COA98-909

(Filed 16 February 1999)

Costs— attorney fees—enumerated factors—interest

A written judgment awarding attorney fees to plaintiff was remanded where defendant had filed a motion asking the court to reconsider its prior oral order awarding attorney fees and the court neither received evidence nor heard arguments on defendant's motion for reconsideration, although that motion raised several issues which should have been resolved by the trial court in order that it might properly exercise its discretion. Moreover, the court erred by including a provision for prejudgment and post-judgment interest in the award; attorney fees awarded pursuant to N.C.G.S. § 6-21.1 are taxed as part of court costs and there is no provision for interest on court costs.

Appeal by defendant from judgment entered 9 June 1998 by Judge Coy E. Brewer in Cumberland County Superior Court. Heard in the Court of Appeals 18 January 1999.

In December of 1996, plaintiffs filed a complaint alleging that they were injured in an automobile collision due to defendant's negligence and sought compensatory damages in excess of $10,000.00. On 17 March 1997, defendant served offers of judgment pursuant to Rule 68(a) of the North Carolina Rules of Civil Procedure on each of the plaintiffs. The offers, which totaled $5,573.21, were rejected by the plaintiffs. On 1 October 1997, defendant made additional offers of judgment to each of the plaintiffs in the total amount of $8,004.00. Plaintiffs did not accept the offers and the case proceeded to trial. A jury returned verdicts against defendant and awarded plaintiffs the total sum of $3,782.31. On 20 January 1998, plaintiffs moved for reasonable attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 (1997).

On 9 February 1998, the trial court orally entered an order awarding attorney fees to plaintiffs' counsel. Defendant filed a motion on 19 February 1998, asking that the trial court reconsider its order with respect to attorney fees. It does not appear from the record that the trial court ruled on defendant's motion. On 9 June 1998, the trial court signed a written judgment, which included the following findings with regard to attorney fees:

2. That the Defendant filed Offer of Judgments in this matter on or about September 26, 1997.

3. That the Plaintiff's [*sic*] attorney had expended a reasonable amount of time in this case up to September 26, 1997, expending approximately 37.5 hours.

4. That the Plaintiff's [*sic*] attorney has usual and normal and reasonable fees in representation of matters of this type with an hourly rate of $150.00 per hour.

5. That the plaintiffs' attorney had reasonably expended 37.5 hours as of September 26, 1997, when the last Offer of Judgments in this matter were tendered. The reasonable attorneys fees at that time was $5,632.50.

6. That after this matter had been scheduled for trial and not heard and then finally reached for trial in January of 1998, the Plaintiffs' attorney had reasonably expended a total of 67.85 hours.

7. That the amount of time expended as of the Offer of Judgments in this Superior Court case was quite reasonable.

Based on these findings of fact, the trial court concluded that plaintiffs were entitled to a final judgment based on the jury verdict and an award of attorney fees, and ordered the following:

1. That the Plaintiff shall have and recover of the Defendant a sum of $1282.74 for Larita Faye Washington; $977.19 for Plaintiff, Cynthia Washington; $761.19 for the minor Plaintiff Tenell Washington; and $761.19 for the minor Plaintiff Jermaine Washington, together with pre-judgment and post-judgment interest at the rate of 8% per annum until paid.

2. It is further ordered that the Plaintiff's [*sic*] attorney shall have and recover of this Defendant attorney's fees in the amount of $4,000.00, together with pre-judgment and post-judgment interest at the rate of 8% per annum until paid.

Defendant appealed, contending that the trial court abused its discretion in the award of attorney fees.

Walen & McEniry, P.A., by K. Lee McEniry, for plaintiff appellees.

Walker, Barwick, Clark & Allen, L.L.P., by Jerry A. Allen, Jr., and Gay Parker Stanley, for defendant appellant.

HORTON, Judge.

As a general rule, in the absence of some contractual obligation or statutory authority, attorney fees may not be recovered by the successful litigant as damages or a part of the court costs. *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973). In 1959, however, the North Carolina General Assembly enacted legislation now codified as N.C. Gen. Stat. § 6-21.1 which provided for an award of attorney fees as part of the costs in certain cases. After an amendment in 1963, the statute read as follows:

> In any personal injury or property damage suit instituted in a court of record, where the judgment for recovery of damages is one thousand dollars ($1,000.00) or less [now $10,000], the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

The rationale behind the statute was set forth in *Hicks*, in which our Supreme Court stated:

> The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

Id. at 239, 200 S.E.2d at 42.

In 1967, N.C. Gen. Stat. § 6-21.1 was amended so as to apply to actions brought against a named defendant insurance company by an insured or beneficiary under a policy issued by the defendant insurer. In order to recover against an insurance company, however, the amendment required that the trial court first find "an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit . . . ." *Id.* Our appellate courts have uniformly held that a finding of unwarranted refusal to pay a claim is required only in suits brought by an insured or a beneficiary against an insurance company defendant. *See Rogers v. Rogers*, 2 N.C. App. 668, 672, 163 S.E.2d 645, 648-49 (1968); *see also Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 343, 276 S.E.2d 496, 498, *disc. review denied*, 303 N.C. 320, 281 S.E.2d 660 (1981). In the case *sub judice*, an insurance company was not a named defendant, hence there was no requirement that the trial court make an "unwarranted refusal" finding in order to award attorney fees.

Defendant argues that the trial court abused its discretion in awarding attorney fees in any amount to the plaintiffs' counsel. Defendant alleged in her 19 February 1998 motion for reconsideration of the attorney fees award that plaintiffs were offered a total of $10,402.00 prior to institution of the action but refused the offer. The record also indicates an offer of judgment to each of the plaintiffs on 14 March 1997 in the total amount of $5,573.21. Plaintiffs did not accept those offers. Defendant also alleges that she entered into mediation on 25 September 1997 in good faith and then offered the plaintiffs the total sum of $8,004.00 on 26 September 1997, which plaintiffs rejected. Defendant also alleged that the plaintiffs made excessive settlement demands ranging from $30,000.00 to $50,000.00 prior to verdict.

The allowance of attorney fees is in the discretion of the presiding judge, and may be reversed only for abuse of discretion. *McDaniel v. N.C. Mutual Life Ins. Co.*, 70 N.C. App. 480, 483, 319 S.E.2d 676, 678, *disc. review denied*, 312 N.C. 84, 321 S.E.2d 897 (1984). After a careful review of the record, we conclude that the award of attorney fees must be reversed and remanded to the trial court for reconsideration after a full hearing on the issues raised by defendant's motion to reconsider. First, we note that the trial court neither received evidence nor heard arguments on the defendant's motion for reconsideration, although that motion raised several issues which should have been resolved by the trial court in order that it might properly exercise its discretion in awarding attorney fees. Second, the trial court finds that an offer of judgment was made in September 1997, but makes no findings about the earlier offers of judgment in March 1997. Third, there is no finding about the fee arrangement between plaintiffs and their counsel. Finally, we note that in its judgment the trial court makes certain findings and then makes its attorney fee award "as a matter of law," rather than in the exercise of its discretion.

The discretion accorded the trial court in awarding attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 is not unbridled. On remand, the trial court is to consider the entire record in properly exercising its discretion, including but not limited to the following factors: (1) settlement offers made prior to the institution of the action ["If a party wishes to avoid payment of attorney fee in cases to which G.S. 6-21.1 may be applicable, he should make his offer of settlement before the suit is instituted." *Hicks v. Albertson*, 18 N.C. App. 599, 601, 197 S.E.2d 624, 625, *aff'd*, 284 N.C. 236, 200 S.E.2d 40 (1973)]; (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers [*Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996)]; (3) whether defendant unjustly exercised "superior bargaining power" [*Hicks*, 284 N.C. at 239, 200 S.E.2d at 42]; (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose." [*Benton v. Thomerson*, 113 N.C. App. 293, 296, 438 S.E.2d 434, 437 (1994), *rev'd on other grounds*, 339 N.C. 598, 453 S.E.2d 161 (1995)]; (5) the timing of settlement offers [*Hicks*, 284 N.C. at 241, 200 S.E.2d at 43]; (6) the amounts of the settlement offers as compared to the jury verdict [*Benton*, 113 N.C. App. at 298, 438 S.E.2d at 437-38]; and the whole record [*see Hillman*, 59 N.C. App. at 155, 296 S.E.2d at 309].

In *Harrison v. Herbin*, 35 N.C. App. 259, 241 S.E.2d 108 (1978), this Court affirmed the trial court's denial of attorney fees where the defendant had offered $200.00 to plaintiff prior to trial, and the jury returned a verdict of $250.00 for plaintiff. We stated in that case that

> [w]e perceive of no exercise of any unjustly superior bargaining power on the part of the defendant. While the statute is aimed at encouraging injured parties to press their meritorious but pecuniarily small claims, we do not believe that it was intended to encourage parties to refuse reasonable settlement offers and give rise to needless litigation by guaranteeing that counsel will, in all cases, be compensated.

Id. at 261, 241 S.E.2d at 109, *cert. denied*, 295 N.C. 90, 244 S.E.2d 258 (1978).

We also note that the trial court provided that the award of attorney fees included a provision for "pre-judgment and post-judgment interest at the rate of 8% per annum until paid." Attorney fees awarded pursuant to N.C. Gen. Stat. § 6-21.1 are taxed as part of the court costs pursuant to the express provisions of N.C. Gen. Stat. § 6-21 (1997). There is no provision for interest on court costs, however, and the trial court erred in that portion of its award. *See City of Charlotte v. McNeely*, 281 N.C. 684, 696, 190 S.E.2d 179, 188 (1972).

Reversed and remanded.

Chief Judge EAGLES and Judge McGEE concur.

STATE OF NORTH CAROLINA v. RODNEY J. McCASLIN

No. COA98-465

(Filed 16 February 1999)

1. Motor Vehicles— driving while impaired—instructions—two instances—single offense—unanimous verdict

The trial court did not err in a prosecution for driving while impaired by refusing to instruct jurors that they could consider only the first incident of defendant's driving, even though defendant argued that a less than unanimous verdict resulted, where defendant left the scene of an accident, returned in a car driven

by another person while a highway patrol trooper was completing the accident report, left the scene when the trooper told defendant that he needed to see the truck, and returned a few minutes later driving his truck.

2. Criminal Law— entrapment—driving while impaired

The trial court properly refused to instruct the jury on the defense of entrapment in an impaired driving prosecution where defendant left the scene of an accident, returned in a car driven by another person as the highway patrol trooper was writing the accident report, the trooper asked to see defendant's truck, and defendant left and returned driving the truck. There was no evidence that the trooper suspected defendant of being intoxicated prior to requesting to see the truck, there was no evidence that the trooper instructed defendant rather than the female accompanying him to drive the truck back to the scene, the Trooper testified that he did not begin to suspect that defendant was intoxicated until defendant was seated in the patrol car after returning the truck to the scene, and the other participant in the accident testified that he had observed nothing about defendant which would have led him to believe defendant was intoxicated.

Appeal by defendant from judgment entered 6 January 1998 by Judge L. Todd Burke in Alexander County Superior Court. Heard in the Court of Appeals 11 January 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Wesley E. Starnes for defendant-appellant.

MARTIN, Judge.

Defendant appeals his conviction and sentence for driving while impaired ("DWI") in violation of G.S. § 20-138.1 resulting from events which took place on the evening of 20 February 1997. At approximately 7:45 p.m. on that date, Christopher Tunstill, accompanied by his wife, was driving his vehicle when defendant, driving a black Ford pick-up truck, approached them from the opposite direction. As the vehicles passed, an exercise bike fell off the back of defendant's truck and struck the Tunstills' vehicle. Both drivers stopped their vehicles to inspect the damage, and Mr. Tunstill used his cellular phone to report the incident to the Highway Patrol. Defendant left the scene, telling Mr. Tunstill that he was going home and would return shortly.

In response to Mr. Tunstill's call, Trooper D. D. McDevitt of the North Carolina Highway Patrol arrived and spoke with Mr. Tunstill. While Trooper McDevitt and Mr. Tunstill were completing an accident report, defendant returned to the scene in a red car driven by a female. Trooper McDevitt questioned defendant as to the whereabouts of the truck involved in the accident, and defendant responded that the truck was at his home. Trooper McDevitt told defendant that he needed to see the truck, since information for the accident report was needed from the vehicle. Defendant left the scene in the red car driven by the female and returned a few minutes later driving his truck.

Trooper McDevitt testified at trial that after defendant returned in the truck, both drivers were seated in the patrol car while the officer completed some paper work. Trooper McDevitt began to detect the odor of alcohol coming from defendant. Trooper McDevitt then observed defendant more closely and saw that his eyes were bloodshot and that he had a strong odor of alcohol on his breath. He asked defendant to take an alco-sensor test, but defendant refused. Trooper McDevitt then arrested defendant for DWI. Defendant offered no evidence.

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[1] By his second and fourth assignments of error, defendant argues the trial court committed reversible error by (1) refusing to instruct the jurors that they could consider only the first incident of defendant's driving in determining whether he did so while subject to an impairing substance, and (2) having declined to give such an instruction, by refusing to set aside the verdict on grounds it could have been less than unanimous. The trial court denied defendant's request that the jurors be restricted to a consideration of defendant's driving at the time of the accident and instructed the jury as follows:

> Now I charge that for you to find the defendant guilty . . . the State must prove three things beyond a reasonable doubt. First, that the Defendant was driving a vehicle. Second, that he was driving this vehicle upon a highway or street or public vehicular area within the State . . . . The third element . . . is that at the time the Defendant was driving the vehicle, he was under the influence of an impaired substance.

Defendant contends that permitting the jury to consider defendant's driving both at the time of the accident, as well as when he returned to the scene in his truck, in determining the existence of the forego-

ing elements, resulted in the possibility that defendant was convicted upon a less than unanimous vote in violation of his constitutional right to a unanimous verdict. We reject his argument.

The North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. Art. I, § 24. Our Supreme Court addressed the issue of disjunctive instructions and nonunanimous verdicts in *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). In *Hartness*, the defendant, who was convicted of various counts of sexual abuse, argued that the disjunctive phrasing of the jury instructions allowed the jury to consider both the defendant's touching of his stepson, as well as the stepson's touching of defendant, in determining defendant's guilt under the statute, thereby resulting in the possibility of a nonunanimous verdict. *Id.* at 563, 391 S.E.2d at 178. The court determined, however, that no such risk existed, "because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive." *Id.* at 564, 391 S.E.2d at 179. The court went on to state:

> [e]ven if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of [the statute].

Id. at 565, 391 S.E.2d at 179.

Thus, under *Hartness*, we must look to the language of G.S. § 20-138.1 to determine whether it proscribes a single offense, or "discrete criminal activities in the disjunctive." Our Supreme Court addressed this very issue in *State v. Oliver*, 343 N.C. 202, 215, 470 S.E.2d 16, 24 (1996), wherein the court stated, "[a]s is indicated by the plain language of the statute, N.C.G.S. § 20-138.1 proscribes the single offense of driving while impaired which may be proven in one of two ways." The court, citing the reasoning applied in *Hartness*, stated that even taking as true the defendant's argument that the jury may have returned a guilty verdict without all twelve jurors agreeing as to the time and extent of the defendant's drunkenness, "the fact remains that jurors unanimously found defendant guilty of the single offense of impaired driving." *Id.* at 215, 470 S.E.2d at 24.

This Court has also found *Hartness* to be controlling in situations which involve "alternative methods of establishing a single offense."

See State v. Johnston, 123 N.C. App. 292, 297, 473 S.E.2d 25, 29, *disc. review denied*, 344 N.C. 737, 478 S.E.2d 10 (1996) (where defendant's conviction for disseminating obscenity was predicated on the sale of two magazines and the jury could have disagreed as to which one was obscene, the trial court's refusal to instruct the jury that "there must be unanimous agreement that at least one of the two magazines . . . was obscene," did not violate defendant's right to a unanimous verdict). In light of the foregoing precedent, we overrule defendant's second and fourth assignments of error.

[2] By his third assignment of error, defendant argues the trial court erred in failing to instruct the jury on the issue of entrapment. Entrapment is "the inducement of a person to commit a criminal offense not contemplated by that person, for the mere purpose of instituting criminal action against him." *State v. Davis*, 126 N.C. App. 415, 417, 485 S.E.2d 329, 331 (1997) (citations omitted). In order to establish the defense a defendant must show that "(1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials rather than with the defendant." *Id.* at 418, 485 S.E.2d at 331. A defendant must present " 'credible evidence tending to support [his] contention that he was a victim of entrapment . . .' " to be entitled to a jury instruction on the defense of entrapment. *State v. Goldman*, 97 N.C. App. 589, 592-93, 389 S.E.2d 281, 283, *disc. review denied*, 327 N.C. 434, 395 S.E.2d 691 (1990) (quoting *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955)). *See also*, *State v. Martin*, 77 N.C. App. 61, 334 S.E.2d 459 (1985), *cert. denied*, 317 N.C. 711, 347 S.E.2d 47 (1986).

In the present case, defendant contends the evidence of Trooper McDevitt's request to see defendant's truck so that he could complete the accident report was sufficient credible evidence to support the conclusion that defendant was a victim of entrapment. Defendant argues this evidence showed Trooper McDevitt had the time necessary to observe that defendant was intoxicated prior to his requesting to see defendant's truck, and, therefore, a jury could infer that Trooper McDevitt intended to trick defendant into driving the truck back to the scene while he was under the influence of an impairing substance. We disagree.

There was no evidence that Trooper McDevitt suspected defendant of being intoxicated prior to requesting to see the truck, nor was

there evidence that Trooper McDevitt instructed defendant, rather than the female accompanying him, to drive the truck back to the scene. Moreover, Trooper McDevitt testified that he did not begin to suspect that defendant was intoxicated until defendant was seated in his patrol car after returning the truck to the scene, and Mr. Tunstill testified that he had observed nothing about defendant which would have led him to believe defendant was intoxicated.

In *State v. Bailey*, 93 N.C. App. 721, 379 S.E.2d 266 (1989), the defendant approached an officer for help in locating his truck. The officer observed that the defendant was visibly intoxicated, and pointed the defendant in the general direction of his vehicle. The officer then stood and watched as the defendant got into his truck and began to drive, at which point the officer followed the defendant and arrested him. *Id.* The court, in holding that the defendant was not entitled to an entrapment instruction, stated, "[t]here was no showing of any persuasion or fraud on the part of the officer, nor was there a showing that the criminal design originated with [the officer]." *Id.* at 724, 379 S.E.2d at 268. Likewise, in the present case, defendant has failed to present any credible evidence that Trooper McDevitt's motive in requesting to see defendant's truck was anything more than a legitimate need to see the vehicle involved in the accident in order to complete his investigation. We hold, therefore, that the trial court properly refused to instruct the jury on the defense of entrapment. *See State v. Rosario*, 93 N.C. App. 627, 379 S.E.2d 434, *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989) (in the absence of evidence tending to establish all elements of entrapment, the defense has not been sufficiently raised to submit the issue to the jury).

Defendant's remaining assignment of error has been abandoned.

No error.

Chief Judge EAGLES and Judge McGEE concur.

BARNEY HUANG, PLAINTIFF v. THOMAS J. ZIKO, BECKY R. FRENCH, BRUCE R. POULTON, THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA AND CONSTITUENT INSTITUTION, NORTH CAROLINA STATE UNIVERSITY, DEFENDANTS

No. COA98-352

(Filed 16 February 1999)

Statute of Limitations— tolling—federal action

The trial court did not err by allowing defendant's motion for summary judgment on the basis of the statute of limitations where plaintiff pursued through the state and federal courts claims arising from his dismissal as a university professor following charges of attempted second-degree rape and assault on a female; assuming that plaintiff's claims accrued when defendant Board affirmed his dismissal on 9 February 1990, plaintiff ordinarily would have had until 9 February 1993 to file his complaint in state court; plaintiff did not file his claim in state court until 22 May 1996 and his claims were time barred unless the statute of limitations was tolled; no statute or rule provides for the exclusion of the time during which the federal action was pending from the limitations period; and, because North Carolina has no applicable "grace period" longer than the thirty-day period set out in 28 U.S.C.A. § 1367, the statute of limitations was tolled while the federal action was pending and for thirty days thereafter. Plaintiff could have filed his complaint in state court at any time during the pendency of the federal action and up to thirty days after the United States Court of Appeals reached its decision on 7 December 1995.

Appeal by plaintiff from judgment entered 16 February 1998 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 25 January 1999.

Kenneth N. Barnes for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General David Roy Blackwell, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Prior to his dismissal, plaintiff was a tenured professor in the Department of Biological and Agricultural Engineering at North

Carolina State University (hereinafter "defendant University"). In June 1988, plaintiff was charged with attempted second-degree rape and assault on a female. On 14 July 1988, defendant Bruce R. Poulton, then chancellor of defendant University, issued a notice of intent to discharge letter to plaintiff suspending him from his duties and terminating his salary as of 1 January 1989. Plaintiff requested a hearing on his dismissal pursuant to the Code of the Board of Governors of the University of North Carolina (hereinafter "defendant Board").

Following a hearing and recommendation by a Faculty Hearing Committee that plaintiff be removed from the faculty, defendant Poulton dismissed plaintiff effective 7 February 1989. Plaintiff appealed to defendant University's Board of Trustees and, then, to defendant Board. Defendant Board ultimately affirmed the Board of Trustees' decision on 9 February 1990. Plaintiff appealed to the superior court, which reversed his dismissal. This Court affirmed the superior court's reversal of plaintiff's dismissal, but the Supreme Court reversed this Court's decision and upheld plaintiff's dismissal. *In re Dismissal of Huang*, 336 N.C. 67, 441 S.E.2d 696 (1994).

Prior to exhausting his administrative remedies, plaintiff filed a complaint in superior court against defendant University and defendant Poulton for breach of contract and intentional infliction of emotional distress. The trial court granted summary judgment for defendants on the emotional distress claim and for plaintiff on the contract claim. Defendants appealed to this Court, which reversed the trial court's summary judgment for plaintiff on the ground that he had an adequate remedy for breach of contract in the administrative appeal of his discharge. *Huang v. N.C. State University*, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

On 21 June 1991, plaintiff filed a complaint in the United States District Court for the Eastern District of North Carolina against defendants Thomas J. Ziko, Becky R. French, Poulton, Board, and University. In the complaint, he alleged federal claims of civil rights violations, Title VII violations, free speech violations, and age discrimination. He alleged state claims of due process and equal protection. Defendants filed a motion for summary judgment.

On 11 January 1993, the United States District Court granted defendants' motion for summary judgment with respect to all federal claims. As to plaintiff's state claims, the court ruled as follows:

> Because all the federal claims have been dismissed against defendants in this action, the court dismisses without prejudice the remaining pendent state claims plaintiff has asserted under the North Carolina Constitution. In view of this, the court is divested of jurisdiction to entertain these claims, and plaintiff is left to pursue these matters in state court.

Plaintiff appealed to the United States Court of Appeals for the Fourth Circuit. On 7 December 1995, the Court of Appeals affirmed the lower court's decision in an unpublished per curiam opinion. *Huang v. French*, 73 F.3d 357 (4th Cir. 1995). On 22 April 1996, the United States Supreme Court denied plaintiff's petition for a writ of certiorari. *Huang v. French*, 517 U.S. 1157, 134 L. Ed. 2d 649 (1996).

On 22 May 1996, plaintiff filed a complaint in the superior court seeking compensatory and punitive damages from defendants for breach of contract, due process violations, malicious prosecution, intentional infliction of emotional distress, civil conspiracy, and constructive fraud. Defendants subsequently filed an answer that included a motion to dismiss and alternative motion for summary judgment. Defendants asserted as an affirmative defense that each of plaintiff's claims was barred by a three-year statute of limitations.

On 16 February 1998, the trial court granted defendants' motion for summary judgment. The trial court ruled that "[t]he statute of limitations bars each and every one of the Plaintiff's claims." Plaintiff appeals.

Plaintiff argues that the trial court erred by granting defendants' motion for summary judgment. He contends that the statute of limitations had not run at the time he filed his complaint. We disagree.

The parties agree that each of plaintiff's claims was subject to a three-year statute of limitations. Assuming *arguendo* that plaintiff's claims accrued when defendant Board affirmed his dismissal on 9 February 1990, plaintiff ordinarily would have had until 9 February 1993 to file his complaint in state court. Because plaintiff did not file his complaint in state court until 22 May 1996, his claims were time-barred, unless the statute of limitations was tolled.

As the parties recognize, "filing an action in federal court which is based on state substantive law . . . toll[s] the statute of limitations while that action is pending." *Clark v. Velsicol Chemical Corp.*, 110 N.C. App. 803, 808, 431 S.E.2d 227, 229 (1993), *aff'd per curiam*, 336 N.C. 599, 444 S.E.2d 223 (1994). The parties agree that plaintiff's fed-

eral action was no longer pending for the purpose of tolling the statute of limitations when the United States Court of Appeals reached its decision on 7 December 1995. *See Clark*, 110 N.C. App. 803, 431 S.E.2d 227 (holding that because a petition for writ of certiorari to the United States Supreme Court is not an appeal of right, the federal action is not alive for the purpose of tolling the statute of limitations while a decision to allow or deny such a petition is pending). However, the parties disagree as to whether plaintiff had additional time to file his complaint in state court after the United States Court of Appeals reached its decision.

Plaintiff contends that once the federal action was no longer pending, the time for filing his complaint in state court should have been extended for the portion of the three-year limitations period that had not been used when he filed the federal action. Since less than a year and a half had passed when plaintiff filed his federal action, he would have had more than a year and a half after 7 December 1995 to file his complaint in state court.

Plaintiff's contention is untenable. The rule which plaintiff would have this Court adopt is contrary to the policy in favor of prompt prosecution of legal claims. Furthermore, such a rule is contrary to the general rule that "[i]n the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him[.]" 51 Am. Jur. 2d *Limitation of Actions* § 311 (1970). In this case, no statute or rule provides for the exclusion of the time during which the federal action was pending from the limitations period.

We likewise find unpersuasive defendants' contention that the statute of limitations was tolled only until the United States Court of Appeals reached its decision and that plaintiff had no additional time to file his complaint in state court. We believe the question presented by this appeal is controlled by 28 U.S.C.A. § 1367 (1993). *See Kolani v. Gluska*, 75 Cal. Rptr. 2d 257 (1998); *Roden v. Wright*, 611 So. 2d 333 (Ala. 1992). That federal statute provides that when a federal district court has original jurisdiction over a civil action it may also exercise "pendent" or "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy[.]" 28 U.S.C.A. § 1367(a). A federal district court may decline to exercise supplemental jurisdiction over a claim if it "has dismissed all claims over

which it has original jurisdiction[.]" 28 U.S.C.A. § 1367(c)(3). The statute further provides that the period of limitations for any supplemental claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C.A. § 1367(d). Since the claims now asserted by plaintiff were supplemental claims dismissed by the United States District Court, he was entitled to thirty additional days to file his complaint in state court after the United States Court of Appeals reached its decision, unless some state statute provided for a longer period of time.

Rule 41(b) of the North Carolina Rules of Civil Procedure provides a savings provision for claims that have been involuntarily dismissed:

> If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (1990). Assuming *arguendo* that Rule 41(b) could apply in this case, the United States District Court did not specify in its order that a new action based on the same claims could be commenced within one year after the dismissal. *See Bockweg v. Anderson*, 328 N.C. 436, 402 S.E.2d 627 (1991). Therefore, the time for plaintiff to file his complaint in state court was not extended for an additional year.

Because North Carolina has no applicable "grace period" longer than the thirty-day period set out in 28 U.S.C.A. § 1367, the statute of limitations was tolled while the federal action was pending and for thirty days thereafter. Plaintiff could have filed his complaint in state court at any time during the pendency of the federal action and up to thirty days after the United States Court of Appeals reached its decision on 7 December 1995. Plaintiff's complaint, filed on 22 May 1996, was not timely filed, and the trial court did not err by allowing defendants' motion for summary judgment.

The summary judgment entered by the trial court is affirmed.

Affirmed.

Judges GREENE and HUNTER concur.

IN RE: ATASHA DAWN BEAN, A MINOR CHILD

No. COA98-531

(Filed 16 February 1999)

1. Attorneys— representation by out-of-state counsel—no local counsel—no prejudicial error

There was no prejudicial error in a child custody action where respondent was represented by Florida counsel, it could not be determined from the record whether local counsel appeared, and petitioners did not object. N.C.G.S. § 84-4.1.

2. Child Support, Custody, and Visitation— child support—prior Florida custody order—North Carolina petition to terminate parental rights—jurisdiction

A North Carolina court properly declined to invoke its jurisdiction under N.C.G.S. § 7A-289.23 where petitioners obtained custody of a child under a Florida order, petitioners and the child moved to North Carolina with the approval of the Florida court, and petitioners subsequently filed this action in North Carolina to terminate the parental rights of the respondent father, who resides in Florida. The trial court must first consider whether it has jurisdiction to make a child custody order under N.C.G.S. § 50A-3 before it can exert the "exclusive original" jurisdiction granted in N.C.G.S. § 7A-289.23. The trial court's jurisdiction in a termination of parental rights case must be compatible with both the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA); under the PKPA, the Florida court retains jurisdiction because the father continues to reside in Florida.

Appeal by petitioners from an order entered 25 February 1998 by Judge James T. Bowen in Lincoln County District Court. Heard in the Court of Appeals 6 January 1999.

Short, Smith & Wilson, P.A., by Charles E. Wilson, Jr., for petitioners-appellants.

Michael W. Johnson; and Harrington, Moore, Ward, Gilleand & Winstead, L.L.P., by Eddie S. Winstead, III, for respondent-appellee.

WALKER, Judge.

Petitioners, George and Cherri Punch, brought this action to terminate the parental rights of respondent, Robert Bean, the putative father of the minor child, Atasha Dawn Bean, who was born 6 July 1988. The biological mother's parental rights were terminated in 1992. The respondent father resides in Ocala, Florida while the petitioners and the child currently reside in Lincoln County, North Carolina. The child was declared dependent on 15 June 1989 by order of the Circuit Court, Marion County, Florida and placed in the custody of the Marion County, Florida Department of Health and Rehabilitative Services (the Department). The Department placed the child in the custody of the petitioners on 20 December 1990 and the child has remained in the petitioners' custody since that time. In December 1994, the petitioners and the child moved to Lincoln County, North Carolina from Florida with the consent of the Department and the Circuit Court.

By an order dated 30 January 1996, the Circuit Court in Marion County, Florida continued the child in the long-term custody of the petitioners:

> The court hereby continues the minor child in the long term custody of the above adult non-relatives willing to care for the child without the supervision of the Department. . . . [T]he court has determined that neither reunification, termination of parental rights, nor adoption is currently in the best interest of the child. . . . All parties understand that the long-term custodial relationship does not preclude the possibility of the child returning to the custody of the father at a later date.
>
> . . .
>
> The court retains jurisdiction over this case and the child shall remain in the long-term custody of George A. Punch and Cherri Punch, . . . until the order creating the long-term custodial relationship is modified by the court.

Petitioners were present in Florida at the hearing from which this order was derived on 19 January 1996. The child has not returned to Florida since March 1995.

Petitioners filed this action on 29 April 1997 and service was obtained upon the respondent father in Florida. The respondent's

counsel, a member of the Florida bar, moved the trial court to allow him to appear *pro hac vice*, but did not associate local counsel for the hearing in conformance with N.C. Gen. Stat. § 84-4.1. Nevertheless, the trial court granted the motion. On 19 June 1997, the respondent father filed a motion to dismiss the petition on the grounds that the Circuit Court in Florida retained jurisdiction over the child and that the trial court here could not exercise jurisdiction consistent with the Uniform Child Custody Jurisdiction Act (UCCJA). The trial court granted the motion to dismiss finding that Florida retained jurisdiction over the child.

[1] Petitioners first assign as error the trial court's granting of the respondent's counsel's Motion to Appear *Pro Hac Vice* because the attorney did not comply with N.C. Gen. Stat. § 84-4.1, which requires that local counsel be associated and appear with the out-of-state counsel at trial.

An out-of-state attorney must comply with five requirements contained in N.C. Gen. Stat. § 84-4.1 when filing a motion to appear, including a requirement that local counsel be associated who will accept service on behalf of the attorney in any related proceeding or disciplinary action. N.C. Gen. Stat. § 84-4.1 (1995). The purpose of the statute is to allow courts a means to control out-of-state counsel and to assure their compliance with the duties and responsibilities of attorneys from this State. *N.C.N.B. v. Virginia Carolina Builders*, 57 N.C. App. 628, 292 S.E.2d 135, *rev'd on other grounds*, 307 N.C. 563, 299 S.E.2d 629 (1982).

In this case, the trial court allowed counsel's motion; however, we are unable to determine from the record whether local counsel appeared as petitioners did not object. *See* N.C.R. App. P. 10(b)(1). Petitioners now contend the trial court erred by failing to enforce compliance with the statute. Nevertheless, assuming the trial court erred by failing to enforce compliance, we decline to find prejudicial error such that the order should be set aside.

[2] Petitioners contend the trial court erred in dismissing their petition on the grounds that it did not have jurisdiction to hear the case. They argue that the trial court has original jurisdiction over a petition to terminate parental rights pursuant to N.C. Gen. Stat. § 7A-289.23 in all cases where the child resides in or is found in the district.

N.C. Gen. Stat. § 7A-289.23 provides for jurisdiction over termination of parental rights actions:

> The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition. . . . *Provided that, before exercising jurisdiction under this Article the court shall find that it would have jurisdiction to make a child custody determination under the provisions of G.S. 50A-3.* . . .

N.C. Gen. Stat. § 7A-289.23 (1995) (emphasis added). This provision requires a two-part process in which the trial court must first consider whether it has jurisdiction to make a child custody order under N.C. Gen. Stat. § 50A-3 before it can exert the "exclusive original" jurisdiction granted in N.C. Gen. Stat. § 7A-289.23. *In re Leonard*, 77 N.C. App. 439, 335 S.E.2d 73 (1985). Thus, the district court may assert its jurisdiction only if to do so would be compatible with the UCCJA, which is codified in N.C. Gen. Stat. Ch. 50A. The UCCJA governs "custody proceedings" where multiple states are involved and its purpose is to prevent forum shopping for the convenience of competing parents to the detriment of the interest of the child. *Holland v. Holland*, 56 N.C. App. 96, 286 S.E.2d 895 (1982).

Our State's jurisdiction is governed by both the UCCJA and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (1980). *Beck v. Beck*, 123 N.C. App. 629, 473 S.E.2d 789 (1996). The PKPA has established the national policy with regard to custody jurisdiction, and to the extent a state custody statute conflicts with the PKPA, the federal statute controls. *Id.*; *Gasser v. Sperry*, 93 N.C. App. 72, 376 S.E.2d 478 (1989); *See Thompson v. Thompson*, 484 U.S. 174, 98 L. Ed. 2d 512 (1988). The trial court's jurisdiction in a termination of parental rights case must be compatible with both the UCCJA and the PKPA.

The UCCJA establishes four routes by which a trial court may assert its jurisdiction: (1) if this is the child's "home state," or (2) if there is a "significant connection" between the child and this State, or (3) if the child is physically present and there is an emergency, or (4) if no other state would have jurisdiction or another state has declined jurisdiction and found that this State would be a more appropriate forum. N.C. Gen. Stat. § 50A-3 (1984). The UCCJA only requires a trial court to decline to exercise jurisdiction when it is notified that a custody proceeding is ongoing in another jurisdiction.

See N.C. Gen. Stat. § 50A-6 (1984). However, the PKPA imposes an additional limitation to the circumstances in which a trial court may assert its jurisdiction:

> (d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or *any contestant.*

28 U.S.C. § 1738A(d) (1980) (emphasis added). Subsection (c)(1) mandates that the trial court making the original determination have proper jurisdiction under its own laws. Thus, so long as the original trial court had proper jurisdiction under its own laws and the child or any contestant continues to reside in that state, it retains jurisdiction.

In this case, Florida has adopted the UCCJA, so the jurisdiction of the Florida court was dependent on whether it was the child's home state at the time of the original dependency declaration in 1990. *See* Fla. Stat. Ann. §§ 39.013, 61.1308 (West 1998). Although the petitioners and the child have now resided in Lincoln County, North Carolina since 1994, the putative father, a contestant in this case, continues to reside in Florida, the State which originally granted custody to the petitioners and which has continued to assert its jurisdiction over this case. Under the PKPA, because the father continues to reside in Florida, the Florida court retains jurisdiction and the trial court properly declined to invoke its jurisdiction under N.C. Gen. Stat. § 7A-289.23.

For these reasons, the order of the trial court dismissing the petition is

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

GEORGE C. LEWIS, PLAINTIFF-APPELLANT v. GAMALIEL JONES, SR. AND WIFE, SHIRLEY F. JONES, DEFENDANTS-APPELLEES

No. COA98-631

(Filed 16 February 1999)

1. **Judgments— consent—sale of real estate**

The trial court properly concluded that plaintiff had waived his right to purchase property where plaintiff agreed to purchase from defendants real property, plaintiff filed an action for specific performance of the agreement, the parties entered into a consent judgment which provided an appraisal procedure, defense counsel sent a letter to plaintiff's counsel seeking an offer for the property following the appraisals, plaintiff failed to respond, defendants entered into a contract to sell the property to a third party and requested that plaintiff remove a notice of lis pendens, plaintiff refused to do so, defendants filed a motion asking the trial court to declare what right plaintiff continued to have in the property, and the trial court concluded that plaintiff had waived his rights under the consent judgment and was equitably estopped from asserting his rights. Although knowing that he had the right to purchase the property according to the terms of the consent judgment, plaintiff failed to exercise this right even after receiving the letter sent by defendant.

2. **Estoppel— equitable—rights under consent judgment not asserted**

The trial court properly concluded that plaintiff was estopped from asserting any rights to real property under a consent judgment where plaintiff chose not to exercise his right to purchase and agreed for defendants to seek a driveway permit; defendants thereafter sent plaintiff a letter inviting an offer based on an appraisal; and defendants were entitled to rely on the fact that plaintiff had taken no action to exercise his right to purchase under the consent judgment when defendants sold the property to a third party a year later.

Appeal by plaintiff from judgment entered 30 January 1998 by Judge W. Allen Cobb in New Hanover County Superior Court. Heard in the Court of Appeals 13 January 1999.

Allen & MacDonald, by James A. MacDonald and Mary Margaret McEachern, for plaintiff-appellant.

Lea, Clyburn & Rhine, by J. Albert Clyburn and James W. Lea, III, for defendants-appellees.

WALKER, Judge.

On 4 June 1986, plaintiff and defendants entered into an agreement whereby plaintiff agreed to purchase from defendants approximately 4.43 acres of real property located in New Hanover County, North Carolina. Plaintiff filed this action on 16 January 1991 against defendants seeking specific performance of their agreement.

On 11 September 1992, plaintiff and defendants entered into a consent judgment in which the plaintiff would have the right to purchase the property from defendants pursuant to the conditions of the consent judgment. The consent judgment provided that each party would obtain an appraisal and, if the two appraisals were more than $20,000 apart, a third appraisal would be obtained. The purchase price would then be settled by averaging the two closest appraisals.

On 1 August 1992, defendants obtained an appraisal from Gene Merritt, of the Gene Merritt Company, who appraised the property at $221,500. On 28 September 1992, plaintiff obtained an appraisal from Carlton Fisher, who appraised the property at $127,680 and stated "[t]his property has no accessibility at the present time and valuation is based on this fact."

Since the appraisals were more than $20,000 apart, a third appraisal was necessary and a third appraiser was subsequently selected by the two appraisers. Defendants then requested time to obtain a driveway permit to allow for accessibility to the property before the third appraisal was completed. Application for a street and driveway access permit was made to the North Carolina Department of Transportation and was approved on 14 November 1995. The third appraisal was completed on 18 September 1996 by Hansen S. Matthews, Jr., who appraised the property at $510,000 and noted that the owners would be allowed to have a driveway.

On 1 October 1996, defendants' counsel sent a letter to plaintiff's counsel seeking an offer for the property and asked for a response to the letter. Plaintiff failed to respond and one year later, defendants entered into a contract to sell the property for $435,000 to a third party.

Subsequent to the sale of the property, defendants requested that plaintiff remove the notice of *lis pendens* which had been previously filed against the property; however, plaintiff refused to do so. As a result, defendants filed a motion asking the trial court to declare what right, if any, plaintiff continued to have in the property. On 30 January 1998, the trial court entered a judgment and found:

> 5. The letter of October 1, 1996 clearly sets forth the price at which the Defendant would accept the purchase of the property by the Plaintiff, George C. Lewis.
>
> 6. This letter placed upon the Plaintiff an affirmative duty to tender a response to the Defendant, but the Plaintiff remained silent and did not respond to the Defendant's letter of October 1, 1996 in any manner.
>
> . . .
>
> 9. In reliance on the failure of the Plaintiff to respond in any manner, the Defendant has taken affirmative action to market and sell the property which is the subject to the lawsuit and has in fact, entered into contract with a third party.
>
> 10. That more than five years has passed since the entry of the original Consent Judgment in this case and during this period of time, the Plaintiff has not taken any action to enforce what he deems to be his rights under the Consent Judgment. The Consent Judgment is in the nature of an option to purchase property and the Plaintiff has failed to affirmatively take action, on a timely basis, to exercise this option.
>
> 11. After the sending of the October 1, 1996 letter, circumstances were such as to call for some action or declaration on the part of the Plaintiff but he failed to respond in any way.

The trial court then concluded:

> 2. That the Plaintiff has waived any and all rights to purchase the property which is the subject to this action.
>
> 3. In addition, the Plaintiff is equitably estopped from asserting any further rights to this property.

As a result, the trial court then ordered:

> 1. That any and all rights of the Plaintiff to purchase the above-referenced property pursuant to the terms and conditions of the

> Consent Judgment entered into between the parties . . . are hereby voided by this Judgment and the Plaintiff has no further legal and/or equitable right to purchase the property. . . .
>
> 2. That the Notice of Lis Pendens filed June 27, 1988 as 88 CVS 1884 and the Notice of Lis Pendens filed January 16, 1991 as 91 CVS 0185, against this property, are hereby stricken from the record. . . .

Plaintiff contends the trial court erred in concluding that he had waived his rights under the consent judgment and that he was equitably estopped from asserting his rights under the consent judgment.

In reviewing a decision of a trial court, which sits without a jury, this Court's role is "to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts." *In re Norris*, 65 N.C. App. 269, 274-75, 310 S.E.2d 25, 29 (1983), *disc. review denied*, 310 N.C. 744, 315 S.E.2d 703 (1984).

[1] First, plaintiff argues the trial court erred in concluding he had waived his right to purchase the property under the consent judgment.

A consent judgment is a contract between parties entered on the record with the trial court's approval. *Yount v. Lowe*, 24 N.C. App. 48, 51, 209 S.E.2d 867, 869 (1974), *affirmed*, 288 N.C. 90, 215 S.E.2d 563 (1975). It is well established that a party can waive its rights in a contract if the following elements are established: "(1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Fetner v. Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959).

The trial court found the consent judgment was in the nature of an option to purchase the property and plaintiff was required to exercise his option in a reasonable amount of time. *See Yancey v. Watkins*, 17 N.C. App. 515, 518, 195 S.E.2d 89, 92, *cert. denied*, 283 N.C. 394, 196 S.E.2d 277 (1973). In the five years since the consent judgment was entered, the plaintiff failed to take any action to enforce his rights.

In addition, the consent judgment stated that the parties were each to "select and hire a licensed real estate appraiser who shall

appraise the property owned by the defendants . . . *at its present fair market value.*" (Emphasis added). Without the driveway permit and access, the property was less valuable. Plaintiff could have elected to purchase the property without the driveway permit. Although knowing that he had the right to purchase the property according to the terms of the consent judgment, plaintiff failed to exercise this right even after receiving the letter sent by defendants on 1 October 1996. Therefore, all of the elements necessary to show waiver on the part of the plaintiff have been established. Thus, the trial court properly concluded the plaintiff had waived his right to purchase the property.

[2] Next, plaintiff contends the trial court erred in concluding he was equitably estopped from asserting his rights under the consent judgment. The doctrine of equitable estoppel can be applied when neither bad faith, fraud, nor intent to deceive is present. *Hamilton v. Hamilton*, 296 N.C. 574, 576, 251 S.E.2d 441, 443 (1979). Equitable estoppel arises when a party "by acts, representations, admissions, or by silence. . . induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his or her detriment." *Amick v. Amick*, 80 N.C. App. 291, 294, 341 S.E.2d 613, 614 (1986).

Plaintiff chose not to exercise his right to purchase the property but agreed for defendants to seek a driveway permit. By allowing the defendants to make this improvement to the property, defendants were entitled to assume that plaintiff was only interested in the property if he could obtain access. Thereafter, defendants sent plaintiff a letter inviting an offer based on the third appraisal; however, plaintiff did not respond. When defendants sold the property to a third party a year later, they were entitled to rely on the fact that plaintiff had taken no action to exercise his right to purchase under the consent judgment. Therefore, the trial court properly concluded that "plaintiff had waived any and all rights to purchase the property" and that "plaintiff is equitably estopped from asserting any further rights to this property."

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

IN RE MOLINA

[132 N.C. App. 373 (1999)]

IN THE MATTER OF: EMMANUEL MOLINA

No. COA98-897

(Filed 16 February 1999)

Juveniles— training school—other alternatives unsuccessful or inappropriate—lack of recommendation

The trial court did not err by committing respondent to the Division of Youth Services following a probation violation where it appears the court resorted to training school only after efforts to deal with respondent by other less restrictive dispositional alternatives were unsuccessful or deemed inappropriate. Although respondent argued that the court erred by committing him when no recommendation for such disposition was made by anyone, the option of a training school was suggested by a social worker and, even if the social worker's statement did not amount to a recommendation of training school, there is no statutory provision requiring the trial court to give any particular weight to recommendations made as to a disposition and no prohibition against the court committing a juvenile without any recommendation to that effect.

Appeal by respondent from orders entered 19 May 1998 and 28 May 1998 by Judge Yvonne Mims Evans in Mecklenburg County District Court. Heard in the Court of Appeals 18 January 1999.

On 20 May 1997, a petition was filed alleging that fourteen-year-old Emmanuel Molina (respondent) was a delinquent juvenile in that he committed the offenses of second degree rape and taking indecent liberties with a child. Following a hearing, the trial court entered an order finding beyond a reasonable doubt that respondent committed the offenses. On 23 January 1998, the trial court entered an order placing respondent on probation for twelve months. Among the conditions of probation were that respondent attend school each day; that he complete sixty hours of community service; that he pay a fine of $78.00; and that he cooperate with and successfully complete a juvenile sex offender's program. The trial court also ordered that he serve five days of detention, but that portion of the order was stayed pending respondent's appeal. On 16 April 1998, respondent withdrew his appeal.

On or about 21 April 1998, a court counselor filed a motion for review alleging that respondent had violated a condition of his

probation by having unexcused absences from school. At a hearing, respondent admitted the allegations of the motion for review.

Following the hearing, the trial court entered orders on 19 May 1998 and 28 May 1998 finding that respondent was in violation of conditions of his probation. In the orders, the trial court found that respondent's behavior constitutes a threat to persons or property in the community in that he "forced himself upon his young cousin" and "does not understand or acknowledge his responsibility in this matter." The trial court found respondent needed "to learn acceptable social and sexual behaviors" and "to continue his education, including learning English as a second language." The trial court also found that alternatives to commitment "have been attempted unsuccessfully or were considered and found to be inappropriate" and elaborated as follows:

> Prior to adjudication, the juvenile was offered the opportunity to participate in and successfully complete the Juvenile Sex Offender Program. He did not do so. He denied the offenses and even after adjudication and disposition, he refused to cooperate in the sex offender treatment program. At disposition he was placed on probation for twelve months, ordered into JSO treatment, required to pay a fine of $78.00 and complete 60 hours of community service work.
>
> At the probation violation hearing on May 15, nearly 5 months after disposition, the juvenile had not paid any portion of his fine even though he had been employed at the time of disposition. Nor had he completed a single hour of community service. More importantly, he had missed seven of eleven Juvenile Sex Offender treatment sessions without good cause. When he did attend, his participation was not fully cooperative.

Based upon its findings, the trial court concluded "that commitment of the juvenile to the Division of Youth Services is the least restrictive dispositional alternative that is available and that is appropriate to meet the needs of the juvenile and the objective of the State in exercising jurisdiction in this case." Based upon its findings and conclusion, the trial court ordered that respondent be committed to the Division of Youth Services for an indefinite term not to exceed his eighteenth birthday and that he participate in and complete the sex offender program offered by the Division of Youth Services. Respondent appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Diane Martin Pomper, for the State.

Children's Law Center, by Susan Nye Surles, for respondent appellant.

HORTON, Judge.

Respondent first argues the trial court erred by committing him to the Division of Youth Services "when all community based alternatives had not been exhausted and had not been shown to be inappropriate by all the evidence." We disagree.

N.C. Gen. Stat. § 7A-658 (1995) provides that "[i]f a juvenile violates the conditions of his probation, he and his parent after notice, may be required to appear before the court and the judge may make any disposition of the matter authorized . . . ." N.C. Gen. Stat. § 7A-652(a) (Cum. Supp. 1997) provides that a delinquent juvenile may be committed to training school if the trial court finds "alternatives to commitment as contained in G.S. 7A-647, 7A-648, and 7A-649 have been attempted unsuccessfully or were considered and found to be inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community." The statute further provides that the trial court's findings must be supported by substantial evidence in the record that the trial court "determined the needs of the juvenile, determined the appropriate community resources required to meet those needs, and explored and exhausted or considered inappropriate those resources[.]" *Id.*

"In selecting among the dispositional alternatives, the trial judge is required to select the least restrictive disposition taking into account the seriousness of the offense, degree of culpability, age, prior record, and circumstances of the particular case." *In re Bullabough*, 89 N.C. App. 171, 185- 86, 365 S.E.2d 642, 650 (1988). The trial court must also consider the best interests of the State and select a dispositional alternative consistent with public safety. *Id.*

In this case, evidence in the record shows as follows: respondent was placed on probation after he committed the offenses of second degree rape and taking indecent liberties with a child; respondent violated conditions of his probation by failing to attend school, by missing juvenile sex offender treatment sessions without good cause, and by failing to cooperate when he did attend those sessions; respondent had not paid any of his fine although he was employed; and that

respondent had not completed any of his community service hours. The record further shows that the trial court received various recommendations for respondent including that he serve additional hours of community service and that he be given an out-of-home placement. A person identified by the parties as a social worker told the trial court that the only options available to ensure respondent's attendance at a treatment program were training school or an out-of-home placement. A letter from a court counselor stated that respondent needed "to be in a placement whether that is home or otherwise that will ensure that he attends group [treatment] and will supervise him while he is in the community."

The evidence in the record fully supports the finding of fact made by the trial court that "[a]ll alternatives to commitment . . . have been attempted unsuccessfully or were considered and found to be inappropriate." It appears the trial court resorted to committing respondent to training school only after efforts to deal with him by other less restrictive dispositional alternatives were unsuccessful or deemed inappropriate. *See In re Hughes*, 50 N.C. App. 258, 273 S.E.2d 324 (1981) (holding that the trial court made every effort to comply with the purpose of the Juvenile Code by selecting the least restrictive dispositions but that after unsuccessful efforts the trial court properly resorted to committing the respondent to training school).

Some of the recommendations made at the hearing in this case dealt with the five days of detention imposed in the first dispositional order. That detention was stayed pending respondent's first appeal. Since respondent withdrew that appeal, he would have been required to serve those five days even if the trial court had not modified the disposition due to his probation violations.

Respondent also argues the trial court erred by committing him to the Division of Youth Services "when no recommendation for such disposition was made by anyone, including the District Attorney, court counselor, or any representative of a community based alternative resource." We disagree.

The option of training school was suggested by a social worker as one of two options that would ensure respondent's attendance at a treatment program. Even if this statement did not amount to a recommendation of training school, respondent has failed to cite any authority in support of his contention that the trial court erred by committing him to the Division of Youth Services when no one made that recommendation. Indeed, there is no statutory provision requir-

ing the trial court to give any particular weight to recommendations made as to a disposition and no prohibition against the trial court committing a juvenile without any recommendation to that effect.

Because there is evidence in the record to support the trial court's orders committing respondent to the Division of Youth Services and because there is no requirement that a recommendation for training school be made before a commitment is ordered, the orders are affirmed.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

ROBERT E. TIMMONS, JR., EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EMPLOYER, SELF-INSURER, DEFENDANT

No. COA97-1230

(Filed 16 February 1999)

Workers' Compensation— life care plan—costs—consideration on remand

The Court of Appeals affirmed its prior holding in light of the holding in *Adams v. AVX Corp.*, 349 N.C. 676, where the only part of the prior Court of Appeals decision impacted by Adams is the denial of preparation costs for a life care plan, Adams requires a court to defer to the Commission's findings only when there is some shard of evidence in support thereof, and there was no competent evidence to support the award in this case.

Reconsidered in light of *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998) pursuant to 30 December 1998 order of the North Carolina Supreme Court. Originally heard in Court of Appeals 18 May 1998.

Folger and Folger, by Fred Folger, Jr., for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General D. Sigsbee Miller, for the State.

LEWIS, Judge.

The Supreme Court ordered that we reconsider our decision of 15 September 1998 in *Timmons v. North Carolina Dep't of Transp.*, 130 N.C. App. 745, 504 S.E.2d 567 (1998) (*Timmons II*), in light of its holding in *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). We have reconsidered the issues presented, and we affirm our prior decision.

This Court now reviews this case for the third time. At issue has been whether preparation and/or implementation of a "Life Care Plan" for the paraplegic plaintiff should be covered as a necessary medical expense under the Workers Compensation Statute as it existed at the time of plaintiff's injury. *See* N.C. Gen. Stat. § 97-25 (1985). To begin, both parties appealed the North Carolina Industrial Commission's 26 May 1995 award. In the first appeal, this Court remanded the award to the Commission for clarification of whether charges for the preparation of the plan were intended to be taxed as costs to the defendant. *See Timmons v. Dep't of Transp.*, 123 N.C. App. 456, 473 S.E.2d 356 (1996) (*Timmons I*), *aff'd per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997). After the initial remand and clarification, defendant appealed from an opinion and award entered 29 July 1997 by the Commission which ordered defendant to pay for the costs of the plan and seemed to indicate that it also should pay for each item listed within the plan. *See Timmons II*, 130 N.C. App. at 749, 504 S.E.2d at 570. On appeal in *Timmons II*, defendant assigned three errors from the Commission's award. We now must review our holdings on each of the *Timmons II* questions in light of *Adams*.

Adams addresses a standard of review question; it indicates that if there is any competent evidence within the record to support the Commission's findings of facts, such findings are conclusive on appeal. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. The Commission need not defer to the Deputy's determination of credibility; it is free to reassess the record and make its own determination virtually *de novo*. *See id.* at 680-81, 509 S.E.2d at 413. *Adams* indicates that this Court must uphold the Commission's findings if there is a scintilla of evidence supporting them. *See id.* at 681, 509 S.E.2d at 414.

In *Timmons II*, defendant first contended that because the case was remanded solely for clarification of the costs issue, an award of the plan itself was beyond the scope of the Court's mandate. We disagreed, and the recent *Adams* decision has no bearing on this issue.

Second, defendant argued that the Commission could not modify a conclusion to which no error was assigned by plaintiff. Again, we disagreed, and *Adams* has no bearing on this issue either. Finally, defendant argued that the Workers Compensation Act does not authorize the award of the costs of preparing the life care plan or the implementation of the plan itself. We agreed, saying that costs could not be awarded since "[p]laintiff has not directed us to any evidence that supports this finding, and we find none." *Timmons II*, 130 N.C. App. at 750, 504 S.E.2d at 570. We held that "[b]ecause there was no evidence that the life care plan was a medical service or other treatment reasonably necessary to effect a cure or give relief, the Commission erred when it ordered defendant to pay Dr. Wilhelm for the costs of [the plan's] preparation." *Id.*

We further held that although it was unclear whether the Commission intended to do so, the Commission was prohibited by law from awarding the substance of the plan to plaintiff. The Commission may have ordered the plan as a whole be awarded to plaintiff, but since parts of the plan clearly are outside statutory authority, we disapproved any such reading of the Commission's award. *See id.* Our denial of the implementation of the plan was grounded not in a lack of evidence but rather in a lack of statutory authorization for at least some of the items requested. As such, the only part of our *Timmons II* decision impacted by *Adams* is the denial of the plan preparation costs to the plaintiff.

In *Timmons II* we found "there was ***no evidence*** that the life care plan was a medical service or other treatment reasonably necessary to effect a cure or give relief." *Id.* (emphasis added). *Adams* requires a Court to defer to the Commission's findings only when there is some shard of evidence in support thereof. Because there is *no* competent evidence to support the award of costs of preparation of the life care plan, we affirm our prior holding.

Affirmed.

Judges MARTIN and SMITH concur.

BETTY M. DAUGHTRY, EXECUTRIX OF THE ESTATE OF THEODORE EUGENE McLAMB (ALSO KNOWN AS THEODORE E. McLAMB), PLAINTIFF v. SHARON D. McLAMB AND UNITED OF OMAHA LIFE INSURANCE COMPANY, (ALSO KNOWN AS MUTUAL OF OMAHA COMPANIES), DEFENDANTS

No. COA98-643

(Filed 16 February 1999)

Insurance— change of beneficiary—divorce decree

The trial court properly granted defendant's motion for summary judgment on an action seeking a declaration that the proceeds of a life insurance policy belonged to the estate of decedent under the terms of a divorce decree rather than the beneficiary in the policy, decedent's ex-wife, where the language of the decree did not sufficiently show an intent to divest defendant as beneficiary in that it did not specifically refer to life insurance, decedent never attempted to change the beneficiary in the four years after the divorce, and decedent and defendant remained friends after their divorce and continued to maintain a joint checking account.

Appeal by plaintiff from judgment entered 23 February 1998 by Judge W. Russell Duke, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 13 January 1999.

Earl Whitted, Jr. and D. Lynn Whitted for plaintiff-appellant.

Phillip E. Williams for defendant-appellee.

WALKER, Judge.

Thomas Eugene McLamb ("decedent") and Sharon D. McLamb ("defendant McLamb") were married on 2 August 1986. On 1 July 1988, decedent purchased a life insurance policy from defendant United of Omaha Life Insurance Company in the amount of $50,000 and named defendant McLamb as the beneficiary of the policy. Decedent and defendant McLamb were divorced on 21 May 1992. The divorce decree approved by the trial court stated the following:

> It is decreed that the estate of the parties be divided as follows:
>
> Petitioner [decedent] is awarded the following as Petitioner's sole and separate property, and Respondent [defendant McLamb]

is hereby divested of all right, title and interest in and to such property:

. . .

(2) Any and all insurance, pensions, retirement benefits and other benefits arising out of Petitioner's employment with the United States Air Force.

Decedent died testate on 14 September 1996 without ever having executed a change of beneficiary on his life insurance policy. On 19 November 1996, plaintiff Daughtry, sister of decedent and in her capacity as Executrix of decedent's estate, filed this action seeking a declaration that the proceeds of the life insurance policy belonged to the estate of the decedent. Defendant McLamb answered asserting she was entitled to the proceeds since she remained the beneficiary under the policy.

At a hearing on defendant McLamb's motion for summary judgment, the trial court found:

4. That aside from the divorce decree cited by the plaintiff there was no factual allegation or claim of intention by the decedent to change the designation of defendant Sharon McLamb as the beneficiary of the life insurance policy at issue.

5. That the divorce decree in question does not specifically refer to "life insurance" and refers only to insurance "arising out of [decedent's] employment with the United States Air Force."

The trial court granted defendant McLamb's motion for summary judgment after concluding that "there is no genuine issue of material fact, and that defendant Sharon McLamb is entitled to judgment as a matter of law."

On appeal, plaintiff contends the trial court erred in granting summary judgment. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191, *rehearing denied*, 327 N.C. 146, 394 S.E.2d 168 (1990). The burden is on the movant to establish the lack of a genuine issue of material fact. *Seay v. Allstate Insurance Co.*, 59 N.C. App. 220, 221-22, 296 S.E.2d 30, 31 (1982). The evidence is viewed in the light most favorable to the non-moving party with all reasonable inferences drawn in favor of the non-movant. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974).

Plaintiff argues that the language of the divorce decree shows that defendant McLamb intended to relinquish any rights she may have had in decedent's life insurance policy.

This Court has held that a divorce should not annul or revoke the beneficiary designation in a life insurance policy. *DeVane v. Insurance Co.*, 8 N.C. App. 247, 251, 174 S.E.2d 146, 148 (1970). In *DeVane*, the defendant was designated as beneficiary in her husband's life insurance policy. *Id.* at 248-49, 174 S.E.2d at 146-47. The defendant and her husband divorced and he remarried prior to his death; however, he failed to change the beneficiary on the policy. *Id.* There, the plaintiff (the husband's second wife) argued that the separation agreement entered into by the defendant and her husband prior to their divorce constituted a revocation of the designation of the defendant as the beneficiary on the life insurance policy. *Id.* The separation agreement provided that the defendant "relinquishes and quitclaims" to her husband all rights to his property. *Id.* This Court found the separation agreement was not a sufficient revocation of the first wife as the beneficiary of the policy and held that since the husband failed to exercise a change in the beneficiary that indicated his intention not to effect such a change. *Id.* at 148, 174 S.E.2d at 250. In addition, in *Tobacco Group Ltd. v. Trust Co.*, 7 N.C. App. 202, 206, 171 S.E.2d 807, 810 (1970) (quoting *4 Couch on Insurance 2d* § 27:114), this Court stated:

> General expressions or clauses in a property settlement agreement between a husband and wife. . . are not to be construed as including an assignment or renunciation of expectancies, and a beneficiary therefore retains his status under an insurance policy if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouse it was intended to deprive either spouse of the right to take under the insurance contract of the other. . . .

Here, the language in the parties' divorce decree does not sufficiently show that it was the intention of the parties to divest defendant McLamb as beneficiary on the policy. As the trial court found, the divorce decree does not specifically refer to "life insurance," but instead refers only to insurance "arising out of [decedent's] employment with the United States Air Force." In addition, in the four years since the divorce, the decedent never attempted to change defendant McLamb as the beneficiary. Also, the evidence showed that the decedent and defendant McLamb remained friends after their divorce and

continued to maintain a joint checking account. When no attempt is made during the decedent's lifetime to change the beneficiary, the named beneficiary has acquired vested rights to the policy benefits. *Smith v. Principal Mut. Life Ins. Co.*, 131 N.C. App. 138, 140, 505 S.E.2d 586, 588 (1998).

The plaintiff failed to present evidence to show that the decedent ever intended to change defendant McLamb as the beneficiary on the life insurance policy. Therefore, since there is no genuine issue of material fact, the trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

JIMMIE B. HICKS, JR. AND WIFE BETH B. HICKS, PLAINTIFFS v. CLEGG'S TERMITE AND PEST CONTROL, INC., DEFENDANT

No. COA98-616

(Filed 16 February 1999)

Costs— attorney fees—contract action

The trial court did not err by denying attorney's fees under N.C.G.S. § 6-21.1 in an action arising from a contract to inspect plaintiff's property for termites where the only two issues presented to the jury were whether defendant breached its contract to plaintiffs and the amount of damages. There is no mention of breach of contract cases in the current version of N.C.G.S. § 6-21.1, just as such a cause of action was omitted when the statute was established in 1959 and amended in 1963, 1967, 1969, 1979, and 1986. The Legislature has had ample opportunity to extend the statute's remedial provisions to causes of action it intends to cover.

Judge WALKER concurring.

Appeal by plaintiffs from order filed 6 April 1998 by Judge James E. Ragan, III, in Craven County Superior Court. Heard in the Court of Appeals 13 January 1999.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Scott C. Hart, for plaintiff-appellants.

Hutson Hughes & Powell, P.A., by Kathryn P. Fagan, for defendant-appellee.

LEWIS, Judge.

Plaintiffs had a contract with defendant under which defendant was to inspect plaintiffs' property for termites. After their home was damaged by termites, plaintiffs filed an action against defendant in Craven County Superior Court alleging breach of contract, negligence, breach of express warranty, breach of implied warranty, specific performance, fraud, and unfair trade practices. The case was tried before a jury, and at the close of plaintiffs' evidence the trial court presented only two issues to the jury: whether defendant breached its contract with plaintiffs and if so, the amount of damages plaintiffs sustained. On 12 February 1998 the jury unanimously answered that defendant had breached its contract, and that plaintiffs had sustained damages in the amount of $2,030.00 as a result. Plaintiffs then moved for attorney's fees under N.C. Gen. Stat. section 6-21.1 (1997).

In an order signed 30 March 1998 and filed 6 April 1998, the presiding judge found that plaintiffs were "not entitled to attorney's fee since this was as [sic] action for breach of contract with property damage." The court further found that it did not have discretion to order attorney's fees in this breach of contract case, but that if it did, it would have allowed attorney's fees in the amount of $9,750.00. From this decision plaintiffs appeal, arguing only that the trial court did in fact have discretion to award attorney's fees under section 6-21.1.

The sole issue to be decided in this case is one of statutory interpretation. The statute at issue, entitled "Allowance of counsel fees as part of costs in *certain* cases" (emphasis added), reads in relevant part:

> In any personal injury or property damage suit, . . . where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

G.S. § 6-21.1. Plaintiffs argue that because this breach of contract case involved property damage, they are entitled to attorney's fees under section 6-21.1. They attempt to support this assertion by citing *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973), a case resulting from a suit filed when a plaintiff's automobile was damaged as a result of the defendant's alleged negligence. In that case, our Supreme Court interpreted the statute and stated, "This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." *Id.* at 239, 200 S.E.2d at 42.

We look, then, at the intended scope of this statute. It appears from the title of the statute that it is to apply to "certain cases," and from the text of the statute it seems clear that these certain cases are "personal injury or property damage suit[s]," as well as particular suits against insurance companies. G.S. § 6-21.1. There is no mention of breach of contract cases in the current version of section 6-21.1, just as such a cause of action was omitted from the purview of this statute when it was established in 1959 and amended in 1963, 1967, 1969, 1979, and 1986. It is well worth noting that the provisions regarding suits against insurance companies were not in the original version of the statute, either. They were added by amendment in 1967, just as breach of contract cases could have been at that time or any time since, had the legislature so intended.

"It appears to be well established that ordinarily attorneys' fees are recoverable only when expressly authorized by statute." *Construction Co. v. Development Corp.*, 29 N.C. App. 731, 734, 225 S.E.2d 623, 625, *disc. review denied*, 290 N.C. 660, 228 S.E.2d 459 (1976). The consumer relief sought by plaintiffs is available in Chapter 75 of our statutes and, as noted in plaintiffs' complaint, N.C. Gen. Stat. section 75-16.1 (1994) provides for the awarding of attorney's fees in unfair trade practices actions. Plaintiffs' unfair trade practices claim, however, did not reach the jury, and plaintiffs do not appeal from the trial court's decision to limit the jury's deliberations to breach of contract issues.

This is clearly a case in contract. To embrace property damages under this statute because some damage may have resulted from the termites would be to make attorney's fees in every contract case compensable by extending the damages to some sort of property or personal injury. Nearly forty years have now passed since G.S. section 6-21.1 was made the law of this state, and the legislature has had

ample opportunity to extend the statute's remedial provisions to the causes of action it intends to cover. Such an extension was made in 1967 for certain insurance cases, and breach of contract claims could be addressed just as easily if the legislature wished to include them among the "certain cases" it enumerates in the statute. It has not chosen to do so, and we are unable to do so now by reading additional words into the plain language of the statute. As such, we affirm the trial court's decision to deny attorney's fees under the statutory theory cited by plaintiffs.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge WALKER concurs with separate opinion.

Judge WALKER concurring.

I write to express my concern over the language in N.C. Gen. Stat. § 6-21.1 (1997). The statute allows recovery of attorney fees at the discretion of the trial court in personal injury or property damage suits, which seems to allow recovery only in cases arising out of negligence. It is true that attorney fees are recoverable only when expressly granted by statute. *See Construction Co. v. Development Corp.*, 29 N.C. App. 731, 734, 225 S.E.2d 623, 625, *disc. review denied*, 290 N.C. 660, 228 S.E.2d 459 (1976). However, our Supreme Court held in *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973), that this statute "should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." The General Assembly should extend this statute to clearly permit recovery of attorney fees in cases such as this.

SUTTON v. N.C. DEP'T OF LABOR

[132 N.C. App. 387 (1999)]

SYDNEY CHERYL SUTTON, PETITIONER v. NORTH CAROLINA DEPARTMENT OF LABOR, RESPONDENT

No. COA98-539

(Filed 16 February 1999)

Administrative Law— judicial review—order—inadequate for appellate review

A superior court order reversing and remanding a State Personnel Commission decision was remanded where the decision was completely silent as to both the scope of review utilized and its application.

Appeal by respondent from order dated 8 January 1998 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 26 January 1999.

Patton Boggs, L.L.P., by James S. Schenck, IV and Judith K. Guibert, for petitioner-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ralf F. Haskell and Assistant Attorney General Daniel D. Addison, for the respondent-appellant.

GREENE, Judge.

The North Carolina Department of Labor (NCDOL) appeals from the Superior Court's reversal and remand of the State Personnel Commission's (SPC) order determining, *inter alia*, that Sidney Cheryl Sutton (Plaintiff) was not discriminated against based on her sex when she was not promoted to the position of Safety Compliance Officer I (SCO-I).

Plaintiff, a female State employee of NCDOL, applied for a promotion to one of five SCO-I positions available in April of 1995. Plaintiff was denied the promotion, and all five positions were filled by male applicants. Plaintiff alleges she was discriminated against and denied the promotion based on her sex, and was retaliated against because of her allegations of sexual harassment against a former supervisor.

On 2 November 1995, Plaintiff filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings, and a Notice of Contested Case and Assignment was issued on 14 November 1995.

Plaintiff's case came before Administrative Law Judge Meg Scott Phipps (ALJ), who, on 4 February 1997, issued a Recommended Decision determining that Plaintiff "should be placed in the first available [SCO-I] position. She should also receive back pay and front pay, if necessary, as well as attorney's fees."

This matter then was heard before the SPC on 10 April 1997. In declining to accept the ALJ's Recommended Decision, the SPC determined that Plaintiff "was not discriminated against based on her sex when she was not promoted to [SCO-I]" and "[the] five successful candidates that were hired had better qualifications for the position." The SPC also found Plaintiff "was not retaliated against because of her allegations of sexual harassment."

On 22 July 1997, Plaintiff filed a Petition for Judicial Review in the Superior Court of Wake County, Judge Robert L. Farmer (Judge Farmer) presiding, requesting that the SPC's Final Decision be reversed, and the Recommended Decision of the ALJ be adopted. The petition also alleged that the SPC's Final Decision was "affected by [an] error of law, [was] arbitrary and capricious, and [was] not supported by substantial evidence in the record." Judge Farmer entered an order on 8 January 1998 simply stating, "Upon consideration of the arguments presented and the record in this matter, it is, ORDERED, that the Final Decision of the [SPC] is hereby REVERSED, and this action is REMANDED to the [SPC] for further proceedings." Judge Farmer did not state his specific reasons for reversal or the issues to be resolved on remand. NCDOL filed notice of appeal to this Court on 30 January 1998.

The dispositive issue is whether Judge Farmer's order is sufficient to allow this Court to conduct the appropriate standard of review.

"The proper standard for the superior court's judicial review [of an administrative agency's decision] depends upon the particular issues presented on appeal." *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). If the petitioner asserts the agency's decision was not supported by competent evidence or was arbitrary and capricious, the superior court must apply the "whole record" test. *Id.* This test requires the review of all competent evidence to determine whether the agency's decision was supported by substantial evidence. *Id.* When a petitioner alleges an error of law in the agency's decision, the superior court must con-

duct a "de novo" review, considering the matter anew, and freely substituting its own judgment for the agency's judgment. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62, 468 S.E.2d 557, 559, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996). This Court reviews a superior court's order regarding an agency decision for any errors of law. *ACT-UP*, 345 N.C. at 706, 483 S.E.2d at 392. This requires "a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.*

The trial court, when sitting as an appellate court to review an administrative agency's decision, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review. It is not necessary, however, that it "make findings of fact and enter a judgment thereon in the same manner as the court would be when acting in its role as trial court." *Shepherd v. Consolidated Judicial Retirement System*, 89 N.C. App. 560, 562, 366 S.E.2d 604, 605 (1988).

In this case, the superior court's order reversing and remanding the SPC's decision is completely silent as to both the scope of review utilized and its application. We, therefore, are unable to determine whether the review was appropriate and properly conducted. Accordingly, we vacate the order and remand the case to the superior court for the entry of a new order consistent with this opinion.[1]

Vacated and remanded.

Judges JOHN and HUNTER concur.

1. We note that Judge Farmer has retired since the entry of this order. In the event Judge Farmer is not available for the entry of a new order, as required by this opinion, the Petition for Judicial Review must be reheard before another superior court judge and a new order entered at the conclusion of that hearing.

ROBERT WAYNE WHITLEY, PLAINTIFF v. RODNEY EUGENE KENNERY, JASON SIDNEY LEWIS, JOEL COLBURN LEWIS, II, AND CHERRY DOVER LEWIS, DEFENDANTS

No. COA98-1004

(Filed 16 February 1999)

Statute of Limitations— tolling—restitution

The trial court erred by dismissing a civil action for assault and battery based upon the conclusion that the one-year statute of limitations of N.C.G.S. § 1-54(3) was not tolled by N.C.G.S. § 1-15.1 because the court ordered restitution but did not set a specific amount. It is clear that the intent of N.C.G.S. § 1-15.1 is to toll the statute of limitations pending payment of all restitution, the court in this case clearly indicated that it was ordering restitution as a monetary condition and special condition of probation and the judge also clearly indicated that he was holding open the matter of restitution pending determination of insurance coverage. The statute of limitations remained tolled pending the entry of an order establishing the amount of restitution and the payment in full of that amount by defendants, or until the terms of the judgment are set aside and probation terminated.

Appeal by plaintiff from order entered 5 June 1998 by Judge Thomas W. Ross in Cabarrus County Superior Court. Heard in the Court of Appeals 25 January 1999.

Plaintiff appeals the trial court's dismissal of plaintiff's civil action against defendants for assault and battery. The trial court dismissed plaintiff's action on the grounds that it was barred by the one-year statute of limitations pursuant to G.S. 1-54(3) and furthermore that G.S. 1-15.1 did not operate to toll the statute of limitations.

As plaintiff was jogging on a sidewalk in Kannapolis on 17 September 1995, he was struck in the right eye by an egg thrown from a passing pickup truck occupied by defendants Robert Eugene Kennerly, Jason Sidney Lewis, and Joel Colburn Lewis, II. On 7 March 1996 defendants pled guilty to a criminal charge of assault with a deadly weapon and the court placed defendants on supervised probation for two years. As a monetary condition of probation, the court decreed that restitution was "[t]o be determined." As a special condition of probation, the court ordered "[r]estitution to be held open to [a] later date (until civil process is settled)." The court

identified plaintiff by name and address as the aggrieved party to receive restitution.

On 19 November 1997 plaintiff filed this civil action seeking damages for the injuries he incurred as a result of the assault. Defendants Kennerly and Lewis filed answers and asserted the statute of limitations as a defense, and entry of default was made against defendant Jason Lewis. The trial court heard defendants' motion to dismiss at the 11 May 1998 session of court. The trial court held that the one-year statute of limitation for assault and battery expired on 17 September 1996 and that G.S. 1-15.1 did not operate to toll the statute because the trial court in the criminal action had not ordered a specific amount of restitution. The court accordingly dismissed the action. Plaintiff appeals.

Wesley B. Grant and C. Todd Williford for plaintiff-appellant.

Michael A. Johnson, Jr., for Robert Eugene Kennerly, defendant-appellee.

Essex, Richard, Morris, Jordan & Matus, P.A., by Robert S. Blair, Jr., for Joel Colburn Lewis, II, defendant-appellee.

EAGLES, Chief Judge.

Plaintiff contends that the court erred by concluding that the one-year statute of limitation of G.S. 1-54(3) (1996) was not tolled by G.S. 1-15.1 (1996), which states in pertinent part:

> (a) Notwithstanding any other provision of law, if a defendant is convicted of a criminal offense and is ordered by the court to pay restitution or restitution is imposed as a condition of probation, special probation, work release, or parole, then all applicable statutes of limitation and statutes of repose, except as established herein, are tolled for the period set forth in this subsection for purposes of any civil action brought by an aggrieved party against that defendant for damages arising out of the offense for which the defendant was convicted. Any statute of limitation or repose applicable in the civil action shall be tolled from the time of entry of the court order
>
> (1) Requiring that restitution be made,
>
> (2) Making restitution a condition of probation or special probation, or

(3) Recommending that restitution be made a condition of work release or parole, and until the defendant has paid in full the amount of restitution ordered or imposed. Provided, however, in no event shall an action to recover damages arising out of the criminal offense be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

Defendants argue, and the trial court agreed, that by not setting a specific amount of restitution, the sentencing court did not enter an order of restitution. We cannot subscribe to this argument.

It is clear that the intent of G.S. 1-15.1 is to toll the statute of limitation pending payment of all restitution. While the sentencing court in the criminal case did not enter an order setting the amount of restitution, the court clearly indicated in the judgments that it was ordering restitution as a monetary condition and special condition of probation. The sentencing judge also clearly indicated in open court that he was holding open the matter of restitution pending the determination of insurance coverage and that he was going to "do what we can for Mr. Whitley."

We hold that the sentencing court in the criminal action effectively tolled the running of the statute of limitation for plaintiff's civil action when the court decreed that restitution was to be determined later. By operation of G.S. 1-15.1, the statute of limitation remained tolled pending the entry of an order establishing the amount of restitution and the payment in full of that amount by the defendants, or until the terms of the judgment are satisfied and probation terminated.

Accordingly, we reverse the trial court's order dismissing plaintiff's civil action for assault and battery and remand the case to the trial court for further proceedings.

Reversed and remanded.

Judges McGEE and HORTON concur.

IN THE MATTER OF THE APPEAL OF: STERLING DIAGNOSTIC IMAGING, INC. FROM THE APPRAISAL OF REAL PROPERTY BY TRANSYLVANIA COUNTY FOR 1997

No. COA98-538

(Filed 16 February 1999)

Taxation— appeal to Property Tax Commission—statement of claim—adequate

An appeal to the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review, was erroneously dismissed for failure to state a claim where the taxpayer asserted that the valuation was erroneous, arbitrary and illegal because it did not reflect true value, it was the result of an arbitrary or illegal appraisal method, it substantially exceeded true value, it failed to address the factors impacting the value of real property under N.C.G.S. § 105-317, it was premised on clerical, mathematical and/or appraisal errors, and it failed to properly adjust the value of the property based on its physical condition and layout as well as its economic and functional obsolescence. The taxpayer adequately stated a claim under N.C.G.S. § 105-287.

Appeal by taxpayer from order entered 25 March 1998 by the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 6 January 1999.

Hunton & Williams, by Jean Gordon Carter, Christopher G. Browning, Jr., and Albert Diaz, for taxpayer-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker, for Transylvania County-appellee.

PER CURIAM.

This appeal concerns the 1997 real property tax valuation of a manufacturing facility owned by Sterling Diagnostic Imaging, Inc. ("Sterling") and located in Transylvania County ("the County"). Sterling appealed the valuation to the County Board of Equalization and Review ("the Board") pursuant to section 105-287 of the North Carolina General Statutes. The Board denied Sterling's request to reduce the valuation, and Sterling appealed the decision to the North

Carolina Property Tax Commission ("the Commission"), sitting as the State Board of Equalization and Review. The County filed a motion to dismiss the appeal on the ground that "Sterling's pleadings fail to state a claim upon which relief can be granted." Following a hearing, the Commission granted the County's motion.

After reviewing the record and briefs and after hearing oral arguments, we conclude that the allegations in Sterling's pleadings were sufficient to state a claim for relief under section 105-287 of the General Statutes.

A taxpayer requesting modification of a tax valuation in a non-reappraisal year must allege that a justifiable cause under section 105-287 exists. *MAO/Pines Assoc. v. New Hanover County Bd. of Equalization*, 116 N.C. App. 551, 558, 449 S.E.2d 196, 200 (1994). Section 105-287 states that the tax assessor shall adjust a valuation to:

> (1) Correct a clerical or mathematical error[;]
>
> (2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment[; or]
>
> . . .
>
> (3) Recognize an increase or decrease in the value of the property resulting from a factor other than . . . [n]ormal, physical depreciation of improvements[,] [i]nflation, deflation, or other economic changes affecting the county in general[.]

N.C. Gen. Stat. § 105-287(a),(b) (1997).

In its Application for Hearing before the Commission, Sterling asserted that the 1997 valuation was erroneous, arbitrary and illegal because (1) it did not reflect true value; (2) it was the result of an arbitrary or illegal appraisal method; (3) it substantially exceeded true value; (4) it failed to address the factors impacting the value of real property under section 105-317 of the North Carolina General Statutes; (5) it was premised on certain clerical, mathematical and/or appraisal errors; and (6) it failed to properly adjust the value of the property based on its physical condition and layout, as well as its economic and functional obsolescence. Sterling adequately stated a claim under section 105-287 of the General Statutes, and the Commission erred in dismissing Sterling's appeal.

For the foregoing reasons, the order dismissing Sterling's appeal is reversed and this matter remanded to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

Panel consisting of:

LEWIS, WALKER, and TIMMONS-GOODSON, JJ.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 FEBRUARY 1999

BOGER v. GROCE No. 98-251	Davie (96CVS2)	No Error
COLLINS v. COLLINS No. 98-448	Surry (97CVS1357)	Dismissed
DEAL v. BAPTIST CHILDREN'S HOMES No. 98-699	Davidson (97CVS1566)	Affirmed
FLOYD v. LEWIS No. 98-1035	Vance (97CVD282)	Reversed and Remanded
GILLENWATER v. N.C. DEP'T. OF TRANSP. No. 98-515	Guilford (97CVS9013)	Reversed and Remanded
GREENE v. HUMPHREY No. 98-602	Burke (96CVS654)	Dismissed
GRIFFIN v. FONVILLE MORISEY REALTORS No. 98-659	Durham (97CVS02440)	Affirmed
GUNTER v. KIRKLAND No. 98-690	Swain (92CVS89)	Affirmed
HORTON v. HORTON No. 98-767	Person (97CVD200)	Affirmed in part, Reversed and remanded in part
HUCKABEE v. UNITED CAROLINA BANK No. 98-535	New Hanover (94CVS1870)	Affirmed
IN RE ALONSO No. 97-1140	Johnston (94J149)	Affirmed
IN RE GIBBS No. 98-630	Dare (97J38)	Affirmed
IN RE HONEYCUTT No. 98-988	Buncombe (94J186)	Affirmed
IN RE SVOBODA No. 98-409	Orange (97SPC1132)	Dismissed
IN RE SWINSON No. 98-606	Wilson (96J128)	Affirmed
JONES v. N.C. FARM BUREAU MUT. INS. CO. No. 98-263	Brunswick (96CVS192)	Affirmed

LATTIMORE v. MILLER No. 98-717	Wake (96CVS12532)	Affirmed
LEIGH v. ELIZABETH CITY HOUSING AUTH. No. 98-1186	Pasquotank (98CVD122)	Dismissed
N.C. FARM BUREAU MUT INS. CO. v. CALDWELL No. 98-708	Dare (96CVS492)	Affirmed
PARAMORE v. LILLEY No. 98-665	Beaufort (95CVS99)	Affirmed
PERSON COUNTY ex rel. HIGGS v. EWING No. 98-260	Person (97CVD91)	Vacated and Remanded
STATE v. BARBOUR No. 98-964	Wake (95CRS64915)	No Error
STATE v. BROWN No. 98-407	Forsyth (96CRS25218) (96CRS25219) (96CRS25220) (96CRS31202) (96CRS31203)	No Error
STATE v. CANDELARIA No. 98-831	Robeson (95CRS24286)	No Error
STATE v. CAULDER No. 98-842	Sampson (97CRS7137)	No Error
STATE v. CHANDLER No. 98-300	Randolph (95CRS11149)	No error at trial. Remanded for resentencing
STATE v. CHAVIS No. 98-365	Chatham (94CRS3886) (94CRS3887)	No Error
STATE v. COOKE No. 98-957	Gaston (97CRS20110)	No Error
STATE v. DAVIS No. 98-501	Rowan (96CRS13661)	Affirmed
STATE v. ESTRADA No. 98-461	Lee (97CRS3419)	No Error
STATE v. FUNDERBURK No. 98-497	Rowan (96CRS10390) (96CRS10391)	No Error

STATE v. GIOGLIO No. 98-866	Gaston (97CRS19419) (97CRS19421) (97CRS19416) (97CRS19417)	Vacated and Remanded
STATE v. GLOVER No. 98-733	Iredell (96CRS20428)	No Error
STATE v. GONZALES No. 98-965	Wake (94CRS63103) (94CRS63104)	Affirmed
STATE v. HARPER No. 98-984	Gaston (96CRS13574) (96CRS13575) (96CRS13576) (96CRS13577) (96CRS13578)	No Error
STATE v. HARRIS No. 98-440	Wake (97CRS17759) (97CRS17762) (97CRS17763) (97CRS23180)	No Error
STATE v. HOWELL No. 98-1090	Johnston (98CRS1664)	No Error
STATE v. JACKSON No. 98-836	New Hanover (97CRS13562) (97CRS13563) (97CRS13564) (97CRS13779) (97CRS13780)	No Error
STATE v. JAMES No. 98-1069	Mecklenburg (97CRS30489)	No Error
STATE v. JARMAN No. 98-893	Craven (97CRS4489)	No Error
STATE v. JOHNSON No. 98-563	New Hanover (95CRS23224)	Affirmed
STATE v. JONES No. 98-415	McDowell (97CRS2820)	No Error
STATE v. KIMMER No. 98-479	Yadkin (96CRS2181) (96CRS2182)	No Error
STATE v. LOVE No. 98-1019	Alamance (95CRS31581)	Affirmed

STATE v. McCOY No. 98-1112	Guilford (98CRS23277)	No Error
STATE v. MINOR No. 98-778	Guilford (95CRS074714)	No Error
STATE v. MURRAY No. 98-969	Guilford (97CRS82255)	No Error
STATE v. PERRY No. 98-482	Iredell (96CRS20435) (96CRS20436)	Case number 96CRS20435— Reversed Case number 96CRS20436— No Error
STATE v. RODRIGUEZ No. 98-994	Forsyth (97CRS23209) (97CRS23210) (97CRS23211) (97CRS23212)	No Error
STATE v. SAUNDERS No. 98-796	Mecklenburg (94CRS49477)	No Error
STATE v. SCOTT No. 98-427	Halifax (96CRS8215)	No Error
STATE v. SIZEMORE No. 98-974	Rutherford (95CRS3137)	No Error
STATE v. SOLOMON No. 98-629	Martin (97CRS1984)	No Error
STATE v. SURRETT No. 98-347	Haywood (97CRS2178) (97CRS2179) (97CRS2180) (97CRS790) (97CRS791) (97CRS846) (97CRS847) (97CRS1393) (97CRS1394) (97CRS2181)	No Error
STATE v. SUTTON No. 98-546	Greene (97CRS63) (97CRS64)	No Error
STATE v. WALLACE No. 98-1012	Guilford (97CRS79092)	No Error
STATE v. WESTFIELD No. 98-905	Guilford (97CRS62636)	No Error

STATE v. WHEELER No. 98-925	Alamance (97CRS376) (97CRS377) (97CRS378) (97CRS379)	Reversed as to conspiracy to sell and/or deliver a controlled substance with A. Smith (97CRS377) No error as to 97CRS376, 97CRS378 and 97CRS379
STATE v. WILLIAMS No. 98-1049	Wake (97CRS13434) (97CRS13435) (97CRS13369)	No error in trial; Vacated and remanded for resentencing in 97CRS1434
WICKLINE v. MOORE No. 98-895	Duplin (97CVS794)	Affirmed
WILLIAMS v. AIKENS No. 98-491	Edgecombe (96CVS980)	Affirmed

WELLS v. WELLS

[132 N.C. App. 401 (1999)]

BETTY JEWEL WELLS, PLAINTIFF v. WILLIAM ARNOLD WELLS, DEFENDANT

No. COA98-230

(Filed 2 March 1999)

1. Appeal and Error— appealability—interlocutory order—post-separation support—specific performance of separation agreement

The trial court's grant of defendant's specific performance counterclaim in an action arising from a separation agreement and a subsequent post-separation support claim was properly reviewable on appeal even though not referenced in plaintiff's formal notice of appeal where the order was a nonappealable interlocutory order indisputably involving the merits and necessarily affecting the final judgment and which was challenged within an assignment of error. The portion of the order denying plaintiff's post-separation support motion was not before the court on appeal where plaintiff neither referenced in her assignments of error nor argued in her appellate brief any assertion of error regarding that denial on that date. Although the better practice would be to designate each order appealed from in a notice of appeal, where the intent to appeal an intermediate interlocutory order is clear from the record, such order may be reviewed upon appeal of a final judgment notwithstanding failure of the order to be specifically mentioned in the notice of appeal.

2. Divorce— alimony and support—notice of hearing

A portion of a trial court order granting defendant's claim for specific performance of a separation agreement was vacated as being outside the authority of the trial court where plaintiff contended that she had no reason to believe that the hearing was to be determinative of any issue other than post-separation support and nothing in the record reflects that defendant's specific performance action was tried upon notice or with the express or implied consent of the parties.

3. Divorce— alimony—post-separation support hearings—not binding on subsequent proceedings

The trial court erred by entering summary judgment on plaintiff's alimony claim based upon findings regarding reconciliation and the validity of a separation agreement in a prior post-separation support proceeding. Upon a post-separation support motion,

the trial court must inquire into the case and weigh the circumstances presented against the statutory factors to determine issuance of a PSS award, but such consideration of the then-existing circumstances decides the issues for the PSS hearing only.

4. Collateral Estoppel and Res Judicata— post-separation support hearing—subsequent proceedings

The trial court erred by granting summary judgment on an alimony claim on the basis of collateral estoppel arising from a previous post-separation support proceeding. PSS rulings act as temporary determinations on the issues and those orders are interlocutory and do not constitute a final judgment.

Appeal by plaintiff from summary judgment filed 21 November 1997 by Judge Rebecca W. Blackmore in New Hanover County District Court. Heard in the Court of Appeals 8 October 1998.

John K. Burns, for plaintiff-appellant.

Lineberry and White, L.L.P., by Chas. M. Lineberry, Jr., for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's 21 November 1997 grant of summary judgment in favor of defendant. Plaintiff contends the trial court erred by ruling that "collateral estoppel precludes [her] from relitigating" issues previously ruled upon at a postseparation support (PSS) hearing. We reverse the trial court.

Pertinent undisputed facts and relevant procedural history include the following: Plaintiff and defendant were married 14 September 1965 and separated 27 October 1990. In May 1992, the parties executed a separation agreement (the agreement), the terms of which included, *inter alia*, waiver of temporary and permanent alimony and the requirement that defendant pay plaintiff $500.00 per month for five years, retroactive to October 1990. These payments were made each month until October 1993.

On 15 October 1993, defendant moved into plaintiff's apartment, remaining there until on or about 7 March 1994, when he obtained his own residence. In April 1994 and subsequent months, defendant made the $500.00 payments required by the agreement.

On 4 October 1995, plaintiff filed a "Complaint for Alimony and Motion for Postseparation Support" pursuant to N.C.G.S. § 50-16.1A (1995). The section became effective as to civil actions filed on or after 1 October 1995, on which date N.C.G.S. § 50-16.1 (*repealed by* 1995 N.C. Sess. Laws ch. 319, § 1, effective October 1, 1995), the alimony *pendente lite* (APL) statute, was repealed.

In a separate action, defendant was granted an absolute divorce from plaintiff on 13 October 1995. Plaintiff filed a calendar request for the PSS motion on 8 November 1995, seeking to be heard 20 November 1995. Defendant subsequently filed an "Answer and Counterclaim" on 13 November 1995, asserting, *inter alia*, execution of the agreement as "a complete bar to the Plaintiff's claims under N.C.G.S. § 50-16.1A *et seq.*," *see* N.C.G.S. § 50-16.6(b) (1995) ("[a]limony, postseparation support, and counsel fees may be barred by an express provision of a valid separation agreement . . . so long as the agreement is performed"), and asserting a counterclaim for specific performance of the agreement.

The parties agree that at the 20 November 1995 hearing the trial court heard live testimony, that defendant relied upon the agreement as a defense to an award of PSS, and that the issue was raised regarding whether the parties' period of joint residence constituted a reconciliation. *See Stegall v. Stegall*, 100 N.C. App. 398, 403-04, 397 S.E.2d 306, 309-10 (1990), *disc. review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991), and *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976) (reconciliation of parties voids executory provisions of a separation agreement).

In an order filed 12 January 1996, the trial court included the following pertinent findings of fact:

> 20. The parties, notwithstanding their common residence from 15 October 1993 to 7 March 199[4] [*sic*], have not reconciled, and have continuously acted in accordance with the terms and conditions of the Separation Agreement.
>
> 21. . . . Plaintiff accepted the housing and resided with the Defendant for financial reasons only.
>
> 22. The Separation Agreement that the parties entered into on or about 21 May 1992 has remained in full force and effect.

The court further concluded as a matter of law that:

> 3. The Defendant is entitled to specific performance of the Separation Agreement . . . on the grounds that the parties' common residence does not qualify as a reconciliation, and that the terms and conditions contained in the Separation Agreement constitutes a complete bar to Plaintiff's claims for post-separation support.

The trial court thereupon denied plaintiff's motion for PSS. In addition, it ordered that "[d]efendant's claims for specific performance of the Separation Agreement are hereby granted."

On 8 July 1996, defendant moved for summary judgment on plaintiff's alimony claim. Defendant argued there remained no issue of material fact in view of the trial court's determination at the earlier hearing that there had been no reconciliation and that the agreement containing plaintiff's waiver of alimony was enforceable.

At the summary judgment hearing on 21 November 1997, the trial court found as fact that

> 3. At a hearing in November 1995, on Plaintiff's claim for post-separation support, testimony was solicited, evidence was presented, counsel gave argument on the facts concerning whether the parties had reconciled. Consequently the facts were actually litigated by the parties.
>
> . . . .
>
> 5. The resolution of the issue of reconciliation was essential to the determination of specific performance . . . . As a result, these issues are now precluded from further litigation in Plaintiff's claim for permanent alimony.

The trial court then concluded as a matter of law that:

> 2. Collateral Estoppel precludes the Plaintiff from relitigating the issue of specific performance of the parties'[][*sic*] May 1992 Separation Agreement, and hence, Plaintiff's claim for permanent alimony.

Based on the foregoing, the trial court granted defendant's motion for summary judgment and denied plaintiff's claim for permanent alimony. Plaintiff appeals.

[1] Preliminarily, we address defendant's suggestion that plaintiff's failure to enter notice of appeal upon entry of the trial court's 12 January 1996 order precludes our consideration thereof. In *Rowe v. Rowe*, 131 N.C. App. 409, 507 S.E.2d 317 (1998), this Court held the order of a trial court granting PSS was interlocutory and not subject to immediate appeal:

> 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, since a postseparation support order is a temporary measure, it is interlocutory . . . and it is not appealable.

Id. at 411, 507 S.E.2d at 319; *see also Stephenson v. Stephenson*, 55 N.C. App. 250, 252, 285 S.E.2d 281, 282 (1981) (alimony *pendente lite* awards interlocutory and not immediately appealable).

Although plaintiff did not attempt immediate appeal of the 12 January 1996 order, in light of the attack in her second assignment of error upon the trial court's grant of defendant's specific performance claim in said order, we note the recent decision of our Supreme Court in *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 510 S.E.2d 156 (1999).

Floyd addressed the issue of jurisdiction of the appellate court to review earlier trial court orders in a matter wherein

> the notice of appeal referred solely to the trial court's final judgment entered after the jury's verdict and made no reference to other orders entered at trial which plaintiffs sought to appeal.

Id. at 50, 510 S.E.2d at 158. The Supreme Court examined the nature of the earlier order complained of, determined it to have been interlocutory and not subject to immediate appeal, and concluded, citing N.C.G.S. § 1-278 (1996) (upon "appeal from a judgment, the [appellate] court may review any intermediate order involving the merits and necessarily affecting the judgment"), that

> a party seeking to appeal from a nonappealable interlocutory order must wait until final judgment is rendered and may then proceed as designated in [N.C.R. App. P.] 3(d).

Id. at 51, 510 S.E.2d at 158. Under *Floyd*, therefore, although we caution that the better practice without doubt would be to designate each order appealed from in an appellant's notice of appeal, where the intent to appeal an intermediate interlocutory order "is quite clear

from the record," *id.* at 52, 510 S.E.2d at 159, such order may be reviewed upon appeal of a final judgment notwithstanding failure of said order to be "specifically mentioned in the notice of appeal," *id.*

By contrast with the trial court's 12 January 1996 grant of defendant's specific performance claim, plaintiff has neither referenced in her assignments of error nor argues in her appellate brief any assertion of error regarding denial of her PSS motion on that same date. That portion of the trial court's 12 January 1996 order thus is not before us. *See* N.C.R. App. P. 10(a) ("scope of review on appeal is confined to a consideration of those assignments of error set out in the record").

However, we conclude that we may properly consider the trial court's 12 January 1996 allowance of defendant's specific performance counterclaim. This order was "final . . . as to one or more but fewer than all of the claims," N.C.G.S. § 1A-1, Rule 54(b) (1990), and therefore interlocutory and not subject to immediate appeal, *see Fliehr v. Fliehr*, 56 N.C. App. 465, 466, 289 S.E.2d 105, 106 (1982) (order for child support "entered in conjunction with orders awarding alimony *pendente lite*" not appealable "until entry of a final order on the plaintiff's claim for permanent alimony"), save under circumstances not present *sub judice*, *see First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 246, 507 S.E.2d 56, 60 (1998) (interlocutory order immediately appealable only if trial court properly certifies "there is no just reason to delay the appeal" or order "deprives the appellant of a substantial right which would be lost absent immediate review"). As a nonappealable interlocutory order indisputably "involving the merits and necessarily affecting the [final] judgment," G.S. § 1-278; *Floyd*, 350 N.C. at 51, 510 S.E.2d at 159, which is challenged within plaintiff's second assignment of error in the instant appeal, the trial court's 12 January 1996 grant of defendant's specific performance counterclaim thus is properly reviewable on appeal even though not referenced in plaintiff's formal notice of appeal, *see id.* at 52, 510 S.E.2d at 159.

[2] We therefore examine the trial court's directive in the 12 January 1996 order that

> Defendant's claims for specific performance of the Separation Agreement are hereby granted, and Plaintiff is hereby ordered and directed to specifically perform and abide by the terms and conditions of the Separation Agreement entered into on 21 May 1992.

As noted above, plaintiff instituted her action 4 October 1995; on 8 November 1995, she filed and served upon defendant a calendar request seeking hearing of the PSS motion at the 20 November 1995 Non-Jury Session of New Hanover County District Court, "Monday Motion Session," indicating one hour as the "length of time required" for hearing. On 13 November 1995, defendant filed his Answer and Counterclaim, asserting the agreement as an affirmative defense to plaintiff's claims for PSS and alimony as well as counterclaiming for specific performance of the agreement.

The record contains no indication defendant filed either a motion for summary judgment as to plaintiff's PSS motion and alimony claims based upon the agreement or served notice of any motion hearing or trial upon plaintiff. Indeed, in arguing her second assignment of error, plaintiff aptly complains,

> plaintiff had no reason to believe that the November 1995 hearing was [to be] determinative of any issue other than the issue of her entitlement to postseparation support.

On 12 January 1996, *nunc pro tunc* 20 November 1995, the trial court filed its order denying PSS to plaintiff and granting defendant's counterclaim for specific performance of the agreement. The order recited the matter had been heard at the "20 November 1995 Monday Motion Session of the District Court for New Hanover County."

It is fundamental that

> [t]he right to notice and an opportunity to be heard on motions filed in a lawsuit is critically important to the non-movant and cannot be considered an insubstantial or inconsequential omission on the part of the movant and the court. The non-movant "has a right to resist the relief sought by the motion and principles of natural justice demand that his rights not be affected without an opportunity to be heard . . . ."

Pask v. Corbitt, 28 N.C. App. 100, 104, 220 S.E.2d 378, 382 (1975) (citations omitted). Further,

> if the adverse party appears for any reason to be entitled to be heard in opposition to the whole or any part of the relief sought, the application must be made on notice to such adverse party.

Id. at 104, 220 S.E.2d at 381 (citations omitted).

In the case *sub judice*, the record fully sustains plaintiff's position that

> there was no notice to the plaintiff that the hearing was to include a final adjudication, for both her postseparation support and her permanent alimony claims, of the critical issues of reconciliation and enforcement of the separation agreement.

As plaintiff notes, the case had been pending a mere six weeks at the time of hearing and defendant had filed his answer and counterclaim only a week earlier, *see* N.C.G.S. § 1A-1, Rule 6(d) (1990) (written motion and notice of hearing thereof "shall be served not later than five days" before the time fixed for hearing), at which point the time for discovery had barely commenced, *see* Gen. R. Pract. Super. and Dist. Ct. 8 (discovery is "to begin promptly" and is "authorized to begin even before the pleadings are completed"). Plaintiff's notice of hearing served upon defendant indicated the matter at issue was plaintiff's PSS motion and that one hour was the estimated time of hearing. Defendant neither filed nor served upon plaintiff any corresponding notice to hear or request for trial of his specific performance action. Indeed, the matter was not placed on a trial calendar, but rather the "Monday Motion Session of the District Court," presumably limited to the hearing of motions, *see* Gen. R. Pract. Super. and Dist. Ct. 6 ("[m]otions may be heard . . . either at the pre-trial conference or on motion calendar").

While defendant emphasizes that evidence was presented regarding his affirmative defense grounded upon the agreement, and while participation in a hearing may constitute waiver of notice of a motion, *see Brandon v. Brandon*, 10 N.C. App. 457, 461, 179 S.E.2d 177, 180 (1971), the valid agreement defense indisputably was applicable to the matter actually noticed for hearing, *i.e.*, the PSS motion. No transcript of the 20 November 1995 hearing was filed with this Court, and nothing in the instant record indicates either plaintiff or defendant considered the latter was simultaneously advancing his specific performance action at the hearing or that he sought a ruling thereon from the trial court. Rather, it appears defendant was resisting the PSS motion with evidence of what he contended was a valid separation agreement, *see* G.S. § 50-16.6(b), and that the trial court "gratuitously declared," *Dorn v. Dorn*, 52 N.C. App. 370, 372, 278 S.E.2d 281, 283 (1981), that "defendant [wa]s entitled to specific performance of the Separation Agreement."

In short, nothing in the record reflects that defendant's specific performance action was tried upon notice or with the express or implied consent of the parties. Accordingly, and particularly in view of the lack of notice and other circumstances discussed above, we vacate that portion of the trial court's 12 January 1996 order granting defendant's specific performance claim as void and of no effect in consequence of being outside the authority of the trial court. *See Briggs v. Briggs*, 234 N.C. 450, 67 S.E.2d 349 (1951) (at APL hearing where APL denied for want of proof of grounds, trial court lacked jurisdiction and authority to dismiss alimony claim because case "was not before the court on final hearing on the merits"), *Bond v. Bond*, 235 N.C. 754, 755, 71 S.E.2d 53, 54 (1952) (trial court at APL hearing "correctly denied" that motion but improperly dismissed alimony claim, the latter being ordered "reinstated . . . for trial" because case was not before trial court for final hearing on merits and court was without jurisdiction to dismiss alimony claim), *Allred v. Tucci*, 85 N.C. App. 138, 143, 354 S.E.2d 291, 295, *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987) (citing *Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952)) (where court acts in excess of its authority "its judgment . . . is void and of no effect"; "a void judgment may be attacked whenever and wherever it is asserted, without any special plea"), and *Amodeo v. Beverly*, 13 N.C. App. 244, 245, 184 S.E.2d 922, 923 (1971) (pre-trial order "amount[ing] to summary judgment against plaintiff on at least one of the issues" vacated in that "[d]efendants had not moved for summary judgment and plaintiff had no notice that such was being considered"). Defendant's counterclaim for specific performance is thus reinstated for resolution in the trial court.

[3] There remains the issue of the binding effect, if any, of the findings and conclusions supporting the trial court's 12 January 1996 denial of plaintiff's PSS motion, not challenged on appeal. In essence, plaintiff argues the trial court's PSS order was not a final ruling, but rather an interlocutory order effective only until the rendering of a permanent alimony decision. Therefore, continues plaintiff, determinations contained in the PSS order would not be binding in subsequent proceedings, and the trial court erred in entering summary judgment as to plaintiff's alimony claim because there continued for purposes of that claim a genuine issue of material fact as to the reconciliation of the parties and the consequent issue of enforceability of the agreement. *See* N.C.G.S. § 1A-1, Rule 56(c) (1990), and *Goins v. Puleo*, 130 N.C. App. 28, 32, 502 S.E.2d 621, 623 (1998).

Defendant responds that the trial court's PSS order regarding reconciliation and validity of the agreement was conclusive because these issues were fully litigated and resolved in defendant's favor, thereby barring plaintiff's alimony claim under the principle of collateral estoppel. Comparison of the legislative purposes and procedural directives regarding PSS and APL may be helpful to resolution of this question.

APL was statutorily defined as "alimony ordered to be paid pending the final judgment of divorce . . . ," G.S. § 50-16.1(2) (repealed), the purpose thereof being to afford funds to a dependent spouse for subsistence pending trial and to employ counsel. *Haywood v. Haywood*, 95 N.C. App. 426, 429, 382 S.E.2d 798, 800 (1989), *rev'd in part on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993).

Section 50-16.1A defines PSS 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.

G.S. § 50-16.1A(4). PSS, as was APL, is "primarily designed to function as a means of securing temporary support for a dependent spouse in an expedited manner." Sally B. Sharp, *Step By Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C.L. Rev. 2090 (1998). Thus PSS, like APL, is "only intended to be temporary and ceases when an award of alimony is either allowed or denied by the trial court." *Rowe*, 131 N.C. App. at 411, 507 S.E.2d at 319.

Further, in view of their temporary nature, PSS orders are interlocutory and not subject to immediate appeal. *Id.* Likewise, orders granting APL were interlocutory and not immediately appealable. *Stephenson*, 55 N.C. App. at 252, 285 S.E.2d at 282 (orders allowing APL interlocutory and not immediately appealable).

In addition, upon application for a PSS award

> the court may base its award on a *verified pleading, affidavit*, or other competent evidence.

N.C.G.S. § 50-16.8 (amended 1995) (emphasis added). This is akin to the previously prescribed procedure upon application for an APL award:

> the parties shall be heard *orally, upon affidavit, verified pleading*, or other proof.

G.S. § 50-16.8(f) (*amended by* 1995 N.C. Sess. Laws ch. 319, § 12, effective October 1, 1995). In other words, under both statutory schemes, the trial court might grant or deny awards based upon paper filings at abbreviated hearings conducted early in the litigation process and prior to significant discovery.

Moreover, as a noted authority in domestic relations law points out, given the "relative brevity" of the factors guiding PSS awards, *see* N.C.G.S. § 50-16.2A (1995), compared with the extensive list of fifteen factors governing the amount of an alimony award, *see* N.C.G.S. § 50-16.3A(b) (1995), it is apparent that

> postseparation support contemplates a rather truncated examination of the parties' needs and assets. [Further,] given the fact that this section clearly looks at short-term, rather easily calculable, economic characteristics of the individuals to a marriage, the statutory factors [set out in G.S. § 50-16.2A] coincide very neatly with the purposes of postseparation support—to function almost as a stop-gap measure to provide some support to a dependent spouse prior to the discovery of the data necessary for an alimony . . . hearing.

S. Sharp, 76 N.C.L. Rev. at 2092.

Next, the concept of changed circumstances affecting entitlement to spousal support which may occur between the PSS order and the alimony trial also indicates that the temporary character inherent in APL similarly underlies the new PSS statute. In PSS motion hearings, as was the case in APL hearings, the trial court renders a preliminary determination as to whether a dependent spouse is entitled to support pending a final hearing on the merits. *See* G.S. §§ 50-16.2A(c) and 50-16.3A(a).

The pertinent PSS statute provides:

> . . . a dependent spouse is entitled to an award of postseparation support if, based on consideration of the factors specified in subsection (b) of this section the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.

G.S. § 50-16.2A(c).

> The APL statute allowed temporary support for
>
> (a)(2) . . . [a] dependent spouse [that] has not sufficient means whereon to subsist during the prosecution or defense of the suit . . . .
>
> (b) The determination of the amount and the payment of [APL] shall be in the same manner as alimony . . . .

N.C.G.S. § 50-16.3(a)(2) and (b) (*repealed by* 1995 N.C. Sess. Laws ch. 319, § 1, effective October 1, 1995).

> Under APL,
>
> [c]hanges in circumstances . . . which occur[red] after the entry of an order for alimony *pendente lite* m[ight be considered to] . . . affect the dependent spouse's entitlement to support, *as there ha[d] been no permanent adjudication of that entitlement.*

Brown v. Brown, 85 N.C. App. 602, 605, 355 S.E.2d 525, 527, *disc. review denied*, 320 N.C. 511, 358 S.E.2d 516 (1987) (emphasis added); *see also Sprinkle v. Sprinkle*, 17 N.C. App. 175, 178, 193 S.E.2d 468, 471 (1972) (issues at APL hearing "not the same as those presented by a claim for . . . alimony"). In like manner, changes in circumstance occurring between issuance of a PSS order and the permanent alimony hearing may well affect dependency status as well as other material issues, *see* S. Sharp, 76 N.C.L. Rev. at 2036-2040, thereby mitigating against the conclusion that entitlement findings by the trial court during a PSS hearing are final and binding at subsequent proceedings.

We also note that the issue of "fault" may play a different role in determining entitlement to PSS and to alimony. For example, the trial court must refuse to grant alimony upon a finding the dependent spouse engaged in illicit sexual behavior, G.S. § 50-16.3A(a), whereas such behavior operates merely as a consideration in determining whether to award PSS, G.S. § 50-16.2A(d).

Further, although a jury trial was not sought in the pleadings *sub judice*, G.S. § 50-16.3A(d) provides:

> In the claim for alimony, either spouse may request a jury trial on the issue of marital misconduct as defined in G.S. 50-16.1A. If a jury trial is requested, the jury will decide whether either spouse or both have established marital misconduct.

However, G.S. § 50-16.2A(d) states:

> At a hearing on postseparation support, the judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support . . . . When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.

In thus mandating resolution of the factual circumstance of marital misconduct by the trial court at PSS hearings, but retaining the right to a jury trial for ultimate factual disposition of marital misconduct issues, the General Assembly unmistakably signaled its intent that factual determinations by the trial court at PSS hearings would not conclusively resolve those issues nor bind the ultimate trier of fact thereon. *See N.C. Div. of Sons of Confederate Vets. v. Faulkner*, 131 N.C. App. 775, 779, 509 S.E.2d 207, 210 (1999) ("a well-established tenet of statutory construction [is] that the intent of the General Assembly controls," and "[i]n ascertaining this intent, we 'assume that the Legislature comprehended the import of the words it employed' ").

Similarly, "the trial court's findings in an [APL] motion [we]re solely for the purpose of that motion." *Perkins v. Perkins*, 85 N.C. App. 660, 666, 355 S.E.2d 848, 852, *disc. review denied*, 320 N.C. 633, 360 S.E.2d 92 (1987). Further, the determinations set forth in an APL order "form[ed] no part of the ultimate relief sought, [and] d[id] not affect the final rights of the parties." *Peele v. Peele*, 216 N.C. 298, 300, 4 S.E.2d 616, 618 (1939); *see also Bumgarner v. Bumgarner*, 231 N.C. 600, 601, 58 S.E.2d 360, 360 (1950) (facts found at APL hearing "not binding on the parties nor receivable in evidence on the trial of the issues"), *Flynt v. Flynt*, 237 N.C. 754, 757, 75 S.E.2d 901, 903 (1953) (ruling at APL hearing had "no bearing whatever on the merits" of permanent alimony claim "for the very simple reason that [the alimony claim] was not involved in any way in the matter there heard and decided"), *Hall v. Hall*, 250 N.C. 275, 277, 108 S.E.2d 487, 488 (1959) (APL findings "not binding on the parties"), and *Harris v. Harris*, 258 N.C. 121, 124, 128 S.E.2d 123, 125 (1962) ("ultimate rights of the parties at the final hearing" not affected by APL findings).

In comparing PSS to APL, therefore, we hold PSS effectively replaced APL and must in general operate under the same principles.

To treat PSS otherwise would deter many dependent spouses from seeking needed support for fear they would be bound by a ruling based on incomplete evidence.

Prior to applying the foregoing to the case *sub judice*, however, we observe that one writer has perceived a distinction between the PSS and APL statutes giving rise, in the opinion of the writer, to creation of a "window" through which PSS orders might become final. *See* Nancy E. LeCroy, Note, *Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements*, 74 N.C.L. Rev. 2128, 2143-44 n.105 (1995). The writer points out that the APL statute contained explicit language providing that such awards were to be paid "pending the final judgment of divorce. . . ." G.S. § 50-16.1(2) (repealed). However, the PSS statute contains no exact termination event, but rather provides payment "until the *earlier of either* the date specified in the order . . . or an order awarding or denying alimony." G.S. § 50-16.1A(4) (emphasis added). Therefore, concludes the writer,

> if an effective date of termination for postseparation support payments is specified in neither the postseparation support order, nor in the order awarding or denying alimony, the postseparation support payments may continue indefinitely if the dependent spouse never sues for alimony (or at least until an effective alimony award would have terminated, that is, when the dependent spouse remarried, cohabitated, or died).

N. LeCroy, 74 N.C.L. Rev. at *id.*

Notwithstanding, we view the hypothetical occurrence of the foregoing circumstance as arising not from the intended application of the statute, but rather from failure of the trial court to designate a termination date in the PSS order. The statutory language, "until the *earlier of either*," G.S. § 50-16.1A(4) (emphasis added), would appear to contemplate as the better practice that each PSS order set forth a termination date against which the trial court in a subsequent alimony proceeding may gauge which event occurred "earlier" for purposes of termination of PSS.

We turn now to defendant's contention that the parties fully litigated and the court considered and ruled upon the merits of the valid separation agreement defense during the PSS hearing, and that

the trial court in subsequent proceedings would be bound by the earlier rulings. Based upon the preceding discussion, we reject this argument.

During APL hearings, the trial court was to "look into the merits of the action, so far as they [we]re then disclosed" so as to determine whether to grant temporary alimony. 24 Am. Jur. 2d *Divorce and Separation* § 566 (1983). Similarly, upon a PSS motion, the trial court must inquire into a case and weigh the circumstances presented against the statutory factors in order to determine issuance of a PSS award. However, such consideration of the then-existing circumstances does not act to "determine in advance the ultimate outcome of the [alimony] suit," *id.*, *see also Flynt*, 237 N.C. at 757, 75 S.E.2d at 903 (ruling at APL hearing had "no bearing whatever on the merits" of permanent alimony claim), but rather decides the issues for the PSS hearing only.

[4] Notwithstanding, defendant counters that plaintiff is collaterally estopped from re-litigating the reconciliation issue at later proceedings because it was determined at the PSS hearing. We do not agree.

Under collateral estoppel, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit . . . ." *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986). However, as we have determined that PSS rulings act as temporary determinations on the issues and that PSS orders are interlocutory and do not constitute a "final judgment," *see Rowe*, 131 N.C. App. at 411, 507 S.E.2d at 319; *see also Coleman v. Coleman*, 74 N.C. App. 494, 497, 328 S.E.2d 871, 873 (1985) ("[g]iven the interlocutory nature" of APL order, it does not constitute a "final judgment, order, or proceeding" which might properly be the "subject of a G.S. 1A-1, Rule 60(b) motion" for relief from judgment), collateral estoppel would not operate to preclude subsequent litigation of the issues of the parties' reconciliation and validity of the agreement. Accordingly, the trial court erred in granting summary judgment in favor of defendant on the basis of collateral estoppel.

In sum, the trial court's 12 January 1996 allowance defendant's specific performance claim is vacated, the court's 21 November 1997 grant of summary judgment in favor of defendant is reversed, and this case is remanded for further proceedings not inconsistent with the opinion herein.

Reversed and remanded.

Judges McGEE and HORTON concur.

EVERETTE B. BARNARD AND WIFE, DIANE S. BARNARD, PLAINTIFFS v. BOBBY ROWLAND, D/B/A BOBBY ROWLAND TIMBER & LOGGING, DEFENDANT & THIRD-PARTY PLAINTIFF v. JAMES M. FIFE AND WIFE, MICHELLE H. FIFE, THIRD-PARTY DEFENDANTS

No. COA97-1411

(Filed 2 March 1999)

1. Appeal and Error— briefs—type size—double costs

Double costs were assessed for violation of N.C.R. App. P. 26(f) where both briefs violated type size restrictions.

2. Trespass— wrongful cutting of timber—sufficiency of evidence

The trial court did not err in a trespass action arising from the cutting of timber by submitting to the jury plaintiff-Barnards' trespass claim or by denying defendant Roland's JNOV motion where the parties stipulated that the Barnards owned the property subject to the alleged trespass, and, viewed in the light most favorable to plaintiffs, the testimony at trial indicated that defendant Roland entered upon the Barnards' land without authorization, proceeded to cut timber, and that the Barnards were damaged thereby.

3. Damages and Remedies— punitive damages—trespass and wrongful cutting of timber—double recovery

The trial court erred in a trespass action arising from the cutting of timber by submitting the issue of punitive damages to the jury where plaintiffs sought damages for the value of the timber cut and the diminution in value of their land but elected to seek recovery under N.C.G.S. § 1-539.1 and relinquished any claim for punitive damages attendant to the common law claim. A plaintiff suing for unlawful cutting or removal of timber may recover either the difference in value of the property immediately before and after the cutting, in addition to punitive damages if appropriate under the facts, or the value of the timber itself doubled by

operation of N.C.G.S. § 1-539.1(a), but not both. Collecting punitive damages under common law and statutory double damages would amount to double recovery.

4. Contracts— wrongful interference—directed verdict

The trial court did not err by granting plaintiffs' motion for a directed verdict on a counterclaim for wrongful interference with contract arising from a claim for wrongful cutting of timber. The record fails to reveal the requisite scintilla of evidence that plaintiffs acted without justification in opposing the logging operations; rather, as owner of adjoining real estate, plaintiffs' interest in protecting their property from unauthorized logging activities was without doubt reasonable and bona fide.

5. Contracts— impossibility of performance and prevention—no instruction—no prejudice

The trial court did not err in an action arising from the cutting of timber by not instructing the jury on the doctrine of impossibility of performance. In assessing and denying the third-party plaintiff's claim that the third-party defendants breached the timber contract, the jury necessarily considered whether it was impossible for the defendant and third-party plaintiff to have performed the contract or whether the third-party defendants prevented him from doing so.

6. Contribution— instruction not given—no prejudice

There was no prejudice in an action arising from the cutting of timber where the court failed to charge the jury on contribution because the jury determined that defendant trespassed "purposefully" and the trespass was thus not a result of a misrepresentation of property lines by the party letting the contract, so that defendant had no claim for contribution.

Appeal by defendant and third-party plaintiff from judgment entered 17 February 1997 by Judge Ted Blanton in Rowan County District Court. Heard in the Court of Appeals 4 June 1998.

J. Stephen Gray for defendant and third-party plaintiff.

B.S. Brown, Jr., for plaintiffs.

Inge and Doran, by Michael Doran, for third-party defendants.

JOHN, Judge.

Defendant and third-party plaintiff Bobby Rowland (Rowland) appeals the trial court's denial of his motions pursuant to N.C.G.S. § 1A-1, Rule 50(b) (1990) for directed verdict and for judgment notwithstanding the verdict (JNOV). Rowland also contends the court erred by: (1) granting the directed verdict motion of plaintiffs Everette and Diane Barnard (the Barnards) on Rowland's claim of tortious interference of contract; and (2) failing to instruct the jury properly on the doctrines of impossibility of performance and prevention, and contribution. For the reasons discussed herein, we affirm in part, vacate in part, and remand with further instructions.

Pertinent facts and procedural history include the following: In early March 1995, Rowland entered into an oral agreement with third-party defendants James and Michelle Fife (the Fifes) for cutting and removal of timber located on the Fifes' property in Rowan County. Under the agreement, Rowland paid the Fifes $3,200.00 for a quantity of timber cut from their property, the exact amount of timber logged being disputed by the parties.

The Fifes, whose property adjoined that of the Barnards, did not designate to Rowland the precise boundaries of their tract. Regarding the Fife/Barnard boundary, however, Mr. Fife informed Rowland that a barbed and electric wire fence approximated the property line, and that if Rowland remained five to ten feet inside the fence, he "would definitely be all right."

Rowland commenced logging 14 March 1995. The next day, Mr. Barnard reported to the Rowan County Sheriff's Department (Sheriff's Department) that Rowland had cut or was about to cut three trees on the Barnard property. Although Rowland insisted he had purchased all trees on the Fifes' side of the fence, the fence was "bowed" and did not necessarily conform to the boundary between the Barnard property and that owned by the Fifes. Notwithstanding Mr. Barnard's objections, Rowland felled the three trees.

On 16 March 1995, Mr. Fife requested assistance from the Sheriff's Department in removing Rowland from the Fife property. According to Mr. Fife, Rowland's timbering activities were injuring neighboring properties and his conduct was not in conformance with the verbal agreement. On 18 March 1995, Rowland was escorted from the Fife property, whereupon Mr. Fife blocked the entrance so as to

prevent Rowland's return. In all, Rowland felled approximately sixteen trees located completely or partially on the Barnard property, including one approximately fifteen feet from the Fife/Barnard boundary.

The Barnards instituted the instant action 24 October 1995, seeking to recover from Rowland the value of the cut timber, the diminished value of their property, and punitive damages. Rowland answered, generally denying the allegations. He also counterclaimed against the Barnards, alleging wrongful interference with the timber contract, and cross-claimed against the Fifes, claiming they materially breached the agreement by "making it impossible for [Rowland] to finish the contract." Further, Rowland asserted a claim for contribution against the Fifes in the event he were to be found liable to the Barnards. The Fifes subsequently counterclaimed against Rowland, alleging breach of the logging agreement.

At trial, Rowland's motions for directed verdict at the conclusion of the Barnards' evidence and at the close of all the evidence were denied. However, the Barnards' motion for directed verdict on Rowland's counterclaim for tortious interference of contract was allowed. The court denied Rowland's requested jury instruction on the doctrine of impossibility of performance and prevention. The court also rejected the Fifes' motion for directed verdict on Rowland's third-party claim for contribution.

Following the jury's award of $1,244.00 to the Barnards as the value of the cut timber and $600.00 in punitive damages, Rowland moved for JNOV. On 17 February 1997, the trial court entered its ruling, declaring in pertinent part:

> 1) That the amount awarded to plaintiffs for damage to their wood, timber, shrubs or trees be doubled, pursuant to G.S. § 1-539.1.
>
> 2) That the plaintiffs have and recover judgment against the defendant in the principle amount of $2,488.00 for damages to trees, etc. and $600.00 for punitive damages.
>
> . . . .
>
> 4) That the defendant's motion to set aside the verdict as being against the greater weight of evidence is denied.

Defendant timely appealed 21 February 1997.

I.

[1] As a preliminary matter, we note that each brief submitted herein violates N.C.R. App. P. 26(g) (Rule 26(g)). Rule 26(g) requires documents filed with this Court to appear in "at least 11 point" type, the term "point" referring to the height of a letter, extending from the highest part of any letter to the lowest part. *Id.*; *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 147, 468 S.E.2d 269, 273 (1996). Accordingly, a brief may not contain more than sixty-five (65) characters and spaces per line, nor more than twenty-seven (27) lines of double-spaced text per page. *See Lewis*, 122 N.C. App. at 147, 468 S.E.2d at 273. Although Rule 26(g) 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.*

> Rule 26(g) may also be met by a brief presented in the
>
> same type-setting as used by this Court in its slip opinions—Courier 10 cpi—which insures no more than sixty-five (65) characters per line and twenty-seven (27) lines per page. Courier 10 cpi may be achieved in computer and word processing technology by utilizing no smaller than size twelve (12) Courier or Courier New font.

Howell v. Morton, 131 N.C. App. 626, 628, 508 S.E.2d 804, —— (1998).

In the case *sub judice*, all briefs presented to this Court contain in excess of ninety-one (91) characters per line and thus violate Rule 26(g). It should be unnecessary to reiterate that our appellate rules are mandatory, *see Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 568 (1984), so as to "prevent unfair advantage to any litigant," *Lewis*, 122 N.C. App. at 147, 468 S.E.2d at 273, and that violation thereof subject an appeal to dismissal. *See Wiseman*, 68 N.C. App. at 255, 314 S.E.2d at 566. While emphasizing that the ever-increasing volume of materials filed with this Court require uniformity and compliance with the Rules so as to facilitate our disposition of matters before us, we nonetheless elect in this instance to exercise our discretion under N.C.R. App. P. 2 and consider the instant appeal on its merits. However, double costs are assessed, *see* N.C.R. App. P. 34(b)(2) (court of the appellate division may impose sanction of "double costs"), the first set to be shared equally among the parties, *see* N.C.R. App. P. 35(a) (if judgment is "modified in any way, costs shall be allowed as directed by the court"), the second to be paid in equal shares by counsel for the parties.

II.

A.

[2] Rowland first argues the trial court erred in denying his motions for directed verdict and JNOV on the issues of trespass and punitive damages and in denying his JNOV motion on the issue of breach of contract. We conclude the latter assignment of error has been waived and that the former is unfounded.

The question presented by a defendant's directed verdict motion is whether the evidence, considered in the light most favorable to plaintiff, is sufficient to take the case to the jury and to support a verdict for plaintiff. *See Henderson v. Traditional Log Homes*, 70 N.C. App. 303, 306, 319 S.E.2d 290, 292, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984). If there is more than a scintilla of evidence "to support plaintiff's *prima facie* case in all its constituent elements," the motion for directed verdict should be denied. *Douglas v. Doub*, 95 N.C. App. 505, 511, 383 S.E.2d 423, 426 (1989). Appellate review of a directed verdict is limited to those grounds asserted by the movant before the trial court. *See Southern Bell Telephone and Telegraph Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 766 (1990), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991).

A JNOV motion is "essentially a renewal of a motion for directed verdict," *Smith v. Price*, 74 N.C. App. 413, 418, 328 S.E.2d 810, 815 (1985), *aff'd in part, rev'd in part on other grounds*, 315 N.C. 523, 340 S.E.2d 408 (1986), and thus must be preceded by a motion for directed verdict at the close of all evidence. *See Whitaker v. Earnhardt*, 289 N.C. 260, 264, 221 S.E.2d 316, 319 (1976). On appeal, we apply the same standard of review as that for a directed verdict. *See Northern Nat'l Life Ins. Co. v. Miller Machine Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). Notably, "[t]he movant cannot assert grounds [for the JNOV] not included in [his] motion for directed verdict." *Love v. Pressley*, 34 N.C. App. 503, 509, 239 S.E.2d 574, 580, *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

In the case *sub judice*, the sole ground asserted for Rowland's directed verdict motion was insufficiency of the evidence supporting the Barnards' claims of trespass and punitive damages. Moreover, Rowland did not contest the sufficiency of the evidence regarding the Fifes' breach of contract counterclaim. As such, appellate review of the trial court's denial of defendant's JNOV motion addressed to that issue has been waived. *See Lee v. Bir*, 116 N.C. App. 584, 587, 449

S.E.2d 34, 37 (1994), *cert. denied*, 340 N.C. 113, 454 S.E.2d 652 (1995). We therefore consider only whether the trial court properly determined "more than a scintilla of evidence" sustained presentation of the issues of trespass and punitive damages to the jury. *See Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991).

The elements of a claim of trespass are:

1) [t]hat the plaintiff was either actually or constructively in possession [or was the owner of described lands];

2) [t]hat the defendant made an unauthorized, and therefore an unlawful, entry [upon said lands]; [and]

3) [t]hat the plaintiff suffered damage by reason of the matter alleged as an invasion of his rights of possession.

Matthews v. Forrest, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952).

In the case *sub judice*, the parties stipulated the Barnards owned the property subject to the alleged trespass. Further, viewed in the light most favorable to plaintiffs, testimony at trial indicated Rowland entered upon the Barnards' land without authorization, proceeded to cut timber, and that the Barnards were damaged thereby. As Rowland testified:

Q: You didn't buy any of Mr. Barnard's timber, did you?

A: No, sir.

Q: And you had no right at all to cut any of Mr. Barnard's timber—

A: No, sir.

Q: —did you?

A: Huh-uh (no).

Q: Who sawed down those three trees?

A: I had four or five [employees] cutting trees. I don't know which one cut them down.

Q: All right. But you knew they were cut?

A: Oh, yeah.

In addition, Mr. Barnard stated:

Q: All right. And when he got to your house, what did you do?

A: . . . I showed [Rowland], you know, how my fence line right at that area was. I said, "You're not going to cut these trees," He said, "Oh yeah," he said, "I'm going to cut them trees," I said, "No, you ain't." I said, "They're not [Fife's]. They're mine."

. . . .

Q: And this damage is on your side of the fence?

A: Yes, sir.

Q: How did he get to this area?

A: He came through my gate.

. . . .

Q: Came on your property?

A: Yes.

The foregoing was corroborated by Richard Brandon, a registered surveyor, who testified in relevant part:

Q: Okay. And all the trees that are shown on this plat, other than the one that does not have a number, are either on the line or on Mr. Barnard's property?

A. Correct.

Q: Did Mr.—? In looking at these trees and all, did Mr. Barnard identify them to you as trees that had been cut by Mr. Rowland?

A: Yes, sir.

Taking all inferences in favor of the Barnards, more than a scintilla of evidence supported each element of plaintiff's trespass claim, *see Snead*, 101 N.C. App. at 464, 400 S.E.2d at 92, and the trial court did not err in submitting this issue to the jury or by denying defendant Rowland's JNOV motion.

B.

[3] Rowland next maintains the trial court erred in submitting the issue of punitive damages to the jury. At trial, Rowland argued that submission of the issue would allow plaintiff a "double recovery." *See West*, 100 N.C. App. at 670, 397 S.E.2d at 766 (appellate review limited to grounds asserted by movant to trial court). This contention has merit.

Two alternative measures of damages are available in a suit claiming unlawful cutting of timber:

> One gives the landowner the difference in the value of his property immediately before and immediately after the cutting. The other gives plaintiff the value of the timber itself. This latter value is then doubled by reason of N.C.G.S. 1-539.1(a) which allows plaintiff to recover double the value of timber cut or removed.

Britt v. Georgia-Pacific Corp., 46 N.C. App. 107, 109, 264 S.E.2d 395, 398 (1980) (citations omitted). One may not "recover both . . . statutory damages and damages for the diminution in value of . . . property." *Id.* at 110, 264 S.E.2d at 398. Rather, a party makes an election between the remedies by "proceed[ing] upon [one or the other] theory at trial." *Id.*

N.C.G.S. § 1-539.1(a) (1995) provides in relevant part:

> (a) Any 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.

G.S. § 1-539.1(a). G.S. § 1-539.1 pointedly authorizes doubling timber value, but not doubling loss in property value. *See Britt*, 46 N.C. App. at 110, 264 S.E.2d at 398 (1980); *see also* Dan B. Dobbs, *Trespass to Land in North Carolina Part II: Remedies for Trespass*, 47 N.C.L. Rev. 334, 337 (1969).

Statutes in derogation of the common law or statutes imposing a penalty must be strictly construed. *See Simmons v. Wilder*, 6 N.C. App. 179, 181, 169 S.E.2d 480, 481 (1969). Accordingly,

> everything [must] be excluded from the operation of [G.S. § 1-539.1] which does not come within the scope of the language used, taking the words in their natural and ordinary meaning.

Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 518, 190 S.E.2d 422, 424 (1972). For example, parties proceeding under G.S. § 1-539.1 may not recover under the common law remedy of "trover to recover the value of the goods" in their changed condition. *Id.* at 518, 190 S.E.2d at 424-25.

Similarly, in the instant case, G.S. § 1-539.1 may not afford the common law remedy of punitive damages since it is itself punitive. *See* 1945 N.C. Sess. Laws 837 (HB 371, later enacted as G.S. § 1-539.1, entitled "An Act Providing for Double and *Punitive* Damages in Actions for Unlawful Injury, Cutting or Removal of Timber") (emphasis added); *Woodard v. Marshall*, 14 N.C. App. 67, 69, 187 S.E.2d 430, 432 (1972) (describing G.S. § 1-539.1 as imposing penalty), and 22 Am. Jur. 2d *Damages* § 814 (1988) (statutes providing for double damages and regarded "as a penalty . . . subject the wrongdoer to an extraordinary liability by way of punishment"). Consequently, a plaintiff may not collect punitive damages under common law, and recover statutory double or "punitive" damages under G.S. § 1-539.1(a) because doing so would amount to double recovery. *See Britt*, 46 N.C. App. at 110, 264 S.E.2d at 398 (plaintiff cannot recover both common law and statutorily provided remedies), *accord Jones*, 15 N.C. App. at 518, 190 S.E.2d at 424; *cf. Johnson v. Tyler*, 277 N.W.2d 617, 619 (1979) (both punitive and statutory treble damages may not be recovered under Iowa statute prohibiting unlawful cutting of timber since to do so would constitute double recovery).

Therefore, a plaintiff suing for unlawful cutting or removal of timber may recover *either* 1) the difference in value of the property immediately before and immediately after the cutting, in addition to punitive damages if appropriate under the facts, *or* 2) the value of the timber itself, doubled by operation of G.S. § 1-539.1(a). A plaintiff may not recover both.

In the case *sub judice*, the Barnards sought 1) damages for the value of timber cut by Rowland, and 2) the "damage to [plaintiffs'] land," *i.e.*, diminution in value. At trial, however, the Barnards abandoned the latter claim, having introduced "no evidence" establishing "the value of the property before and after" the alleged trespass of Rowland. The Barnards thus elected to seek recovery under G.S. § 1-539.1 and relinquished any claim for punitive damages attendant to the common law claim. The trial court therefore erred in submitting the issue of punitive damages to the jury, and the jury award of such damages in the amount of $600.00 must be reversed and vacated.

C.

[4] Rowland next contends the trial court erred "in allowing [the Barnards'] motion for directed verdict on defendant's counterclaim of wrongful interference of contract." We disagree.

Upon a plaintiff's motion for directed verdict challenging a defendant's counterclaim, the test is whether all the evidence tending to support defendant's counterclaim, taken as true and considered in the light most favorable to the defendant, is sufficient to submit that claim to the jury. *See Sloan v. Wells*, 37 N.C. App. 177, 179-80, 245 S.E.2d 529, 531 (1978), *rev'd on other grounds*, 296 N.C. 570, 251 S.E.2d 449 (1979).

The elements of tortious interference of contract are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Embree Construction Group v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992).

Significantly, in granting the Barnards' directed verdict motion, the trial court noted the absence of proof regarding the fourth element of Rowland's claim, stating:

> the key element here that this motion directs the Court toward is the fourth of the elements needed to be proved—acted without justification. I think there is not any evidence to take to the jury that he acted without justification at all.

Whether an actor's conduct is justified depends upon:

> the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of the actor and the contractual interests of the other party.

Peoples Security Life Ins. Co. v. Hooks, 322 N.C. 216, 221, 367 S.E.2d 647, 650 (1988). Further, justification is lacking if " 'the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the [accused] which is involved.' " *Id.* at 220, 367 S.E.2d at 650 (quoting *Smith v. Ford Motor Co.*, 289 N.C. 71, 91, 221 S.E.2d 282, 294 (1976)). However, if a particular act is done for a "legitimate . . . purpose, [the act] is privileged." *Id.* at 221, 221 S.E.2d at 650.

Suffice it to state that careful review of the record fails to reveal the requisite scintilla of evidence that Mr. Barnard acted without jus-

tification in opposing the logging operations of Rowland. *See Snead*, 101 N.C. App. at 110, 400 S.E.2d at 92. Rather, as owner of adjoining real estate, Mr. Barnard's interest in protecting his property from unauthorized logging activities without doubt was "reasonable and bona fide." *See Smith*, 289 N.C. at 91, 221 S.E.2d at 294. As the evidence failed regarding a "constituent element[]" of Rowland's counterclaim, *see Douglas*, 95 N.C. App. at 511, 383 S.E.2d at 426, the trial court did not err in granting the Barnards' motion for directed verdict thereon.

D.

[5] Finally, Rowland asserts the court erred "by failing to instruct the jury on the doctrine of impossibility of performance and prevention," and by failing to provide specific instruction on "the doctrine of contribution." We do not agree.

Upon request for a special instruction " 'correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance.' " *State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E.2d 271, 273 (quoting *State v. Tidwell*, 112 N.C. App. 770, 773, 436 S.E.2d 922, 924 (1993)), *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). Further, "[i]t is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence." *Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 509, 358 S.E.2d 566, 568 (1987).

Erroneous or incomplete instructions notwithstanding, the "party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986); *see also* N.C.G.S. § 1A-1, Rule 61 (1990) (Rule 61). Moreover,

> [w]hen the jury returns answers to other issues which establish the rights of the parties irrespective of the answer to the questioned issue, or the rights of the parties are not dependent upon the answer to the issue returned by the jury, any error in the instructions upon such issue is harmless.

Mode v. Mode, 8 N.C. App. 209, 213, 174 S.E.2d 30, 33-34 (1970).

The trial court herein submitted the following pertinent issues to the jury:

Issue One

. . . .

(b) . . . was the trespass done purposefully or wilfully?

Answer: Yes

. . . .

Issue Four

(a) Was the defendant, Bobby Rowland, the agent of the third-party defendant, James Fife, at the time of the trespass by Rowland on the property owned by Barnard?

Answer: No

. . . .

Issue Five

(a) Did the defendant, Bobby Rowland, breach his contract with the third-party defendants, James and Michelle Fife?

Answer: Yes

. . . .

Issue Six

(a) Did the third-party defendants, James and Michelle Fife, breach their contract with the defendant, Bobby Rowland?

Answer: No

Assuming *arguendo* the court erred by not instructing the jury upon impossibility of performance and prevention, and contribution, we nonetheless hold Rowland has not demonstrated he has been prejudiced thereby.

For instance, in asserting that the Fifes breached the timber contract, Rowland alleged in his third-party claim:

> [t]he third-party defendants, without justification or excuse, wrongfully and materially breached the contract with the third-party plaintiffs *by making impossible for the third-party plaintiff to finish the contract*, by, but not limited to the following:
>
> . . . .

> C. The third-party defendant *James M. Fife demanded that the third-party plaintiff, the defendant herein, leave the premises* prior to the third-party plaintiff removing all of the timber that had been bargained for pursuant to a threat of violence against the third-party plaintiff.
>
> D. *The third-party defendant, James M. Fife prevented the defendant from sowing grass* on both sides of the creek.

(Emphasis added).

In assessing and denying Rowland's claim that the Fifes breached the timber contract, the jury necessarily considered whether it was impossible for defendant to have performed the contract or whether the Fifes prevented him from doing so. Defendant has not shown that "a different result would likely have ensued had the [alleged] error not occurred," *Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985), *i.e.*, had the jury been separately instructed on the doctrine of impossibility of performance and prevention. We therefore hold that any such error was harmless. *See* Rule 61.

[6] Similarly, the jury's findings "establish[ed] the rights of the parties irrespective of the answer to the question[]" of contribution, *Mode*, 8 N.C. App. at 213, 174 S.E.2d at 33, and any error by the trial court in failing to charge the jury on this issue was also harmless. *See id.* Notably, the jury determined Rowland trespassed upon the Barnards' property "purposefully" and that he was not acting on behalf of or as "the agent of the third-party defendant [Fifes]." Rowland's trespass was thus not "a result of a misrepresentation of property lines by the party letting the contract," *see* G.S. § 1-539.1(c), and Rowland therefore had no claim to contribution. *See id.*; *cf.* N.C.G.S. § 1B-1(a) (1983) (contribution not proper "in favor of any tortfeasor who has intentionally caused or contributed to the injury"). Accordingly, Rowland has failed to show he was "prejudiced as a result" of the lack of a specific jury instruction on contribution, *Lawing*, 81 N.C. App. at 162, 344 S.E.2d at 104, and any error by the trial court in that regard was harmless. *See* Rule 61.

In sum, we hold the trial court did not err in denying Rowland's motions for directed verdict and JNOV, or by granting the Barnards' motion for directed verdict on defendant's tortious interference of contract counterclaim. Further, Rowland was not prejudiced as a result of the court's failure to instruct the jury with respect to the doc-

trines of impossibility of performance and prevention, or contribution. However, we reverse the trial court's submission of the issue of punitive damages to the jury and its subsequent judgment including an award of such damages. This cause is therefore remanded to the District Court of Rowan County for entry of a new judgment in favor of plaintiff not inconsistent with the opinion herein. Double costs are assessed, the first set payable in equal shares by the parties, the second set to be paid in equal shares by counsel for the parties.

Affirmed in part; reversed in part and remanded with instructions. Double costs.

Judges McGEE and SMITH concur.

AMERICAN CONTINENTAL INSURANCE COMPANY, PLAINTIFF-APPELLANT, CROSS-APPELLEE v. PHICO INSURANCE COMPANY, DEFENDANT-APPELLEE, CROSS-APPELLANT

No. COA98-728

(Filed 2 March 1999)

1. Insurance— coverage—claims-made policy—definition of claim

In a declaratory judgment action to determine whether a claims-made policy provided coverage to a hospital where a Notice of Claim was received two days before the coverage was to expire and the insurance company (PHICO) contended that there was no claim, there was compelling evidence that the hospital's risk manager reasonably anticipated an express demand for damages and that an effective notice of claim as defined by the insurance policy was therefore filed prior to the expiration of coverage.

2. Insurance— claims-made hospital insurance—timely notice—duty to defend—material prejudice

There was no error in a declaratory judgment action which determined that a claims-made policy issued to a hospital provided coverage of a particular case where the insurance company contended that there was no duty to defend because of failure to provide timely notice. It is apparent that the insured became aware of the possible fault only when an attorney sought the

patient's medical records and, under those circumstances, it cannot be said that a delay of less than six weeks amounted to a purposeful failure to notify the insurer. Moreover, although the insurance company argued that it was prejudiced because the passage of time between the injury and the institution of the suit, any prejudice would have arisen from the thirty-eight day delay between notification of the claim and notice to the insurance company and no such prejudice was established.

3. Insurance— coverage—overlapping—mere volunteer

An insurance policy provided to a hospital by ACIC did not provide coverage for a claim and ACIC was entitled to reimbursement from another insurance company, PHICO, where PHICO denied coverage and ACIC settled the claim, the express language of ACIC's policy precluded overlapping coverage, and ACIC was not acting as a mere volunteer in that it had its own interest to protect. The trial court erred by finding that the costs of defense and settlement should be borne equally by ACIC and PHICO.

Judge HORTON dissenting.

Appeal by plaintiff and cross-appeal by defendant from judgment entered 20 April 1998 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 28 January 1999.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington and James Y. Kerr, II, for plaintiff-appellant, cross-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Richard T. Boyette and Kari Russwurm Johnson, for defendant-appellee, cross-appellant.

EDMUNDS, Judge.

Defendant PHICO Insurance Company (PHICO) provided professional liability insurance coverage to Caldwell Memorial Hospital (Caldwell) in Lenoir, North Carolina from 1988 to 1 October 1994. PHICO's policy was a "claims-made" policy, which obligated PHICO to assume coverage when a claim was asserted against Caldwell during the policy period, and Caldwell in turn reported the claim to PHICO. Effective 1 October 1994, Caldwell terminated its relationship with PHICO to obtain a more favorable premium rate. Caldwell's new

policy (also a "claims-made" policy) was with plaintiff American Continental Insurance Company (ACIC) and contained a provision whereby ACIC would provide retroactive coverage for prior acts occurring as far back as 1 October 1975, so long as those acts were first reported during the policy period and were not otherwise excluded.

In October 1991, William T. Watson was born at Caldwell. He experienced complications and was transferred to a children's hospital. In March 1993, Watson's parents requested his medical records from Caldwell for the purpose of genetic testing. On 19 August 1994, an attorney representing the Watson family requested the child's medical records from Caldwell. On 26 September 1994, Caldwell's risk manager, Marie Chapman, sent a Notice of Claim in regard to the Watson matter to PHICO. PHICO received this notice on 28 September 1994, two days before its coverage of Caldwell was to expire, and declined to accept coverage for the claim. In a 30 September 1994 letter to Caldwell, PHICO stated that the notice did "not comply with PHICO's general reporting guidelines as contained and defined in your Policy of Insurance."

On 7 October 1994, the Watson family filed suit against the hospital for medical negligence. Upon receipt of the summons and complaint, Caldwell forwarded the suit papers to PHICO and asked for reconsideration of its earlier denial of coverage. On 17 October 1994, PHICO reiterated its denial of coverage based upon failure to meet the policy's reporting requirements. Caldwell then requested that ACIC undertake the defense and indemnification of the hospital. ACIC did so and settled the lawsuit in July 1996 for $30,000.00, incurring defense costs totaling $24,863.48.

On 10 August 1995, Caldwell filed a complaint against PHICO, seeking a declaratory judgment regarding PHICO's responsibility under its claims-made policy. After filing its answer, PHICO filed a motion to dismiss on 11 June 1997, claiming (1) the trial court lacked jurisdiction because no controversy existed between Caldwell and PHICO and (2) all "persons" potentially affected were not named as parties to the suit. On 30 July 1997, the trial court granted PHICO's motion. ACIC was thereafter substituted as the real party in interest, and on 26 February 1998, ACIC amended the original complaint to state that it was the new liability insurance carrier for Caldwell and had settled the claim against Caldwell. On 9 March 1998, PHICO answered the amended complaint. After a non-jury trial on the merits, the trial judge entered judgment on 20 April 1998, concluding that

both the PHICO policy and the ACIC policy covered the disputed claim and that, therefore, the costs of defense and settlement should be borne equally by PHICO and ACIC. Both parties appeal.

[1] "The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of C and M Investments*, 123 N.C. App. 52, 54, 472 S.E.2d 341, 342 (1996) (citations omitted), *aff'd in part, rev'd in part*, 346 N.C. 127, 484 S.E.2d 546 (1997). The trial court here first found that PHICO's policy provided coverage to the hospital. We agree. This policy reads in pertinent part:

> PHICO will pay on behalf of the **insured** all sums which the **insured** shall be legally obligated to pay as damages because of **bodily injury** or **property damage** caused by a **medical incident** which occurs on or after the Initial Effective Date stated in the Declarations and for which **claim** is reported to PHICO during the **policy period**.

Within this policy, a "claim" is defined as:

> (1) an express demand for damages to which this insurance applies, arising from an injury allegedly caused by the **insured**; an express demand for damages shall be deemed to include a civil action in which damages to which this insurance applies are alleged and an arbitration proceeding to which the **insured** is required to submit by statute or court rule or to which the **insured** has submitted with PHICO's consent; or
>
> (2) an act or omission which the **insured** reasonably believes will result in an express demand for damages to which this insurance applies.
>
> A report of a **claim** to PHICO must comply with the requirements of Section VIII—Conditions, Condition 3, of this policy.

The condition to which this definition refers reads as follows:

> **3. Reporting Requirements; Assistance and Cooperation of Insured.**
>
> (a) A **claim** shall be considered made when the **insured** has reported it to PHICO. A **claim** as defined in paragraph (1)

> of its definition shall be reported immediately to PHICO. The **insured** shall immediately forward to PHICO every demand, notice, summons or other process the **insured** or the **insured's** representative receives. A **claim** as defined in paragraph (2) of its definition shall be reported as soon as practicable to PHICO.
>
> . . . .
>
> An event reported by the **insured** to PHICO as part of risk management or loss control services shall not be considered a report of a **claim**.

PHICO contends that the Watson claim is not a "claim" as defined by the policy language. It is apparent that no claim was made under the terms of subsection (1) of PHICO's definition of claim, because there was no "express demand for damages" until the Watsons filed suit on 7 October 1994, after the expiration of the policy. PHICO further argues that there was no claim under subsection (2) of the definition, relying upon the deposition testimony of Marie Chapman, Caldwell's risk manager. We disagree.

PHICO's policy set up three categories of reports that Caldwell could make. The first two were "claims," which were to be filed either when an actual demand for damages was made, or when the insured reasonably anticipated an express demand for damages. The third category covered reports made as part of risk management or loss control services. It is under this last category that PHICO contends the Watson matter falls, arguing that Caldwell did not have a "reasonable belief" that a demand for damages would be made, but rather was merely "cleaning house" prior to the expiration of its policy period with PHICO. Accordingly, PHICO stresses the belief and understanding of Ms. Chapman, Caldwell's risk manager, as set out in her deposition testimony. PHICO's reliance on her testimony is unavailing.

An examination of Ms. Chapman's deposition testimony demonstrates that her own definition of the term "claim" was more restrictive than the definition in PHICO's policy. She stated that, to her, a claim only existed when a suit had actually been filed. "[A] claim would be when I get that yellow piece of paper from the court. To me that's a claim or a lawsuit." When she was asked about this case, she used language not found in the policy.

Q. William T. Watson, when you filed this notice of claim on September 26, 1994, did you consider that to be a claim?

A. No.

Q. And what did you consider yourself to have been doing?

A. I considered it a precautionary notice.

Q. And why did you not consider it a claim at the time?

A. Because it hadn't been filed, to my knowledge, as a lawsuit.

Ms. Chapman's interpretation of the term "claim" is not controlling, however; rather the focus of our inquiry is on the more expansive definition of "claim" set out in the policy. *See Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996). The policy sets up a subjective standard in subsection (2), under which a claim is deemed filed if the insured reasonably believes that an express demand for damages will be forthcoming. Therefore, we must view Ms. Chapman's actions to determine whether she, on behalf of the insured, had a reasonable belief that a suit would be filed in the Watson case. We find sufficient evidence of such a belief. She testified that an attorney's request for records was a "red flag" for her, indicating that "the incident might turn into a claim." PHICO encouraged Ms. Chapman to report potential suits, even if she, personally, did not define these reports as claims. She testified during deposition as follows:

A. My understanding from [Douglas Deitrich, Senior Malpractice Claim Specialist] and from my managers, claims managers [Nan Holland and Barbara Maly, risk management consultants], was you report anything that you think might turn into a claim.

. . . .

Q. When you say you reported them [in anticipation of a claim], what was your method of reporting these events?

A. The notice of claim.

Therefore, even if she did not perceive a report filed in anticipation of a suit as being a claim, she was instructed to be sure that PHICO was advised of these instances so that coverage would be available.

In her 13 October 1994 letter to PHICO's claim division, Ms. Chapman stated, "I had no idea that the enclosed case was being considered for litigation at that time, simply that the records had been

requested. I feel strongly that PHICO is responsible for defending this suit and request that you assist me in obtaining this service." When read along with her testimony that a request for hospital records by an attorney was a "red flag," this letter shows that while she had no knowledge of an upcoming suit when she sent notice, she nevertheless filed it understanding that PHICO's policy required it to defend appropriately-made claims. Additionally, because she held the position of risk manager for Caldwell, it would seem logical that if she were filing the Watson matter as a risk management/loss control report, she would have sent it to PHICO's risk management division, instead of its claims division.[1] These factors are all compelling evidence that Ms. Chapman reasonably anticipated an express demand for damages, and that an effective notice of claim, as defined in the insurance policy, was therefore filed prior to 1 October 1994.

[2] Next, PHICO contends that even if a claim had been made, PHICO still had no duty to defend because of Caldwell's failure to provide timely notice as required by the policy. Claims filed under subsection (2) of the definition had to "be reported as soon as practicable to PHICO." Despite PHICO's contention that notice should have been filed as soon as the baby showed distress, the hospital had no reason then to suspect that a lawsuit would arise. Ms. Chapman testified that transfers of newborns to another hospital were a weekly occurrence, and that the Watson child's condition was not unusual. Almost three years later the hospital received a request for medical records from the Watsons' attorney. Approximately five weeks thereafter, the hospital mailed its Notice of Claim to PHICO.

The issue of timely reporting has been addressed in *Great American Ins. Co. v. C. G. Tate Construction Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986). Our Supreme Court there enumerated the steps to be taken when an insurer claims that notice was not given "as soon as practicable." The Court held that the requirement for timely notice is satisfied despite delay in notifying the insurer so long as (1) the delay was occasioned in good faith and (2) the insurer was not prejudiced. *See id.* at 719, 340 S.E.2d at 747. A court will find good faith unless (1)

1. We note that the method for filing risk management/loss control reports is not set out in the record, and it is possible that *all* reports, not just "claims," were sent to PHICO's claims division. The Notice of Claim form that Ms. Chapman was instructed to use did not call on her to distinguish what type of report she was filing, which suggests that if all reports were sent to the same destination, PHICO had the prerogative of deciding whether a report would be characterized as a claim (and therefore covered) or as a report to risk management (and not covered). In that case, PHICO cannot avoid coverage by its unilateral action in placing the filing in a particular category.

the insured was aware of the possible fault *and* (2) the insured "purposefully and knowingly fail[ed] to notify the insurer." *Id.* at 720, 340 S.E.2d at 747. Here, while PHICO contends that the claim accrued when the Watson child was born, and that the delay in reporting was therefore a matter of years, we note Ms. Chapman's testimony that the conditions of the child's birth and transfer to another hospital were, if not routine, at least commonplace. Under the facts before the trial court, it is apparent that the insured became aware of the possible fault only when an attorney sought the child's medical records, an event that was a "red flag" to Ms. Chapman. Under these circumstances, we cannot say that a delay of less than six weeks in notifying PHICO amounted to a purposeful failure to notify the insurer. In fact, the trial judge's finding that PHICO's policy afforded coverage necessarily implied a finding that the notice was timely given.

Once the insured proves that it acted in good faith, the burden shifts to the insurer to prove that its ability to investigate and defend the case was materially prejudiced by the delay. *See id.* at 718, 340 S.E.2d at 746 (quoting *Great American Insurance Company v. Tate Construction Company*, 303 N.C. 387, 399, 279 S.E.2d 769, 776 (1981)). Although PHICO argues that it has been prejudiced because of the passage of time between the birth and the institution of the suit, this contention is without merit. The evidence establishes that Caldwell only became aware of the potential for a suit when the medical records were requested. Before that event there were no grounds for a reasonable belief that a demand for damages would be made. Therefore, any prejudice would have arisen from the thirty-eight day delay between Caldwell's notification of the claim and Caldwell's notice to PHICO. No such prejudice has been established. This assignment of error is overruled.

[3] After determining that PHICO's policy provided coverage for the claim, we turn next to ACIC's policy. The trial court quoted this policy in its findings of fact and concluded as a matter of law that the ACIC policy provided coverage for the Watson claim. We disagree. The express language of ACIC's policy precludes overlapping coverage, and, therefore, we hold that the conclusion of law is not supported by the findings of fact. ACIC's policy reads in pertinent part:

> WE will pay on YOUR behalf those sums which YOU shall become legally obligated to pay:
>
> 1. As damages because of INJURY to any person arising out of an OCCURRENCE resulting from a negligent act, error

> or omission in rendering or failing to render PROFESSIONAL SERVICES on or after the Retroactive Date for Coverage C stated in the Declarations, and for which claim is first made against YOU and reported to US during this POLICY PERIOD.

The retroactive date of the policy was 1 October 1975. However, the policy also listed the following as one of its exclusions:

> 6. LIABILITY of the INSURED for damages resulting from an injury, harm or loss if, prior to the INSURED'S first continuous POLICY PERIOD with US, any claim has been made against the INSURED by anyone for such damages or if the INSURED could have reasonably foreseen that such injury, harm or loss might result in a claim for such damages.

It is apparent that ACIC included this clause to prevent overlapping coverage. Caldwell's valid claim to PHICO, filed no later than 28 September 1994, was made because Caldwell then reasonably foresaw an express claim for damages, as defined by PHICO's policy. That claim, filed before ACIC's policy became effective, necessarily fell within ACIC's exclusion. The trial court therefore erred in finding that ACIC's policy provided coverage for the Watson claim.

PHICO contends that even if ACIC's policy did not provide coverage for the Watson suit, ACIC is not entitled to reimbursement from PHICO because ACIC was acting as a "mere volunteer" when it defended and settled the Watson matter. It is true that "[w]hen suing as a subrogee, a mere volunteer may not recover defense costs and settlement payments." *Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 122 N.C. App. 449, 454, 470 S.E.2d 556, 559 (1996). However, one is not a volunteer if protecting a " 'real or supposed right of interest.' " *Id.* (quoting *Insurance Co. v. Insurance Co.*, 277 N.C. 216, 221, 176 S.E.2d 751, 755 (1970) (hereinafter "Jamestown")). As our Supreme Court has stated with regard to a similar situation:

> Jamestown defended because Nationwide refused to do so. Jamestown defended in good faith as Jamestown would have been liable had it been adjudged that Nationwide's policy did not provide coverage for [the insured]. Under these circumstances, Jamestown was not such a pure volunteer as to be deprived of the right of subrogation.

Jamestown, 277 N.C. at 222, 176 S.E.2d at 756. ACIC was not acting as a mere volunteer; it had its own interests to protect. "[A]n insurer

may recover under subrogation theory if the insurer defends an insured with the good faith belief that he has an interest to protect although the insurer in fact has no duty to defend and no liability." *See Nationwide*, 122 N.C. App. at 453, 470 S.E.2d at 559. Accordingly, ACIC is entitled to reimbursement from PHICO.

This case is remanded to the superior court for entry of judgment that (1) PHICO's policy provided coverage for the Watson suit; (2) ACIC's policy did not provide coverage for the Watson suit; and (3) ACIC is entitled to recover from PHICO its costs for defending the claim, such amount being $54,863.48, plus interest at the legal rate from the date of entry of the judgment until paid by PHICO.

Affirmed in part, reversed in part, and remanded.

Judge WYNN concurs.

Judge HORTON dissents.

Judge HORTON dissenting.

The dispositive question before us is whether a "claim" was made against PHICO under its "claims-made" professional liability insurance policy. The PHICO policy defines "claim" in subsection (1) as an "express demand for damages." There is no contention that subsection applies here. Subsection (2) deals with a situation in which the insured hospital reasonably anticipates a claim for damages. I agree with the majority that the standard is subjective, and that we must examine the testimony of the hospital's risk manager, Ms. Chapman, to determine whether Ms. Chapman, on behalf of the insured, had a reasonable belief that a suit would be filed in the Watson case. I believe that Ms. Chapman did not have such a reasonable belief, and was merely filing a notice of claim with PHICO as a "precautionary" measure, as she described her action. The most telling statement by Ms. Chapman was contained in her letter of 13 October 1994 to PHICO, following the institution of an action by the Watsons against the hospital: "I had no idea that the enclosed case was being considered for litigation *at that time* [*i.e.*, when she sent the notice of claim to PHICO on 26 September 1994], simply that the records had been requested [by an attorney]." (Emphasis added.) The PHICO policy specifically provides that "[a]n event reported by the insured to PHICO as part of risk management or loss control services shall not be considered a report of claim." The weight of the evidence shows

that Ms. Chapman's "precautionary" report of claim was merely a "part of risk management," and was not based on a reasonable belief that a demand for damages against the insured would result from the attorney's request for records.

I respectfully dissent, therefore, from the majority opinion, and would reverse and remand the case for entry of judgment finding that the PHICO policy did not provide coverage of the claim in question, and that the ACIC policy did provide such coverage.

STATE OF NORTH CAROLINA v. MATTHEW THOMAS RICH

No. COA98-500

(Filed 2 March 1999)

1. Homicide— instructions—malice

The trial court did not err in a prosecution for second-degree murder by instructing the jury that the malice necessary for second-degree murder could be supplied by one, some, or all of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief.

2. Homicide— instructions—deliberately bent on mischief

The trial court did not err in a second-degree murder prosecution in its instruction on malice in its definition of "deliberately bent on mischief." In the context of the entire instruction, the charge correctly conveyed to the jury that it could infer malice if it found that the acts of defendant "manifest depravity of mind and disregard of human life."

3. Criminal Law— instructions—additional—counsel not heard

There was no prejudicial error in a second-degree murder prosecution where defendant contended that the court violated N.C.G.S. § 15A-1234(c) by giving additional instructions without first allowing counsel an opportunity to be heard, but the challenged instruction constituted a clarification and the court was not required to inform the parties or afford them an opportunity to be heard. Moreover, in light of the holding elsewhere that the

instructions were correct, defendant failed to show that he was prejudiced by the alleged omission.

4. Evidence— lay opinion—experienced law enforcement officer—defendant impaired

The trial court did not err in a second-degree murder prosecution by allowing an officer to testify that, in his opinion, defendant was impaired and unable to drive. The opinion was based on the officer's experience as a law enforcement officer in conjunction with his observation of the circumstances surrounding the collision.

5. Evidence— prior crime or act—malice—prior traffic offenses

The trial court did not err in a second-degree murder prosecution arising from speeding and drinking by admitting defendant's prior traffic violations to substantiate malice. Evidence of defendant's prior violations was relevant to establish defendant's "depraved heart" on the night he struck the victims' vehicle while rounding a sharp curve at a speed at least forty miles per hour over the posted limit.

6. Evidence— medical records—district court judge—disclosure—no prejudice

There was no prejudice in a second-degree murder prosecution arising from an automobile accident where an order compelling disclosure of defendant's medical records (including a statement to a doctor that he had drunk several shots and several beers) was issued by a district court judge rather than a superior court judge. While the order should have come from a superior court judge, there was no reasonable possibility of the jury reaching a different result in view of the overwhelming evidence that defendant had a strong odor of alcohol on his breath on the night in question.

7. Homicide— second-degree murder—malice—sufficiency of evidence

The trial court did not err in a second-degree murder prosecution arising from an automobile accident by failing to dismiss the charges for insufficient evidence of malice where, viewed in the light most favorable to the State, the evidence tended to show that defendant had a history of driving at speeds far in excess of the posted limits and that defendant entered a sharp curve with a

speed limit of 35 mph at a speed in excess of 70 mph while under the influence of alcohol, colliding head-on with an oncoming vehicle and causing the deaths of two people.

8. Sentencing— structured—mitigating factors not found—sentence within presumptive range

The trial court did not err when sentencing defendant for second-degree murder by failing to find any factors in mitigation where the sentences were within the presumptive range. The trial court is not obligated to make findings regarding aggravating and mitigating factors where the court imposes sentences within the presumptive range for all offenses.

Appeal by defendant from judgments entered 25 September 1997 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 13 January 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

J. Donald Cowan and Shannon R. Joseph for defendant-appellant.

TIMMONS-GOODSON, Judge.

Matthew Thomas Rich ("defendant") was convicted of two counts of second-degree murder and was sentenced to two consecutive prison terms of 132-168 months. For the reasons stated herein, we uphold the convictions rendered and the sentences imposed.

The State's evidence at trial tended to show the following facts: At approximately 10:15 p.m. on 29 November 1996, Todd Allan Bush and James Brady Litrell were traveling on Horse Pen Creek in Greensboro, North Carolina, when their vehicle was struck head-on by defendant's car. The collision occurred at a sharp curve in the road where the speed limit was 35 miles per hour ("mph"). The two-lane stretch of road leading up to the curve was a no-passing zone with a speed limit of 40 mph. Nonetheless, seconds before colliding with Bush and Litrell, defendant passed the vehicle traveling ahead of him and entered the curve at a speed in excess of 70 mph. Bush and Litrell died as a result of the collision.

Officer L. E. Farrington of the Greensboro Police Department arrived at the scene shortly after the collision occurred and noted a strong odor of alcohol on defendant's breath. Karrina Crews, a mem-

ber of the EMS team that responded to the accident, testified that she also detected a strong odor of alcohol on defendant as she and the other paramedics removed him from his vehicle. Crews further testified that defendant was verbally abusive and combative with the paramedics while they attended to his medical needs. The EMS team transported defendant to Moses Cone Hospital for treatment of his injuries. The treating physician, Dr. Kai-Uwe Mazur, asked defendant a series of questions to determine his general physical condition. When Dr. Mazur asked defendant whether he drank alcohol, defendant admitted that he frequently drank alcohol and that on the night of the accident, he drank "several beers and several shots." Dr. Mazur noted this statement in defendant's medical records.

Officer Gerald Austin interviewed defendant at the hospital at 11:35 p.m. Officer Austin reported a moderate to strong odor of alcohol on defendant's person. The officer further noted that defendant's eyes were bloodshot and watery and that defendant had trouble focusing on him during the interview. Based on these observations, Officer Austin formulated the opinion that defendant was appreciably impaired and "unfit to operate machinery or equipment of any type." Nothing in the record, however, indicates that a blood alcohol test was administered to defendant on the night of the accident.

The State also presented evidence of defendant's prior driving record. This evidence disclosed that defendant was convicted of the following traffic violations: driving 75 mph in a 45 mph zone on 3 October 1988; driving 76 mph in a 45 mph zone on 6 September 1990; reckless driving and fleeing to elude arrest on 3 October 1991; driving 70 mph in a 35 mph zone on 11 August 1995; and driving 70 mph in a 55 mph zone on 11 May 1994.

At the conclusion of the State's evidence, defendant moved to dismiss the second-degree murder charges, and the trial judge denied the motion. Thereafter, the court charged the jury on second-degree murder and involuntary manslaughter, emphasizing that the element of malice distinguished the two offenses. The court gave the following instruction regarding malice:

> Now, members of the jury, our courts have defined malice, and our courts have declared that there are three kinds of malice in our law of homicide. One kind of malice connotes a possible concept of express hatred, ill will, or spite. This is 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. And there is, in addition, 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.

With regard to the second kind of malice, the court further instructed that "any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person, is sufficient to supply the malice necessary for second degree murder."

After less than an hour of deliberation, the jury returned to the courtroom and requested that the court review the definitions of malice. The court complied, and the jury resumed its deliberation. Several hours later, however, the jury again returned to the courtroom and asked the court to address specific questions regarding the concept of "deliberately bent on mischief." The court gave the jury further guidance as to the meaning of the phrase, and after additional deliberation, the jury returned verdicts finding defendant guilty of both counts of second-degree murder. The court sentenced defendant to two consecutive prison terms, totaling approximately 22-28 years. Defendant appeals.

Defendant brings forward several assignments of error challenging the trial court's instructions to the jury, its evidentiary rulings, its failure to dismiss the charges of second-degree murder, and its sentencing decision. Having reviewed defendant's arguments, we conclude that the proceedings before the trial court were without legal error.

[1] At the outset, defendant argues that the trial court erred in instructing the jury on the element of malice essential to support a conviction of second-degree murder. Upon review of a trial court's charge to the jury, we must determine whether, considering the instruction in its entirety, "it clearly appears that the law was presented in such a manner that there is no reasonable cause to believe that the jury was misled or misinformed." *Rice v. Wood*, 82 N.C. App. 318, 329, 346 S.E.2d 205, 212 (1986). The appealing party must demonstrate not only that the court erred in its instructions, but "that if the error had not occurred there is a reasonable probability that the result of the trial would have been favorable to him." *Id.*

Second-degree murder is defined under section 14-17 of the North Carolina General Statutes as the " 'unlawful killing of a human being with malice, but without premeditation or deliberation.' " *State v. Mapp*, 45 N.C. App. 574, 579, 264 S.E.2d 348, 353 (1980) (quoting *State v. Duboise*, 279 N.C. 73, 81, 181 S.E.2d 393, 398 (1971)). "What constitutes proof of malice will vary depending on the factual circumstances in each case." *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733 (1993). It is defendant's contention, however, that the trial court improperly charged the jury concerning malice, as the term was defined by our Supreme Court in *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). As the Court stated,

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

Id. at 578-579, 247 S.E.2d at 916 (quoting *State v. Wrenn*, 279 N.C. 676, 686-87, 185 S.E.2d 129, 135 (1971) (citations omitted)).

In the present case, the trial court instructed the jury as follows regarding the kind of "depraved-heart" malice described in *Wilkerson*:

> You have asked me with regard to wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, a mind regardless of social duty and deliberately bent on mischief, as to whether all of these must be present. My answer to that is no. One of these, some of these, or all of these may be proved and may be sufficient to supply the malice necessary for second degree murder. That is a factual determination that you, the jury, must make[.]

Defendant takes issue with this instruction and argues that "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief" constitute elements of "depraved-heart" malice.

Defendant contends that as such, all must exist before a jury can find that he acted maliciously. At oral arguments, however, defendant conceded that less than all—two or more—would be sufficient to show malice. We, therefore, reject defendant's contention and adopt, instead, the State's position that "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief" are examples, any one of which may provide the malice necessary to convict a defendant of second-degree murder.

In support of this conclusion, we look to our rulings in *McBride*, 109 N.C. App. 64, 425 S.E.2d 731, and *State v. Hemphill*, 104 N.C. App. 431, 409 S.E.2d 744 (1991). In *McBride*, this Court upheld the defendant's conviction of second-degree murder, concluding that malice was sufficiently established where the evidence showed that defendant acted with (1) "a mind without regard for social duty and with 'recklessness of consequences' "; (2) "a mind deliberately 'bent on mischief' "; and (3) " 'a mind utterly without regard for human life and social duty.' " *McBride*, 109 N.C. App. at 68, 425 S.E.2d at 734 (citations omitted). Likewise, in *Hemphill*, we held that the evidence showing "that defendant acted with 'recklessness of consequences' " was sufficient to support a finding of malice necessary to convict the defendant of second-degree murder. *Hemphill*, 104 N.C. App. at 434, 109 S.E.2d at 745. The holdings in *McBride* and *Hemphill* indicate that "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief" are examples of circumstances which, if proven to exist, allow the jury to infer malice. Accordingly, we hold that the trial court did not err in charging the jury that "[o]ne of these, some of these, or all of these may be proved and may be sufficient to supply the malice necessary for second degree murder."

[2] Defendant next argues that the trial court erred in defining the phrase "deliberately bent on mischief" in response to the jury's request for "legally accepted paraphrases of the [term]." Defendant takes particular exception to the following language:

> [T]his notion of a mind regardless of social duty and deliberately bent on mischief . . . connotes conduct as exhibits conscious indifference to consequences and circumstances wherein probability of harm to another within [the] circumference of such conduct is reasonably apparent, though no harm to such other is intended.

Defendant contends that this language contradicted the plain meaning of the phrase "deliberately bent on mischief" and "erroneously paralleled the definition of culpable negligence." However, in this jurisdiction, it is well-settled "that a charge is to be construed as a whole and isolated portions of a charge will not be held prejudicial where the charge as a whole is correct and free from objection." *State v. Poole*, 305 N.C. 308, 324, 289 S.E.2d 335, 345 (1982). Moreover, " '[i]t is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression may be inferred.' " *Id.* (quoting *State v. Gatling*, 275 N.C. 625, 633, 170 S.E.2d 593, 598 (1969)). Having reviewed the instruction in its entirety, we discern no error.

The record shows that immediately after giving the challenged portion of the instruction, the trial court explained that the phrase "deliberately bent on mischief" further

> [c]onnotes an entire absence of care for the safety of others which exhibits indifference to consequences. It connotes conduct where the actor, having reason to believe his act may injure another, does it, being indifferent to whether it injures or not. It indicates a realization of the imminence of danger, and reckless disregard, complete indifference and unconcern for probable consequences. It connotes conduct where the actor is conscious of his conduct, and conscious of his knowledge of the existing conditions that injury would probably result, and that, with reckless indifference to consequences, the actor consciously and intentionally did some wrongful act to produce injurious result.

This portion of the charge, read in the context of the entire instruction, correctly conveyed to the jury that it could infer malice if it found that the acts of defendant " 'manifest depravity of mind and disregard of human life.' " *Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 916 (quoting *Wrenn*, 279 N.C. at 687, 185 S.E.2d at 135). Therefore, defendant's argument must fail.

[3] Next, defendant contends that the trial court committed reversible error in giving "additional instructions" to the jury without first allowing counsel an opportunity to be heard. Defendant argues that the trial court acted in violation of section 15A-1234(c) of the General Statutes. We cannot agree.

After the jury has retired to deliberate, the trial court "may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court[.]" N.C. Gen. Stat. § 15A-1234(a) (1997). The statute further provides that:

> Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. 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.G.G. § 15A-1234(c). Where the trial judge simply repeats or clarifies instructions previously given and "d[oes] not add substantively to those instructions," the latter instructions are not "additional instructions" as that term is contemplated in section 15A-1234(c), and the trial judge need not consult with the parties or give them an opportunity to be heard in advance of giving such instructions. *State v. Williamson*, 122 N.C. App. 229, 236, 468 S.E.2d 840, 845 (1996).

Contrary to defendant's assertion, the instruction giving "legally-accepted paraphrases of 'deliberately bent on mischief' " was not a substantive addition to the original instruction. The word paraphrase is defined as "[a] restatement of a text or passage in another form or other words, often to clarify meaning." AMERICAN HERITAGE DICTIONARY 602 (3rd ed. 1994). Thus, the challenged instruction constitutes a clarification, and as such, the trial court was not required to inform the parties or afford them an opportunity to be heard.

Even assuming, *arguendo*, that the trial court erred in this regard, the error was harmless, because defendant has failed to show that he was prejudiced by the alleged omission. In light of our holding that the instructions were correct, when viewed as a whole, we cannot envision how a different verdict would likely have ensued had the trial court notified the parties of the instructions it intended to give or permitted them an opportunity to be heard. *See Rice*, 82 N.C. App. 318, 346 S.E.2d 205 (stating that appellant must show not only error, but that absent error, result probably would have been different). Defendant's argument is, therefore, overruled.

[4] Defendant further argues that the trial court erred in permitting Officer Austin to testify that, in his opinion, defendant was impaired and unable to drive. Again, we must disagree.

Rule 701 of the North Carolina Rules of Evidence provides as follows regarding the admissibility of opinion testimony by lay witnesses:

> 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. Furthermore, the rule is well-established that " 'a lay witness who has personally observed a person may give his opinion as to whether that person was under the influence of intoxicants.' " *State v. Adkerson*, 90 N.C. App. 333, 338, 368 S.E.2d 434, 437 (1988) (quoting *State v. Lindley*, 286 N.C. 255, 258, 210 S.E.2d 207, 209 (1974)).

In the case *sub judice*, Officer Austin testified that in his opinion, defendant was appreciably impaired and unable to operate a vehicle on the night of the collision. Officer Austin's opinion was based on his experience as a law enforcement officer in conjunction with his observations of the circumstances surrounding the collision. Officer Austin testified that as he proceeded to the scene, he noted the posted speed limits, and when he arrived at the place where the accident occurred, he observed the position and condition of the vehicles involved. He stated that he also witnessed defendant's behavior at the scene and described him as "giving E.M.S. quite a hard time." When Officer Austin later interviewed defendant at the hospital, he detected a "moderate to strong" odor of alcohol about defendant's person. He further noted that defendant's eyes were bloodshot and watery and that defendant had difficulty focusing on the officer during the interview. Armed with these facts, a police officer with more than three years' experience in the enforcement of motor vehicle laws and who has been personally involved in the investigations of nearly 200 driving while impaired cases is competent to express an opinion that defendant was under the influence of alcohol when he collided with the victims' vehicle. We, therefore, hold that the trial court was correct in allowing Officer Austin to offer his opinion on this matter, and we reject defendant's argument to the contrary.

[5] Further, defendant argues that the trial court erred in admitting his prior traffic violations into evidence and in instructing the jury that it could consider such evidence "to establish a pattern of reckless and inherently dangerous conduct to substantiate malice . . . and

to show the absence of accident." Defendant contends that his prior traffic offenses were not sufficiently similar to the circumstances of the collision at issue to be probative of malice or absence of accident. We cannot agree.

Rule 401 of the North Carolina Rules of Evidence defines "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 probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Thus, evidence tending to support the theory of the State's case is generally admissible. *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990). Under Rule 404(b),

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.R. Evid. 404(b). As our Supreme Court has recognized, this " 'list of permissible purposes for admission of "other crimes" evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact other than the defendant's propensity to commit the crime.' " *State v. Pierce*, 346 N.C. 471, 490, 488 S.E.2d 576, 587 (1997) (quoting *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995)). Moreover, this Court has repeatedly held that evidence of prior convictions is admissible under Rule 404(b) to show the malice necessary to support a second-degree murder conviction. *State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998) (prior convictions for driving under the influence admissible as evidence of malice); *McBride*, 109 N.C. App. 64, 425 S.E.2d 731 (prior driving while impaired convictions may be offered to show malice); *State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992) (pending driving while impaired charge admissible to show requisite mental state for second-degree murder).

As previously noted, the State, in the present case, sought to establish the malice element of second-degree murder by showing that defendant committed an act evidencing a total disregard for human life—i.e., showing "wickedness of disposition," "recklessness of consequences" or "a mind regardless of social duty and deliberately bent on mischief." Evidence of defendant's prior traffic violations—driving 75 mph in a 45 mph zone, 76 mph in a 45 mph zone, 70

mph in a 35 mph zone, and 70 mph in a 55 mph zone—was relevant to establish defendant's "depraved heart" on the night he struck the victims' vehicle while rounding a sharp curve at a speed at least 40 mph over the posted limit. Thus, we hold that the evidence was properly admitted under Rule 404(b) and that the trial court gave an appropriate limiting instruction.

[6] Defendant next challenges the trial court's failure to exclude information from his medical records on the ground that such records were obtained in violation of section 8-53 of the General Statutes. Defendant argues that his statement to Dr. Mazur that he drank "several shots and several beers" on the night of the accident was erroneously admitted into evidence. We discern no prejudicial error.

Section 8-53 of the General Statutes sets forth the procedure for compelling the disclosure of information ordinarily protected by physician-patient privilege. *State v. Drdak*, 330 N.C. 587, 411 S.E.2d 604 (1992). Under the statute, a party seeking disclosure of such information must obtain an order of the presiding judge compelling disclosure, "if in his opinion disclosure is necessary to a proper administration of justice." N.C. Gen. Stat. § 8-53 (1986). The statute further provides that "if the case is in superior court the judge shall be a superior court judge." *Id.*

Defendant contends that because the order compelling the disclosure of his medical records was issued by a district court judge, rather than a superior court judge, the disclosure was unlawful, and the records should have been suppressed. While the State concedes, and we agree, that the "order compelling the disclosure of [defendant's] medical records should have come from a superior court judge," defendant has not shown prejudicial error. "An error is prejudicial if there is a reasonable possibility that a different result would have occurred at trial if the error had not been committed." *State v. Proctor*, 62 N.C. App. 233, 236, 302 S.E.2d 812, 815 (1983). In view of the overwhelming evidence that on the night in question, defendant had a strong odor of alcohol on his breath, we are of the opinion that there is no reasonable possibility that the jury would have reached a different result had the evidence of defendant's statement been excluded. This argument fails.

[7] Additionally, defendant argues that the trial court erred by failing to dismiss the charges of second-degree murder, because the State's evidence was insufficient to support a finding of malice. We cannot agree.

In ruling on a motion to dismiss, the trial court is to view all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving it the benefit of 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). Where there is substantial evidence of each essential element of the crime charged, the motion to dismiss should be denied. *State v. Williams*, 127 N.C. App. 464, 490 S.E.2d 583 (1997). " 'Substantial evidence' " is defined as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 467, 490 S.E.2d at 586 (quoting *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E.2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E.2d 57 (1996)). 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).

"Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *Grice*, 131 N.C. App. at 53, 505 S.E.2d at 169. As previously stated, malice necessary to establish second-degree murder may be inferred from conduct evincing " 'recklessness of consequences' " or " 'a mind regardless of social duty and deliberately bent on mischief,' " such as manifests a total disregard for human life. *Wilkerson*, 295 N.C. at 578-79, 247 S.E.2d at 916 (quoting *Wrenn*, 279 N.C. at 687, 185 S.E.2d at 135). Viewed in the light most favorable to the State, the evidence tends to show that defendant, with a history of driving at speeds far in excess of the posted limits, entered a sharp curve with a speed limit of 35 mph at a speed in excess of 70 mph while under the influence of alcohol. Defendant collided head-on with an on-coming vehicle and caused the deaths of two persons. We hold that this evidence was sufficient to go to the jury on the issue of whether defendant acted maliciously in causing the deaths of Bush and Litrell, and the trial court did not err in denying defendant's motion to dismiss.

[8] In his final argument, defendant takes issue with the trial court's failure to find any factors in mitigation of his sentence. Defendant contends that the evidence conclusively established that he was a person of good character, with a support system in the community, a positive employment history, and a good treatment prognosis. Nevertheless, where the trial court imposes sentences within the presumptive range for all offenses of which defendant was convicted, he is not obligated to make findings regarding aggravating and mitigat-

ing factors. *State v. Teasley*, 82 N.C. App. 150, 346 S.E.2d 227 (1986). In the present case, no error occurred, since the trial court sentenced defendant within the presumptive range.

In light of all of the foregoing, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and WALKER concur.

STATE OF NORTH CAROLINA v. DEWEY LEROY PETTY

No. COA98-493

(Filed 2 March 1999)

1. Evidence— corroborative—contradictory

The trial court did not err in a prosecution for indecent liberties and sexual offenses by admitting evidence which defendant argued contradicted rather than corroborated statements made by the victim but the victim's testimony indicated a course of continuing sexual abuse and any new or additional instances of abuse tended to strengthen her trial testimony.

2. Sexual Offenses— instructions—nonunanimous

There was no error in a prosecution for indecent liberties and sexual offenses against a child where the court instructed the jury that it could find defendant guilty of a first-degree sexual offense if it found that defendant had engaged in either of two acts. The single wrong of engaging in a sexual act with a minor may be established by a finding of various alternatives, which are merely alternative ways of showing the commission of a sexual act. Even if some jurors found that one act occurred and others found that the other act transpired, the jury as a whole would unanimously find that there occurred sexual conduct constituting the single crime of engaging in a sexual act with a child. However, it was noted that charging a defendant with a separate count of first-degree sexual offense for each alternative sexual act performed in a single transaction would result in a multiplicious indictment.

3. Criminal Law— prosecutor's closing argument—reasonable doubt

The trial court did not err in a prosecution for first-degree sexual offense and taking indecent liberties with a minor by not intervening ex mero motu in the prosecutor's argument concerning reasonable doubt where defendant had argued that the jury would have to get to 9.7 or 9.8 on a scale of one to ten and the prosecutor argued for a seven and explicitly informed the jury that the case was not about scales at all. Moreover, any prejudice was remedied by the trial court's instruction on reasonable doubt, which was substantially the same as an instruction approved by the Supreme Court with the addition of the phrase "sits nice." That phrase was improper but not prejudicial.

Appeal by defendant from judgments filed 5 December 1995 by Judge C. Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 12 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Jane Rankin Thompson, for the State.

Wyatt, Early, Harris & Wheeler, L.L.P., by Stanley F. Hammer, for defendant-appellant (Robert H. Edmunds, Jr., filed the record and appellant's brief).

GREENE, Judge.

Dewey Leroy Petty (Defendant) appeals from his convictions for first-degree sexual offense and taking indecent liberties with a child.

J.F., the prosecuting witness, testified that Defendant, a friend of her father, began sexually molesting her following her tenth birthday. Defendant began giving J.F.'s father rides home from work, and J.F. saw Defendant "[a]lmost every day." J.F. testified that she often went to "the stores" with Defendant, and specifically named "Winn-Dixie, Food Lion, Crown, Eckerd, [and] Family Dollar." Sometimes Defendant would take her brothers and sisters as well, but "[s]ometimes" Defendant would take only J.F. She testified that it was "[s]cary" when she went to the stores by herself with Defendant, "[b]ecause every time we're alone, he would massage my private parts." J.F. testified that Defendant had often given her money, ice cream, and presents, and had given her a hundred dollars for her tenth birthday. Around the time of J.F.'s tenth birthday, Defendant

took her to a carnival. On this occasion, Defendant "tried to hurt my—play with my body parts." J.F. testified that it was "a hot night," and that Defendant pulled down her skirt to "play with [her] private parts again." J.F. testified that Defendant touched her "[u]nderneath" her underwear and "[i]nside" her "private area." Defendant told J.F. "if [she] didn't let him do it that he was going to not be [her] dad's friend anymore." J.F. testified that on one occasion when it was "cold" outside, Defendant had kissed her on the lips with his mouth open, and that Defendant had kissed her "private parts" a few weeks after the carnival. This latter instance occurred in Defendant's car "behind Winn-Dixie." J.F. started screaming, but Defendant told her not to scream. J.F. pulled her pants down when Defendant told her to because "he was a grown-up and he was my father's friend." J.F. testified that Defendant never took any pictures of her, but had shown her a picture of a naked girl and had asked to take a picture of J.F.'s "private part." Eventually, J.F. told her mother about these incidents, and her parents immediately notified the police.

Elaine Whitman (Whitman) testified as an expert in the field of child sexual abuse. When Whitman began to testify as to statements made to her by J.F.'s mother, Defendant objected and the trial court gave the following instruction:

> Members of the jury, this is being offered for the purpose of corroborating the testimony of the later [witness], and it is for you to determine whether it does so, in fact, corroborate that testimony.
>
> It's not offered for the truth or the falsity of the statement [but] as to whether that statement was made on that occasion.

Whitman began to testify as to what J.F. had told her, and Defendant's counsel stated: "We object as far as substantive evidence that it should only be considered for corroboration or impeachment." The trial court informed the jury: "Again, it's not been offered for the truth or falsity of the statements made, it's for you to sit and determine that." Whitman then testified that J.F. had told her that Defendant "had tried to kiss her in her vaginal area, but she moved away quickly and he kissed the car seat." As Whitman continued, Defendant's counsel stated: "We just asked for an objection with the same instructions as far as anything—" and the trial court again reiterated to the jury that this testimony was "being offered for the purpose of corroborating the testimony of an earlier witness." Whitman continued to testify as to her interview with J.F., and subsequently

was asked by the prosecutor whether J.F. had told her that Defendant had taken her picture. Defendant objected, but did not state the grounds for this objection. The objection was overruled, and Whitman testified that J.F. had told her that Defendant had tried to take a picture of her with "her pants below her knees," but she had pulled her pants up before he could.

Angela Jolene Stanley, M.D. (Dr. Stanley), who examined J.F., was questioned by the prosecutor as to her conversation with J.F.'s mother. Defendant objected "to substantive evidence." The trial court instructed the jury:

> Again, members of the jury, this is being offered for the purpose of corroborating [an] earlier or a later witness, and it will be for you to say and determine whether it does in fact corroborate that witness's testimony. It is not being offered for the truth or falsity of the statement but the fact that the statement was made.

Dr. Stanley was then allowed to testify as to what J.F.'s mother told her J.F. had said. Defendant repeatedly made general objections, which were overruled. Defendant did not object on hearsay grounds, nor did Defendant seek a ruling from the trial court as to whether this evidence was corroborative.

Officer Wayne Redford (Officer Redford) testified that during his interview of J.F., she told him that on one occasion she pulled away from Defendant and he "grabbed her and pulled her back over under him and made her pull her panties down again" and continued to fondle her. Defendant moved to strike this testimony, and the trial court denied this motion.

At the close of the evidence, Defendant's counsel made the following statements during his closing argument to the jury:

> A lot that we've talked about is burden of proof, proof beyond a reasonable doubt, and if you would, if you'd imagine a scale, let's say from zero to ten, zero would be innocence and ten would be guilty, and if you went to that scale, you went up to maybe 5.1 or 5.2 on a scale of ten, that certainly wouldn't be proof beyond a reasonable doubt. We'd say you have to get maybe to 9.7 or 9.8 on that scale, and [the trial court] will talk about that.
>
> I think [the trial court will] tell you that proof beyond a reasonable doubt is proof that fully satisfies and entirely convinces. Basically, you have to be sure.

During the State's closing argument, the prosecutor stated:

> One of the things that the judge will talk to you about and [Defendant's counsel] talked to you about and I argue and contend to you, that this case isn't about boulders or scales from one to ten.
>
> You're not going to hear the judge tell you anything about number one to ten.
>
> But if you think of it in those terms, I would argue to you that about all the State has to do is show you a real strong seven. We're not talking about 90.8 or 90.9, and we're not talking about scales at all.

Defendant did not object to these statements. The trial court subsequently charged the jury as to reasonable doubt as follows:

> The State must prove to you that [D]efendant is guilty beyond a reasonable doubt.
>
> A reasonable doubt is a doubt based on reason and common sense arising out of some or all the evidence that has been presented or the lack or insufficiency of the evidence, as the case may be.
>
> Proof beyond a reasonable doubt is proof that, if you will, sits nice or entirely convinces you of [D]efendant's guilt.

The trial court instructed the jury that for the charge of first-degree sexual offense which allegedly occurred in November of 1994, "the State must satisfy you beyond a reasonable doubt that there was penetration, however slight, with an object into the genital opening of a person's body." For the first-degree sexual offense which allegedly occurred in January of 1995, "the State would have to show you beyond a reasonable doubt that [Defendant] engaged in a sexual act which was cunnilingus, with—or any penetration, however slight, by an object into the genital area of a person's body." After instructing the jury as to the remaining elements of the charged offenses, the trial court instructed the jury that "a verdict is not a verdict until all 12 jurors are unanimous as to what your decisions are. You may not render a verdict by a majority opinion."

After the jury began its deliberation, they asked the trial court to clarify the elements of each offense. In its clarification, the trial court

instructed the jury concerning the first element of first-degree sexual offense as follows:

> [T]hat [D]efendant engaged in a sexual act with the victim. A sexual act means cunnilingus, which is any touching, however slight, by the lips or the tongue of one person to any part of the female sex organ of another, or any penetration, however slight, by an object into the genital opening of a person's body.

The jury found Defendant guilty of taking indecent liberties with J.F. in November of 1994 and in January of 1995. The jury also found Defendant guilty of attempted first-degree sexual offense in November of 1994 and of first-degree sexual offense in January of 1995.

The issues are whether: (I) noncorroborative testimony was improperly admitted; (II) the disjunctive jury instructions on first-degree sexual offense created a risk of a nonunanimous verdict; and (III) the prosecutor's closing argument impermissibly lowered the burden of proof such that the trial court should have intervened *ex mero motu*.

I

[1] Corroborative evidence is evidence that tends "to strengthen, confirm, or make more certain the testimony of another witness." *State v. Adams*, 331 N.C. 317, 328-29, 416 S.E.2d 380, 386 (1992). "Prior consistent statements of a witness are admissible as corroborative evidence, even when the witness has not been impeached." *State v. Burton*, 322 N.C. 447, 449-50, 368 S.E.2d 630, 632 (1988); *see* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* §§ 164-65 (5th ed. 1998) (noting that North Carolina allows wide latitude in the admission of prior consistent statements to corroborate a witness). Corroborative evidence may include "new or additional information" if the new information tends to strengthen or add credibility to the testimony it corroborates. *Burton*, 322 N.C. at 450, 368 S.E.2d at 632; *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986) (noting that the prior statement of the witness "need not merely relate to [the] specific facts brought out in the witness's [trial] testimony"). The witness's prior statements that contradict her trial testimony, however, may not be admitted "under the guise" of corroborating testimony. *Burton*, 322 N.C. at 450, 368 S.E.2d at 632 (holding that the witness's prior statement that the victim was "lying flat on

his back when he was shot" impermissibly contradicted the witness's trial testimony that the victim was "on top of" another individual at that time).

In this case, Defendant contends Whitman's testimony impermissibly contradicted J.F.'s testimony in several particulars. Whitman testified that J.F. had told her that one instance of sexual contact occurred behind Kroger, whereas J.F. testified to an event that occurred behind Winn Dixie. Whitman also testified that J.F. had told her the touching started after her ninth birthday and occurred about twice a week. Although J.F. testified that the touching started following her tenth birthday, and only testified to two specific instances in detail, she testified that she saw Defendant almost every day, that she and Defendant sometimes went to various stores alone, and that "every time we're alone, he would massage my private parts." J.F. further testified that Defendant made improper advances when the weather was "hot" and when it was "cold." J.F.'s testimony indicated a course of continuing sexual abuse; therefore, any new or additional instances of abuse in Whitman's testimony tended to strengthen J.F.'s trial testimony. *See Ramey*, 318 N.C. at 470, 349 S.E.2d at 574 (noting that evidence of additional instances of sexual contact was admissible as corroborative evidence where victim had testified to a course of continuing sexual abuse); *cf. State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991) (noting that children "cannot be expected to be exact regarding times and dates, [and] a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence").

Although Defendant directs this Court to further testimony by Whitman which he contends was contradictory rather than corroborative, Defendant did not object to this testimony on the ground that it was outside the scope of corroborative testimony. Instead, Defendant merely requested the trial court to instruct the jury that the evidence was offered only for corroborative purposes. Accordingly, Defendant failed to preserve these alleged errors for appellate review. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, *stating the specific grounds for the ruling the party desired the court to make* if the specific grounds were not apparent from the context." (emphasis added)). We note that had Defendant raised the question of whether the evidence offered was admissible as corroborative evidence, the trial court could have conducted a *voir dire* hearing outside the pres-

ence of the jury to make such a determination. *See State v. Stills*, 310 N.C. 410, 416, 312 S.E.2d 443, 447 (1984).

Defendant also contends portions of Dr. Stanley's testimony were inadmissible as multiple hearsay. Although we disapprove of the admission of "hearsay statements three or four times removed from the original declarant under the guise of corroborating the corroborative witnesses," *see Stills*, 310 N.C. at 416, 312 S.E.2d at 447, a defendant must object on that ground, giving the trial court the opportunity to correct any perceived error, in order to preserve the question for appellate review, N.C.R. App. P. 10(b)(1). Defendant failed to make an objection on hearsay grounds to the trial court and therefore has failed to preserve this question for our review.

Defendant further contends the testimony of Officer Redmond placed an additional instance of sexual contact before the jury. As noted above, however, J.F. testified to a continuing course of sexual abuse; therefore, the additional instance contained in Officer Redmond's testimony was properly admitted as corroborative evidence.

II

[2] Our state constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24; *see also* N.C.G.S. § 15A-1237(b) (1997) (requiring unanimous jury verdicts). If the trial court instructs a jury that it may find the defendant guilty of the crime charged on either of two alternative grounds, some jurors may find the defendant guilty of the crime charged on one ground, while other jurors may find the defendant guilty on another ground. Where each alternative ground constitutes a separate and distinct offense, the risk of a nonunanimous verdict arises. *State v. Diaz*, 317 N.C. 545, 553, 346 S.E.2d 488, 494 (1986) (jury instructions that the defendant could be found guilty of trafficking if he either possessed or transported marijuana resulted in a verdict which risked nonunanimity because "transportation . . . and possession of . . . marijuana are separate trafficking offenses for which a defendant may be separately convicted and punished"). There is no risk of a nonunanimous verdict, however, where the statute under which the defendant is charged criminalizes "a single wrong" that "may be proved by evidence of the commission of any one of a number of acts . . . ; [because in such a case] the particular act performed is immaterial." *State v. Hartness*, 326 N.C. 561, 566-67, 391 S.E.2d 177, 180 (1990) (single crime of taking indecent liberties

with a child could be proven by showing various types of sexual conduct had occurred, and therefore no risk of nonunanimity arose from jury instructions that the defendant could be found guilty of the crime if he either indecently touched the child *or* if he induced the child to indecently touch him); *see State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996) (single offense of driving while impaired could be shown either by finding the defendant drove while under the influence of an impairing substance *or* by finding the defendant's blood alcohol concentration was 0.08 or more; therefore disjunctive jury instructions did not risk nonunanimity); *cf. Rice v. State*, 532 A.2d 1357, 1364 (Md. 1987) ("In short, the law requires unanimity only in the verdict, not in the rationale upon which the verdict is based.").

> There is a critical difference between the lines of cases represented by *Diaz* and *Hartness*. The [*Diaz*] line establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The [*Hartness*] line establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.

State v. Lyons, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991).

Our courts consider the "gravamen" or "gist" of the statute to determine whether it criminalizes a single wrong or multiple discrete and separate wrongs. *Hartness*, 326 N.C. at 567, 391 S.E.2d at 180 (noting that the defendant's *purpose* for taking an indecent liberty is the gravamen of the offense; therefore the particular act performed is immaterial); *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985) (noting that the gravamen of section 90-95(a)(1), which criminalizes possession of narcotics with the intent to sell or deliver, is possession with the intent to *transfer* and the method of transfer is immaterial); *cf. Rice*, 532 A.2d at 1366 (noting that courts should consider the requisite "mental state, attendant circumstances, . . . result, [and prohibited] conduct" in determining whether a statute criminalizes a single wrong or multiple distinct wrongs).

Finally, if we determine that the statute criminalizes two or more discrete and separate wrongs, we must examine the verdict, the charge, the jury instructions, and the evidence to determine whether

any ambiguity as to unanimity has been removed. *Lyons*, 300 N.C. at 307, 412 S.E.2d at 314; *State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984).

The statute at issue in this case provides:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> > (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim . . . .

N.C.G.S. § 14-27.4(a) (Supp. 1997). A "sexual act," as used in section 14-27.4, includes: "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." N.C.G.S. § 14-27.1(4) (1993). Section 14-27.4's gravamen, or gist, is to criminalize the performance of a sexual act with a child. The statutory definition of "sexual act" does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown. Furthermore, our Supreme Court has expressly determined that disjunctive jury instructions do not risk nonunanimous verdicts in first-degree sexual offense cases. *State v. McCarty*, 326 N.C. 782, 784, 392 S.E.2d 359, 360 (1990) (upholding jury instruction that the defendant could be found guilty of first-degree sexual offense "if [the jury] found [the] defendant [had] engaged in either fellatio or vaginal penetration"); *Hartness*, 326 N.C. at 565, 391 S.E.2d at 179 (holding that disjunctive instructions did not result in a fatally ambiguous verdict in an indecent liberties case, and noting that the indecent liberties statute is "more similar to the statute relating to first-degree sexual offense . . . than to the trafficking statute discussed in *Diaz*").[1]

In this case, the trial court instructed the jury that it could find Defendant guilty of a first-degree sexual offense if, in addition to the other elements of first-degree sexual offense, it found that Defendant

1. We note that prior to the Supreme Court's decision in *McCarty*, this Court reversed a conviction for first-degree sexual offense where jury instructions had been given in the disjunctive. *State v. Callahan*, 86 N.C. App. 88, 356 S.E.2d 403 (1987). *Callahan* was implicitly overruled by our Supreme Court's contrary holding in *McCarty*. In any event, it is well settled that this Court is bound by the holdings of our Supreme Court. *Mahoney v. Ronnie's Road Service*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997).

had "engaged in a sexual act which was cunnilingus, with—or any penetration, however slight, by an object into the genital area of a person's body." This charge was not error, because the single wrong of engaging in a sexual act with a minor may be established by a finding of various alternatives, including cunnilingus and penetration. Cunnilingus and penetration are not disparate crimes, but are merely alternative ways of showing the commission of a sexual act. The trial court's disjunctive instruction therefore did not risk a nonunanimous verdict. As in *Hartness*, "[e]ven if we assume that some jurors found that [cunnilingus] occurred and others found that [penetration] transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct" constituting the single crime of engaging in a sexual act with a child. *See Hartness*, 326 N.C. at 565, 391 S.E.2d at 179.

We note that our Supreme Court's determination that first-degree sexual offense is a single wrong for unanimity purposes requires us to conclude that charging a defendant with a separate count of first-degree sexual offense for each alternative sexual act performed in a single transaction would result in a multiplicious indictment.[2] If the defendant engages in alternative sexual acts in separate transactions, however, each separate transaction may properly form the basis for charging the defendant with a separate count of first-degree sexual offense. *Compare State v. Smith*, 323 N.C. 439, 444, 373 S.E.2d 435, 438 (1988) (holding that the State may charge a defendant with only one count of disseminating obscenity for each separate transaction even though several obscene magazines were disseminated during each transaction) *and State v. Dilldine*, 22 N.C. App. 229, 231, 206 S.E.2d 364, 366 (1974) ("It was improper to have two bills of indictment and two offenses growing out of . . . one episode.") *with State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987) (noting that each act of sexual intercourse is generally a distinct and separate offense and where the defendant raped the first victim, then attempted to rape the

2. An indictment is multiplicious if it charges a single offense in several counts. *See* N.C.G.S. § 15A-924(a)(2) (1997) ("A criminal pleading must contain . . . [a] separate count addressed to each offense charged . . . ."); N.C.G.S. § 15A-926(a) (1997) ("Two or more offenses may be joined in one pleading . . . when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924."). "The principle danger in multiplicity is that the defendant will receive multiple sentences for a single offense . . . . Multiplicity does not require dismissal of the indictment, [but] the defendant will be entitled to relief from an improperly imposed multiple sentence . . . ." 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 457-58 (1984).

second victim, then raped the first victim again, it was proper to charge the defendant with two counts of rape of the first victim) *and State v. Small*, 31 N.C. App. 556, 558, 230 S.E.2d 425, 427 (1976) (noting that the defendant was properly charged with two counts of rape where he dragged the victim into some bushes and raped her, then the victim attempted to lure him to a friend's apartment so she could get help, then the defendant again dragged her into some bushes and raped her a second time), *disc. review denied*, 291 N.C. 715, 232 S.E.2d 207 (1977).

III

[3] Finally, Defendant contends the prosecutor "impermissibly lowered the burden of proof" during her closing argument to the jury, and despite Defendant's failure to object, the trial court should have corrected the prosecutor's argument *ex mero motu*.

The prosecutor's closing argument statements concerning "scales from one to ten" followed Defendant's counsel's closing argument statements that if zero was innocent and ten was guilty, then the jury would "have to get maybe to 9.7 or 9.8 on that scale." In addition, the prosecutor explicitly informed the jury that "this case isn't about . . . scales from one to ten. . . . [W]e're not taking about scales at all." Viewing the closing arguments of both defense counsel and the prosecutor in context, *see State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996), the trial court's failure to intervene *ex mero motu* was not an abuse of discretion. Furthermore, any prejudice which may have resulted from the prosecutor's argument was remedied by the trial court's instruction on reasonable doubt. *See State v. Rose*, 339 N.C. 172, 197, 451 S.E.2d 211, 225 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (noting that any possible error was remedied by the trial court's instruction that "[a] reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt"). The trial court herein stated:

> A reasonable doubt is a doubt based on reason and common sense arising out of some or all the evidence that has been presented or the lack or insufficiency of the evidence, as the case may be.

Proof beyond a reasonable doubt is proof that, if you will, sits nice or entirely convinces you of [D]efendant's guilt.

This is substantially the same instruction on reasonable doubt approved by our Supreme Court in *Rose*. Although the trial court's use of the phrase "sits nice" was improper, taken in the context of the trial court's overall instruction, this phrase did not prejudice Defendant.

No error.

Judges JOHN and HUNTER concur.

WHITECO OUTDOOR ADVERTISING, A DIVISION OF WHITECO INDUSTRIES, INC., PETITIONER v. JOHNSTON COUNTY BOARD OF ADJUSTMENT, RESPONDENT

No. COA98-580

(Filed 2 March 1999)

1. Zoning— outdoor advertising—repair of nonconforming sign—permit required

There was sufficient evidence to support the Johnston County Board of Adjustment's decision that two outdoor advertising signs could not be rebuilt under the Johnston County Ordinance without a new building permit where Section 7.5 of the Ordinance provides that a permit is required when making repairs to a nonconforming sign which exceed fifty percent of the initial value of the sign as determined by the District Engineer; a letter was presented from the DOT District Engineer stating that he had determined that one sign was damaged in excess of fifty percent of its initial value and that he had observed that the sign had been replaced by new materials; the County Damage Assessment Team had determined that the signs were destroyed in a wind storm and that all of the poles used to support the signs had been snapped; and the Johnston County building inspectors had determined that the signs had been destroyed, with one building inspector testifying that new building materials were at the sites when he observed them.

2. Zoning— outdoor advertising—repair of damaged sign—definition of value

There was no manifest error of law in the Johnston County Board of Adjustment's interpretation of "value" in the portion of an ordinance dealing with repair of a sign.

3. Zoning— board of adjustment hearing—evidence—due process

The due process rights of an outdoor advertising company were not violated in a board of adjustment hearing where a letter from the DOT District Engineer was presented as part of sworn testimony and the sign company's counsel merely stated that she had not had the opportunity to review the letter. Local boards, such as municipal boards of adjustment, are not strictly bound by formal rules of evidence and, assuming that counsel's statement sufficed as a formal objection to the introduction of the letter, the sign company failed to show that it did not have ample opportunity to cross-examine the witness as to the contents of the letter or to present its own evidence.

Appeal by petitioner from order entered 18 February 1998 by Judge E. Lynn Johnson in Johnston County Superior Court. Heard in the Court of Appeals 11 January 1999.

Wilson & Waller, P.A., by Betty S. Waller, for petitioner-appellant.

J. Mark Payne and W.A. Holland, Jr., for respondent-appellee.

MARTIN, Judge.

Petitioner Whiteco Outdoor Advertising ("Whiteco") appeals from an order of the superior court affirming a decision of respondent Johnston County Board of Adjustment ("Board") denying Whiteco a use permit to rebuild two damaged billboard signs. The facts underlying this appeal are summarized from the record as follows:

In May 1996, Whiteco managed two billboard signs at different sites adjacent to Interstate 95 in Johnston County, North Carolina. One billboard is located on property owned by Joe Austin ("the Austin sign") and was constructed in January 1960; the other billboard was constructed in September 1982 and is located on property owned by William Kawecki ("the Kawecki sign"). The billboard signs are subject to regulation by both Johnston County and the North

Carolina Department of Transportation ("DOT"), and, prior to May 1996, were nonconforming with Johnston County Zoning Ordinance, Article 5.5, Spacing of Signs. The Austin sign was also nonconforming with DOT regulations and the North Carolina Outdoor Advertising Act.

On 6 May 1996, a windstorm damaged both billboards. Whiteco immediately undertook repairs to restore the signs. On 7 May 1996 the Johnston County Assessment Team for storm damage examined the signs and reported both signs as being "totally destroyed." On 8 May, Greg Smith, a Johnston County building inspector, examined both sites and noted the presence of destroyed sign poles, new sign building materials, including new poles erected at each site, as well as the absence of the old billboard faces. Based on this inspection, a notice was placed at each site informing Whiteco that building permits were required prior to replacing the signs. However, Whiteco continued replacement efforts without obtaining building permits.

On 22 May 1998, C.P. Thompson, Chief Building Inspector for Johnston County, informed Whiteco that the signs had been replaced in violation of stop work orders posted at both sites on 8 and 9 May, and that the signs should be removed. Whiteco was also notified by Calvin Genereux, Johnston County Planning Director, that the signs had been damaged in excess of 50% of their initial value, and that the Johnston County Zoning Ordinance prohibited their replacement. Mr. Genereux informed Whiteco that the County would not issue use permits for the signs to be rebuilt and instructed Whiteco to remove the signs. Whiteco denied that it had been made aware of the stop work orders prior to proceeding with the repairs and contended the cost of repairs to the signs did not exceed 50% of their respective values.

Whiteco appealed Mr. Genereux's decision to respondent Board. After a hearing, the Board determined that both signs had been damaged more than 50% of the original cost of erecting them, rejecting Whiteco's contentions that valuations of the signs should be determined by the income method or by the fair market value method. Whiteco petitioned the Johnston County Superior Court for a writ of *certiorari* to review the Board's decision. Whiteco now appeals from the superior court's order affirming the Board's decision.

In support of the six assignments of error contained in the record, Whiteco advances four arguments on appeal. Whiteco contends the trial court erred in (1) concluding the Board's decision was supported

by substantial competent evidence; (2) concluding that the Board's decision was not arbitrary or capricious; (3) finding that the Board's decision was free from errors of law; and (4) finding that Whiteco's right to due process was not violated by the consideration of evidence which Whiteco had no opportunity to cross-examine. After careful consideration of Whiteco's arguments, we affirm the order of the trial court.

While the Administrative Procedure Act ("APA") does not apply to decisions of town boards or local municipalities, the principles embodied in the APA are "highly pertinent" to a review of such boards. *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners*, 299 N.C. 620, 265 S.E.2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). When reviewing the decision of such a board, the superior court should: (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious. *Id.* at 626, 265 S.E.2d at 383. *See also, Appeal of Willis*, 129 N.C. App. 499, 500 S.E.2d 723 (1998). Our task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review. *Willis* at 502, 500 S.E.2d at 726 (quoting *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

[1] In this case, Whiteco contends the whole record does not contain substantial competent evidence to support the Board's decision. When the decisions of a board of adjustment are challenged as either unsupported by substantial competent evidence or arbitrary and capricious, the reviewing court conducts a "whole record test" to determine whether the Board's findings are supported by substantial evidence contained in the whole record. *Willis* at 501, 500 S.E.2d at 725. Substantial evidence is "evidence a reasonable mind might accept as adequate to support a conclusion." *Hayes v. Fowler*, 123 N.C. App. 400, 405, 473 S.E.2d 442, 445 (1996). Moreover, a decision may be reversed as arbitrary and capricious only where the petitioner establishes that the decision was whimsical, made patently in bad faith, indicates a lack of fair and careful consideration, or "fail[s]

to indicate 'any course of reasoning and the exercise of judgment . . . .' " *Adams v. N.C. State Bd. of Registration for Professional Engineers and Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998) (citation omitted). In this case the Board's order cites the pertinent sections of Section 7.5 of the Johnston County Ordinance, which provides that a permit is required when "[m]aking repairs to a nonconforming sign . . . which exceeds 50 percent of the initial value of the sign as determined by the District Engineer." Section 7.7 of the ordinance states, "[n]o nonconforming sign shall be erected, replaced or otherwise modified in such a way as to increase its nonconformity. Reasonable repair and maintenance of nonconforming signs . . . is permitted, provided that a nonconforming sign which is damaged or deteriorated to the extent of fifty (50) percent or more of its value shall not be replaced unless it conforms to all provisions of this ordinance."

During the Board's hearing of this matter, the Planning Director was presented a letter from the DOT District Engineer stating that he had determined that the Austin sign was damaged in excess of 50% of its initial value, and that the Engineer observed that the sign had been replaced by all new materials. Evidence was also presented establishing that the County Damage Assessment Team determined that the signs were destroyed in the wind storm, and that all of the poles used to support the signs had been snapped in two. Johnston County building inspectors also inspected the signs and determined them to have been destroyed, and building inspector Smith testified that new building materials were at the sites when he observed them.

The foregoing evidence is sufficient to support the Board's decision that, under the Johnston County Ordinance, the signs had been damaged to the extent that they could not be rebuilt without petitioner's receiving a new building permit. While Whiteco presented evidence which would support a contrary decision, neither the trial court nor this Court may substitute its own judgment for that of the Board's. *See Hayes* at 405, 473 S.E.2d at 445 (a court engaging in a whole record review "may not substitute its judgment for that of the administrative body, however compelling the circumstance, merely because reasonable but conflicting views emerge from the evidence."); *See also, CG & T Corp. v. Board of Adjustment*, 105 N.C. App. 32, 411 S.E.2d 655 (1992). Moreover, in light of our holding that the Board's decision was supported by substantial competent evidence in the record, we also hold the Board's decision was neither arbitrary nor capricious, as the Board could reasonably conclude

from the evidence that the signs were damaged to the extent that a permit was needed for their replacement.

[2] Whiteco also contends the trial court erred in failing to find that the Board's decision was affected by error of law. Specifically, Whiteco asserts the Board erroneously interpreted the term "value" in section 7.7 of the ordinance as referring to the initial value of the sign, as opposed to the value of the sign at the time that it was damaged. Where the petitioner alleges that a board decision is based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined. *Willis* at 501, 500 S.E.2d at 725. However, "one of the functions of a Board of Adjustment is to interpret local zoning ordinances," and respondent's interpretation of its own ordinance is given deference. *CG & T* at 39, 411 S.E.2d at 659. Therefore, "our task on appeal is not to decide whether another interpretation of the ordinance might reasonably have been reached by the board," but to decide if the board "acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law" in interpreting the ordinance. *Taylor Home v. City of Charlotte*, 116 N.C. App. 188, 193, 447 S.E.2d 438, 442, *disc. review denied*, 338 N.C. 524, 453 S.E.2d 170 (1994).

Upon *de novo* review of the record, we do not believe the Board's interpretation of "value" as used in section 7.7 of the zoning ordinance to mean "initial value" is a manifest error of law. Article VII of the Johnston County Zoning Ordinance addresses damage to nonconforming signs in three different places; the first two references to value specifically state that the term signifies the initial value of the sign; section 7.7, which simply states "value", does not specify either initial or present value. In construing such ordinances we are obligated to adhere to fundamental principles of statutory construction, including ascertaining the legislative intent of the ordinance as indicated by the language, the spirit of the ordinance, and what the ordinance seeks to accomplish. *Hayes* at 404-5, 473 S.E.2d at 445; *Donnelly v. Bd. of Adjustment of the Village of Pinehurst*, 99 N.C. App. 702, 394 S.E.2d 246 (1990).

In the present case, we read the ordinance *in pari materia* such that it may be inferred that "value" in section 7.7 refers to "initial value", *see Empire Power Co. v. N.C. Dep't of E.H.N.R.*, 337 N.C. 569, 591, 447 S.E.2d 768, 781, *reh'g denied*, 338 N.C. 314, 451 S.E.2d 634 (1994). We also note that the intent and purpose of the ordinance is to prevent excessive repairs and replacements to signs already non-

conforming under the ordinance. While, as Whiteco argues, there may exist other reasonable interpretations of "value" under section 7.7 of the ordinance, no error of law occurred in the Board's interpretation thereof.

[3] Whiteco also contends the Board violated Whiteco's due process rights by considering as evidence a letter he received by Mr. Genereux from the DOT District Engineer. "Local boards, such as municipal boards of adjustment, are not strictly bound by formal rules of evidence, as long as the party whose rights are being determined has the opportunity to cross-examine adverse witnesses and to offer evidence in support of his position and in rebuttal of his opponent's." *Burton v. Zoning Board of Adjustment*, 49 N.C. App. 439, 442, 271 S.E.2d 550, 552 (1980), *cert. denied*, 302 N.C. 217, 276 S.E.2d 914 (1981) (citing *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974)). A party who fails to object to the absence of such an opportunity waives any such right. *Id.*

In the present case, the letter from the DOT District Engineer was presented as part of the sworn testimony of Mr. Genereux, and was contained in an exhibit comprised of materials Mr. Genereux had received from the DOT. Upon Mr. Genereux's reference to the letter, Whiteco's counsel merely stated that she had not had the opportunity to review the letter, and that had she had such an opportunity she may have called the District Engineer to testify. Assuming, *arguendo*, counsel's statement sufficed as a formal objection to the introduction of the letter, Whiteco has failed to show how it did not have ample opportunity to cross-examine Mr. Genereux as to the contents of the letter on which his opinion was based, or to present its own evidence in support of the position that the signs had not been destroyed within the meaning of the ordinance.

The trial court's order upholding the decision of the Johnston County Board of Adjustment is affirmed.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

ANTHONY POE, PLAINTIFF v. ATLAS-SOUNDELIER/AMERICAN TRADING & PRODUCTION CORP., RANDALL FEAGIN D/B/A RANDY'S ELECTRICAL SERVICE, SNYDER CORP. OF LEXINGTON, AND RICHARD BRITT, DEFENDANTS

No. COA98-714

(Filed 2 March 1999)

1. **Negligence— industrial accident—how accident happened—evidence insufficient**

The trial court properly granted summary judgment for defendants in a negligence action which arose from an injury suffered while plaintiff was operating a mechanical die press. Plaintiff was unable to explain how the accident happened and thus to focus on the manner in which one or more of the defendants were negligent; the conflict in plaintiff's own evidence does not present a triable issue of fact.

2. **Workers' Compensation— temporary employment service—coverage by manufacturer—not required**

A negligence plaintiff was barred from pursuing a civil action against a manufacturer where he was employed by a temporary employment service, Mega Force; he was injured while operating a mechanical die press at the manufacturer's plant; and he settled his workers' compensation claim with Mega Force. Under the contract between the manufacturer and Mega Force, Mega Force was responsible for securing the necessary coverage to protect workers who might suffer loss from an industrial accident and the manufacturer was not required to also provide workers' compensation coverage. Moreover, plaintiff did not satisfy the standard of proof for intentional wrongdoing by the manufacturer because he was unable to explain how the accident occurred.

Appeal by plaintiff from summary judgment entered 19 February 1998 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 28 January 1999.

Robert S. Hodgman & Associates, by Robert S. Hodgman and Todd P. Oxner, for plaintiff appellant.

Young Moore and Henderson, P.A., by Dana H. Davis; and Singleton, Murray, Craven & Inman, L.L.P., by Richard Craven, for defendant appellees Feagin and Snyder Corporation.

Dean & Gibson, by Rodney Dean and Kimberly A. Gossage, for defendant appellees Atlas-Soundelier/American Trading & Production Corp., and Richard Britt.

HORTON, Judge.

Plaintiff Anthony Poe was one of approximately 100 temporary employees supplied to defendant Atlas-Soundelier/American Trading & Production Corporation (Atlas-Soundelier) by defendant Mega Force Temporary Services, Inc. (Mega Force), in August of 1993. On 6 August 1993, plaintiff was operating a mechanical die press at Atlas-Soundelier's Laurinburg plant when his left hand was crushed in the press. On 31 July 1996, plaintiff instituted an action in Cumberland County (later removed to Scotland County) against Mega Force; Atlas-Soundelier; E. G. Heller's Son, Inc., the manufacturer of the die press; Snyder Corporation, which supervised the installation of the die press; Randall Feagin, d/b/a Randy's Electrical Service (Feagin), who did electrical work involved with the installation of the die press; and Richard Britt, plaintiff's supervisor at Atlas-Soundelier. E. G. Heller's Son, Inc., is no longer a party to this lawsuit. Plaintiff has settled with Mega Force. Summary judgment in favor of all the remaining defendants was entered on 18 February 1998, and plaintiff appealed, contending there were "genuine issue[s] of material fact supporting numerous triable issues." We disagree, and affirm the judgment of the trial court.

In the spring of 1993, defendant Atlas-Soundelier moved a number of machines from its Fresno, California, plant to its Laurinburg plant. The Heller-Sutherland mechanical power press (the press) involved in this accident was among those relocated. A trucking company disassembled, transported, and reassembled the press in Laurinburg. Atlas-Soundelier contracted with Snyder Corporation to hook up the electrical, air, and hydraulic systems as they had been in the Fresno plant. Snyder then contracted with Feagin to perform the actual hookup. While in use in Fresno, the press was operated either by a foot pedal or by hand buttons. Either the foot pedal or hand buttons could be utilized by merely plugging the device into an existing socket in the press. When the foot pedal was engaged or the hand buttons pressed by the operator, the press would perform a metal-stamping operation. As a safety measure, a light curtain was installed and positioned between the press operator and the areas where the metal blanks are stamped. The light curtain is made up of numerous vertical photoelectric cells which emit a steady light beam across the area

between the operator and the press. If the light beam is interrupted by any object, the press stops immediately and remains stopped until the object is removed from the beam of light. There was only nine and one-half inches of space between the light curtain and the area where the metal blanks were stamped out. After defendants Snyder and Feagin installed the hand controls and light curtain, the press was tested and was working properly. Thereafter, Atlas-Soundelier began using the foot control with the press rather than the hand controls because it increased operator efficiency. Atlas-Soundelier also installed a hand-held toggle switch and changed the use of the press from a one-step to a two-step operation. As modified by Atlas-Soundelier, the press operator was to feed a metal blank into the die on the left side using the toggle switch. The operator was then to activate the press by use of the foot switch. In order to prevent injury, the foot switch was enclosed in a metal box so that it could not be activated accidentally. The operator's foot had to be inserted into the metal box to depress the foot switch. After the press performed the first stamping operation, the worker was to move the metal blank to the right using tongs, insert a second metal blank on the left side, activate the press a second time with the foot pedal, and then remove the finished piece.

On 6 August 1996, plaintiff was assigned to work on the press when he reported to Atlas-Soundelier. Plaintiff had operated the press many times and produced some 25,000 finished pieces. No Atlas-Soundelier employee had ever been injured using the press. After plaintiff had produced about 100 pieces, the press came down on his hand and crushed it. Plaintiff was transported to a local hospital and treated after the accident. A blood alcohol test performed at the hospital one and one-half hours after the accident revealed a level of 0.097%.

On 31 July 1996 plaintiff filed a complaint in Cumberland County Superior Court, alleging negligence on the part of Snyder, Feagin, Heller and Britt; intentional misconduct on the part of Mega Force and Atlas-Soundelier; and breach of warranty against Heller. During the discovery stage, plaintiff testified in his deposition that he was operating the press in the normal fashion when it inexplicably malfunctioned and injured his hand. Plaintiff testified that he did *not* depress the foot pedal and was leaning *through* the light curtain when the press activated and injured him. Plaintiff's own expert witness agreed that the press was operating properly at the time of plaintiff's injury and could explain the injury only by assuming that plaintiff had

gotten between the light curtain and the press, and then somehow reached out with his foot and depressed the foot pedal. If plaintiff's testimony were true, plaintiff's expert could not explain the accident. In September of 1997 defendants filed motions for summary judgment. The trial court granted the motions on or about 18 February 1998. Plaintiff appeals.

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. 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. *Liller v. Quick Stop Food Mart*, Inc. 131 N.C. App. 619, 621, 507 S.E.2d 602, 604 (1998). In considering a motion for summary judgment, "the court must view the evidence presented by both parties in the light most favorable to the nonmoving party." *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 666, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995).

[1] Among other things, plaintiff has sued defendants for negligence. 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. *Liller*, 131 N.C. App. at 621, 507 S.E.2d at 604.

The central difficulty with plaintiff's case is his inability to explain how the accident happened and thus to focus on the manner in which one or more of the defendants were negligent. In fact, many of plaintiff's allegations of negligence in his amended complaint and his brief before this Court are not supported by his own testimony or that of his expert witness. Further, the assumptions made by his expert witness contradict plaintiff's own deposition testimony. That conflict in plaintiff's own evidence does not present a triable issue of fact, however.

For example, as to defendant Britt, plaintiff's supervisor, plaintiff alleges in his brief that Britt "observed [plaintiff] standing between the light curtain and the press but chose not to warn [plaintiff] that he was placing himself in danger by doing so." Plaintiff testified, how-

ever, that he did not see Britt nearby at the time of the accident and did not believe that anyone else was near the press at that time. Both the testimony of Britt and employment records indicate that Britt was not even at work on the day in question. It appears that plaintiff has abandoned his appeal as to Britt. He makes no argument as to why summary judgment in favor of Britt ought to be reversed, and only mentions Britt in passing in his brief. "Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(5).

As to defendants Snyder and Feagin, the evidence suggests that the press was reconfigured properly by them and was working properly when their work was completed. The press was exhaustively inspected following plaintiff's tragic accident, but was working properly. Plaintiff is simply not able to forecast any evidence which would create a jury question as to these defendants. Further, when Snyder and Feagin completed their contract with Atlas-Soundelier, the press was operating with the hand controls and light curtain, exactly as it had been operated in Fresno. The use of the foot control, toggle switch, and the two-step operation were modifications made after their departure and without their involvement. Plaintiff's assignments of error as to summary judgment in favor of Snyder and Feagin are overruled.

[2] Plaintiff is also barred from pursuing a civil action against Atlas-Soundelier for two reasons: (1) § 97-10.1 (1991) (the exclusivity provisions) of the Workers' Compensation Act (the Act), and (2) plaintiff does not forecast enough evidence to satisfy the high standard for proving intentional misconduct under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). Although plaintiff seems to agree that Atlas-Soundelier was a co-employer with Mega Force, and plaintiff has settled his workers' compensation claim with Mega Force, plaintiff contends that he is entitled to bring a tort action grounded in ordinary negligence against Atlas-Soundelier on the grounds that Atlas-Soundelier did not provide him with workers' compensation coverage as required by law. He argues that simply because Mega Force insured him, Atlas-Soundelier was not excused from providing similar coverage. We disagree.

Section 97-9 of the Act provides:

> Every employer subject to the compensation provisions of this Article shall *secure* payment of compensation to his employees in the manner hereinafter provided; and while such security

> remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

(Emphasis added.) As an employer, Atlas-Soundelier secured payment of compensation to plaintiff under the terms of its contract with Mega Force. Mega Force was a temporary employment service which employed workers and paid their taxes, unemployment, and other benefits including workers' compensation coverage. Mega Force supplied workers, including plaintiff, to Atlas-Soundelier. At the Laurinburg plant, plaintiff worked under the supervision of other Atlas-Soundelier employees, who controlled the details of his work. This Court has recognized the "special employment" or "borrowed servant" doctrine which holds that under certain circumstances a person can be an employee of two different employers at the same time. *Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 759, 460 S.E.2d 356, 360, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 234 (1995); *see also* 3 Arthur Larson, *Larson's Workers' Compensation Law* § 48.00 (1991). Plaintiff contends that the provisions of N.C. Gen. Stat. § 97-93 (1991) required Atlas-Soundelier also to provide workers' compensation coverage for plaintiff, and that because it failed to do so, it is liable to plaintiff "either for compensation under this Article or at law at the election of the injured employee." N.C. Gen. Stat. § 97-94(b) (1991). Plaintiff argues that Atlas-Soundelier did not "secure the payment of compensation" as required by the Act. We do not agree.

Under the contract between Atlas-Soundelier and Mega Force, the temporary service was responsible for securing the necessary coverage to protect workers who might suffer loss from an industrial accident. Mega Force carried out its responsibilities and plaintiff has settled with its carrier to receive benefits due him under the Act. A similar situation was before this Court in *Brown*. The plaintiff in *Brown* was sent by a temporary service to work for a roofing contractor and was injured on the job. The temporary worker then sued the temporary agency, the roofing contractor and the general contractor. We found that the injured worker in *Brown* was employed by both the temporary agency and by the roofing contractor. As such, " 'joint employer status does not provide an injured plaintiff-employee with two recoveries; rather, it merely provides two potential sources of recovery.' Therefore, once recovery is obtained under the statutory mechanism of workers' compensation, the plaintiff is barred from proceeding against either of his employers at common

law." *Brown*, 119 N.C. at 759, 460 S.E.2d at 360 (citation omitted). The exclusivity provisions of the Act state:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (1991). Thus, any tort suit against the roofing contractor was barred by the exclusivity provisions of the Act. *Brown*, 119 N.C. App. at 760, 460 S.E.2d at 361.

Plaintiff is simply unable, after voluminous discovery efforts, to explain how the accident occurred and to point to any instance of actionable negligence by any of the defendants. In light of our conclusion, we need not reach defendants' argument that plaintiff was guilty of contributory negligence because of his high blood alcohol reading. Since plaintiff is unable to prove a *prima facie* case of negligence, we find that plaintiff is unable to satisfy the higher standard of *Woodson*, which would require proof of intentional wrongdoing by Atlas-Soundelier.

Affirmed.

Judges WYNN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. REGINALD MAURICE MINOR, DEFENDANT

No. COA98-393

(Filed 2 March 1999)

1. Search and Seizure— defective motion to suppress—right to appeal

A motion by the State to dismiss an appeal involving cocaine and a weapon seized from an automobile was denied where the State contended that the motion to suppress was defective in that it requested suppression of "statements" while the supporting affidavit referred to "items." The trial judge has discretion to

rule on a defective motion and a defendant's failure to comply with N.C.G.S. § 15A-977 does not defeat his right to appeal such a ruling.

2. Appeal and Error— preservation of issues—no privacy interest in searched automobile—not raised at hearing

The State could not assert on appeal that a passenger in an automobile had no legitimate privacy interest in the vehicle where that ground was not raised at the suppression hearing.

3. Search and Seizure— warrantless search of automobile—actions not clearly furtive

A motion to suppress a controlled substance and a weapon should have been granted where a vehicle was stopped for having a smeared temporary license tag, the driver and passengers were removed from the vehicle, the interior of the car was searched without permission, and a weapon and crack cocaine were found in a jacket behind where defendant had been sitting. Defendant merely accessed the center console and rubbed his hands on his legs before he was removed from the car; his actions were not clearly furtive and the evidence does not support a finding that the officers had specific knowledge linking defendant to some criminal activity or any reasonable belief he was armed or dangerous.

Appeal by defendant from judgment entered 30 September 1997 by Judge Ronald Stephens in Durham County Superior Court. Heard in the Court of Appeals 6 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General William McBlief, for the State.

Assistant Public Defender Lisa M. Miles, for defendant-appellant.

LEWIS, Judge.

Defendant asserts that his Fourth Amendment rights under the United States Constitution were violated by the search of his person and the search of a vehicle in which he was a passenger. His motion to suppress evidence seized in the search of the vehicle was denied, and he pled guilty to one count of possession of a Schedule II substance and one count of carrying a concealed weapon. We reverse the trial court's denial of the motion to suppress.

The evidence tended to show that on 23 March 1997 at approximately 4 p.m., defendant was a passenger in a Nissan Altima with a temporary license tag. Because the date on the temporary tag was smeared and illegible, two Durham police officers, Officer Ripberger and Sergeant Mihiach, stopped the vehicle. Sergeant Mihiach testified that he saw defendant move his hand toward the center console of the car after the blue lights were activated. After the car stopped, Sergeant Mihiach approached the driver side of the car. Sergeant Mihiach removed the driver, frisked him, and talked with him while Officer Ripberger stood at the passenger side of the car. Officer Ripberger testified that he saw defendant rub his hand on his thigh as though feeling his pocket. Defendant then put his hand on the door handle as if to emerge from the car, but defendant dropped his hand and remained in the car when he saw Officer Ripberger beside the car.

After determining that the driver had no weapons, Sergeant Mihiach ordered the passengers, defendant and one other man, out of the car. Both men were frisked, and no contraband or weapons was discovered on either. Sergeant Mihiach then twice asked the driver's permission to search the car but received no answer. Sergeant Mihiach then searched the interior of the car. A jacket was found behind where defendant had been sitting, and a .32 caliber handgun was in the pocket. After arresting defendant for carrying a concealed weapon, Sergeant Mihiach further searched the jacket and found crack cocaine in a pocket. The officers determined at some point that the temporary license tag was valid, and no charges were filed against the driver of the car.

[1] We first must address the State's motion to dismiss defendant's appeal. The State contends that the motion to suppress was defective because the motion itself requested the court suppress all "statements," but the affidavit in support of the motion said defendant's attorney believed law enforcement lacked probable cause to seize "items." Even assuming the State is correct in its contention that the language discrepancy flaws the motion, the relevant statutes do not require dismissal of this appeal. Section 15A-977(c)(2) simply says the trial judge *may* deny a motion if the "affidavit does not as a matter of law support the ground alleged." N.C. Gen. Stat. § 15A-977(c)(2) (1997) (emphasis added). The trial judge has discretion to rule on a defective motion, and a defendant's failure to comply with section 15A-977 does not defeat his right to appeal such a ruling. *State v. Marshall*, 92 N.C. App. 398, 406, 374 S.E.2d 874, 878 (1988), *cert.*

denied, 328 N.C. 273, 400 S.E.2d 459 (1991). The State's motion to dismiss the appeal is denied.

[2] The State asserts that defendant, a passenger in the car, had no legitimate privacy interest in the vehicle. Because this ground was not raised at the suppression hearing, the State cannot now make this argument. *See State v. Green*, 103 N.C. App. 38, 42, 404 S.E.2d 363, 366 (1991).

[3] Defendant contends that both the search of his person and of the vehicle in which he was a passenger were unconstitutional. We do not reach the question of the search of his person because no evidence was produced as a result. As such, defendant cannot show he was prejudiced by the search of his person, and any error was harmless. *See e.g.*, *State v. Thomas*, 329 N.C. 423, 438, 407 S.E.2d 141, 151 (1991), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 41 (1997). We do, however, reach the Constitutional question raised regarding the search of the vehicle, and we reverse the trial court.

The United States Supreme Court has approved the search of the passenger compartment of a vehicle, even after the subject is removed from the vehicle, when the officer has an objectively reasonable and articulable belief that the suspect is dangerous. *Michigan v. Long*, 463 U.S. 1032, 1051, 77 L. Ed. 2d 1201, 1221 (1983). An officer may search

> the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, . . . if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Id. at 1049, 77 L. Ed. 2d at 1220 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968)). The rule established in *Long* essentially is an extension of the holding in *Terry* which allows an officer to frisk a suspicious person to determine if he is armed. The Court in *Long* noted that the officers had seen a weapon in the vehicle before searching it. *See id.* at 1050, 77 L. Ed. 2d at 1220-21.

This Court previously has addressed the propriety of a search of the passenger compartment of a vehicle. In *State v. Braxton*, 90 N.C. App. 204, 207, 368 S.E.2d 56, 58 (1988), we held that "gestures which are not clearly furtive are insufficient to establish probable cause for

a warrantless search unless the officer has other specific knowledge relating to evidence of crime." In *Braxton*, the defendant was speeding and initially refused to stop for the officer's blue light. When the officer sounded his siren, the officer observed the defendant put something under the seat. The defendant then stopped the car, but when the officer exited the car, the defendant began driving again and continued to shove something under the seat. The defendant finally stopped in a parking lot approximately 50 feet from the initial stop. When the defendant exited the car, the officer frisked him, but the defendant refused to answer questions about what was under the seat. The officer searched under the seat, found marijuana, arrested the defendant, and resumed searching the car. The search incident to arrest uncovered more contraband and a knife. We held that the defendant's mere suspicious movements and actions were not enough to give the officer a reasonable belief that the defendant was dangerous. *Id.* at 209, 368 S.E.2d at 59.

This Court upheld a vehicle search in which the defendant relied on *Braxton* in *State v. Corpening*, 109 N.C. App. 586, 427 S.E.2d 892 (1993). In *Corpening*, the defendant challenged a warrantless search of his van. The van had caught fire and was disabled; when an officer responded to help, he detected the odor of moonshine. Upon searching the vehicle, the officer found 451 gallon jugs of illegal liquor. We said in *Corpening* that probable cause to search a vehicle requires facts and circumstances "sufficient to support a fair probability or reasonable belief that contraband will be found in the automobile." *Id.* at 589, 427 S.E.2d at 894. We distinguished *Braxton*, noting that the officer in *Corpening* had independent knowledge—the smell—of probable contraband in the vehicle. *Id.* at 590, 427 S.E.2d at 895.

Here, defendant's motions were not "clearly furtive." *Braxton*, 90 N.C. App. at 207, 368 S.E.2d at 58. Defendant merely accessed the center console and rubbed his hands on his legs. These actions are not nearly so suspicious as those this Court deemed not furtive in *Braxton*, nor had the officers any independent knowledge linking defendant to any criminal activity.

The State asserts that *Long* controls and allows the search of the car in this case. As explained above, we disagree. The State further relies on our decision in *State v. Hamilton*, 125 N.C. App. 396, 481 S.E.2d 98, *disc. review denied*, 345 N.C. 757, 485 S.E.2d 302 (1997). In *Hamilton*, the defendant and a friend arrived on a bus from New York City carrying only one small piece of luggage. Two officers followed

the taxi hailed by the defendant as it took them toward a known drug area. While following the taxi, the officers noticed that neither the taxi driver nor the defendant, the front seat passenger, was wearing a seat belt. The officers stopped the taxi, and when they approached the defendant's side of the taxi, the defendant's "hand began to reach toward his left side." *Id.* at 398, 481 S.E.2d at 99. One officer asked the defendant to get out; the officer then frisked the defendant and discovered 192.5 grams of crack cocaine.

Hamilton is clearly distinguishable from this case. First, the search of the defendant's person was at issue there, while here it is the search of the *car* in which defendant rode. In affirming the search of the defendant's person in *Hamilton*, we noted that the police had evidence the defendant had committed an infraction since he was observed without a seat belt. Furthermore, the officer in *Hamilton* immediately removed from the car the subject who moved furtively. The immediate removal in *Hamilton* supports an articulable suspicion that the defendant was armed and contrasts with the case before us where the person the officers supposedly feared was left in the car for a period of time. *Cf. State v. Pearson*, 348 N.C. 272, 276, 498 S.E.2d 599, 601 (1998) (noting that officer being in presence of defendant for 10 minutes before frisking him was a factor in determination that "the circumstances . . . did not justify a nonconsensual search of the defendant's person.").

Because the evidence does not support a finding that the officers in this case had any specific knowledge linking defendant to some criminal activity or any reasonable belief he was armed or dangerous, the search of the vehicle was improper. *See Braxton*, 90 N.C. App. at 207, 368 S.E.2d at 58. The motion to suppress should have been granted. Because we are bound by *Braxton*, we reverse the trial court's order, and we remand with instructions to enter an order allowing the motion to suppress.

Reversed and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

WILLIAM BARTELL, EMPLOYEE, PLAINTIFF-APPELLEE v. FLOYD A. SAWYER, EMPLOYER AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLANTS

No. COA98-410

(Filed 2 March 1999)

1. **Workers' Compensation— subrogation interest in third-party negligence recovery—prejudgment interest**

   Defendants were not entitled to prejudgment interest where plaintiff was injured in a motor vehicle collision with a third party, received workers' compensation benefits, was awarded damages and prejudgment interest in a third-party negligence action against the operator of the motor vehicle, and defendants were properly allocated funds from the third-party recovery for their subrogation interest. The language of N.C.G.S. § 97-10.2(f)(1) is clear and unambiguous, needs no interpretation, and does not provide for defendants to collect a pro rata share of the prejudgment interest.

2. **Workers' Compensation— third-party negligence recovery—prejudgment interest—disbursal to plaintiff**

   Although defendants argued that they were entitled to a pro rata share of a workers' compensation plaintiff's prejudgment interest award on a third-party negligence recovery in order to prevent double recovery by plaintiff, disbursal of prejudgment interest is not specifically addressed in N.C.G.S. § 97-10.2(f)(1) and the plain language of N.C.G.S. § 97-10.2(f)(1)(d) unambiguously directs disbursal to plaintiff of "any amount remaining."

Appeal by defendants from opinion and award entered 12 February 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 October 1998.

Darrell B. Cayton, Jr., for plaintiff-appellee.

Young, Moore & Henderson P.A., by J. Aldean Webster III, for defendant-appellants.

McGEE, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission (Commission) dated 12 February 1998 denying defendants a pro-rata share of pre-judgment interest

recovered by plaintiff in a third party negligence action. The opinion and award of the Commission reversed the third party distribution order entered by a deputy commissioner 26 July 1996.

The Commission found that plaintiff was injured on 16 August 1991, "when he was involved in a motor vehicle collision with a vehicle driven by a third party, Eula Norris Hargis." The Commission determined the accident arose "out of and in the course of [plaintiff's] employment with the defendant-employer," and that plaintiff was entitled to receive workers' compensation benefits. The parties entered into a Form 21 agreement for compensation for disability, which was approved by the Commission on 28 October 1991. Defendants paid compensation and medical expenses to plaintiff in the amount of $44,378.40. Plaintiff filed a third party negligence action against Eula Norris Hargis, the operator of the vehicle. Plaintiff was awarded $95,000 in damages and $5,000 in pre-judgment interest in a jury trial in December 1993.

Defendants had already paid workers' compensation benefits to plaintiff in the amount of $44,378.40. Pursuant to N.C. Gen. Stat. § 97-10.2(f)(1) (1991), defendants had a subrogation interest in plaintiff's third party recovery equaling the total amount of workers' compensation payments made to plaintiff. The Commission properly allocated these funds to defendants, and these funds are not at issue.

Defendants contend they are entitled to a pro-rata share of the pre-judgment interest plaintiff received on his third party recovery. The executive secretary of the Commission ordered the distribution of the third party recovery on 3 February 1994. In pertinent part, the order stated, "The sum of $44,378.40 plus interest if applicable, subject to counsel fee, shall be paid the workers' compensation carrier in full settlement of its subrogation interest."

Plaintiff requested a reconsideration of this order on 24 February 1994, arguing that defendants were not entitled to a share of the pre-judgment interest. The executive secretary of the Commission reaffirmed his order on 14 March 1994, and plaintiff paid defendants the amount of their subrogation lien from his third party recovery. Plaintiff also paid defendants their pro-rata share of the pre-judgment interest on 20 July 1994, an amount equaling $1,566.67.

Plaintiff appealed, arguing that defendants were not entitled to a pro-rata share of the pre-judgment interest that plaintiff had received

on his third party recovery. In an opinion and order dated 26 July 1996, the deputy commissioner concluded that defendant-carrier was entitled to receive its pro-rata share of the pre-judgment interest award "[i]n full satisfaction of its subrogation lien."

Plaintiff appealed to the Full Commission, and based upon the foregoing facts, the Commission made the following conclusions of law:

> 1. The plaintiff is entitled to receive interest on his portion of the money judgment that represents compensatory damages, N.C.G.S. §24-5(b); *Absher v. Vannoy-Lankford Plumbing Co.*, 78 N.C. App. 620, *cert. denied*, 316 N.C. 730 (1985). Interest shall be calculated based on the amount the plaintiff is actually entitled to receive after the defendant-carrier's subrogation lien amount is subtracted. *Absher v. Vannoy-Lankford Plumbing Co.*, 78 N.C. App. 620, *cert. denied*, 316 N.C. 730 (1985).
>
> 2. However, as the Workers' Compensation Statute does not specifically address interest, pro-rated or otherwise, in addition to full satisfaction of the subrogation lien, the undersigned find they cannot award such interest to defendant-carrier absent some authority given to them to do so.

The Commission ordered defendants to return to plaintiff the $1,566.67 in pre-judgment interest. Defendants appeal the order of the Commission.

[1] Defendants argue they are entitled to their pro-rata share of the pre-judgment interest plaintiff received on his third party recovery in order to be fully reimbursed. We disagree and find defendants' argument contrary to the plain meaning of N.C. Gen. Stat. § 97-10.2(f)(1) (1991).

> N.C. Gen. Stat. § 97-10.2(f)(1) (1991) states:
>
> If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

In disbursing any remaining amounts, section d. of the statute unambiguously states that "any amount remaining" from a judgment against a third party shall be disbursed "to the employee or his personal representative." N.C. Gen. Stat. § 97-10.2(f)(1)d.

Our Supreme Court has held that "[w]hen language used in [a] statute is clear and unambiguous, [the Court] must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning." *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996) (citation omitted). The Commission correctly determined that N.C. Gen. Stat. § 97-10.2(f)(1) "does not specifically address interest, pro-rated or otherwise," and that it could not "award such interest to defendant-carrier absent some authority[.]" We agree that the language of the statute does not provide for defendants to collect a pro-rata share of the pre-judgment interest; the language of the statute is clear and unambiguous and needs no interpretation. Defendants' subrogation lien was fully satisfied by plaintiff's payment of $44,378.40 to defendants from his third party recovery. From the third party recovery, defendants were paid the sum of $44,378.40, less one-third in attorney's fees and $349 in expenses, by direction of the executive secretary of the Commission. Pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)c., defendants were reimbursed "for all benefits . . . paid or to be paid by the employer under award of the Industrial Commission." The statute simply does not state that defendants are entitled to any pre-judgment interest.

[2] Defendants also argue that they are entitled to their pro-rata share of plaintiff's pre-judgment interest award to prevent double recovery by plaintiff. Our Court addressed a similar issue in *Absher v. Vannoy-Lankford Plumbing Co.*, 78 N.C. App. 620, 337 S.E.2d 877 (1985), *disc. review denied*, 316 N.C. 730, 345 S.E.2d 385 (1986). In *Absher*, the employee filed an action for personal injury in Superior Court and the defendant filed an answer asserting that the employee's injuries were caused by joint and concurring negligence of her employer. A jury awarded plaintiff damages in the amount of $26,400. Pursuant to N.C. Gen. Stat. § 97-10.2(e), the trial court "reduced the employee's award by $20,108.16, the amount which plaintiff's employer would otherwise have been entitled to receive by way of subrogation, and entered judgment awarding plaintiff the principal sum of $6,291.84 plus 8% interest from the date the action was instituted." *Absher* at 621, 337 S.E.2d at 877. On appeal to our Court, we held that the employee was not entitled to interest on the entire award where that award had been reduced by the amount she had received in workers' compensation benefits. We stated that:

> Under G.S. 24-5, plaintiff is entitled to receive interest on the portion of her "money judgment" that represents "compensatory damages." Because plaintiff had already received a workers' compensation award of $20,108.16, the judgment awarded plaintiff $6291.84 in damages. The trial court arrived at that figure by following the requirements of G.S. 97-10.2(e). After the reductions required by statute are made, it can be determined what amount plaintiff is actually entitled to receive. Interest should be calculated based on the amount plaintiff is actually entitled to receive.

Id. at 623-24, 337 S.E.2d at 879.

As stated in *Absher*, pre-judgment interest is to be calculated based upon the amount of money plaintiff is entitled to receive once an employer's subrogation lien for workers' compensation payments has been satisfied. *Absher* at 624, 337 S.E.2d at 879. In the present case, plaintiff was awarded $95,000 by the jury and received $5,000 in pre-judgment interest. Pursuant to N.C. Gen. Stat. § 97-10.2(f)(1), defendants received $44,378.40 of plaintiff's third party recovery as reimbursement for workers' compensation payments previously made. Following the jury award, the Commission's executive secretary entered an order in employee's workers' compensation action dividing the pre-judgment interest between the employee and employer on a pro-rata basis, with the employer receiving $1,566.67.

A deputy commissioner also determined the employer was entitled to receive this amount. The Commission, citing *Absher*, held that plaintiff was entitled to the entire pre-judgment interest on the amount he actually recovered, which was $95,000 less the $44,378.40 paid to defendants.

Neither *Absher* nor N.C. Gen. Stat. § 97-10.2(f)(1) direct that defendants receive a share of plaintiff's pre-judgment interest award. Disbursal of pre-judgment interest is not specifically addressed in N.C. Gen. Stat. § 97-10.2(f)(1). However, the plain language of N.C. Gen. Stat. § 97-10.2(f)(1)d. unambiguously directs disbursal to plaintiff of "any amount remaining." Therefore, defendants' other assignments of error need not be addressed.

The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges JOHN and WALKER concur.

FORTUNE INSURANCE COMPANY, PLAINTIFF v. GARY EDGAR OWENS, JOHNA R. HART, LOUIS L. GILMORE, DEFENDANTS

No. COA98-333

(Filed 2 March 1999)

1. Insurance— North Carolina accident—policy subject only to Florida law

The trial judge did not err in an action arising from a North Carolina automobile accident by determining that an automobile liability policy was subject only to the law of Florida and that it did not extend coverage to defendants. All contracts of insurance on property, lives, or interests that have a close connection with North Carolina are deemed to have been entered in this state; in this case, the connection between North Carolina and the interests insured is too slight to allow interpretation of the policy in accordance with North Carolina law. The policy by its terms does not extend coverage to defendants in compliance with Florida's no fault insurance scheme.

2. Insurance— coverage—estoppel

An insurance company was not estopped to deny coverage in an action arising from an automobile accident where defendants proceeded to trial with full knowledge that the insurance company contested coverage.

Appeal by defendants Johna R. Hart and Louis L. Gilmore from judgment filed 6 October 1997 and from amended judgment filed 13 October 1997 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 October 1998.

Kurdys & Lovejoy, P.A., by Jeffrey S. Bolster, for plaintiff-appellee.

Price, Smith, Hargett, Petho & Anderson, P.A., by Wm. Benjamin Smith, for defendant-appellants Johna R. Hart and Louis L. Gilmore.

GREENE, Judge.

Johna R. Hart (Hart) and Louis L. Gilmore (Gilmore) appeal from the trial court's entry of judgment for Fortune Insurance Company (Fortune).

On 29 January 1990, in Mecklenburg County, North Carolina, a motor vehicle owned and driven by Gary Edgar Owens (Owens) struck a motor vehicle occupied by Hart and Gilmore. At the time of the accident, Owens' motor vehicle was covered by a policy of insurance (the Owens Policy) issued in Florida by Fortune, a Florida corporation. The Owens Policy provided, in pertinent part:

CONFORMITY WITH LAW

If any provision of this policy is contrary to any law to which it is subject, such provision is hereby amended to conform thereto.

COVERAGE: PERSONAL INJURY PROTECTION

[Fortune] will pay, in accordance with the Florida Motor Vehicle No Fault Law, as amended, to or for the benefit of the insured person: [enumerated damages] incurred as a result of bodily injury, caused by an accident arising out of the ownership, maintenance, or use of a motor vehicle and sustained by:

1. the named insured or any relative while occupying a motor vehicle or, while a pedestrian, through being struck by a motor vehicle; or

2. any other person while occupying the insured motor vehicle or, while a pedestrian, through being struck by the insured motor vehicle.

When Owens applied to Fortune for insurance approximately one month prior to the accident, he listed his address as Destin, Florida. Owens had a duplicate Florida driver's license issued to him at that time. In addition, the motor vehicle covered by the Owens Policy and involved in the 29 January 1990 wreck in North Carolina had Florida license plates and a Florida vehicle identification number.

Hart and Gilmore each filed suit against Owens in January of 1993. Fortune hired a Charlotte, North Carolina, attorney, Rex C. Morgan (Morgan), to represent Owens, and answers to Hart and Gilmore's complaints were filed on Owens' behalf. Morgan was never able to locate Owens and never had any contact with him. In July of 1995, Fortune notified Morgan that he should "close his files." Morgan immediately made a motion to withdraw as Owens' attorney, which was granted by the trial court. In his motion to withdraw, Morgan stated that Fortune had informed him when he was retained that it had "sent a reservation of rights letter to [Owens] and advised that it took the position that it had no coverage." No reservation of rights letter is contained in the record on appeal. Also in July of 1995, Fortune filed a Petition for Declaratory Judgment seeking a judicial determination that Fortune had no obligation to provide a defense to Owens or to pay any judgment that might be entered against Owens pursuant to the actions filed by Hart and Gilmore. Hart and Gilmore's answer, filed 20 September 1995, asserted that Fortune should be "estopped to deny coverage." A hearing was not held on Fortune's petition until October of 1997.

Hart and Gilmore's suits against Owens were consolidated and tried without a jury in January of 1997. Owens did not appear, and was not represented by counsel. The trial court determined that Owens was liable to Hart for $18,500.00 for personal injuries and was liable to Gilmore for $18,500.00 for personal injuries.

In October of 1997, at the hearing on Fortune's Petition for Declaratory Judgment, the trial court found that Owens was a Florida resident at the time the Owens Policy was entered, and that Owens'

vehicle had Florida plates and a Florida vehicle identification number. Based on these and other findings, the trial court concluded that Florida law applied to the interpretation of the Owens Policy because "there are no significant connections between the [Owens Policy] and the State of North Carolina and the [Owens] Policy was issued to a Florida resident in the State of Florida." The trial court further concluded that "Florida law does not require the extension of bodily injury liability coverage to [Hart and Gilmore] under the facts and circumstances of this case." The trial court ruled in Fortune's favor on the issue of estoppel. Accordingly, the trial court determined that Fortune was not obligated to pay the judgments obtained by Hart and Gilmore against Owens arising out of the 29 January 1990 automobile accident in Mecklenburg County, North Carolina. Hart and Gilmore appeal from the order of the trial court.

The issues are whether: (I) the Owens Policy "is subject" to North Carolina law; and (II) Fortune is estopped from denying coverage.

I

[1] Hart and Gilmore contend that the Owens Policy "is subject" to North Carolina law, and therefore must comply with our Financial Responsibility Act. Fortune, on the other hand, contends that the Owens Policy "is subject" only to the law of Florida.

Generally, an insurance contract "is subject" to the law of the state where the contract was entered. *See Roomy v. Insurance Co.*, 256 N.C. 318, 322-23, 123 S.E.2d 817, 820 (1962) (interpreting insurance contract in accordance with the law of the state where it was entered). All contracts of insurance on "property, lives, or interests" that have a close connection with North Carolina are deemed to have been entered in this state. *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 335 N.C. 91, 95, 436 S.E.2d 243, 245 (1993) (construing N.C. Gen. Stat. § 58-3-1). Accordingly, North Carolina law has been applied to insurance contracts entered outside this state where the vehicles insured under the policy were registered in this state. *Id.*; *Martin v. Continental Ins. Co.*, 123 N.C. App. 650, 656, 474 S.E.2d 146, 149 (1996). Where the only connection to North Carolina is that the interests insured are in this state at the time of the accident, however, North Carolina law may not be applied. *Johns v. Automobile Club Ins. Co.*, 118 N.C. App. 424, 427, 455 S.E.2d 466, 468, *disc. review denied*, 340 N.C. 568, 460 S.E.2d 318 (1995).

In this case, the connection between North Carolina and the interests insured is too slight to allow us to interpret the Owens Policy in accordance with North Carolina law. The "lives" and "interests" insured by the express terms of the Owens Policy were the lives of Owens, his relatives, occupants of Owens' vehicle, and pedestrians struck by Owens' vehicle. Hart and Gilmore fall within none of these categories. The trial court found that Owens was a resident of Florida at the time the Owens Policy was issued, and, as substantial evidence supports this finding, we are bound by it. *See Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 452, 325 S.E.2d 493, 495 (1985). The "property" insured, Owens' vehicle, had Florida plates and a Florida vehicle identification number. There is no evidence that Owens' vehicle was ever registered in North Carolina. It follows that the "property, lives, or interests" insured under the Owens Policy do not have a close connection with this state. Furthermore, the fact that Owens and his vehicle were present in this state at the time of the accident is insufficient to provide the necessary close connection. *See Johns*, 118 N.C. App. at 427, 455 S.E.2d at 468. Accordingly, the Owens Policy is not deemed to have been entered in this state; it therefore "is subject" to the law of Florida, the state where the contract was entered.

By its terms, the Owens Policy does not extend bodily injury liability coverage to Hart and Gilmore. The Owens Policy only covers injuries "sustained by . . . the named insured, . . . any relative [of the named insured], . . . any other person while occupying the insured motor vehicle, or . . . a pedestrian . . . struck by the insured motor vehicle." This provision complies with Florida's no-fault insurance scheme. *See* Fla. State. Ann. §§ 627.730-627.7405 (West 1996 & Supp. 1999). Accordingly, neither Hart nor Gilmore are covered parties under the Owens Policy.

II

[2] Hart and Gilmore alternatively contend that Fortune should be estopped from denying coverage. We disagree.

As a general rule, estoppel may not be used "to broaden the coverage of a policy so as to protect the insured against risks not included therein . . . ." *Currie v. Insurance Co.*, 17 N.C. App. 458, 459-60, 194 S.E.2d 642, 643 (1973). Where an insurer defends its insured without a reservation of its right to deny coverage, however, courts recognize an exception to this general rule and estop the insurer from subsequently denying coverage if the denial results in prejudice to a

party. *See Early v. Insurance Co.*, 224 N.C. 172, 174, 29 S.E.2d 558, 559-60 (1944) ("[T]he insurer having come in and assumed charge of the defense in the action of the plaintiff [without a reservation of its rights to deny coverage] and continued in charge of such defense until an adverse judgment was rendered against the insured, . . . the insurer cannot now be heard to deny liability . . . ."); *Insurance Co. v. Surety Co.*, 1 N.C. App. 9, 13, 159 S.E.2d 268, 272 (1968) (noting that estoppel is found where "the insurer, having knowledge of facts which would result in noncoverage, nevertheless assumes and conducts the defense of an action brought against its insured" without reserving its right to deny coverage); *see generally* 14 Ronald A. Anderson, *Couch on Insurance* §§ 51:82-51:99 (2d ed. 1982). The filing of a declaratory judgment action to clarify coverage issues "has the same effect as serving the insured with a reservation of rights." 2 Eric Mills Holmes, *Appleman on Insurance* § 8.4 (2d ed. 1996).

In this case, the record is equivocal as to whether Fortune reserved its right to deny coverage at the time it hired Morgan to undertake the representation of Owens. There is no reservation of rights letter in the record; however, Morgan's motion to withdraw states that he was informed by Fortune that it had "sent a reservation of rights letter to [Owens]." In any event, Fortune filed a petition for declaratory judgment denying coverage to Hart and Gilmore approximately one and a half years prior to trial. Accordingly, Hart and Gilmore proceeded to trial with full knowledge that Fortune contested coverage.

Affirmed.

Judges LEWIS and HORTON concur.

ROBERTSON v. HUNSINGER

[132 N.C. App. 495 (1999)]

VANDA H. ROBERTSON, PLAINTIFF v. LINDA KAY HUNSINGER, DEFENDANT AND BERNICE L. SHULER, SAM J. LOVE, AND WIFE, MARCELLA B. LOVE, AND EVERETT BRUCE HUNSINGER, DEFENDANTS

No. COA98-622

(Filed 2 March 1999)

Deeds— inconsistent clauses—right of way

There was sufficient evidence in an action to determine the location of a property line to support the findings, which supported the conclusions, addressing the intent of several brothers in locating a right of way where four adjoining tracts came out of one property.

Appeal by defendant Linda Kay Hunsinger from judgment entered 16 December 1997 by Judge Earl J. Fowler, Jr. in Buncombe County District Court. Heard in the Court of Appeals 13 January 1999.

Ochsenreiter Law Firm, by Patrick B. Ochsenreiter, for plaintiff-appellee.

Hyler Lopez & Walton, P.A., by George B. Hyler, Jr. and Robert J. Lopez, for defendant-appellant.

WALKER, Judge.

This action involves four adjoining tracts of land which came out of a tract of approximately five acres owned by Joe and Agnes Love. This property was bequeathed to their four children after Agnes' death in 1981. In the will, the southeast quadrant of the five-acre tract was devised to defendant Bernice Love Shuler (defendant Shuler), and the balance of the property was devised to the three Love brothers as tenants in common. The will also provided for a right-of-way over the northeast portion of defendant Shuler's property to the balance of the Love tract and that a survey of the property was to be completed. On 25 September 1985, a survey was completed by C.W. Smith.

On 21 February 1986, the Love brothers executed cross deeds which subdivided into three tracts their remainder interest in the five-acre tract. Danner Love received the southwest quadrant, Samuel Love the northwest, and Joseph Love the northeast. Each of the cross deeds contained a metes and bounds description of the property and also attached was a copy of a plat of the four tracts (Exhibit "A"). The

right-of-way depicted on the plat entitled Exhibit "A" consisted of a 25-foot strip with the center line being the Bernice Shuler-Joseph Love property line. However, this boundary line in Exhibit "A" differed substantially from the boundary line shown on the Smith survey in 1985.

Thereafter, defendant Shuler brought an action in 86 CVS 818 to determine the location of the property line between her tract and Joseph Love's tract. On 13 February 1987, the trial court determined that the property line, as shown on the Smith survey in 1985, was the correct property line. The trial court then located the right-of-way along defendant Shuler's property across the northeastern portion of her property. As a result of the trial court's decision, the description in the cross deed to Joseph Love did not encompass a small triangular shaped parcel of land adjoining defendant Shuler's northern property line. Thus, the Love brothers believed they each owned a one-third undivided interest in the triangular piece of property since it had not been specifically included in the description of the tract conveyed to Joseph Love.

Subsequently, Samuel Love and Joseph Love deeded both of their tracts to defendant Linda Kay Hunsinger along with their respective one-third interests in the aforementioned triangular parcel. The deeds did not specifically describe the right-of-way, but stated that the conveyances were "subject to easements, restrictions, and rights-of-way of record."

On 23 June 1989, Danner Love conveyed his tract to plaintiff. In the plaintiff's deed, she also received a one-third interest in the triangular parcel and the right-of-way was described with reference to Exhibit "A" that was attached to the cross deeds.

On 10 April 1991, in her amended complaint, plaintiff alleged she had a right-of-way across the property of defendants Shuler and Hunsinger and that she had been denied access to her property. Subsequently, plaintiff voluntarily dismissed her claims against Samuel Love, Marcella B. Love, and Everett Bruce Hunsinger. On 16 May 1991, defendant Hunsinger filed an answer and counterclaim admitting the existence of the right-of-way, but denying plaintiff's contention as to its location and further denying interference with plaintiff's access to the property over the actual right-of-way. On 15 January 1991, defendant Shuler filed a motion to dismiss and asserted as an affirmative defense that the location of that portion of the right-of-way which ran over her property had been established by the judg-

ment in a prior action, 86 CVS 818, which was *res judicata* to this action.

On 20 September 1991, the parties appeared and agreed that they would present evidence to the trial court by stipulation on the issue of the location of the right-of-way. The stipulated evidence presented to the trial court was in the form of prior plats, deeds, and judgments. On 4 December 1991, the trial court entered a judgment which determined that the location of the right-of-way was consistent with the contentions of plaintiff. The trial court also found that the prior action, 86 CVS 818, was *res judicata* as to defendant Shuler and granted her motion to dismiss.

Defendant Hunsinger appealed to this Court, which held in *Robertson v. Hunsinger*, 111 N.C. App. 929, 434 S.E.2d 884 (1993) (unpublished), that "the trial court's findings of fact do not address the critical issue of the intent of the Love brothers in locating the easement." Thus, the judgment was vacated and the case was remanded to the trial court for additional findings to ascertain the intent of the parties with respect to the location of the easement.

On remand, the trial court made the following new findings:

18. That the map attached to the cross deeds of the Love brothers as "Exhibit A" wherein is shown a 25 foot right of way was prepared by C. W. Smith, R. L. S.

19. That the Plaintiff's contention as to the intent of the Love brothers when they signed their respective deeds was to convey a 25 foot wide right of way located in accordance with the attached map and described in paragraph 22 of the original order dated December 4, 1991 in addition to all interest the Love brothers and their respective spouses had in their respective parcels.

. . .

21. That the Love brothers' intent through their subsequent conveyances of a triangular shaped parcel located within their previously conveyed properties was for the benefit of their previous grantees. The court finds these subsequent conveyances and the absence of revenue stamps on the later deeds to be further evidence that the brothers' original intent was to convey any and all interest they had in the property they inherited from their mother. The court also finds that Plaintiff has a one-third interest in the

triangular shaped parcel of land referred to herein as a tenant in common and therefore has a right of way over this portion of land also.

22. That the court finds that it was the intent of the Love Brothers to create a right of way as shown by the Exhibit A's attached to their cross deeds and the deed from Danner Love and wife to the Plaintiff herein and that the centerline of said right of way is shown on said attached Exhibit A. That the court finds that the total width of this right of way is 25 feet at all points. That the court bases its findings of intent upon the fact the above referred to map gives a metes and bounds description which can be located upon the ground which is in accordance with *Allen v. Duvall*, 311 N.C. 245, 316 S.E.2d 217 (1984). The court also finds that another right of way involving Plaintiff's property includes all of lot 9 as shown in Plat Book 28 at page 30 of the Buncombe County Register of Deeds Office and the triangular shaped property described as follows:

Starting from the northwestern most point of lot 9 Plat Book 28 page 30 thence N. 85 degrees 07' 20" W. 37.40 feet to the point and place of beginning; thence N. 85 degrees 07' 20" W. 102.46 feet; thence N. 11 degrees 18' 10" W. 36.37 feet to a point which is the northeastern most point of Plaintiff's property thence S. 70 degrees 38' 18" E. 139.66 feet to the point and place of beginning.

The trial court concluded:

2. That the preponderance of the evidence makes the court conclude that the intent of the Love brothers when they first conveyed the property was shown in their original deeds to each other referred to in paragraph 14 Exhibits 3,4,5, and 6 of the findings of fact of the appealed order and comprised what the brothers believed at that time to be all their respective interests in their properties. Their later conveyances were not as a result of a creation of a triangular piece of property after these original conveyances but a correction of a mistake.

Then the trial court ordered:

1. The Plaintiff, her heirs, successors, and assigns have rights of way for ingress, egress, and regress from Roland Road across all of lot 9 Plat Book 28 page 30, the property over B[e]rnice Shuler's northeast corner described in 86 CVS 818, and the 25 feet wide area described in paragraph 3 under conclusions of law above to

the property described in Deed Book 1567 page 289 et seq. of the Buncombe County, N.C. Registry.

2. The Plaintiff is hereby granted a permanent injunction preventing the Defendants, their heirs, successors and assigns from access to the property described in Deed Book 1567 page 289 et. seq. of the Buncombe County, N.C. Registry by means of any of the rights of way described in number 1 above. That a mandatory injunction is granted wherein Defendant Sales is directed to remove the area of the barn shown on the Stallings and Vandewart survey within 60 days of the new survey by Ron Peterson being performed.

On appeal, defendant Hunsinger contends that the trial court erred in and takes exception to the judgment.

The findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even though there may be evidence which would support a contrary conclusion. *Williams v. Skinner*, 93 N.C. App. 665, 671, 379 S.E.2d 59, 63-64, *cert. denied*, 325 N.C. 277, 384 S.E.2d 532 (1989).

N.C. Gen. Stat. § 39-1.1(a) (1984) states, "In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument." The intention of the parties is to be given effect whenever that can be done consistently with rational construction. *Allen v. Duvall*, 311 N.C. 245, 251, 316 S.E.2d 267, 271, *rehearing granted*, 311 N.C. 245, 316 S.E.2d 267 (1984). It is the trial judge's role to determine the intent of the parties. *Mason-Reel v. Simpson*, 100 N.C. App. 651, 654, 397 S.E.2d 755, 756 (1990). When creating an easement in a deed, "[t]here must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land." *Allen*, 311 N.C. at 249, 316 S.E.2d at 270, (*quoting Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942)).

As requested by this Court, the trial court made additional findings on remand addressing the intent of the Love brothers in locating the right-of-way. These findings determine that it was the intent of the Love brothers to create a 25-foot right-of-way on what is now defendant Hunsinger's property according to the description of the right-of-way referred to in the map marked Exhibit "A". After a careful review of the record, we find there was sufficient evidence to support these

additional findings by the trial court. These findings support the trial court's conclusions which in turn support the judgment entered. The defendant's other assignments of error are without merit. Thus, the judgment of the trial court is

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

LARRY M. DAVIS AND WIFE, SUE DAVIS; RANDY MANN, INDIVIDUALLY AND D/B/A RANDY'S AUTO SALVAGE; JOSEPH WRENN AND WIFE, ANNETTE WRENN; INTERSTATE NARROW FABRICS; LOGAN CRUTCHFIELD, INDIVIDUALLY AND D/B/A CRUTCHFIELD'S MOBILE CRUSHER, PLAINTIFFS v. THE CITY OF MEBANE, NORTH CAROLINA; THE CITY OF GRAHAM, NORTH CAROLINA; AND W.M. PIATT & COMPANY, DEFENDANTS

No. COA98-562

(Filed 2 March 1999)

1. **Evidence— experts—flooding**

The trial court did not err in a negligence action arising from the building of a dam and subsequent downstream flooding by striking plaintiffs' experts' opinion testimony where the court determined that the testimony was not reliable and there is evidence in the record to support that finding.

2. **Negligence— construction of dam—subsequent flooding—summary judgment for defendants**

The trial court did not err by granting summary judgment for defendants in a negligence action arising from the construction of a dam and subsequent downstream flooding where plaintiffs' expert testimony was stricken. Lay testimony would not be sufficient to explain changes in the watershed or in the downstream water flow and the expert testimony was necessary to prove causation.

Appeal by plaintiffs from orders entered 23 February 1998 by Judge J. B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 4 January 1999.

Plaintiffs are property and business owners in Haw River, North Carolina whose homes and businesses are located downstream from Back Creek Dam ("the dam") and the Graham-Mebane Reservoir formed by the dam. The dam was designed by defendant W.M. Piatt & Company ("Piatt") and construction was completed in 1991. Plaintiffs assert that since the dam was completed, plaintiffs have suffered repeated flooding of their properties and businesses. The City of Mebane and The City of Graham ("municipal defendants") own and operate the dam.

Plaintiffs initiated this action 25 February 1997. Plaintiffs alleged that the flooding was proximately caused by the negligent design and location of the dam. Plaintiffs filed their amended complaint 15 October 1997 alleging causes of action for inverse condemnation, negligence against defendant Piatt and against the municipal defendants as an alternative to the inverse condemnation claim, nuisance against the municipal defendants as an alternative to the inverse condemnation claim, and an action for injunctive relief seeking an order that municipal defendants operate the dam with an appropriate flood storage capacity.

On 30 October 1997 defendants jointly moved for summary judgment. In response, plaintiffs filed witness affidavits, floodplain maps, rainfall records, photographs and maps produced by defendants in discovery, and the deposition and affidavit testimony of plaintiffs' experts. On 30 January 1998 defendants jointly moved to strike "the opinions expressed in the 'Back Creek Flood Study' submitted by Barrett Kays & Associates, P.A." When defendants' motions were heard on 9 February 1998, defendants orally amended their Motion to Strike to strike also the opinions expressed in the Joint Affidavit of Barrett Kays and John Harris. Defendants argued that the opinions should be "either stricken or ignored because they are unreliable, conclusory, and not properly supported."

On 23 February 1998 the trial court determined that the opinions were not reliable, were conclusory, lacked factual support and were "shown by the record to be contrary to uncontradicted facts." The trial court found that the experts' conclusions were "dependent upon the appropriateness of comparing [to one another] the water flow numbers . . . derived in . . . two earlier studies." The trial court noted that the authors of the two earlier studies "used different methodologies" in calculating their water flow rate numbers. The trial court concluded that the "[p]laintiffs have failed to show that there is any

recognized scientific basis or logical rational [sic] for comparing [to one another] the water flow numbers derived in these two earlier studies." Based on these findings the trial court granted defendants' motion to strike. The trial court then determined that there were no material issues of fact and granted defendants' motion for summary judgment. Plaintiffs appeal.

Womble Carlyle Sandridge & Rice, PLLC, by Allan R. Gitter and Jack M. Strauch, for plaintiff-appellants.

Poyner & Spruill, L.L.P., by Keith H. Johnson, for defendant-appellees The City of Mebane and The City of Graham.

Ragsdale, Liggett & Foley, by Peter M. Foley, for defendant-appellee W.M. Piatt & Company.

EAGLES, Chief Judge.

We first consider whether the trial court abused its discretion in granting defendants' motion to strike Dr. Barrett Kays' and John Harris' expert testimony. Plaintiffs first argue that "both Kays and Harris are amply qualified to testify as to their opinions about whether the dam caused the flooding." According to plaintiffs, Dr. Kays has a Ph.D. in soil science and has experience and training in soil science, ground absorption systems and hydrology. Harris is a licensed professional engineer who specializes in hydraulics and has experience designing dams and conducting flood studies. Plaintiffs next argue that the methodology underlying the experts' opinion was sufficiently reliable. Plaintiffs contend that the experts used "established techniques" and "conducted significant independent research into the cause of the flooding." Additionally, plaintiffs argue that the studies relied upon by plaintiffs' experts were subjected to substantial peer review. Plaintiffs contend that the study conducted by Kays and Harris has sufficient indicia of reliability and any "perceived flaws in the testimony . . . are matters properly to be tested in the crucible of adversarial proceeding; they are not the basis for truncating that process." *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996). Finally, plaintiffs argue that Kays' and Harris' opinions were relevant and would assist the trier of fact.

Defendants argue that the trial court did not abuse its discretion in striking the plaintiffs' experts' opinion testimony. First, defendants assert that the experts' opinions were inconclusive, since they stated that there was a "possible relationship" between the flooding and the

dam. Additionally, defendants contend that the experts' testimony was not reliable because their conclusion that the dam increased flooding was based upon the validity of comparing water flow rates generated by others using "dramatically different methodologies." Defendants also argue that the trial court did not abuse its discretion in striking plaintiffs' experts' opinion that the reservoir lacked a normal flood storage capacity because there was no explanation for how the experts reached the opinion, and the "unexplained opinion was refuted by uncontradicted facts." Accordingly, defendants argue that the opinion was conclusory.

[1] After careful review of the record, briefs and contentions of all the parties, we affirm. The admissibility of scientific testimony or evidence is governed by Rules 702 and 703 of the North Carolina Rules of Evidence.

> Implicit in these rules is the precondition that the matters or data upon which the expert bases his opinion be recognized in the scientific community as sufficiently reliable and relevant. "Whether scientific opinion evidence is sufficiently reliable and relevant is a matter entrusted to the sound discretion of the trial court.

State v. Spencer, 119 N.C. App. 662, 664, 459 S.E.2d 812, 814, *disc. review denied*, 341 N.C. 655, 462 S.E.2d 524 (1995) (citations omitted). The trial court determined that the experts' testimony was not reliable. There is evidence in the record to support the trial court's finding. First, defendants' experts, Benjamin Wilson and Everette Knight, testified that Harris' study utilized water flow rates which were based on dramatically different methodology, and that "it should have been immediately and readily apparent to any competent engineer that any comparison of the water flow rates . . . is invalid and fundamentally flawed, and thus, that any conclusions drawn from such a comparison would be erroneous, misleading and unreliable." Second, the trial court determined that plaintiffs' experts' opinion that the dam project proximately caused the flooding because the reservoir flood storage capacity was not normal was conclusory because plaintiffs' experts provided no explanation or support for their opinion. Additionally, defendants' experts gave uncontradicted testimony that the flood storage capacity was increased substantially by the dam and reservoir. Accordingly, we find no abuse of discretion. The assignment of error is overruled.

[2] We next consider whether the trial court erred in granting summary judgment for defendants. Plaintiffs assert that expert testimony

is not necessary to prove causation in this case, and that lay testimony is competent to establish proximate cause. Plaintiffs argue that there was sufficient competent evidence of causation to create a genuine issue of fact as to whether the dam project caused the recurring floods. Plaintiffs cite lay testimony that the dam was the only significant change in the watershed; the absence of floods before the dam and the emergence of recurring floods after it was built; that rainfalls both before and after the dam have been the same; and that rainfalls less than half the 100-year rain resulted in floods well beyond the 100-year floodplain as it existed before the dam was built. Plaintiffs also cite testimony of an admission by an employee of municipal defendants that the municipal defendants had the power to prevent the flooding by diverting the water, but did not do so because they wanted to keep the reservoir full to accommodate recreation.

Defendants argue that expert testimony is necessary to establish causation here because "a layman could have no well-founded knowledge on that issue and would be required to speculate." Defendants assert that lay testimony that there was no flooding before the dam was built and significant flooding after the dam was built is not sufficient to survive a motion for summary judgment. Defendants contend that they have shown by "uncontroverted expert testimony . . . that the Dam decreased waterflow upstream from the Plaintiffs" and "[a]t most, plaintiffs have shown that, if they suffered any abnormal flooding, it was created by a condition downstream from [plaintiffs'] residences and places of businesses which caused water to back-up onto their properties." Accordingly, defendants argue that summary judgment was properly granted.

We find defendants' arguments persuasive and hold that expert testimony is necessary to prove causation in this case.

> There are many instances in in [sic] which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of . . . Where, however, the subject matter . . . is 'so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of . . . [the] condition.'

Gillikin v. Burbage, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1964) (citations omitted). Here, lay testimony would not be sufficient to explain changes in the watershed or in the downstream water flow.

Accordingly, we find that "[c]ausation of flooding is a complex issue which must be addressed by experts." *Hendricks v. United States*, 14 Cl.Ct. 143, 149 (1987) (*citing Herriman v. United States*, 8 Cl.Ct. 411, 420 (1985)). Because plaintiffs failed to present sufficient expert evidence regarding the element of causation, we affirm the order of summary judgment.

Because of our determination of the above issue, we need not address the remaining issue on appeal.

Affirmed.

Judges MARTIN and McGEE concur.

JIMMY D. FOSTER, EMPLOYEE, PLAINTIFF v. CAROLINA MARBLE AND TILE COMPANY, INC., EMPLOYER, AND AMERICAN STATES INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA98-586

(Filed 2 March 1999)

1. Workers' Compensation— evidence—weight given by Commission—credibility

The Industrial Commission did not err in a workers' compensation action in which it reversed the Deputy Commissioner and awarded continuing benefits by not according more weight to the testimony of two physicians with respect to plaintiff's ability to work or by failing to defer to credibility determinations made by the Deputy Commissioner. The applicable standard of review does not afford the Court of Appeals the ability to judge the weight that the Commission has chosen to assign certain evidence and the Commission is not required to defer to credibility determinations by the Deputy Commissioner.

2. Workers' Compensation— Form 21 agreement—mistake of law

An Industrial Commission decision in a workers' compensation case to uphold a Form 21 agreement awarding compensation for tinnitus was affirmed even though defendants argued that plaintiff was not entitled to compensation for tinnitus or hearing loss pursuant to N.C.G.S. § 97-53(28)(c). Any alleged mistake in

entering into the Form 21 agreement was a mistake of law, which does not affect the validity of the contract, there being no evidence of fraud, misrepresentation, undue influence, or abuse of a confidential relationship.

3. Workers' Compensation— presumption of continuing disability—finding that presumption not rebutted—conflicting evidence

An opinion of the Industrial Commission in a workers' compensation case was affirmed where the Commission found that defendants failed to rebut the presumption of plaintiff's continued disability even though there was conflicting testimony. It was the Commission's function to weigh the testimony.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission filed 21 January 1998. Heard in the Court of Appeals 11 January 1999.

Celeste M. Harris for plaintiff-appellee.

Moreau, Marks & Gavigan, PLLC, by W. Timothy Moreau, for defendant-appellants.

MARTIN, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff continuing compensation for temporary total disability. Evidence in the record tends to show that plaintiff has been employed by defendant Carolina Marble & Tile since about 1986 or 1987; his employment has included tile work, renovation work, and brick work. In December 1991, plaintiff complained of headaches and ringing in his ears after several days of jackhammer use, and working where jackhammers were in use, at a particular job site.

On 15 January 1992 plaintiff began treatment with Dr. Ann Bogard, who specializes in ear, nose, and throat disorders. Dr. Bogard diagnosed plaintiff's tinnitus, and an audiogram revealed that plaintiff was experiencing hearing loss in his right ear due to work-related noise exposure. Since that time plaintiff has continued to seek treatment from Dr. Bogard for his hearing loss, tinnitus, and subsequent symptoms of vertigo. Plaintiff has been heavily medicated for his conditions, and contends that such medications have interfered with all

aspects of his life, including his ability to drive, sleep, concentrate, and perform simple tasks. Since 1994 plaintiff has also been under psychiatric treatment in order to learn to cope with tinnitus-related depression and anxiety. Plaintiff has been evaluated by other doctors who agree that plaintiff has suffered from hearing disorders, but who hold varied opinions as to plaintiff's employability. Dr. Bogard testified, however, that plaintiff has not improved, is not likely to get better, and, in light of his condition and necessary medication, plaintiff should not work.

Plaintiff was employed by defendant Carolina Marble & Tile until 20 April 1992. In July 1992, the parties entered into a Form 21 Agreement, approved by the Industrial Commission on 5 October 1992, wherein defendants agreed to pay plaintiff temporary total disability benefits as needed for his tinnitus and hearing loss. In March 1995 defendants filed a Form 33 Request for Hearing seeking to stop the payment of benefits. The deputy commissioner entered an opinion and award authorizing defendants to cease paying plaintiff benefits pursuant to the Form 21 Agreement and receive credit for amounts paid after 12 July 1994 with respect to any future compensation which might be awarded.

On appeal the Full Commission reversed, concluding plaintiff was entitled to receive continuing benefits as provided by the Form 21 Agreement until he returned to suitable employment or until further order of the Commission. Defendants appeal.

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[1] Defendants first argue the Commission erred in not according more weight to the testimony of two physicians with respect to plaintiff's ability to work, and in failing to defer to credibility determinations made by the deputy commissioner as to such testimony and the testimony of plaintiff. It is well established, however, that our role in reviewing decisions of the Commission is strictly limited to the twofold inquiry of (1) whether there is competent evidence to support the Commission's findings of fact; and (2) whether these findings of fact justify the Commission's conclusions of law. *Beaver v. City of Salisbury*, 502 N.C. App. 885, 502 S.E.2d 885, 887 (1998). This standard of review does not afford this Court the ability to judge the weight that the Commission has chosen to assign certain evidence; the Commission "is the sole judge of the weight and credibility of testimony . . . ." *Thompson v. Tyson Foods, Inc.*, 119 N.C. App. 411, 414, 458 S.E.2d 746, 748 (1995). *See also, Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965).

Plaintiff relies on *Sanders v. Broyhill Furniture Indus.*, 124 N.C. App. 637, 478 S.E.2d 223 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997), for the proposition that the Full Commission must give appropriate deference to credibility determinations of the deputy commissioner. However, our Supreme Court recently overruled *Sanders*, stating:

> Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate, as *Sanders* states, "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.

Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998).

[2] Defendants next argue that the Commission erred in failing to set aside the Form 21 Agreement as being contrary to state law. Specifically, defendants argue that plaintiff is not entitled to compensation for tinnitus or hearing loss pursuant to G.S. § 97-53(28)(c) which provides:

> No compensation benefits shall be payable for temporary total or temporary partial disability under this subdivision and there shall be no award for tinnitus or a psychogenic hearing loss.

N.C. Gen. Stat. § 97-53(28)(c) (1997). As such, defendants contend the Commission was obligated in the interest of equity to set aside the agreement affording plaintiff compensation.

It is well established that in order to disturb the binding force of a contract, there must exist a mutual mistake as to a material fact comprising the essence of the agreement. *Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 395 S.E.2d 160 (1990). "A mutual mistake of fact is a mistake 'common to both parties and by reason of it each has done what neither intended.' " *Swain v. C & N Evans Trucking Co., Inc.*, 126 N.C. App. 332, 335, 484 S.E.2d 845, 848 (1997) (citation omitted). G.S. § 97-17 specifically provides the Commission with the authority to set aside a Form 21 Agreement entered into

upon a mutual mistake of fact. N.C. Gen. Stat. § 97-17 (1997). A mistake of law, however, unless accompanied by fraud, misrepresentation, undue influence, or abuse of a confidential relationship, " 'does not affect the validity of a contract.' " *Swain* at 335, 484 S.E.2d at 848 (citation omitted).

In *Swain*, this Court was faced with a similar issue as to whether the Commission should have set aside a Form 21 Agreement allegedly containing an error in the computation of the plaintiff's "average weekly wages" under the Act. *Id.* at 336, 484 S.E.2d at 848. The Court noted that because the parties needed to look to the Act, as well as the caselaw construing the Act, in order to determine the correct amount of the plaintiff's average weekly wages, it held the issue to be one of law, not fact. *Id.* Thus, the mistake was one of law, and in the absence of evidence of fraud, misrepresentation, undue influence, or abuse of a confidential relationship, there was no valid basis upon which to set aside the Form 21 Agreement.

Applying the reasoning of *Swain* to the facts before us, we likewise hold the issue of whether plaintiff was entitled to compensation for tinnitus or hearing loss was one of law, properly resolved through an analysis of both the text of the Act as well as caselaw interpreting the Act. Any alleged mistake in entering into the Form 21 Agreement was a mistake of law, and, there being no evidence of fraud, misrepresentation, undue influence, or abuse of a confidential relationship, the Commission's decision to uphold the agreement will be affirmed.

[3] Finally, defendants argue the Commission erred in finding that defendants had failed to rebut the presumption of plaintiff's continued disability. An approved Form 21 Agreement creates the presumption of an employee's continued disability. *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 476 S.E.2d 434 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). Once the presumption attaches, the employer has the burden of establishing that the plaintiff is employable. *Id.* Moreover, the Commission's findings of fact on this issue are binding on appeal if there is any competent evidence in the record to support them. *Lowe v. BE & K Construction Co.*, 121 N.C. App. 570, 468 S.E.2d 396 (1996).

While there was certainly competent evidence in the record which would have supported a finding that plaintiff had regained the ability to work, there also exists competent evidence to support the Commission's findings and conclusion that plaintiff continues to be

disabled. *See Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 486 S.E.2d 252 (1997) (Commission's findings conclusive on appeal when supported by competent evidence, even though record contains competent evidence to the contrary). Dr. Bogard opined that plaintiff should not return to work in his capacity as a tile setter, regardless of whether the noise factor could be reduced. Dr. Bogard stated that, "in good faith we've tried to help this patient and get him better so he can go back to work, and it's not worked out," and "the situation hasn't cleared up and he's still on medication and it's not likely to get better." Dr. Bogard further testified, in response to a question regarding whether any job would be suitable for plaintiff, that unless changes could be made in plaintiff's medication, plaintiff should not work. She stated that plaintiff's problems have not resolved, that plaintiff "still has tinnitus, he still has hearing loss" and that "those things alone are enough to keep him from working, and the medication he has to take on a regular basis." It was the Commission's function, not ours, to weigh this testimony as well as that opposing it; the testimony supports the Commission's findings which, in turn, support its conclusion that defendants have failed to rebut the presumption of continuing disability. The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

GARY LOWERY, EMPLOYEE, PLAINTIFF v. LOCKLEAR CONSTRUCTION, EMPLOYER; HARTFORD UNDERWRITERS INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA98-259

(Filed 2 March 1999)

Stipulations— setting aside—Industrial Commission

The Industrial Commission erred in a workers' compensation action by not treating a motion to submit additional evidence as a motion to set aside a stipulation. Defendants' motion was tantamount to a motion to set aside the stipulation and should have been treated as such by the Commission; the fact that it was not delineated as a motion to "set aside a stipulation" is not material.

LOWERY v. LOCKLEAR CONSTR.

[132 N.C. App. 510 (1999)]

Appeal by plaintiff and defendants from Opinion and Award filed 9 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 1999.

Hester, Grady, Hester, Greene & Payne, by H. Clifton Hester, for plaintiff-appellant.

Morris, York, Williams, Surles & Brearley, by G. Lee Martin, for defendant-appellants.

GREENE, Judge.

Hartford Underwriters Insurance Company (Defendant-carrier), Locklear Construction (Defendant-employer) (collectively, Defendants), and Gary Lowery (Plaintiff) appeal from the North Carolina Industrial Commission's (Commission) Opinion and Award ordering Defendants to pay Plaintiff temporary disability compensation.

While being transported to work on 7 April 1995, Plaintiff was involved in an automobile accident and sustained injuries to his knees and back.

Plaintiff filed a Notice of Accident (Form 18) with the Commission on 17 July 1995, and the matter was heard before Deputy Commissioner Phillip Holmes on 12 June 1996, who allowed the parties time to take the deposition of Dr. Dixon Gerber, one of Plaintiff's medical care providers. On 25 November 1996, the Deputy Commissioner entered an Opinion and Award ordering both Defendants to pay Plaintiff temporary total disability compensation from 7 April 1995 through 2 October 1995. In his Opinion and Award, the Deputy Commissioner also noted the stipulations of all the parties: (1) "The parties are subject to and bound by the provisions of the North Carolina Workers' Compensation Act"; (2) "An employee-employer relationship existed between [Plaintiff] and [Defendant-employer] on April 7, 1995"; and (3) "[Defendant-carrier] was the carrier on the risk at the time of the alleged injury."

On 27 November 1996, Plaintiff filed notice of appeal to the Commission, and filed his application for review on 1 April 1997. On 7 May 1997, Defendants filed, and served on Plaintiff, a "Motion To Submit Additional Evidence To The Full Commission," containing, *inter alia*, the following declarations: (1) "Based on information available to [Defendant-carrier] at the time of the hearing,

[Defendant-carrier] stipulated that [Plaintiff] was an employee of [Defendant-employer] when he was actually an employee of Carl Locklear"; (2) Neither Plaintiff nor "Carl Locklear has [ever] worked for [Defendant-employer]"; (3) "Carl Locklear is a subcontractor of Great American Homes, Inc. . . . [and] does not have workers' compensation insurance"; and (4) "Great American Homes, Inc. has workers' compensation insurance through the Maryland Insurance Group." Defendant-carrier also requested the Commission substitute "Carl Locklear and Great American Homes, Inc. as parties to this action."

Defendants' motion also included affidavits from Keith Locklear and Sandra Conner. In his affidavit, Keith Locklear swore: (1) Keith Locklear was "the owner of [Defendant-employer]"; (2) "[Defendant-employer has] its workers' compensation coverage through [Defendant-carrier]"; (3) "Plaintiff . . . has never worked for [Defendant-employer and] Carl Locklear, who represented that he owned [Defendant-employer], has never worked for [Defendant-employer]"; (4)"[Defendant-employer] builds decks and prepares inside trim for houses . . . [and] has never been engaged in the business of roofing"; and (5) Keith Locklear did not become aware "that [Plaintiff] claimed that he was an employee of [Defendant-employer until he] received the Opinion and Award from the Deputy Commissioner."

Sandra Conner, in her affidavit, swore: (1) She is employed by Defendant-carrier to investigate workers' compensation claims; (2) She "was notified of the workers' compensation claim arising out of [Plaintiff's] accident . . . by receipt of a Form 18 which was forwarded to [her] by the Industrial Commission"; (3) "Based on the information provided to [her] through the Industrial Commission in the Form 18, [she] contacted Carl Locklear. His recorded statement was taken on August 30, 1995"; (4) "Carl Locklear represented to [her] that he was the owner of [Defendant-employer] and based upon his representation and the information received from the Industrial Commission in Form 18, [Defendant-carrier] admitted that it provided coverage for [Defendant-employer] with [Plaintiff] as an employee of [Defendant-employer]"; (5) "At the time of [Plaintiff's] accident . . . [Defendant-carrier] did provide workers' compensation coverage for [Defendant-employer]. However, it was later determined, after the Opinion and Award was sent to Keith Locklear, the owner of [Defendant-employer], that Carl Locklear is not affiliated with [Defendant-employer]"; (6) "Keith Locklear . . . informed

[Defendant-carrier] that he never employed [Plaintiff] and that the wrong employer was listed on the Opinion and Award"; and (7) "[Defendant-carrier] does not provide workers' compensation coverage for Carl Locklear's roofing business and [Plaintiff] is not an employee of [Defendant-employer]."

On 9 September 1997, the Commission filed an Opinion and Award denying Defendants' motion to submit additional evidence, stating, "Defendants stipulated that they were proper parties to this action and by law they may not now present evidence contrary to that position." The Opinion also found the following facts. On 7 April 1995, Plaintiff was employed as a roofer for Defendant-employer, and was injured in a car accident while being transported to work in Greenville, South Carolina. Plaintiff was the passenger in a van owned by Defendant-employer, and driven by Carl Locklear, who was doing business as Defendant-employer. As a result of the accident, Plaintiff suffered injuries to his back and knees. The Commission concluded that Plaintiff had "sustained an injury by accident arising out of and in the course of his employment" and as a result "was incapable of earning wages with [Defendant-employer] or in any other employment from 7 April 1995 until 2 October 1995," and awarded Plaintiff temporary total disability compensation. All parties now appeal the Commission's Opinion and Award.

The dispositive issue is whether Defendants proceeded properly in seeking to set aside the previously made stipulations of the parties.

Defendants contend the Commission erred in denying their motion to submit additional evidence. We agree.

"A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party." *R.R. Co. v. Horton and R.R. Co. v. Oakley*, 3 N.C. App. 383, 389, 165 S.E.2d 6, 10 (1969). "Application to set aside a stipulation must be seasonably made; delay in asking for relief may defeat the right thereto." *Id.* Whether a motion is "seasonably made," however, cannot be determined with mathematical precision. *Cf. Willoughby v. Wilkins*, 65 N.C. App. 626, 641, 310 S.E.2d 90, 100 (1983) (applying "seasonably" in context of Rule 26(e)(1) of the North Carolina Rules of Civil Procedure), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 698 (1984). *Compare In re Marriage of Jacobs*, 180 Cal. Rptr. 234 (Ct.

App. 1982) (motion to set aside a stipulation filed six months after date of judgment was timely) *with Hawaii Housing Authority v. Uyehara*, 883 P.2d 65 (Haw. 1994) (motion to set aside stipulation filed over three years after entry of judgment was untimely).

"It is generally recognized that it is within the discretion of the court to set aside a stipulation of the parties relating to the conduct of a pending cause, where enforcement would result in injury to one of the parties and the other party would not be materially prejudiced by its being set aside." 73 Am. Jur. 2d *Stipulations* § 13 (1974). "A stipulation entered into under a mistake as to a material fact concerning the ascertainment of which there has been reasonable diligence exercised is the proper subject for relief." *Id.*, § 14. Other proper justifications for setting aside a stipulation include: misrepresentations as to material facts, undue influence, collusion, duress, fraud, and inadvertence. 83 C.J.S. *Stipulations* § 35, at 90 (1953); *see Thomas v. Poole*, 54 N.C. App. 239, 242, 282 S.E.2d 515, 517 (1981) (just cause for setting aside a stipulation includes mistake, inadvertence, and stipulations made by counsel without authority), *disc. review denied*, 304 N.C. 733, 287 S.E.2d 902 (1982).

In this case, Defendants moved to submit additional evidence which sought to relieve them from a previously made stipulation. This motion was tantamount to a motion to set aside a stipulation and should have been treated as such by the Commission. The fact that the motion was not delineated as one to "set aside a stipulation" is not material. The Opinion and Award of the Commission denying Defendants' motion reveals the Commission did not treat the motion to submit additional evidence as a motion to set aside the stipulation, denying the motion simply on the grounds that "Defendants stipulated that they were proper parties to this action and by law may not now present evidence contrary to that position." Accordingly, the Commission erred and the Opinion and Award denying Defendants' motion must be reversed and remanded. On remand, the Commission must accept evidence to determine whether the motion to set aside the stipulations was filed seasonably and if so, whether there is justification for setting them aside.

Although the Commission on remand may rule in favor of Defendants, thus mooting the issues raised in Plaintiff's appeal to this Court, we, nonetheless, have considered those assignments of error carefully, and overrule them.

Reversed and remanded.

Judges JOHN and HUNTER concur.

STATE OF NORTH CAROLINA v. TERRY LEE THOMAS

No. COA98-470

(Filed 2 March 1999)

1. Jurisdiction— criminal case on civil calendar—mandate of Chief Justice

The trial court had proper jurisdiction over a prosecution for discharging a firearm into occupied property where the matter was called for trial before a judge presiding over a calendar designated as "civil" because an order from the Chief Justice specifically authorized the trial court to hear during a civil calendar week both civil and criminal cases.

2. Trials— exhibits—viewed in jury room—consent not obtained

There was no prejudicial error in a prosecution for discharging a firearm into occupied property where the trial court allowed photographs of a vehicle to be sent to the jury room without conducting the jury to the courtroom or obtaining the consent of the parties, but defendant did not argue and the court could not discern prejudice.

Appeal by defendant from judgment filed 23 December 1997 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 26 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Wallace R. Young, Jr., for the State.

Wyatt, Early, Harris & Wheeler, L.L.P., by John D. Bryson, for defendant-appellant.

GREENE, Judge.

Terry Lee Thomas (Defendant) appeals from his jury conviction of discharging a firearm into occupied property.

Defendant was charged with the offense of discharging a firearm into occupied property on 15 July 1997, arrested on 28 July 1997, and indicted on 10 November 1997. The matter was called for trial on 11 December 1997 in the Guilford County Superior Court with the Honorable L. Todd Burke (Judge Burke) presiding over a week of court designated as "civil" on the calendar of courts issued by the Administrative Office of the Courts.

The State's evidence at trial tended to show the following facts. On 15 July 1997, Lesa Thomas (Ms. Thomas), Defendant's estranged wife, was driving her vehicle in Archdale, North Carolina, and saw Defendant pass her heading in the opposite direction. Defendant then turned his vehicle around and proceeded to follow Ms. Thomas for several miles into High Point, North Carolina. Ms. Thomas drove to an entrance ramp to Interstate Business 85, when she observed Defendant reach behind his seat, and pull his vehicle along side of her vehicle. She then heard a "very loud bang" and heard something hit the car. She looked up at the passenger side window of Defendant's van, and saw the end of a black powder muzzle loader shotgun with which Defendant had previously threatened her. She stopped her vehicle and attempted to reverse the car back up the entrance ramp. Defendant drove to the next exit, turned around, and came back down the opposite side of the highway. Ms. Thomas then drove to the Asheboro Police Department because she knew the police had a restraining order which had not yet been served on Defendant. After going to the Asheboro Police Department, Ms. Thomas was advised to go to the Magistrate's office in Guilford County, where she filed a report with Officer Eddie Caldwell (Officer Caldwell) of the High Point Police Department, and showed Officer Caldwell the dent in her door allegedly caused by Defendant's shooting. Officer Caldwell confirmed Ms. Thomas' story in his testimony at trial. The State also offered into evidence photographs of Ms. Thomas' door, showing the dent allegedly caused by Defendant.

Defendant presented the testimony of his cousin James Thomas, who demonstrated to the jury that due to the weight of the shotgun, it was not possible for him to hold it with one arm at the angle Defendant would have had to hold it, and pull the trigger. James Thomas also testified that he had experience shooting both Defendant's shotgun and his own powder gun. In his opinion, the amount of smoke discharged from the shotgun when fired would have filled the car with smoke, and the sound from the shotgun would have "burst your eardrums and possibly crack[ed] the windows in the

van." Additionally, James Thomas testified that the shotgun had been in his own possession since January of 1997, and his wife, Brenda Thomas, corroborated this testimony. Finally, James Thomas testified that if the shotgun actually had been shot, it would have caused a round bullet hole rather than the dent the State's photographs and Ms. Thomas' testimony suggested.

Defendant also presented the testimony of his brother and employee Shannon Dilldine (Dilldine), who testified that as a part of his employment, his duties were to load and unload Defendant's van regularly. Dilldine also testified that he unloaded the van on 15 July 1997, and there was not a weapon in the vehicle.

The jury retired to deliberate, and during its deliberations sent a note to Judge Burke requesting to review again the photographs of the dent in Ms. Thomas' car door. Judge Burke sent the photographs to the jury room without either: (1) summoning the entire jury back to the courtroom before allowing the photographs to be taken to the jury room; or (2) obtaining the express consent of both parties. The jury returned a guilty verdict and Defendant was sentenced to a minimum of twenty-three and maximum of thirty-seven months in prison.

The dispositive issues are whether: (I) the trial court, when assigned to hold "civil" court pursuant to the calendar of courts, has jurisdiction to conduct a criminal trial; and (II) the trial court committed reversible error by allowing the jury to review the photographs of Ms. Thomas' car in the jury room without first summoning the jury back to the courtroom or obtaining the consent of the parties.

I

[1] Defendant contends the trial court did not have jurisdiction to hear his criminal case because the calendar of courts designated Judge Burke's commission for the trial of civil cases only. We disagree.

Although there is a specific statute providing, "no criminal process shall be made returnable to any civil session," N.C.G.S. § 7A-49.2(b) (1995), there also was an Order from the Chief Justice of the North Carolina Supreme Court, Burley B. Mitchell, of which we

take judicial notice,[1] mandating that for the period of 1 July 1997 through the week beginning 29 December 1997: "Each session [of the Superior Court of North Carolina], notwithstanding the designations appearing on ***THE CALENDAR OF COURTS***, shall be a jury session for the trial of criminal and civil cases." That Order further provided: "The designations appearing on ***THE CALENDAR OF COURTS*** are for administrative purposes only and establish those matters which are to be given priority during the session."

The Order from the Chief Justice thus specifically authorized the trial court to hear, during a civil calendar week, both civil and criminal cases, with the civil cases having priority. The trial court therefore had proper jurisdiction to hear Defendant's criminal case.

II

[2] Defendant also contends the trial court committed reversible error by allowing the jury to view photographs in the jury room without first summoning the jury to the courtroom and obtaining the consent of all parties.

"If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom," N.C.G.S. § 15A-1233(a) (1997), and "with consent of all parties," a trial judge may allow the jury to view admitted exhibits in the jury room, N.C.G.S. § 15A-1233(b).

In this case, it is undisputed that Judge Burke neither conducted the jury to the courtroom, nor obtained the consent of all parties before allowing the photographs of Ms. Thomas' vehicle to be sent to the jury room. Accordingly, because these actions are in direct conflict with the statute, they constitute error. *See State v. McLaughlin*, 320 N.C. 564, 568, 359 S.E.2d 768, 771 (1987) ("not adhering to the requirements of the statute" constitutes error on part of the trial court). This error, however, does not require a new trial unless Defendant demonstrates that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C.G.S. § 15A-1443(a) (1997); *see McLaughlin*, 320 N.C. at 568-70, 359 S.E.2d at 771-72 (requiring defendant to show that error of trial court prejudiced him); *Robinson*

1. "[J]udicial notice is appropriate to determine the existence and jurisdiction of the various courts of the State." *Hinkle v. Hartsell*, 131 N.C. App. 833, —, — S.E.2d —, — (1998); 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 26, at 102 (5th ed. 1998).

v. Seaboard System Railroad, 87 N.C. App. 512, 528, 361 S.E.2d 909, 919 (1987) (rejecting the notion that allowing the jury to view exhibits without the consent of the parties was reversible error *per se*, and requiring "the party asserting the error [to] demonstrate that he has been prejudiced thereby"), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988); *Gardner v. Harriss*, 122 N.C. App. 697, 700, 471 S.E.2d 447, 450 (1996) (determining error by trial court in permitting the jury to view exhibits without consent of the parties, but defendant "is not entitled to a new trial absent a showing that the error was prejudicial"). In this case, Defendant does not argue how the errors were prejudicial and we discern no prejudice from this record.

No error.

Judges JOHN and HUNTER concur.

LAVAL LAMBERT ROBINSON, THE EXECUTRIX OF THE ESTATE OF WILLIAM J. ROBINSON, SR., DECEASED, PLAINTIFF-APPELLANT v. CELIA ENTWISTLE, AND ESLIE ROLLAND PHILLIPS, III, DEFENDANTS-APPELLEES

No. COA98-517

(Filed 2 March 1999)

Medical Malpractice— medical review before filing—allegation ineffective—statute of limitations not tolled

The trial court correctly granted summary judgment for defendants based upon the statute of limitations in a medical malpractice action where the original complaint did not contain the allegations of expert review required by Rule 9(j), an allegation in an amendment was ineffective to meet the requirements of Rule 9(j) and that amendment thus cannot relate back to the original filing to toll the statute of limitations, and a voluntary dismissal without prejudice which ordinarily would allow another year for refiling was unavailable in this case.

Appeal by plaintiff from judgment entered 9 December 1997 by Judge James C. Davis in Cabarrus County Superior Court. Heard in the Court of Appeals 6 January 1999.

Wells & Daisley, P.A., by Jameson P. Wells, for plaintiff-appellant.

Cozen and O'Connor, by Paul A. Reichs, Kimberly Sullivan and Garrett J. McAvoy, for defendant-appellee Eslie Rolland Phillips, III; and Kurdys & Lovejoy, P.A., by Mark C. Kurdys and Jeffrey S. Bolster, for defendant-appellee Celia Entwistle.

WALKER, Judge.

The decedent, William J. Robinson, Sr., died on 18 August 1994. On 12 August 1996, plaintiff initiated a medical malpractice action by filing a civil summons along with an order extending time to file her complaint. The order extended the statute of limitations for the filing of the lawsuit until 1 September 1996. On 30 August 1996, plaintiff filed a complaint alleging negligence on the part of the defendants, but it did not contain allegations that the medical care had been reviewed by an expert as required by Rule 9(j) for medical malpractice actions. Before the defendants filed responsive pleadings, plaintiff amended her complaint to include a paragraph which purported to comply with Rule 9(j). Later, on 21 April 1997, plaintiff dismissed the amended complaint without prejudice pursuant to Rule 41(a)(1).

On 6 June 1997, plaintiff re-filed this medical malpractice action. Both defendants answered the complaint and filed motions to dismiss for failure to comply with Rule 9(j), for judgment on the pleadings pursuant to Rule 12(c), and for summary judgment. The trial court denied the Rule 12(c) motions having considered evidence beyond the pleadings and denied the motions to dismiss for failure to comply with Rule 9(j) finding that the second complaint complied with the requirements set out in the rule. However, the trial court granted the motions for summary judgment in favor of the defendants and found that the statute of limitations had expired for the initiation of the action.

The trial court made the following findings of fact and conclusions of law:

> 5. That the August 30, 1996 complaint filed by the plaintiff did not comply with Rule 9(j) of the North Carolina Rules of Civil Procedure because it did not allege that the medical care had been reviewed by an expert who was reasonably expected to qualify as an expert under Rule 702 and who was willing to testify that the medical care did not comply with the applicable standard

of care, it did not assert that the medical care had been reviewed by a person that the complainant would seek to have qualified as an expert witness by motion under Rule 702(e) and who was willing to testify that the medical care did not comply with the applicable standard of care, and it did not allege facts establishing negligence under the common law doctrine of *res ipsa loquitur*.

6. That on October 28, 1996, the plaintiff filed an amendment to the August 30, 1996, complaint alleging that the medical care of the plaintiff had been reviewed by Dr. Read, a vascular surgeon, who was willing to testify that the medical care did not comply with the applicable standard of care.

7. Dr. Read did not qualify as an expert under Rule 702 of the North Carolina Rules of Evidence to testify as to the standard of care applicable to emergency room physicians.

. . .

9. That on April 21, 1997, the plaintiff voluntarily dismissed the action commenced by the August 30, 1996 complaint because Dr. Read's review of the medical care of William J. Robinson, Sr. did not meet the pleading requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure.

10. The plaintiff did not have William J. Robinson, Sr.'s medical care reviewed by an expert who qualifies under Rule 702 of the North Carolina Rules of Evidence until more than two years after William J. Robinson, Sr.'s death.

. . .

CONCLUSIONS OF LAW

1. That the two-year statute of limitations for wrongful death actions applies to this case and began to run on August 19, 1994, the date of William J. Robinson, Sr.'s death.

2. That the statute of limitations applicable to this case was extended through September 1, 1996, by application of the plaintiff.

3. That the complaint filed by the plaintiff on August 30, 1996, was not properly instituted because it did not conform to the pleading requirements set forth in Rule 9(j) of the North Carolina Rules of Civil Procedure; therefore the August 30, 1996 complaint did not toll the statute of limitations.

4. That the Amendment to the initial complaint filed by the plaintiff on or about October 28, 1996, did not remedy this defect because it alleged that the medical care was reviewed by an expert who did not qualify under Rule 702 to testify as to the standard of care applicable to the defendants in this action.

5. Because the original complaint did not toll the statute of limitations and did not provide the basis for a one year extension by way of a Rule 41(a)(1) Voluntary Dismissal Without Prejudice, the second complaint filed by the plaintiff on June 6, 1997, was filed after expiration of the statute of limitations and therefore is subject to dismissal on the grounds that the action is time barred.

The sole issue in this case is whether the trial court erred in granting summary judgment on behalf of the defendants because the plaintiff's action was barred by the statute of limitations. Plaintiff contends that Rule 41(a)(1) allows a plaintiff to dismiss an action without prejudice and re-file it within one year so long as the original action was filed in a timely manner. Defendants argue that all pleading requirements must be met by the original complaint to toll the statute of limitations and that if the statute of limitations was not tolled, a Rule 41 voluntary dismissal is unavailable to allow an additional year for the action to be re-filed.

Rule 9(j) requires that complaints alleging medical malpractice against a health care provider specifically allege that the "medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and that [the expert] is willing to testify that the medical care did not comply with the applicable standard of care." *Trapp v. Maccioli*, 129 N.C. App. 237, 239-40, 497 S.E.2d 708, 710, *disc. review denied*, 348 N.C. 509, 510 S.E.2d 672 (1998); *See* N.C. Gen. Stat. § 1A-1, Rule 9(j) (Cum. Supp. 1997).

As our Supreme Court has stated, "in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading." *Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986); *See Johnson v. City of Raleigh*, 98 N.C. App. 147, 389 S.E.2d 849, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990). In *Estrada*, our Supreme Court held that where a complaint failed to

comply with Rule 11(a) at the time it was filed, it did not toll the statute of limitations. *Estrada*, 316 N.C. 318, 341 S.E.2d 538. Rule 41(a) was not available to the plaintiff in that action to allow him to dismiss and re-file again within one year because the original statute of limitations had not been met. *Id.* Likewise, in *Johnson*, 98 N.C. App. 147, 389 S.E.2d 849, this Court held that Rule 41(a) was not available to a plaintiff who failed to obtain proper service of process pursuant to Rule 4 prior to the time the statute of limitations expired. Thus, Rule 41(a)(1) is only available in an action where the complaint complied with the rules which govern its form and content prior to the expiration of the statute of limitations.

In this case, although the original complaint was timely filed, both the original complaint and the amendment failed to comply with Rule 9(j). The amendment contained an allegation that Dr. Read had reviewed the records and was prepared to testify; however, plaintiff later admitted in discovery that Dr. Read would not qualify as an expert under Rule 702(b)(2) because he had not practiced as an emergency physician during the year prior to the occurrence which is the basis of this action. *See* N.C. Gen. Stat. § 8C-1, Rule 702(b)(2) (Cum. Supp. 1997). Because plaintiff admitted the allegation in the amendment was ineffective to meet the requirements set out in Rule 9(j), that amendment cannot relate back to the time of the original filing to toll the statute of limitations. Thus, a voluntary dismissal without prejudice which ordinarily would allow for another year for re-filing was unavailable to plaintiff in this case.

For these reasons, we must affirm the trial court's granting of summary judgment in favor of the defendants in that this action was not properly filed before the statute of limitations expired.

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. LISA MICHELLE WEBB, KEVIN WEBB, WILLIAM SPROUSE, AND SAMUEL CHAD LEIGH, DEFENDANTS

No. COA98-661

(Filed 2 March 1999)

Insurance— coverage—automobile policy—object thrown from automobile

A declaratory judgment action was remanded for entry of summary judgment favoring the insurer where a soda bottle was intentionally thrown from the insured automobile, striking a bicyclist. The automobile policy did not provide coverage for the injuries suffered by the victim because those injuries did not arise out of the use of the insured vehicle; as in other cited cases, this act resulted from something wholly disassociated from, independent of, and remote from the vehicle's normal use.

Appeal by Plaintiff from judgment entered 9 April 1998 by Judge Janet M. Hyatt in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 January 1999.

Templeton & Raynor, P.A., by Attorney Marcey R. Selle for the plaintiff.

The Roberts Law Firm, P.A., by Attorney Scott W. Roberts for the defendants.

WYNN, Judge.

The insurance policy at issue covers injuries which arise out of the use of the insured vehicle. Are injuries to a pedestrian caused by a soda bottle intentionally thrown from the insured vehicle covered under that policy? Because we find that the resulting injuries did not arise out of the use of a vehicle, we answer: No.

Just prior to this incident, Samuel Chad Leigh and two other boys rode their mountain bikes along a roadway when they observed an automobile approaching them. Kevin Webb drove the automobile with the consent of its owner, Lisa Michelle Webb, while William Sprouse rode in the back seat.

As Kevin Webb drove the automobile pass the boys, he leaned forward in his seat allowing Sprouse the opportunity to intentionally throw a soda bottle at the boys. The bottle struck Leigh in the eye.

Leigh brought an action for his injuries against Kevin Webb, Sprouse, and Lisa Webb. Nationwide Mutual Insurance Company, the insurer of the automobile, provided a defense for the defendants under a reservation of rights. The trial resulted in a verdict favoring Leigh in the amount of $37,000.00.

Thereafter, Nationwide brought this action seeking a declaration that it was not obligated to provide coverage for Leigh's injuries. The trial court resolved that action by granting summary judgment in favor of Leigh and thereby finding that the Nationwide policy provided coverage for his injuries. Afterwards, Nationwide appealed to this Court contending that since Leigh's injuries did not arise out of the use of an automobile, it was not obligated to provide coverage for his injuries. We agree.

The automobile policy at issue in this case provides: "We will pay damages for bodily injury or property damage for which any insured becomes responsible because of an auto accident." However, "[i]t is well established in North Carolina that as a matter of law the provisions of the Financial Responsibility Act [N.C. Gen. Stat. §§ 20-279.1-279.39 (1993)] are written into every automobile liability policy." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538-39, 350 S.E.2d 66, 69 (1986); *See Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). Under N.C. Gen. Stat. § 20-279.21(b)(2), an owner's policy of liability insurance "[s]hall insure . . . 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 . . . ." Thus, we construe the automobile policy in this case to provide coverage for damages "arising out of the ownership maintenance or use of such motor vehicle."

Furthermore, "the test for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was the proximate cause of the accident." *State Capital Ins. Co.*, 318 N.C. at 539-40, 350 S.E.2d at 69. "Instead, the test is whether there is a casual connection between the use of the automobile and the accident." *Id.* Therefore, in the present case, we must determine whether there is a casual connection between the use of the automobile and Leigh's injury.

In *Providence Washington Ins. Co. v. Locklear*, 115 N.C. App. 490, 445 S.E.2d 418 (1994), this Court addressed the issue of whether

injuries resulting from an object being deliberately thrown from a moving vehicle was causally connected to the use of the vehicle. In that case, a bicyclist was hit by a beer can that was intentionally thrown from a moving vehicle. We found no causal connection between the bicyclist's injuries and the use of the automobile because the automobile was merely the situs of the assault. *Id.* Thus, we held that the automobile insurance policy in that case did not provide coverage for the bicyclist's injuries. *Id.*

Our decision in *Providence* relied on two prior decisions of this Court, *Wall v. Nationwide Mut. Ins. Co.*, 62 N.C. App. 127, 302 S.E.2d 302 (1983) and *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E.2d 341, *disc. review denied*, 293 N.C. 589, 239 S.E.2d 363 (1977)—both involving an intentional shooting of a third person by an occupant of a moving vehicle. We held in those cases that the discharge of the firearms did not arise out of the use of automobiles.

After *Wall* and *Knight*, our Supreme Court in *State Capitol*, *supra*, 318 N.C. at 534, 350 S.E.2d at 66, held that an automobile policy covered injuries suffered by a third person when a rifle accidentally discharged while being removed by the insured from a motor vehicle. The Court in *State Capitol* held:

> The transportation of firearms is an ordinary and customary use of a motor vehicle, especially pickup trucks. In addition, use of an automobile includes its loading and unloading.

Significant to this case, the Court in *State Capitol* distinguished its holding from *Wall* and *Knight* "on the ground that [those] . . . cases deal[t] with injuries caused by activities not ordinarily associated with the use of automobiles." *Id.* at 540, 350 S.E.2d at 69.

The case *sub judice*, like *Providence*, involves an object being intentionally thrown from a moving vehicle. However, Leigh contends that this case is distinguishable from *Providence* because here there are additional facts showing that: (1) the speed of the car was instrumental in causing the injuries, and (2) the driver actively participated in the act of throwing the bottle. We find the presence of these facts insignificant to the outcome of this case because the act committed—throwing a soda bottle from the automobile—was of the same intentional nature as the acts found in *Providence*, *Wall*, and *Knight*. In essence, the act here as in those cases resulted from "something 'wholly disassociated from, independent of, and remote from 'the

[vehicle's] normal use." *Wall*, 62 N.C. App. 127, 129, 302 S.E.2d 302, 303 (quoting *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 22, 234 S.E.2d 206, 211, disc. rev. denied, 293 N.C. 159, 236 S.E.2d 704 (1977)). It follows that the Nationwide automobile policy did not provide coverage for the injuries suffered by Leigh because such injuries did not arise out of the use of the insured vehicle. Accordingly, we remand this action to the trial court for entry of summary judgment favoring Nationwide.

Reversed and remanded.

Judges HORTON and EDMUNDS concur.

MARILY S. FLOYD, EMPLOYEE, PLAINTIFF-APPELLEE v. FIRST CITIZENS BANK, EMPLOYER, DEFENDANT-APPELLANT

No. COA98-560

(Filed 2 March 1999)

1. **Workers' Compensation— findings of fact—evidence sufficient**

In a workers' compensation action arising from a back injury suffered when plaintiff fell while buying bagels for an office Christmas breakfast, the Industrial Commission had ample competent evidence upon which to base its finding that plaintiff's supervisor had instructed her to coordinate the breakfast.

2. **Workers' Compensation— course of employment—coordinating Christmas breakfast**

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff's injury arose in the course of her employment where she fell and injured her back while buying bagels for an office Christmas breakfast. Plaintiff was engaged in an activity directly related to her supervisor's request that she coordinate the breakfast.

Appeal by defendant from opinion and award entered 19 February 1998 by the N.C. Industrial Commission. Heard in the Court of Appeals 4 January 1999.

Carruthers & Roth, P.A., by Kenneth L. Jones, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Daniel C. Pope, Jr., and Bambee N. Booher, for defendant-appellant.

McGEE, Judge.

Plaintiff was employed by defendant in December 1993 when she slipped and fell while buying bagels for an office Christmas breakfast that her boss had instructed her to coordinate for defendant's entire city office, including all department heads. Plaintiff suffered a serious back injury as a result of the fall. The Industrial Commission (Commission) found as a fact that plaintiff's injury caused her to be disabled. The Commission concluded as a matter of law that plaintiff's injury arose within the course of her employment and that she was entitled to workers' compensation disability benefits. Defendant appeals.

[1] Defendant assigns error to the Commission's finding of fact that plaintiff's supervisor instructed her to coordinate the Christmas breakfast. Defendant also assigns error to the Commission's conclusions of law that plaintiff's injury arose in the course of her employment and that plaintiff is entitled to workers' compensation benefits.

In considering an appeal from an award of the Commission,

> [t]he reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact. When the Commission's findings of fact are supported by competent evidence, they are binding on the reviewing court in spite of the existence of evidence supporting contrary findings.

Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986) (citations omitted).

> "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." Thus, the Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal.

Dolbow v. Holland Industrial, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983) (citations omitted), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984).

The Commission found as a fact that plaintiff "was instructed" by her supervisor to coordinate the breakfast. Defendant disputes this finding, saying that "competent evidence does not exist" to support the finding. We disagree. The transcript of the Commission hearing includes plaintiff's testimony stating, "I was asked to coordinate the breakfast for the main office[.]" Plaintiff testified that because she had been asked to coordinate the event, her attendance was "absolutely" mandatory. Plaintiff further testified, "[I]t was . . . my job to coordinate it and do the breakfast, so I went and got the bagels for the breakfast." She also stated, "[I]t was my job to coordinate and do this breakfast[.]" Plaintiff testified that her supervisor "asked me to coordinate this, and so I followed through with coordinating it and making sure everything was there, and part of that was getting the bagels to the breakfast." Furthermore, plaintiff's supervisor, Paul Ford, testified regarding the breakfast that plaintiff "was asked to do it . . . to coordinate this event[.]" The Commission had ample competent evidence upon which to base its finding that plaintiff's supervisor instructed her to coordinate the Christmas breakfast.

[2] Defendant also assigns error to the Commission's conclusion of law that plaintiff's injury arose in the course of employment. In *Stewart v. Dept. of Corrections*, 29 N.C. App. 735, 737-38, 225 S.E.2d 336, 338 (1976) (citations omitted), our Court stated that:

> To be compensable an accident must arise out of the course and scope of employment. Where the fruit of certain labor accrues either directly or indirectly to the benefit of an employer, employees injured in the course of such work are entitled to compensation under the Workmen's Compensation Act.
>
> This result obtains especially where an employee is called to action by some person superior in authority to him. . . . It appears clear that when a superior directs a subordinate employee to go on an errand or to perform some duty beyond his normal duties, the scope of the Workmen's Compensation Act expands to encompass injuries sustained in the course of such labor. Were the rule otherwise, employees would be compelled to determine in each instance and, no doubt at their peril, whether a requested activity was beyond the ambit of the act.

> The order or request need not be couched in the imperative. It is sufficient for compensation purposes that the suggestion, request or even the employee's mere perception of what is expected of him under his job classification, serves to motivate undertaking an injury producing activity. So long as ordered to perform by a superior, acts beneficial to the employer which result in injury to performing employees are within the ambit of the act.

In the case before us, plaintiff's injury occurred while plaintiff was engaged in activity directly related to defendant's request that she coordinate the Christmas breakfast. The Commission did not err in concluding that plaintiff's injury arose in the course of plaintiff's employment.

Defendant argues that plaintiff is not entitled to workers' compensation benefits because the facts of this case do not meet the standard set out in Larson's Workers' Compensation Law § 22.23 and adopted by this Court in *Chilton v. School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980). Defendant is correct that the facts before us do not meet the standard set out in *Chilton*. In fact, the two cases are entirely distinguishable, and *Chilton* is not controlling in this case. In *Chilton*, the plaintiff, a medical school faculty member, attended a departmental picnic and was injured while playing volleyball. Nothing in *Chilton* suggests that the plaintiff had been asked to organize the picnic. Here, plaintiff was injured while carrying out a specific request by her supervisor.

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

Affirmed.

Judges EAGLES and MARTIN concur.

VAN DORN RETAIL MANAGEMENT, INC., PLAINTIFF/APPELLANT v. KLAUSSNER FURNITURE INDUSTRIES, INC., DEFENDANT/APPELLEE

No. COA98-660

(Filed 2 March 1999)

Unfair Trade Practices— price discrimination in secondary line—no cause of action

The trial court did not err by granting summary judgment for defendant in an unfair trade practices action based upon secondary line price discrimination. There is no cause of action in North Carolina for price discrimination in the secondary line.

Appeal by plaintiff from order entered 17 March 1998 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 January 1999.

Mitchell, Rallings, Singer, McGirt & Tissue, PLLC, by Richard M. Mitchell and John W. Taylor, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by F. Lane Williamson, for defendant appellee.

HORTON, Judge.

Van Dorn Retail Management, Inc. (plaintiff), contends on appeal that price discrimination in the secondary line (price discrimination by a supplier between its customers) is an illegal business practice in North Carolina and thus within the purview of Chapter 75 of our General Statutes. In brief, plaintiff contends that, between 24 January 1994 and 20 January 1995, Klaussner Furniture Industries, Inc. (defendant), did not give plaintiff the same 5% truckload discount it extended to its other customers and that such action was illegal and actionable as an unfair trade practice. We disagree and affirm the entry of summary judgment for defendant by the trial court.

Our Supreme Court addressed the issue of price discrimination in *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973), and concluded that secondary-line price discrimination was not in violation of *any* North Carolina law. In *Rose*, the Supreme Court specifically addressed N.C. Gen. Stat. § 75-5(b)(5) (1994), which was repealed effective 1 October 1996 but was in effect at all times relevant to this case. The statute provided that it was unlawful

> [w]hile engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another.

N.C. Gen. Stat. § 75-5(b)(5). The Supreme Court held that § 75-5(b)(5) "is aimed at *predatory area discrimination in the primary line.* It was not intended to outlaw price discrimination in the secondary line, and no *reasonable* construction of the statute produces that result." *Rose*, 282 N.C. at 654, 194 S.E.2d at 529.

Plaintiff acknowledges the language of *Rose*, but argues that N.C. Gen. Stat. § 75-1.1 (1994), which forbids unfair and deceptive trade practices controls the present situation. According to plaintiff, the *Rose* Court did not consider whether price discrimination in the secondary line was prohibited by this statute, because it was not in effect at the time the events in question in *Rose* occurred. Although it is true that § 75-1.1 would not have applied to the events which gave rise to the *Rose* litigation, our Supreme Court was obviously aware that § 75-1.1 had been enacted at the time it rendered its decision in *Rose.* Furthermore, the *Rose* Court did not limit the language of its opinion to state that secondary-line price discrimination was not in violation of any North Carolina law in effect at the time of the events which were the subject of the *Rose* complaint, although it could have easily done so.

Plaintiff also argues that there is support for its position in *L.C. Williams Oil Co., Inc. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985), in which the federal trial court stated, "[i]t is undisputed that price discrimination among those similarly situated constitutes a clear violation of North Carolina's unfair trade practice laws." *Id.* at 482. We are bound, however, by the decisions of our Supreme Court, and further note that the federal court neither cited nor discussed *Rose* in its opinion.

As there is no cause of action in North Carolina for price discrimination in the secondary line, we need not reach the other arguments and contentions of appellant.

Affirmed.

Judges WYNN and EDMUNDS concur.

CITY-WIDE ASPHALT PAVING, INC., PLAINTIFF v. ALAMANCE COUNTY, DEFENDANT

No. COA98-573

(Filed 16 March 1999)

1. **Judgments— res judicata—collateral estoppel—federal constitutional claims—federal court decision—state constitutional claims**

Plaintiff low bidder's state constitutional claims against defendant county arising from defendant's award of a landfill contract to another bidder were not barred by res judicata or collateral estoppel where a federal court decided plaintiff's federal constitutional claims but declined to exercise supplemental jurisdiction over plaintiff's state law claims and dismissed them without prejudice.

2. **Laches— state constitutional claims—unavailable defense**

Laches is an equitable defense and is not available as a defense to plaintiff low bidder's claim that defendant county's award of a landfill contract to another bidder violated plaintiff's state due process and equal protection rights.

3. **Public Works— sovereign immunity—low bidder—contract awarded to another—statutory claim**

Sovereign immunity barred plaintiff's claim against defendant county for damages asserted under N.C.G.S. § 143-129.2 based upon defendant's failure to award a landfill contract to plaintiff as the lowest bidder.

4. **Counties— sovereign immunity—state constitutional claims**

Sovereign immunity did not bar plaintiff low bidder's state due process and equal protection claims for money damages against defendant county arising from its award of a landfill contract to a higher bidder.

5. Public Works— county's rejection of low bid—due process

Defendant county's rejection of plaintiff's low bid on a landfill contract was not arbitrary and capricious and did not violate plaintiff's substantive due process rights where defendant's concerns about whether plaintiff was competent, qualified and financially able to operate the landfill were reasonable in relation to defendant's objective to protect the health and safety of its citizens.

6. Public Works— county's rejection of low bid—equal protection

Defendant county's rejection of plaintiff's low bid on a landfill contract did not violate plaintiff's state equal protection rights because defendant had concerns supported by the evidence about defendant's ability to operate the landfill, and the decision to reject plaintiff's bid bears a rational relationship to a legitimate government interest.

Appeal by plaintiff from order entered 13 March 1998 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 11 January 1999.

The plaintiff, City-Wide Asphalt Paving, Inc. ("City-Wide"), is an Ohio corporation with its principal place of business in Alamance County, North Carolina. On 8 October 1993 the defendant, Alamance County, issued a Request for Proposals ("RFP") to maintain and operate the Alamance County landfill. Plaintiff submitted a proposal on 5 November 1993. Two other companies, Triangle Paving, Inc. ("Triangle") and Mace Grading Company, Inc. ("Mace"), also submitted proposals. Plaintiff's bid was the only bid in compliance with the RFP. Defendant rejected all of the proposals and on 19 November 1993 issued a new RFP which was virtually identical to the 8 October 1993 RFP.

On 13 December 1993 plaintiff submitted a new bid at a reduced price. Triangle and Mace also submitted new proposals, but plaintiff's proposal was the lowest bid. Wayne Church, defendant's purchasing agent, recommended to the defendant that plaintiff's proposal be accepted. However, on 3 January 1994, the Alamance County Board of Commissioners voted to award the contract to Mace.

On 14 November 1996 plaintiff filed the complaint in this action alleging that defendant had acted arbitrarily and capriciously in

awarding the contract to Mace, depriving plaintiff of its right to substantive due process of law and denying plaintiff equal protection of the laws under the North Carolina Constitution. Plaintiff also alleged that "[d]efendant violated the provisions of N.C.G.S. § 143-129.2 in awarding the contract to Mace" because "[t]he proposal submitted by Mace was not more responsive to the defendant's Request for Proposals than was the proposal submitted by plaintiff, and therefore defendant should have awarded the contract to plaintiff rather than Mace."

The action was stayed by the Alamance County Superior Court pending the resolution of *City-Wide Asphalt Paving, Inc. v. Alamance County*, No. 2:96CV0066 in federal court by a consent order dated 9 December 1996. Plaintiff had filed the federal action 23 January 1996 alleging claims based on defendant's award of the contract to operate the landfill to Mace. Defendant alleged violation of the United States and North Carolina Constitutions as well as a violation of G.S. 143-129.2. On 25 March 1997 summary judgment was granted to defendant in the federal action. However, the federal court dismissed plaintiff's state law claims without prejudice. On 16 May 1997 plaintiff moved to lift the stay in this action. On 20 May 1997 an order lifting the stay was entered with defendant's consent.

On 22 January 1998 defendant moved for summary judgment. On 13 March 1998 the trial court granted summary judgment for defendant. Plaintiff appeals.

Smith, James, Rowlett & Cohen, L.L.P., by J. David James, for plaintiff-appellant.

David I. Smith, Alamance County Attorney, for defendant-appellee.

EAGLES, Chief Judge.

In its order granting summary judgment, the trial court noted that it had reviewed defendant's motion and had considered the briefs, pleadings, depositions and affidavits filed by the parties, and having heard argument, had determined that there was no genuine issue as to any material fact. On appeal, plaintiff submits arguments on the issues of (I) *res judicata* and collateral estoppel; (II) laches; (III) the right to bring a private right of action pursuant to G.S. 143-129.2; (IV) sovereign immunity as to plaintiff's constitutional claims; and (V) arguments based on violation of plaintiff's state constitutional rights

to (A) substantive due process and (B) equal protection. Plaintiff contends the trial court erred in granting defendant's motion for summary judgment because there were disputed issues of material fact and defendant was not entitled to judgment as a matter of law.

I

[1] We first consider whether plaintiff's claims are barred by *res judicata* or collateral estoppel. Plaintiff argues that *res judicata* does not apply because plaintiff's claims were based on the North Carolina Constitution and the federal court decision was based upon the United States Constitution. Accordingly, plaintiff argues that identical issues were not involved, litigated or determined. Plaintiff asserts that federal due process claims are not identical to state due process claims. *Evans v. Cowan*, 122 N.C. App. 181, 468 S.E.2d 575, *aff'd per curiam*, 345 N.C. 177, 477 S.E.2d 926 (1996). Plaintiff also argues that collateral estoppel does not apply because the standard of review for the state constitutional claims is different from the standard of review for the federal constitutional claims.

Defendant contends that plaintiff's claim alleging violation of state constitutional rights is barred by collateral estoppel. Defendant argues that Article I, Section 19, the law of the land provision of the North Carolina Constitution, is deemed the same as the equal protection and due process clauses of the Fourteenth Amendment. Accordingly, defendant argues that identical issues here were litigated and determined by the federal court.

After careful review of the record, briefs and contentions of both parties, we hold that plaintiff's claims are not barred by *res judicata* or collateral estoppel. The federal court expressly stated that it "decline[d] to exercise supplemental jurisdiction over Plaintiff's state law claims," and dismissed them without prejudice. While the federal court did review federal due process and equal protection claims, this Court has stated that "[o]ur courts . . . when construing provisions of the North Carolina Constitution, are *not* bound by the opinions of the federal courts 'construing even identical provisions in the Constitution of the United States . . .' " and that "an independent determination of plaintiff's constitutional rights under the state constitution is required." *Evans*, 122 N.C. App. at 183-84, 468 S.E.2d at 577 (citations omitted). Accordingly, plaintiff's state constitutional claims have not been determined and they are not barred by *res judicata* or collateral estoppel.

II.

[2] We next consider whether plaintiff's claims are barred by laches. Plaintiff argues that the laches defense is not available here because it is only available as a defense to an equitable claim and defendant has sought no equitable relief. Plaintiff additionally argues that even if laches was available, the defendant has failed to carry its burden of showing that any alleged delay was unreasonable and prejudicial.

Defendant argues that this Court can apply laches to bar plaintiff's action. Defendant contends that while laches was originally an equitable remedy, equity is no longer "a separate field of study" with "separate chancellors to apply the doctrine" and "such a rule would be an anachronism now." Accordingly, defendant argues that laches is a permissible defense to all actions, whether equitable or legal in nature. Defendant asserts that plaintiff's two year delay in filing suit has worked to the prejudice and disadvantage of defendant and there was no excuse for the delay. Due to the length of time and financial loss defendant argues that laches should bar plaintiff's claim.

Laches is an equitable defense and is not available in an action at law. *Rudisail v. Allison*, 108 N.C. App. 684, 688, 424 S.E.2d 696, 699-700 (1993) (citing G.S. 1-52(3) (1983); *Coppersmith v. Upton*, 228 N.C. 545, 548, 46 S.E.2d 565, 567 (1948); *United States v. Mack*, 295 U.S. 480, 489, 79 L.Ed. 1559, 1565 (1935) (laches within the term of the statute of limitation is not a defense to action at law); 30A C.J.S. Equity § 128, at 351-52 (1992)). Plaintiff's claims are legal in nature, not equitable. Accordingly, the defense of laches cannot support summary judgment for defendant.

III

[3] We next consider whether plaintiff has a private right of action under G.S. 143-129.2. Plaintiff contends that defendant violated G.S. 143-129.2 when it failed to award the contract to plaintiff as the lowest bidder. Plaintiff argues that while the statute does allow a local government to make a contract award to someone other than the lowest bidder, it is allowed only "[u]pon the determination that the selected proposal is more responsive to the Request for Proposals." Plaintiff argues that defendant has failed to prove that Mace's proposal was more responsive than plaintiff's proposal.

Defendant contends that G.S. 143-129.2 does not provide for a civil cause of action for damages. Additionally, defendant argues

that sovereign immunity and the public duty doctrine bar plaintiff's claim.

While our research discloses no case law discussing whether there is a private right of action under G.S. 143-129.2, this Court has allowed a similar action under a related statute, G.S. 143-128(b). *Kinsey Contracting Co. v. City of Fayetteville*, 106 N.C. App. 383, 416 S.E.2d 607 (1992). In *Kinsey*, this Court affirmed a trial court's order denying plaintiff's motion for a preliminary injunction, dissolving plaintiff's temporary restraining order and finding that the award of a contract to build a pumping station to a party who was not the lowest responsible bidder was not an abuse of discretion. *Id.* However, it is not readily apparent on the face of *Kinsey* whether the plaintiff in *Kinsey* sued for damages. Only equitable remedies are mentioned. Therefore, *Kinsey* is not dispositive on whether a private right of action for damages lies under G.S. 143-129.2.

Here, plaintiff did not allege that Alamance County had waived its sovereign immunity. "As required by law, if the plaintiff fails to allege a waiver of immunity . . ., the plaintiff has failed to state a claim against a governmental unit or employee." *Whitaker v. Clark*, 109 N.C. App. 379, 384, 427 S.E.2d 142, 145, *disc. review denied, cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). Accordingly, we hold that as a matter of law sovereign immunity bars plaintiff's claims for damages asserted for violation of G.S. 143-129.2.

IV

[4] We next consider whether defendant has sovereign immunity as to plaintiff's constitutional claims. Plaintiff relies on *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) and argues that the doctrine of sovereign immunity cannot be asserted against a party seeking to remedy violations of its constitutional rights.

Defendant argues that plaintiff's claim for damages from the alleged violation of the state constitution is barred because plaintiff had an adequate remedy in state law, and in such a situation a direct constitutional claim is not warranted. *Corum*, 330 N.C. at 782, 413 S.E.2d at 289; *Barnett v. Karpinos*, 119 N.C. App. 719, 728, 460 S.E.2d. 208, 213, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 232 (1995). Here, defendant contends that if the bid process and awarding of the contract to Mace was illegal, plaintiff could have immediately

sued in state court to have the contract declared void or to enjoin performance.

We hold that the doctrine of sovereign immunity does not bar plaintiff's equal protection and due process claims. Defendant suggests that plaintiff should have filed suit to enjoin the contract or have it declared void. However, these remedies are equitable in nature and do not provide plaintiff with an avenue to pursue money damages. Plaintiff's direct action against defendant pursuant to the North Carolina Constitution provides plaintiff's only adequate legal remedy. Plaintiff's direct constitutional action against defendant "completes his remedies." *Corum*, 330 N.C. at 789, 330 S.E.2d at 294. Accordingly, plaintiff is not precluded from pursuing an action directly under the North Carolina Constitution.

V

We next consider plaintiff's state constitutional claims on their merits. Plaintiff contends that violations of Article I, Section 19 of the North Carolina Constitution are measured by the arbitrary and capricious standard. Plaintiff contends that there was an issue of fact as to whether the defendant acted arbitrarily or capriciously. Plaintiff cites the testimony of State Representative Cary Allred, a former Alamance County Commissioner, that defendant was looking for reasons to reject plaintiff's bid and that the whole bid process was "a farce." Plaintiff argues that this testimony, coupled with the evidence of long time preferential treatment afforded to Mace, raised a factual question of arbitrariness and capriciousness. Furthermore, plaintiff asserts that the defendant's rejection of the low bid was very unusual, and defendant's own purchasing director recommended that the bid be accepted. Plaintiff additionally disputes the defendant's reasons for the bid's rejection, arguing that defendant was "arbitrarily fishing for reasons to deny the contract to plaintiff." Accordingly, plaintiff argues that there is a contested issue of fact on the issue of whether defendant acted arbitrarily or capriciously and that the trial court erred in granting defendant's motion for summary judgment.

A

[5] Defendant argues that the traditional test to judge whether government action violated substantive due process is to determine whether the challenged action had "a rational relation to a valid state objective." *In re Moore*, 289 N.C. 95, 101, 221 S.E.2d 307, 311 (1976). Defendant contends that there is no violation of substantive due

process "unless [defendant's] actions were so bad they were not even debatable." Accordingly, defendant argues that plaintiff's due process claim must fail.

After careful review of the record, briefs and contentions of both parties, we affirm. In regard to plaintiff's state due process allegations, our Supreme Court has stated that it "reserve[s] the right to grant relief against unreasonable and arbitrary" government action under the North Carolina Constitution. *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). Whether government action "violates the law of the land clause 'is a question of degree and *reasonableness in relation to the public good likely to result from it.*' " *Id.* (quoting *In re Hospital*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973) (emphasis added)).

Defendant argues that "when the government's objectives are to guard the health and safety of the citizens and the protection of the environment, the choosing of an agent that is shown to be competent and qualified and financially able to implement the objective is an act related to this objective." In rejecting plaintiff's bid, defendant set forth the following specific reasons for denying the contract to plaintiff: (1) Informal investigation had revealed that Carl Buckland, the majority shareholder and operator of plaintiff, had a poor credit rating; (2) plaintiff did not have the employees, equipment or experience necessary to operate the landfill; and (3) Mr. Buckland's demeanor and conduct at prior Board Meetings raised a concern about his ability to conduct himself in a businesslike manner and with candor on behalf of City-Wide in negotiating and communicating with the Board and other county officials. There is evidence in the record to support the defendant's concerns. Accordingly, we hold that defendant's reasons for rejecting plaintiff's bid, namely concern about whether plaintiff was "competent and qualified and financially able" to operate the landfill, were reasonable in relation to the government's objective to protect the health and safety of its citizens, and its decision to reject plaintiff's bid was not arbitrary or capricious.

B

[6] Defendant next contends that plaintiff's claim of equal protection must be analyzed "according to a two-tiered method of analysis." First, defendant argues that the plaintiff must show that defendant's action was motivated by an "intentional, purposeful discrimination." *Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971) (citations omitted). Defendant argues that plaintiff did not carry its

burden of proving "intentional, purposeful discrimination." Defendant further argues that plaintiff has neither been placed in a suspect class nor claimed infringement of a fundamental right. Accordingly, defendant asserts that the second-tier of analysis applies, and the challenged action must "bear some rational relationship to a conceivable legitimate government interest." *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). Defendant argues that "the proper operation of a landfill has a direct relation to the health of the public and the protection of the environment, and that it is a purpose of government to guard the health of its citizens and to protect the environment. The determination of the [defendant] to choose a properly qualified and adequately financed company to implement its duty to the public is a governmental purpose." Defendant also contends that it had unlimited discretion in selecting bids and specifically reserved that right in its Request for Proposals.

We agree with defendant and hold that since plaintiff has neither been placed in a suspect class nor alleged "intentional, purposeful discrimination," and the awarding of the contract was not an infringement of a fundamental right, the defendant's actions pass muster if they have a reasonable basis and are rationally related to a legitimate governmental objective. *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984). The determination of defendant to choose a properly qualified company to maintain the landfill is a legitimate government purpose. The defendant had concerns about plaintiff's ability to operate the landfill, concerns supported by evidence in the record. Accordingly, the defendant's decision to reject plaintiff's bid bears a rational relationship to a legitimate government interest. Plaintiff's claim of violation of equal protection of the law guaranteed by the North Carolina Constitution fails.

In conclusion, we hold that plaintiff's claim for damages based upon G.S. 143-129.2 fails as a matter of law because plaintiff has failed to show that defendant waived its sovereign immunity. We also hold that summary judgment was properly granted for defendant on plaintiff's state constitutional claim based on substantive due process because defendant's rejection of plaintiff's bid was neither arbitrary nor capricious. Finally, we hold that summary judgment was properly granted for defendant on plaintiff's state constitutional claim based on equal protection of the law because the defendant's actions were rationally related to a legitimate governmental interest.

Affirmed.

Judges MARTIN and McGEE concur.

STEVEN LeGRAND AVANT, PETITIONER-APPELLANT v. SANDHILLS CENTER FOR MENTAL HEALTH, DEVELOPMENTAL DISABILITIES & SUBSTANCE ABUSE SERVICES, RESPONDENT-APPELLEE

No. COA98-295

(Filed 16 March 1999)

1. Administrative Law— agency decision—standard of review

When a superior court reviews an agency decision pursuant to the Administrative Procedure Act (APA), the court essentially functions as an appellate court; as such, the duty of the superior court is not to make findings of fact but to apply the appropriate standard of review to the findings and conclusions of the underlying tribunal.

2. Administrative Law— local appointing authority employee—contested case under APA

Although local appointing authorities are not "agencies" under the APA, their employees are subject to the provisions of the State Personnel Act and may commence a contested case hearing under the APA, N.C.G.S. Ch. 150B.

3. Administrative Law— agency decision—standard of review

When a petitioner alleges that an agency decision was either unsupported by the evidence or arbitrary and capricious, the superior court applies the "whole record test" to determine whether the agency decision was supported by substantial evidence contained in the entire record; when petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record de novo as though the issue had not yet been considered by the agency.

4. Public Officers and Employees— warning and suspension—supporting evidence

Substantial evidence in the record as a whole supported a decision by the local appointing authority upholding a written warning to and suspension of an employee who assisted in the

care of emotionally and/or physically disabled residents of a group facility based upon his failure to use the proper modified therapeutic hold consistent with his training in placing a difficult resident in a shower and his failure to ask for assistance in handling the resident as he had been instructed.

5. Public Officers and Employees—local appointing authority—employee grievance—opportunity to be heard

A local appointing authority's employee was not denied an opportunity to be heard prior to adverse action being taken against him where the record shows that he had ample opportunity to dispute the accusations against him and to present to the authority his argument as to why a written warning should not remain in his file.

6. Administrative Law; Public Officers and Employees—employee grievance—communications between employer's counsel and appeals committee—due process

Petitioner's due process right to an impartial hearing was not violated by communications between respondent's counsel and respondent's appeals committee during the initial appeal process where such communications occurred only during the investigatory process and hearing prior to petitioner's filing a contested case under the APA.

Appeal by petitioner from order entered 21 January 1998 by Judge Russell G. Walker, Jr., in Richmond County Superior Court. Heard in the Court of Appeals 28 October 1998.

Kitchin, Neal, Webb & Futrell, P.A., by Stephan R. Futrell, for petitioner-appellant.

Cunningham, Dedmond, Petersen & Smith, by Bruce T. Cunningham, Jr., for respondent-appellee.

MARTIN, Judge.

A detailed factual and procedural history of this case is set forth in *Avant v. Sandhills Center for Mental Health*, (COA96-1081, unpublished opinion filed 5 August 1997) 127 N.C. App. 208, 490 S.E.2d 253 (1997). Briefly summarized, petitioner was employed by respondent as an "habilitation assistant" at respondent's Mallard Lane Center in Rockingham, North Carolina; his duties included assisting in the care of five emotionally and/or physically disabled residents of Mallard

Lane. On 10 April 1994 an incident occurred wherein petitioner was physically assisting a difficult resident, "Client L", to the shower. "Client L" was violent and petitioner allegedly used an improper hold on her. A fellow employee who witnessed the incident reported it to petitioner's supervisor, resulting in a written warning being issued by respondent's director and petitioner's suspension from work without pay for a period of time.

Petitioner appealed the warning to respondent's appeals committee, arguing that he had never been informed of the special hold that was to be applied to "Client L." The appeals committee affirmed the actions of respondent's director, and petitioner filed a notice for a contested case hearing with the Office of Administrative Hearings. An administrative law judge ("ALJ") made extensive findings of fact, concluded that petitioner's written warning was unsubstantiated, and recommended that the decision to issue the suspension be reversed and that petitioner be awarded back pay. The State Personnel Commission ("SPC") issued its advisory Recommendation for Decision to respondent that petitioner's suspension be reversed, that he be awarded back wages, and that the warning be expunged from his records.

Respondent's Board of Directors, the local appointing authority, rejected the recommended decision and issued a final decision affirming the issuance of the warning to petitioner and his suspension. Petitioner petitioned for judicial review pursuant to G.S. § 150B-43. The superior court concluded respondent had no just cause to suspend petitioner. Both petitioner and respondent appealed the superior court's decision to this Court, which determined that the superior court had not conducted a proper review as required by G.S. § 150B-51. *See Avant, supra.*

On remand, the superior court determined respondent's decision was neither arbitrary nor capricious, had been reached upon lawful procedures, had not been affected by errors of law, and was supported by substantial evidence in view of the whole record. The superior court affirmed respondent's decision and petitioner again appeals, arguing in support of twenty-six assignments of error that (1) the superior court judgment did not conform to the requirements of law; (2) the decision of the appeals committee was not supported by substantial evidence in the record; (3) the decision of the appeals committee was arbitrary and capricious; and (4) due to unlawful procedure, petitioner was denied a fair and impartial hearing. After a

careful consideration of his arguments, we affirm the judgment of the superior court.

[1] Petitioner first argues the judgment of the superior court should be vacated because it does not comply with G.S. § 1A-1, Rule 52(a)(1). The rule requires that, in actions tried without a jury, the trial court make findings as to all issues of fact raised by the pleadings, declare its conclusions of law arising upon the facts found, and enter the appropriate judgment. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975). However, when a superior court reviews an agency decision pursuant to the Administrative Procedure Act ("APA"), the court essentially functions as an appellate court. *Armstrong v. North Carolina State Bd. of Dental Examiners*, 129 N.C. App. 153, 499 S.E.2d 462, *disc. review denied*, 348 N.C. 692, 511 S.E.2d 643 (1998); *Gainey v. North Carolina Dept. of Justice*, 121 N.C. App. 253, 465 S.E.2d 36 (1996). As such, the duty of the superior court, and our duty as well, is not to make findings of fact, but rather to apply the appropriate standard of review to the findings and conclusions of the underlying tribunal. *See Shepherd v. Consolidated Judicial Retirement System*, 89 N.C. App. 560, 562, 366 S.E.2d 604, 605 (1988) ("when a superior court judge sits as an appellate court to review an administrative agency decision the judge is not required to make findings of fact and enter a judgment thereon in the same manner as the court would be when acting in its role as the trial court."). The order entered in this case is procedurally sufficient and is consistent with the trial court's role as a reviewing court. *See id.* at 562, 366 S.E.2d at 606 (holding sufficient an order reciting that court had reviewed the record, arguments, and relevant statutes, and concluding that declaratory ruling of agency should be affirmed). Thus, we consider the trial court's substantive review of respondent's decision.

[2],[3] We first note that although local appointing authorities such as respondent are not "agencies" under the APA, their employees are subject to the provisions of the State Personnel Act and may commence a contested case hearing under the APA, Chapter 150B of the General Statutes. *Cunningham v. Catawba County*, 128 N.C. App. 70, 72, 493 S.E.2d 82, 84 (1997). This Court has held the principles of the APA to be "highly pertinent" to superior court review of a local appointing authority decision. *Id.* In reviewing a superior court order regarding an agency decision, our scope of review consists of the two-fold task of "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Act-Up Triangle v. Com'n for*

Health Serv., 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)). The proper standard for the superior court to apply depends upon the issues presented on appeal. *Id.* Where the petitioner alleges that the agency decision was either unsupported by the evidence, or arbitrary and capricious, the superior court applies the "whole record test" to determine whether the agency decision was supported by substantial evidence contained in the entire record. *Oates v. North Carolina Dept. of Correction*, 114 N.C. App. 597, 601, 442 S.E.2d 542, 545 (1994). Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency. *Dorsey v. University of North Carolina-Wilmington*, 122 N.C. App. 58, 468 S.E.2d 557, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996); *Air-A-Plane Corp. v. North Carolina Dept. of Environment, Health and Natural Resources*, 118 N.C. App. 118, 454 S.E.2d 297, *disc. review denied*, 340 N.C. 358, 458 S.E.2d 184 (1995).

Petitioner originally sought judicial review of respondent's final decision on the grounds that it contained errors of law, and that it was arbitrary, capricious, and unsupported by the evidence. Upon remand, the superior court recited that it had conducted a *de novo* review of the record and had concluded that respondent's decision had been made upon lawful procedure and was unaffected by error of law. In addition, the superior court determined that respondent's decision was supported by substantial admissible evidence in the whole record and was not arbitrary or capricious. We conclude, therefore, that the superior court applied the proper standards of review, and we must now determine whether it applied these standards correctly.

[4] Petitioner contends respondent's decision was unsupported by substantial evidence, and that the decision was arbitrary and capricious. These contentions require that we apply "the whole record test", i.e., an examination of "all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence'." *Act-Up Triangle* at 706, 483 S.E.2d at 392 (quoting *Amanini* at 674, 443 S.E.2d at 118). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). The whole record test is not "a tool of judicial intrusion; instead, it merely gives

a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *North Carolina Dept. of Correction v. Gibson*, 58 N.C. App. 241, 257, 293 S.E.2d 664, 674 (1982), *rev'd on other grounds*, 308 N.C. 131, 301 S.E.2d 78 (1983). Moreover, while the record may contain evidence contrary to the findings of the agency, neither this Court nor the superior court may substitute its judgment for that of the agency. *Employment Security Com'n of North Carolina v. Peace*, 128 N.C. App. 1, 493 S.E.2d 466 (1997), *affirmed in part, review dismissed in part*, 349 N.C. 315, 507 S.E.2d 272 (1998); *Rector v. North Carolina Sheriffs' Educ. & Training Standards Com'n*, 103 N.C. App. 527, 406 S.E.2d 613 (1991).

Applying the "whole record" standard of review, we hold there is sufficient relevant evidence in the record to support respondent's decision to uphold the written warning issued petitioner. The bases upon which the written warning was issued were (1) petitioner's failure to use the proper modified hold on "Client L", and (2) petitioner's failure to ask for assistance in handling "Client L" on 10 April 1994. Respondent made relevant findings of fact that petitioner attempted to pick up "Client L" by placing his arms under hers; that approximately three or four times "Client L" fell to the floor as petitioner attempted to pick her up; that petitioner finally picked up "Client L" and carried her to the bathroom; that the way in which petitioner handled "Client L" was inconsistent with the modified hold which petitioner had been instructed to use in such situations; that petitioner failed to ask for assistance; and that such a one-person carry of "Client L" was unauthorized.

Our review of the whole record reveals ample competent evidence, including petitioner's own affidavit, to support the findings that petitioner did indeed attempt to pick up "Client L" by placing his arms under hers, and that she fell to the floor a number of times before petitioner finally "picked up Client L and carried her to the bathroom." Moreover, it is uncontested that petitioner failed to ask a co-worker present at the time of the incident for assistance, even though the training manual with which petitioner had been trained did not authorize such a one-person carry. The record also reflects that the manner in which petitioner handled "Client L" was inconsistent with the modified therapeutic hold to be applied to "Client L". While the record contains conflicting evidence as to whether petitioner had actually been instructed on the modified therapeutic hold at the time of the incident, neither this Court nor the superior court is authorized to substitute its judgment for that of the agency.

Employment Sec. Com'n of North Carolina v. Peace, supra; *see also, North Carolina Dept. of Correction v. Gibson* at 257, 293 S.E.2d at 674 ("Even where there is conflicting and contradictory evidence and inferences, 'it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and appraise conflicting and circumstantial evidence.' ") (citations omitted). We therefore hold that there exists substantial evidence in the record to support the finding that petitioner did not employ a proper hold on "Client L" consistent with the manner in which petitioner had been trained and, therefore, respondent's decision to uphold the warning was supported by substantial evidence. Moreover, in light of the foregoing findings, respondent's decision cannot be said to be either arbitrary or capricious. *See Jarrett v. North Carolina Dept. of Cultural Resources*, 101 N.C. App. 475, 479, 400 S.E.2d 66, 68-9 (1991) ("Administrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or fail to indicate 'any course of reasoning and the exercise of judgment'. . .") (citations omitted); *Armstrong* at 163, 499 S.E.2d at 470.

Petitioner next asserts that respondent violated his right to a fair and impartial hearing. Specifically, petitioner contends he was not provided an opportunity to be heard prior to adverse action being taken against him, and that certain communications between counsel for respondent and respondent's appeals committee guaranteed an outcome adverse to him, thereby denying his right to an impartial decision maker. Where it is alleged that an agency decision is made upon unlawful procedure or a constitutional violation, *de novo* review is required. *Air-A-Plane Corp.* at 124, 454 S.E.2d at 301. The *de novo* standard requires that we consider the question anew. *Fearrington v. University of North Carolina at Chapel Hill*, 126 N.C. App. 774, 487 S.E.2d 169 (1997).

[5] We first note a lack of merit in petitioner's assertion that he was denied an opportunity to be heard prior to adverse action being taken against him. Petitioner has had ample opportunity to dispute the accusations against him and to present to respondent his argument as to whether the written warning should remain in petitioner's file.

[6] Petitioner also argues that certain communications between respondent's counsel and respondent's appeals committee during the

initial appeals process guaranteed a decision adverse to petitioner, thereby violating his constitutional right to an impartial hearing. The record reflects that respondent's original attorney met with members of respondent's appeals committee on various occasions during which she discussed with committee members the merits of petitioner's appeal. We first note that such communications between respondent's counsel and its appeals committee do not violate the APA, as the record reflects that such communications occurred during the investigatory process and hearing prior to petitioner's filing a contested case with the Office of Administrative Hearings. *See* N.C. Gen. Stat. § 150B-35 (prohibiting *ex parte* communication between a member or employee of the agency making a final decision in a *contested case* and any party or his representative); N.C. Gen. Stat. § 150B-23 ("A contested case shall be commenced by filing a petition with the Office of Administrative Hearings . . ."). Any alleged violations of G.S. § 150B-35 occurring after petitioner's grievance became a contested case are unsubstantiated by the record.

Moreover, petitioner must do more than merely allege that a conflicting role played by an attorney deprived him of due process. The United States Supreme Court has held "that there is no *per se* violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter." *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 603-4, 430 S.E.2d 472, 474-75 (1993) (citing *Withrow v. Larkin*, 421 U.S. 35, 43 L.Ed.2d 712 (1975)). We held in *Hope* that a petitioner's mere allegations that the role of the attorneys in the investigatory process denied him due process were insufficient to overcome the presumption that the Board acted correctly, and that "[a]bsent a showing of actual bias or unfair prejudice petitioner cannot prevail . . . ." *Id.* at 604, 430 S.E.2d at 475. *See also, Crump v. Board of Education*, 326 N.C. 603, 618, 392 S.E.2d 579, 586-87 (1990) (*quoting Liepart v. N.C. School of the Arts*, 80 N.C. App. 339, 354, 342 S.E.2d 914, 924 (1986)) (To make out due process claim based on theory of impartial decision-maker, petitioner "must show that the decision-making board or individual possesses a disqualifying personal bias."). Here, petitioner has brought forth only mere allegations that respondent's board acted with bias in affirming petitioner's warning, and the record contains insufficient evidence to overcome the assumption that respondent acted correctly throughout the appeals process. Petitioner received a fair and impartial hearing.

The order of the superior court affirming the decision of respondent board is affirmed.

Affirmed.

Judges HUNTER and SMITH concur.

C.C. & J. ENTERPRISES, INC., PETITIONER v. CITY OF ASHEVILLE, RESPONDENT AND JACKSON PARK / WOOLSEY NEIGHBORHOOD ASSOCIATION, INTERVENOR-RESPONDENT

No. COA98-310

(Filed 16 March 1999)

1. **Zoning— special use permit—compliance with ordinance requirements—denial based on general safety concerns—arbitrary and capricious**

A city's denial of petitioner's application for a special use permit to build apartments was arbitrary and capricious where petitioner complied with all requirements of the city ordinance governing special use permits; the ordinance does not require that a developer show that the proposal maintains or promotes public health, safety or welfare; and the denial was based on a finding that the developer failed to satisfy the city's concern for public health and safety as stated in a statement of general intent for the ordinance.

2. **Zoning— special use permit—judicial review—standing of neighborhood association**

A neighborhood association was an aggrieved party which had standing to intervene in the judicial review of a city's decision on plaintiff's application for a special use permit to build apartments where the association alleged special damages in its original motion to intervene and particularized the special damages in its amended motion.

Appeal by respondents from order entered 4 December 1997 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 16 February 1999.

Ball, Barden & Bell, P.A., by Stephen L. Barden, III, for petitioner-appellee cross-appellant.

Robert W. Oast, Jr., for respondent-appellant.

Siemens Law Office, P.A., by Albert J. Siemens, for intervenor-respondent-appellant cross-appellee.

LEWIS, Judge.

Respondents City of Asheville ("the City") and Jackson Park/ Woolsey Neighborhood Association ("the Neighborhood") appeal the superior court's order of 4 December 1997 requiring the approval of petitioner's application for a group development. Petitioner cross-appeals the court's order allowing the Neighborhood to intervene. We affirm both of the superior court's orders.

Petitioner owns a 2.75 acre tract of land on which it wishes to develop twenty-four (24) apartment units. The parcel of land is in an area zoned for residential use; the surrounding properties are a mixture of single family homes, duplexes, and triplexes. In February of 1997, petitioner submitted an application and group development plan to the Planning and Development Department of the City for approval as a "Group Development" under Article 6, Section 30-6-1 of Appendix A—Zoning, *Code of Ordinances of the City of Asheville* ("the City Code"). The Planning Department staff and the Technical Review Committee found that the proposal satisfied all development standards and recommended approval of the project. At a public hearing on 5 March 1997, the Asheville Planning and Zoning Commission voted 4-3 to recommend denial of the Group Development application based on safety concerns. Pursuant to City Code section 30-6-2 (F), petitioner's application was scheduled for a public hearing before the Asheville City Council at its regularly scheduled meeting on 25 March 1997. At the meeting, the City Council voted 4-3 to deny petitioner's application for a Group Development.

Petitioner asked the superior court for writs of certiorari and mandamus. On 11 September 1997, the superior court ordered the City to prepare a written decision setting forth the reasons for the denial of petitioner's application. Upon review of the City's decision, the superior court found that petitioner had made a prima facie showing of entitlement to the permit, and that "[r]espondent's decision denying Petitioner's Application . . . is not supported by competent, material, and substantial evidence and is arbitrary and capricious." On 4 December 1997, the court ordered the City to approve petitioner's application as submitted, and it is from this order that respondents appeal. Also on 4 December 1997, the court granted the Neighborhood's motion to intervene; from this order, petitioners appeal.

Group Developments are a type of conditional use permit, sometimes called "special use permits" in our case law. When we review a municipality's decision regarding an application for a special use permit, we are:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). This Court determines "not whether the evidence before the superior court supported that court's order[,] but whether the evidence before the Town Council supported the Council's action." *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, 80 N.C. App. 438, 440, 342 S.E.2d 545, 547, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). Reviewing courts conduct a *de novo* review when a party alleges an error of law in the Council's determination; courts use a whole record test when sufficiency of the evidence is challenged or when a decision is alleged to have been arbitrary or capricious. *See In re Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998).

The municipal bodies conducting hearings on permit applications also are bound by certain standards as well as by their ordinances, which are not all alike. When an applicant for a special use permit produces competent, material, substantial evidence that he has complied with the requirements of the ordinance, he makes a prima facie showing that he is entitled to a permit. *See Triple E Associates v. Town of Matthews*, 105 N.C. App. 354, 358-59, 413 S.E.2d 305, 308, *disc. review denied*, 332 N.C. 150, 419 S.E.2d 578 (1992). After the prima facie showing, a denial of the permit must "be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.* (quoting *Humble Oil & Refining Co. v. Bd. of Aldermen of the Town of Chapel Hill*, 284 N.C.

458, 468, 202 S.E.2d 129, 136 (1974)). Speculatory or mere opinion testimony about the possible effects of a permit are insufficient to support the Council's findings. *See Woodhouse v. Bd. of Comm'rs of the Town of Nags Head*, 299 N.C. 211, 220, 261 S.E.2d 882, 888 (1980); *Piney Mountain Neighborhood Ass'n., Inc., v. Town of Chapel Hill*, 63 N.C. App. 244, 252-53, 304 S.E.2d 251, 256 (1983). Moreover, if no such competent, material evidence appears, the reviewing body must grant the special use permit; failure to do so when the applicant fully complies with specified standards is arbitrary as a matter of law. *Woodhouse*, 299 N.C. at 219, 261 S.E.2d at 887.

[1] In this case, the City's ordinance governing special use permits reads in pertinent part as follows:

> Sec. 30-6-1. Group developments/planned unit developments.
>
> It is the intent of this section to encourage flexibility and innovation in the design and location of structures and land development . . . . It is further intended that these developments will be in harmony with the character of the district in which they are located and that adequate standards will be maintained pertaining to the public health, safety, welfare, and convenience.

City Code, § 30-6-1 (1993). A section titled "Development standards" details specifics of the following ten requirements: density; street access; roadways, parking and loading; drainage; recreational areas; landscaping; group development built in phases; plans and documents; sidewalks, curb and gutter; and street grades. An eleventh requirement is applicable only if a zoning variance is sought, and no zoning variances were requested in petitioner's application.

The City's written decision outlining the reasons for denial of petitioner's application contained the following determination:

> 6. The Project, if developed as proposed, will comply with the technical requirements and development standards contained in or referenced by the City Code, but existing street conditions, topography, access to the Subject Premises, the propensity for storm flooding in the area, and the proposed density of the Project are such that the public health and safety will be materially endangered if the Project is located where proposed and developed in accordance with the submitted site plan.

The City therefore denied petitioner's application based not on a failure to satisfy the requirements listed in the ordinance, but based on a

failure to satisfy the City's more general concern for health and safety. Such concerns are valid and have been upheld when they appear in the ordinance as requirements. *See, e.g., Kenan v. Bd. of Adjustment of the Town of Chapel Hill*, 13 N.C. App. 688, 692-93, 187 S.E.2d 496, 499, *cert. denied*, 281 N.C. 314, 188 S.E.2d 897 (1972).

The Chapel Hill ordinance at issue in *Kenan* and in *Piney Mountain* provided that "[no] Special Use Permit . . . shall be approved by the Council unless each of the following findings is made concerning the . . . planned development. . . ." *Piney Mountain*, 63 N.C. App. at 248, 304 S.E.2d at 254. *See Kenan*, 13 N.C. App. at 692-93, 187 S.E.2d at 499. Four findings were required by the Chapel Hill ordinance before a permit could be issued: (1) that the development would "maintain or promote the public health, safety, and general welfare;" (2) that the development would "compl[y] with all required regulations and standards;" (3) that the development, unless deemed a public necessity, would "maintain or enhance the value of contiguous property;" and (4) that the development "conform[ed] with the general plans" for Town development. *Piney Mountain*, 63 N.C. App. at 248, 304 S.E.2d at 254. Likewise, ordinances at issue in *Rauseo v. New Hanover County*, 118 N.C. App. 286, 290, 454 S.E.2d 698, 701 (1995), *Vulcan Materials Co. v. Guilford County Bd. of Comm'rs*, 115 N.C. App. 319, 323, 444 S.E.2d 639, 642, *disc. review denied*, 337 N.C. 807, 449 S.E.2d 758 (1994), and *Petersilie v. Town of Boone Bd. of Adjustment*, 94 N.C. App. 764, 766-67, 381 S.E.2d 349, 350-51 (1989), included general requirements as absolute conditions to be satisfied before a permit could be issued.

The distinction between those ordinances and the City's ordinance here is obvious. While similar but far less language is used in the City Code here, it is present only as a generalized statement of the intent of the specifications that follow. Nowhere does the Asheville City Code require that a developer show the proposal maintains or promotes public health, safety, or welfare before a permit may issue. Asheville's Code differs significantly from the codes at issue in cases upholding generalized requirements, and this Court cannot rewrite the City's ordinance. *See Wade v. Town of Ayden*, 125 N.C. App. 650, 653, 482 S.E.2d 44, 46 (1997) (holding when ordinance language is clear, courts must give language its plain meaning).

The concerns for safety and convenience are not requirements under Asheville's City Code. *Cf. Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 473, 480 S.E.2d 681, 684 (1997) (holding that

general statement of intent does not override plain language of statute). The City "may not create new requirements not outlined in the ordinance to deny the permit." *Triple E*, 105 N.C. App. at 359, 413 S.E.2d at 308. Asheville and indeed any municipal government may, as Chapel Hill did, require by ordinance that applications satisfy the council's subjective finding of public health, safety and general welfare. These are not necessitated by a preamble of intent; they must be specified as requirements to be met and found as facts by the council or board. The City found that petitioner had satisfied all of the development standards for approval of the application. "[W]here a zoning ordinance specifies standards to apply in determining whether to grant a special use permit and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law." *Woodhouse*, 299 N.C. at 219, 261 S.E.2d at 887 (quoting *Hay v. Township of Grow*, 296 Minn. 1, 5, 206 N.W.2d 19, 22 (1973). *See also*, *In re Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970) (holding that where applicant had satisfied all ordinance requirements, commissioners could not deny permit simply in their discretion). A municipality may not deny an application simply because the proposed plan fails to meet portions outlined in the intent section. *See Woodhouse*, 299 N.C. at 216-17, 261 S.E.2d at 886. As such, the City acted arbitrarily and capriciously when it denied petitioner's application in this case. We affirm the superior court's order that the application be allowed.

[2] We now address petitioner's cross appeal. The City found that there was no substantial evidence that property values near the proposed development would be adversely impacted. The superior court heard argument on the standing question, found that the Neighborhood was an aggrieved party, and ordered that it be allowed to intervene. Petitioner asserts that *Heery v. Town of Highlands Zoning Bd. of Adjustment*, 61 N.C. App. 612, 300 S.E.2d 869 (1983) controls and prevents intervention. We disagree, and we affirm the superior court's order.

An "aggrieved party" may seek review of decisions made pursuant to zoning ordinances. *See Heery*, 61 N.C. App. at 613, 300 S.E.2d at 870. In *Heery*, we held that because there was no finding of fact in the trial court's order, and petitioners did not allege any special damages, petitioners were not an aggrieved party and thus lacked standing. In contrast, the Neighborhood alleged special damages in their original motion to intervene and particularized the special damages in their amended motion. Petitioner emphasizes that the City found

there was no evidence of diminished property values; however, the court, not the City, determines standing. The superior court found the Neighborhood to be aggrieved, such a finding is supported by the Neighborhood's pleading, and therefore we affirm. *See Piney Mountain*, 63 N.C. App. at 247, 304 S.E.2d at 253 (holding that when "a corporate petitioner has no property interest, but represents individuals who live in the affected area and who potentially will suffer injury. . . ., such petitioner has standing").

Affirmed.

Judges GREENE and HORTON concur.

JAMES E. PRICE, PLAINTIFF-APPELLEE v. LARRY DAVIS AND B. DEWITT CREECY, DEFENDANT-APPELLANTS

No. COA98-591

(Filed 16 March 1999)

1. Appeal and Error— appealability—interlocutory order—sovereign immunity

An interlocutory order denying defendant's motion for summary judgment was immediately appealable to the extent the appeal is based on the affirmative defense of governmental or sovereign immunity.

2. Governmental Immunity; Prisons and Prisoners— inmate—damages claim—prison officials—sovereign immunity

Sovereign immunity barred an inmate's claim for damages against defendant prison officials in their official capacities based upon their confiscation of alleged contraband items from the inmate upon his arrival at the prison and their refusal to permit the inmate to receive legal texts from an outside visitor since defendants were performing governmental functions for sovereign immunity purposes, and the record does not indicate that immunity has been waived through consent or the purchase of liability insurance. Furthermore, the prison officials were immune from a suit in their official capacities for damages under 42 U.S.C. § 1983.

3. Public Officers and Employees— prison officials—inmate's claim—qualified immunity

The doctrine of qualified immunity shielded prison officials from an inmate's claim for damages against them in their individual capacities based upon their allegedly unconstitutional confiscation of contraband (solid-barrel ball point pens, highlighters, and a padlock) when the inmate arrived at the prison and their refusal to permit the inmate to receive legal texts from an outside visitor where the officials acted in accordance with the Division of Prisons Policy Manual and the prison's operating procedures manual.

4. Public Officers and Employees— prison officials—individual liability—public official immunity

Defendant prison officials are protected by public official immunity from individual liability on plaintiff inmate's claim for alleged violations of state statutes and prison regulations arising from the confiscation of contraband when he arrived at the prison and refusal to permit him to receive legal texts from an outside visitor where plaintiff failed to show that the defendants' conduct was malicious, corrupt, or outside the scope of their official authority.

Appeal by defendants from order entered 6 March 1998 by Judge Cy A. Grant, Sr., in Northampton County Superior Court. Heard in the Court of Appeals 11 January 1998.

James E. Price, pro se, for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General William McBlief, for defendant-appellants.

MARTIN, Judge.

Plaintiff, an inmate confined in the custody of the North Carolina Department of Correction, filed this action on 12 May 1995 seeking compensatory and punitive damages for alleged deprivations of his statutory and constitutional rights. In his complaint, plaintiff alleged that on 23 March 1995, he was transferred from Harnett Correctional Center to Odom Correctional Center. Upon his arrival at Odom, plaintiff alleged that defendant Creecy, a correctional sergeant, confiscated twenty-six solid-barrel ball point pens, nine highlighters, and a padlock from plaintiff, in violation of G.S. § 148-11, prison policy, and

plaintiff's due process rights. Plaintiff also alleged that on 8 April 1995, defendant Davis, the assistant superintendent at Odom, refused to permit plaintiff to receive various legal texts which had been brought to him by a visitor, in violation of G.S. § 148-11, prison policy, and plaintiff's constitutional right to meaningful access to the courts.

Defendants filed an answer, admitting the confiscation of contraband materials from plaintiff, denying the other material allegations of the complaint, and asserting affirmative defenses, including sovereign and governmental immunity, and qualified immunity. Defendants thereafter moved for summary judgment. The motion was supported by affidavits of defendants Davis and Creecy, in which they averred the contraband items were confiscated from plaintiff according to written Odom Standard Operating Procedures and that replacement "see-through" pens were offered to plaintiff but refused by him. They also averred that plaintiff's personal lock was considered a security risk and a replacement combination lock was issued to him. The confiscated materials were secured in the Odom mailroom and, according to defendant Davis, were forwarded to the Columbus Correctional Center upon plaintiff's subsequent transfer to that facility. In addition, defendant Davis asserted that Division of Prisons ("DOP") Policy and Odom Standard Operating Procedures permit medium security inmates such as plaintiff to receive publications only directly from the publisher. Copies of the applicable DOP Policy Manual and Odom Standard Operating Procedures, as well as correspondence directed to plaintiff and various other documents, were attached to the affidavits. Plaintiff asserted the confiscated items were permitted according to the terms of an "Inmate Booklet", dated April 1997, issued by the Department of Correction.

On 6 March 1998, the trial court entered an order in which it determined that a genuine issue of material fact existed as to "whether a prisoner may rely upon the Department of Correction 'Inmate Booklet' " and that defendants were not entitled to summary judgment. Defendants appeal from the denial of their motion for summary judgment.

I.

[1] The order denying defendants' motion for summary judgment is interlocutory; while, as a general rule, such orders are not immediately appealable, this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial

right sufficient to warrant immediate appellate review. *See, e.g., Dewort v. Polk County*, 129 N.C. App. 789, 501 S.E.2d 379 (1998), *Hedrick v. Rains*, 121 N.C. App. 466, 466 S.E.2d 281, *affirmed*, 344 N.C. 729, 477 S.E.2d 171 (1996). "We allow interlocutory appeals in these situations because 'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.'" *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996) (citing *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991)). Therefore, to the extent defendants' appeal is based on an affirmative defense of immunity, this appeal is properly before us.

II.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1997). The movant bears the burden of establishing that no genuine issue of material fact exists, and can meet the burden by either "1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor sufficient to surmount an affirmative defense to his claim." *Messick v. Catawba County*, 110 N.C. App. 707, 712, 431 S.E.2d 489, 492-93, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993).

III.

[2] We first address plaintiff's claims for damages, made against defendants in their official capacities, alleging defendants' actions violated the provisions of North Carolina statutes and prison regulations. As a general rule, governmental, or sovereign 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." *Kephart v. Pendergraph*, 131 N.C. App. 559, 507 S.E.2d 915, 918 (1998). Provided that the State has not consented to suit or has waived its immunity through the purchase of liability insurance, "the immunity provided by the doctrine is absolute and unqualified." *Messick*, at 714, 431 S.E.2d at 494. Moreover, "[t]he provision of police services, and the erection and operation of prisons and jails, have previously been determined to

constitute governmental functions." *Kephart, supra* (citations omitted) (holding actions of county officials in maintaining confinement facilities constitute governmental functions for purposes of applying sovereign immunity); *see also, Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439, *reh'g denied*, 326 N.C. 488, 392 S.E.2d 90 (1990).

In confiscating alleged contraband items from plaintiff upon his arrival at Odom, and in preventing his receipt of publications from an outside visitor, defendants were acting in their official State capacities; such actions were, therefore, governmental functions for purposes of sovereign immunity. Plaintiff has not alleged, nor does the record indicate, that immunity has been waived through consent or the purchase of liability insurance. *See Messick* at 714, 431 S.E.2d at 494 (holding summary judgment for defendants proper on basis of sovereign immunity where defendants were engaged in governmental functions and where record did not indicate State waiver or purchase of liability insurance). Thus, sovereign immunity bars plaintiff's claims for damages made against defendants in their official capacities.

In addition, we hold defendants to be immune from suit in their official capacities for any alleged violations of the United States Constitution under color of state law. 42 U.S.C. § 1983 authorizes such a civil action for deprivation of constitutional rights, and provides, in pertinent part:

> 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 . . . .

42 U.S.C.A. § 1983 (Cum. Supp. 1998). However, our Supreme Court has held that the text of § 1983 permits actions against "persons," but that "neither a State nor its officials acting in their official capacity" are "persons" under § 1983 when monetary damages are sought. *See Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L.Ed.2d 431 (1992). In *Corum*, the Court held that the plaintiff, who was seeking damages against state employees in

their official capacities, was barred from maintaining the suit; we likewise hold defendants are immune from suit in their official capacities. *See Stroud v. Harrison*, 131 N.C. App. 480, 508 S.E.2d 527 (1998).

IV.

[3] We next consider plaintiff's claims asserted against defendants in their individual capacities. Defendants argue the doctrine of qualified immunity shields them from plaintiff's claims. We agree. "Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Roberts v. Swain*, 126 N.C. App. 712, 718, 487 S.E.2d 760, 765, *disc. review denied*, 347 N.C. 270, 493 S.E.2d 746 (1997) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed.2d 396, 410 (1982)). Moreover, "[r]esolution of whether a government official is insulated from personal liability by qualified immunity 'turns on the "objective legal reasonableness" of the [official's] action . . . assessed in light of the legal rules that were "clearly established" at the time it was taken.' " *Id.* (citations omitted).

We hold that defendants' actions were objectively reasonable in light of the clearly established legal rules in effect at the time of the alleged violations of plaintiff's rights, and that defendants are therefore entitled to qualified immunity. Plaintiff asserts that defendants unconstitutionally deprived him of his pens, highlighters, padlock, and legal texts. However, defendants acted in accord with the discretion afforded them by provisions contained in the DOP Policy Manual, as well as the Odom Standard Operating Procedure Manual. Section .0501 of the DOP manual provides that when an inmate arrives at a prison facility the general rule is that the inmate may retain certain personal belongings, but further provides:

> the Division of Prisons assumes no responsibility for replacing any items if they are damaged, destroyed or lost. The amount of authorized items may be limited where necessary to provide for proper accountability, contraband control, storage space, sanitary conditions and resident morale.

DOP Policy 2F.0501.

Moreover, pursuant to Odom Standard Operating Procedures, inmates are not permitted to retain any type of solid-barrel writing

instrument, including the type of pens and highlighters which plaintiff sought to retain upon his arrival at Odom, and such items may be classified as contraband for which confiscation by prison officials is clearly authorized. *See also* N.C. Gen. Stat. § 148-18.1 (1997) ("Any item of personal property which a prisoner in any correctional facility is prohibited from possessing by State law or which is not authorized by rules adopted by the Secretary of Correction shall . . . be confiscated . . ."). The evidentiary materials of record also reflect that it is Odom policy to allow inmates to receive legal texts directly from publishers only, that plaintiff was offered replacement writing utensils, and that the confiscated materials were placed in a mailroom and subsequently forwarded to the facility to which plaintiff was transferred. Defendants acted within clearly established legal rules in confiscating and withholding certain materials from plaintiff, and plaintiff has failed to meet his burden of showing that defendants did not act within clearly established law, or that their conduct otherwise violated plaintiff's rights. *See Hawkins v. State*, 117 N.C. App. 615, 453 S.E.2d 233, *review dismissed as improvidently granted*, 342 N.C. 188, 463 S.E.2d 79 (1995) (plaintiff bears the burden of establishing a violation of a clearly established right under doctrine of qualified immunity).

[4] Moreover, defendants are protected by public official immunity from individual liability for alleged violations of State statutes and prison regulations. The essence of the doctrine of public official immunity is that public officials engaged in the performance of their governmental duties involving the exercise of judgment and discretion, and acting within the scope of their authority, may not be held liable for such actions, in the absence of malice or corruption. *Barnett v. Karpinos*, 119 N.C. App. 719, 729, 460 S.E.2d 208, 213, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 232 (1995) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)). "As long as the official lawfully exercises his judgment or discretion, stays within the scope of his official authority, and does not act with malice or corruption, he is protected from liability." *Id.*

Here, plaintiff has failed to allege or show that defendants acted maliciously or outside the scope of their authority. *See Epps* at 205, 468 S.E.2d at 851-52 (to maintain individual capacity suit plaintiff must make initial *prima facie* showing that defendants' conduct is malicious, corrupt, or outside scope of official authority). Thus, plaintiff is unable to show an essential element of his claim and summary judgment should have been granted.

In light of defendants' immunity from suit, any issue of fact which may exist in this case concerning plaintiff's reliance upon the Department of Correction "Inmate Booklet" is not material. The order denying defendants' motion for summary judgment is reversed and this case is remanded to the Superior Court of Northampton County for entry of summary judgment in favor of defendants.

Reversed and remanded.

Chief Judge EAGLES and Judge McGEE concur.

RICKY ADAM RIDENHOUR, PLAINTIFF-APPELLANT v. INTERNATIONAL BUSINESS MACHINES CORPORATION AND CHET GURSKI, DEFENDANTS-APPELLEES

No. COA98-361

(Filed 16 March 1999)

1. Fraud— constructive fraud—breach of fiduciary duty—failure to show benefit

In plaintiff's action against his former employer and its plant manager for constructive fraud based on breach of fiduciary duty after defendants failed to keep confidential defendant's identity as the person who gave the employer information about a supplier's fraud, benefits plaintiff claims were allegedly received by defendants from the breach of fiduciary duty were insufficient to support a claim of constructive fraud since (1) the employer's recovery of more than one million dollars from the supplier for fraud as a result of the information supplied by plaintiff did not relate to any breach of fiduciary duty owed to plaintiff; (2) the employer's continued business relationship with the supplier was not predicated on a breach of fiduciary duty owed to plaintiff; and (3) the employer's right to terminate plaintiff's at-will employment without cause was a right the employer already possessed and did not result from a breach of fiduciary duty to plaintiff.

2. Employer and Employee— wrongful discharge—violation of public policy—insufficient evidence

Plaintiff former employee failed as a matter of law to establish a claim of wrongful discharge in violation of public policy

where plaintiff's evidence failed to show that defendant employer was engaged in illegal activity or that plaintiff was asked by defendant to violate any state or federal law or to perform any activity injurious to the public, and uncontroverted evidence at trial tended to show that plaintiff was discharged immediately following a lengthy unexcused and unexplained absence from work.

Appeal by plaintiff from judgment entered 12 March 1997 by Judge Ronald E. Bogle in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 1998.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy, III, Harvey L. Kennedy, and Annie Brown Kennedy, for plaintiff-appellant.

Kilpatrick Stockton LLP, by Charles E. Johnson and R. Rand Tucker, for defendants-appellees.

HUNTER, Judge.

Plaintiff was employed as a machinist with International Business Machines Corporation (IBM) at its facility in Charlotte, North Carolina from December 1989 until December 4, 1991. In March 1990, plaintiff learned that IBM was renegotiating their contract with Atlantic Design Company (ADC), a company where plaintiff had previously worked. Plaintiff informed his manager that he had sensitive information that would be helpful to IBM in their negotiations. He asked for anonymity and was given assurances that his identity would be kept confidential. Plaintiff disclosed that ADC had contracted to manufacture cards for IBM by hand, was actually manufacturing the cards by machine on off shifts, and was billing IBM as if the cards were done by hand. Plaintiff referred to the jobs as "cheat jobs" and stated they involved millions of dollars in fraud.

Plaintiff related the same information to numerous IBM officials and requested anonymity from each, explaining that the ADC managers involved in the fraud were unsavory characters and he feared for his safety. At one point during the investigation, plaintiff met with a representative of ADC's parent company and was introduced to him by name by an IBM manager. Plaintiff claims this was a breach of the manager's promise to maintain his anonymity and after the introduction plaintiff became fearful for his life, became nervous, could not eat, and developed severe stomach and back pains.

As a result of plaintiff's information regarding the fraud of ADC, IBM recovered $1,250,000.00 from ADC. Plaintiff applied for IBM's national suggestion award and on 15 June 1991, he received the maximum award of $150,000.00. The award was presented in the presence of four IBM managers, an act which plaintiff contends also breached IBM's commitment to confidentiality. However, defendants claim the application for the award made clear that such an application and award could not be kept confidential.

Plaintiff further claims he experienced on-the-job retaliation after he received the suggestion award. Retaliatory acts included being removed from his regular job and used as an extra, being assigned to the worst machines to assure a decrease in production numbers, being given bad appraisals and bypassed for promotion, and ultimately being terminated on 4 December 1991. Defendants claim that IBM terminated plaintiff's employment after plaintiff left work on 23 November 1991 without permission, had six days of unexcused absences, failed to follow IBM's call-in procedures, and failed to respond to his supervisor's requests for an explanation for his absence.

On 15 December 1994, plaintiff filed a complaint against IBM and several IBM employees including Chet Gurski, IBM's plant manager, alleging wrongful discharge in violation of public policy. An amended complaint added the claim of constructive fraud based on breach of fiduciary duty. During discovery, two defendants were voluntarily dismissed without prejudice and one was dismissed pursuant to Rules 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure. The remaining defendants' (Gurski and IBM) motion for summary judgment was denied and the case was tried before a jury on 27 January 1997. After the close of plaintiff's evidence, the trial court granted defendants' motion for directed verdict as to all claims against Gurski and as to the constructive fraud claim against IBM. A jury rendered a verdict against the plaintiff on his remaining claim of wrongful discharge in violation of public policy against IBM. Plaintiff appeals.

[1] Plaintiff first contends the trial court committed reversible error in granting defendants' motion for a directed verdict on plaintiff's claim for constructive fraud based on a breach of fiduciary duty. Upon defendants' motion for a directed verdict, the evidence must be taken as true and considered in the light most favorable to the plaintiff. *Farmer v. Chaney*, 292 N.C. 451, 452, 233 S.E.2d 582, 584 (1977).

However, if plaintiff fails to present evidence of each element of his claim for relief, the claim will not survive a directed verdict motion. *Felts v. Liberty Emergency Service*, 97 N.C. App. 381, 383, 388 S.E.2d 619, 620 (1990).

In order to withstand defendants' motion for directed verdict, plaintiff had the burden of presenting evidence to support each element of his constructive fraud claim. In stating a cause of action for constructive fraud, plaintiff must allege facts and circumstances which created the relation of trust and confidence and "which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (citation omitted). "Implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." *Id.* "The requirement of a benefit to defendant follows logically from the requirement that a defendant harm a plaintiff by taking advantage of their relationship of trust and confidence . . . [and is] implicit throughout the cases allowing constructive fraud claims." *Id.* at 667, 488 S.E.2d at 224. *See, e.g., Terry v. Terry*, 302 N.C. 77, 84, 273 S.E.2d 674, 678-79 (1981) (defendant used position of trust and confidence to take advantage of his ill brother and purchase his business at a price below market value); *Link v. Link*, 278 N.C. 181, 193, 179 S.E.2d 697, 704 (1971) (defendant husband took advantage of relationship with wife to obtain shares of stock as part of a separation agreement); *Vail v. Vail*, 233 N.C. 109, 115, 63 S.E.2d 202, 207 (1951) (defendant son took advantage of relationship of trust to obtain deed to property from his mother).

The parties dispute whether plaintiff's forecast of evidence tends to show there was a relationship of trust and confidence between defendants and plaintiff sufficient to support a claim for constructive fraud. We need not decide this issue, however, because we find that although plaintiff claims IBM benefitted from a breach of its fiduciary duty, the benefits plaintiff claims were received are insufficient to support a claim of constructive fraud. Plaintiff first claims that IBM received the monetary benefit of $1,250,000.00 recouped from ADC. However, this money was recovered because of the fraud by ADC and there is no evidence the recovery of the funds relates to any breach of a fiduciary duty owed to plaintiff by IBM. Plaintiff also claims that IBM benefitted by having a continued business relationship with

ADC. Again, we fail to see how this continued relationship was predicated on a breach of fiduciary duty owed to plaintiff. In addition, our Supreme Court has stated that the benefit of a continued relationship "is insufficient to establish the benefit required for a claim of constructive fraud." *Barger*, 346 N.C. at 667, 488 S.E.2d at 224.

The final benefit plaintiff claims IBM received is the retaliatory firing of plaintiff. It has been held that "[e]ither party to an employment-at-will contract can terminate the contract at will for no reason at all, or for an arbitrary or irrational reason." *Tompkins v. Allen*, 107 N.C. App. 620, 622, 421 S.E.2d 176, 178 (1992), *disc. review denied*, 333 N.C. 348, 426 S.E.2d 713 (1993) (citation omitted). "However, this doctrine is not without limits and a valid claim for relief exists for wrongful discharge of an employee at will if the contract is terminated for an unlawful reason or a purpose that contravenes public policy." *Id.* (citations omitted). The jury either found that plaintiff's conduct of reporting the fraud by ADC was not protected by law or that plaintiff's conduct was not a substantial factor in IBM's decision to terminate plaintiff. The benefit of the right to terminate plaintiff without cause was a right IBM already possessed, and therefore IBM could not have received that benefit from breaching a fiduciary duty. We find the trial court properly granted defendants' motion for directed verdict on plaintiff's claim for constructive fraud based on breach of fiduciary duty.

[2] Plaintiff next contends the trial court committed reversible error in its instructions to the jury on plaintiff's claim of wrongful discharge in violation of public policy and in failing to give plaintiff's proposed special jury instructions regarding that claim. Plaintiff requested the trial court to instruct the jury, in part, that no employee may be terminated from his employment in violation of public policy. The court denied plaintiff's request and, instead, instructed the jury from the North Carolina Pattern Jury Instructions—Civil 640.20 (1991). "It is well settled [that] the trial court must give the instructions requested, at least in substance, if they are proper and supported by evidence. However, the trial court may exercise discretion to refuse instructions based on erroneous statements of the law." *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995) (citation omitted).

Here, the trial court determined, in its discretion, that the evidence did not support plaintiff's allegation that he was discharged for a purpose contravening public policy and instructed the jury to determine whether the plaintiff was wrongfully discharged for "his partic-

ipation in conduct protected by law." The jury rejected this remaining contention.

As previously stated, North Carolina is an employment-at-will state. Our Supreme Court "has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997), *reh'g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). Limited exceptions have been adopted to this bright-line rule.

> First, as stated above, parties can remove the at-will presumption by specifying a definite period of employment contractually. Second, federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer. *See, e.g.*, 29 U.S.C. § 623(a) (1988) (Age Discrimination Act); 42 U.S.C. § 2000e-2a (1988) (Equal Employment Opportunities Act); 42 U.S.C. § 12112(a) (Supp. 1988) (Americans with Disabilities Act); N.C.G.S. § 95-241 (1993) (prohibiting discharge in retaliation for filing workers' compensation, OSHA, and similar claims). Finally, this Court has recognized a public-policy exception to the employment-at-will rule. *See . . . Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989) (discharging an employee for refusing to falsify driver records to show compliance with federal transportation regulations offends public policy).

Id. at 331-32, 493 S.E.2d at 422.

Public policy is defined as "the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Johnson v. Mayo Yarns, Inc.*, 126 N.C. App. 292, 296, 484 S.E.2d 840, 842-43, *disc. review denied*, 346 N.C. 547, 488 S.E.2d 802 (1997). There is no specific list of what actions constitute a violation of public policy. *Garner v. Rentenbach Constructors Inc.*, 129 N.C. App. 624, 628, 501 S.E.2d 83, 86 (1998). However, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employers request, *see Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331,

333 S.E.2d 490 (1985), (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy, *see Garner, supra.*

Viewing the evidence in a light most favorable to plaintiff, it appears, as a matter of law, that plaintiff has failed to establish a claim of wrongful discharge under any of these recognized public policy exceptions. First, plaintiff's employer was not engaged in unlawful activity and plaintiff's evidence shows no indication he was asked by his employer to violate any federal or state law or to perform any activity "injurious to the public or against the public good." Rather, defendant, IBM, was actually the victim of unlawful activity. Plaintiff, of his own accord, reported the fraudulent activity to IBM and saved his employer well over $1 million dollars for which he was awarded $150,000.00. Second, uncontraverted evidence introduced at trial tended to show that plaintiff was discharged immediately following a lengthy unexcused and unexplained absence from work. Based on the above, we find no violation of public policy. The trial court was justified in refusing to instruct the jury on the public policy exception to North Carolina's employment-at-will doctrine.

As a result of our holdings above, we find it unnecessary to address plaintiff's remaining assignment of error.

Affirmed.

Judges MARTIN and SMITH concur.

DEBRA C. CLOER, PLAINTIFF v. VICKIE H. SMITH, DEFENDANT

No. COA98-601

(Filed 16 March 1999)

1. Discovery— compelling second deposition—cost of first deposition—sanction

The trial court had express authority pursuant to Rule 37 to enter an order compelling defendant to undergo another deposition and had inherent authority to sanction defendant by ordering her to reimburse plaintiff for the cost of her first deposition where the deposition transcript supports a finding by the trial

court that counsel for defendant refused to allow defendant to answer some questions and in other instances told defendant what to say. N.C.G.S. § 1A-1, Rule 37.

2. Pleadings— compulsory counterclaim—independent action—amount exceeding magistrate's jurisdiction—filing with appeal to district court

Plaintiff tenant's action to recover damages for improper exercise of the summary ejectment remedy was a compulsory counterclaim in defendant landlord's summary ejectment action. However, since plaintiff sought damages in excess of the jurisdictional amount established by N.C.G.S. § 7A-210(1), plaintiff's action could not have been pleaded as a compulsory counterclaim to defendant's summary ejectment action while it was before the magistrate but should have been filed with the appeal from the magistrate's decision to the district court.

3. Pleadings— compulsory counterclaim—independent action—dismissal or stay

Where plaintiff filed a compulsory counterclaim for improper exercise of the summary ejectment remedy as an independent action in the superior court during the pendency of defendant's prior summary ejectment action in the district court, and defendant's motion for summary judgment informed the trial court that the summary ejectment action was pending in the district court, the trial court should have treated defendant's motion as being pursuant to Rule 13 and either dismissed or stayed plaintiff's action under Rule 13. N.C.G.S. § 1A-1, Rule 13.

Appeal by plaintiff from judgment filed 23 October 1997 and from order filed 23 October 1997 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 12 January 1999.

Wilson, Palmer & Lackey, P.A., by W.C. Palmer and Timothy J. Rohr, for plaintiff-appellant.

Michael P. Baumberger, for defendant-appellee.

GREENE, Judge.

Debra C. Cloer (Cloer) appeals from the trial court's entry of summary judgment in favor of Vickie H. Smith (Smith) and from the trial court's order sanctioning Cloer.

Smith, who operates a tanning and hair salon, leased the adjoining business space to Cloer on 10 December 1996. The lease agreement provided that the "premises shall be used only as [a] NAIL SALON." Cloer subsequently began a tanning bed business on the premises, and Smith terminated the lease. When Cloer failed to vacate the premises, Smith instituted summary ejectment proceedings against Cloer. On 18 April 1997, a magistrate found that Smith had "proved the case by the greater weight of the evidence" and ordered that Cloer "be removed from and [Smith] be put in possession of the premises described in the complaint." Cloer appealed this order to District Court.

On 22 July 1997, while Cloer's appeal of the summary ejectment action was pending in District Court, Cloer filed a complaint for damages in Superior Court alleging that Smith had "improper[ly] exercise[d] . . . the remedy commonly called 'Summary Ejectment,' " and that Smith had "locked [Cloer] out of the premises which [Cloer] has the right to occupy pursuant to the Lease."

On 8 September 1997, pursuant to notice, counsel for Smith attempted to depose Cloer. Excerpts indicative of the deposition follow:

[Counsel for Smith]: What is that?

[Counsel for Cloer]: Objection. It's a piece of paper, isn't it?

[Cloer]: Piece of paper.

. . . .

[Counsel for Smith]: All right. Did you read [the lease] before you signed it?

[Cloer]: Yes, I did.

[Counsel for Smith]: All right. What did [the lease] mean to you?

[Counsel for Cloer]: Objection. Sir, it doesn't mean—it doesn't matter what it means to her. What is important is what it means with regard to the law. And what—What it means to her is irrelevant.

[Counsel for Smith]: Ms. Cloer, would you answer the question, please.

[Counsel for Cloer]: You're not required to answer that.

[Cloer]: I refuse to answer that.

[Counsel for Smith]: You refuse to answer the question?

[Cloer]: Yes. Because I'm not required to answer it.

. . . .

[Counsel for Smith]: What did you-all talk about, Ms. Cloer?

[Counsel for Cloer]: I object to it.

[Counsel for Smith]: Are you instructing her not to answer?

[Counsel for Cloer]: No, no, but I'm telling you that—

[Counsel for Smith]: Ms. Cloer, you may answer the question.

(Counsel [for Cloer] conferred with [Cloer].)

[Cloer]: Yes, we talked about it. And the discussion was that whenever I talked with her about renting the building, that I had—She asked me what I had in my shop at the time at the other—the old location. I told her we had a tanning bed and what we did.

Smith ended the deposition and moved for sanctions against Cloer for discovery violations and for an order requiring Cloer to answer questions at a future deposition. After a hearing, the trial court found that "[C]ounsel for [Cloer] substantially disrupted [the] deposition in that . . . [he] . . . refused to allow his client to answer questions; . . . [and] upon at least some . . . occasions, [counsel for Cloer] told [Cloer] what to say." Based on these and other findings, the trial court concluded:

> [T]he above . . . constitute[s] a failure of [Cloer] to answer the questions under Rule 37(a)(2); that the answers to many of the questions did not constitute the testimony of [Cloer]; and that the actions of [Cloer] and her counsel rendered the deposition unfit for use at the time of trial . . . .

Accordingly, the trial court ordered Cloer to pay the cost of the deposition and "to give her deposition, without prompting by counsel, upon proper notice by [Smith]."

On 23 September 1997, Smith moved in Superior Court for summary judgment on Cloer's claims. In her motion, Smith "refer[red] the Court to the pleadings of this action, File No. 97-CvD-626 entitled 'Vickie H. Smith vs. Debbie Cloer' which is presently pending in the District Court of Caldwell County." The trial court granted summary

judgment on 23 October 1997. Cloer appealed from both the order sanctioning her and from summary judgment in favor of Smith.

The issues are whether: (I) the trial court abused its discretion in sanctioning Cloer for discovery violations; and (II) Cloer's action is a compulsory counterclaim to Smith's prior summary ejectment action.

I

[1] Deposition examination "may proceed as permitted at the trial under the provisions of Rule 43(b)." N.C.G.S. § 1A-1, Rule 30(c) (Supp. 1997). "All objections . . . shall be noted upon the deposition . . . . Subject to any limitations imposed by orders [of the court], evidence objected to shall be taken subject to the objections." *Id.* If a party "fails to answer a question propounded" during the deposition, "the discovering party may move for an order compelling an answer." N.C.G.S. § 1A-1, Rule 37(a)(2) (1990). Rule 37 gives the trial court express authority to compel discovery and to sanction a party for abuse of the discovery process. N.C.G.S. § 1A-1, Rule 37 (providing, in subsection (a)(4), that the trial court "shall . . . require the party or deponent whose conduct necessitated the motion [to compel] or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust"). The trial court also retains inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37. *Green v. Maness*, 69 N.C. App. 292, 299, 316 S.E.2d 917, 922 (referring to the trial court's "inherent authority to regulate trial proceedings"), *disc. review denied*, 312 N.C. 622, 323 S.E.2d 922 (1984). Sanctions imposed by the trial court will not be overturned absent a showing of abuse of discretion. *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995).

In this case, the deposition transcript supports the trial court's findings that counsel for Cloer refused to allow Cloer to answer some questions, and, in other instances, "told [Cloer] what to say."[1] The trial court therefore had express authority, pursuant to Rule 37, to enter an order compelling Cloer to undergo another deposition to answer Smith's questions, and likewise had inherent authority to

1. Cloer contends that Smith waived the right to sanctions by failing to object during the deposition to the discovery violations; however, our review of the transcript reveals that Smith repeatedly noted objections to the conduct of Cloer and Cloer's attorney.

sanction Cloer by ordering her to reimburse Smith for the cost of the first deposition. Accordingly, no abuse of discretion has been shown.

II

[2] An action must generally be brought, if at all, as a compulsory counterclaim in a pending action if "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." N.C.G.S. § 1A-1, Rule 13(a) (1990); *see also Wood v. Wood*, 60 N.C. App. 178, 181, 298 S.E.2d 422, 423 (1982) (holding that failure to raise compulsory counterclaims during a pending action bars a subsequent action on those claims). To determine whether a claim arises out of the same transaction or occurrence as a prior claim, the court must consider: "(1) whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions." *Brooks v. Rogers*, 82 N.C. App. 502, 507-08, 346 S.E.2d 677, 681 (1986); *Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 494, 263 S.E.2d 323, 325 (1980) (holding that the defendant's summary ejectment action was not a compulsory counterclaim to the plaintiff's prior breach of contract, unfair and deceptive trade practices, and federal section 1983 action because the actions had no logical relationship to each other).

In this case, Smith's action for summary ejectment is based on the assertion that Cloer breached the lease agreement. Cloer's action is based on assertions that Smith "improper[ly] exercise[d] . . . the remedy commonly called 'Summary Ejectment,' " and that Smith locked Cloer out of the leased premises, which she had "the right to occupy." The issues of law and fact are therefore largely the same in both actions, both require substantially the same evidence for their determination, and the actions are logically related. Although Cloer seeks damages as a remedy and Smith seeks injunctive relief, both actions rise and fall with the determination of whether Cloer breached the lease. Cloer's action is therefore a compulsory counterclaim in the summary ejectment action filed by Smith.

Cloer's action sought damages in an amount in excess of $10,000.00, however, and therefore could not have been pleaded as a compulsory counterclaim to Smith's summary ejectment action while it was before the magistrate. *See* N.C.G.S. § 7A-219 (1995) ("No counterclaim . . . which would make the amount in controversy exceed the

jurisdictional amount established by G.S. 7A-210(1) is permissible in a small claim action assigned to a magistrate."); N.C.G.S. § 7A-210(1) (1995) (setting jurisdictional amount of a small claim action at $3,000.00). Instead, Cloer was required to file this action, if at all, with her appeal from the magistrate's decision to the district court. *See* N.C.G.S. § 7A-220 (1995) ("[O]n appeal from the judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims . . . ."); 1 G. Gray Wilson, *North Carolina Civil Procedure* § 13-1, at 256 (2d ed. 1995) ("On appeal from a magistrate for a trial *de novo* before a district judge, appropriate counterclaims and crossclaims may be asserted for the first time."). Where a compulsory counterclaim is filed as an independent action during the pendency of the prior action, as Cloer's action was in this case, it "must be dismissed with leave to file it as a counterclaim in the prior action or stayed until final judgment has been entered in that action." *Atkins v. Nash*, 61 N.C. App. 488, 493, 300 S.E.2d 880, 883 (1983). The option to stay the second action (*i.e.*, the action which should have been brought as a compulsory counterclaim to the first action) "should be reserved for unusual circumstances." *Brooks*, 82 N.C. App. at 507, 346 S.E.2d at 681 (noting that the purpose of Rule 13 is to promote judicial economy).

[3] In this case, Smith's motion for summary judgment informed the trial court that the summary ejectment action was "presently pending" before the District Court. The trial court therefore should have treated Smith's motion as a motion pursuant to Rule 13. *Atkins*, 61 N.C. App. at 493, 300 S.E.2d at 883 (holding that a motion to dismiss due to the pendency of a prior action is to be treated as a motion under Rule 13). Because the trial court granted summary judgment rather than dismissing or staying the action pursuant to Rule 13, the order of the trial court must be vacated.[2]

Order to Compel and for Sanctions: Affirmed.

Summary Judgment: Vacated and Remanded.

Judges JOHN and HUNTER concur.

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2. If Smith's summary ejectment action is no longer pending and the trial court addresses the merits of Cloer's claim, it must consider whether the disposition of Smith's action bars Cloer's claims on *res judicata* grounds (if Smith raises *res judicata* as a defense). *See, e.g., Wood*, 60 N.C. App. at 180-81, 298 S.E.2d at 423 (discussing the applicability of the doctrine of *res judicata* to claims which should have been asserted as compulsory counterclaims).

WILLARD M. DISHMOND, PLAINTIFF v. INTERNATIONAL PAPER COMPANY, DEFENDANT

No. COA98-747

(Filed 16 March 1999)

1. Workers' Compensation— brain injury—hearing and vision loss—scheduled injuries or total disability

A workers' compensation claimant who suffered a brain injury which resulted in a hearing and vision loss was not entitled to compensation for both scheduled injuries under N.C.G.S. § 97-31 and total permanent disability under N.C.G.S. § 97-29, but was entitled to determine which statutory remedy offers the more generous benefits and to proceed under that statute.

2. Workers' Compensation— brain injury—total disability—concurrent symptoms not compensable

Where an employee received compensation for a brain injury under the total disability provisions of N.C.G.S. § 97-29, additional recovery is not available for concurrent symptoms caused by that injury.

Appeal by plaintiff from Opinion and Award for the Full Commission entered 13 April 1998. Heard in the Court of Appeals 28 January 1999.

Eisele, Ashburn, Greene & Chapman, P.A., by Douglas G. Eisele, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J. A. Gardner, III, for defendant-appellee.

EDMUNDS, Judge.

Plaintiff was employed by defendant, International Paper Company, as a forklift operator. His duties included transferring large rolls of paper in and around defendant's manufacturing facility. On 20 September 1993, a roll of paper weighing approximately 1700 pounds fell on top of the forklift, causing its beacon warning light fixture to break loose and strike plaintiff's head. Plaintiff suffered a compound depressed skull fracture, causing brain damage that resulted in a twenty-six percent (26%) loss of hearing to his right ear and a sixty percent (60%) loss of vision in his left eye.

Plaintiff filed a claim with the Industrial Commission maintaining that he was entitled to compensation for scheduled injuries under N.C. Gen. Stat. § 97-31 (1991) in addition to compensation for total permanent disability under N.C. Gen. Stat. § 97-29 (1991). After an unfavorable ruling before a Deputy Commissioner, plaintiff appealed to the Full Commission. The Full Commission affirmed the Deputy, finding plaintiff to be "permanently and totally disabled as a result of the injuries to his brain, hearing, and vision," and concluding that plaintiff was entitled to compensation under section 97-29, but ineligible for additional compensation under section 97-31. Plaintiff appeals. We affirm the findings and conclusions of the Industrial Commission.

[1] Plaintiff first claims that the Industrial Commission erred when it ruled as a matter of law that he was not entitled to compensation for both scheduled injuries under section 97-31 and total incapacity under section 97-29. We do not agree.

> Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission. . . . This is so even though there is evidence which would support a finding to the contrary.

Radica v. Carolina Mills, 113 N.C. App. 440, 445-46, 439 S.E.2d 185, 189 (1994) (*quoting Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106, *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992)).

Sections 97-29 and 97-31 have been interpreted as offering alternative avenues of recovery to an employee whose scheduled injuries leave him or her totally incapacitated. *See Hill v. Hanes Corp.*, 319 N.C. 167, 353 S.E.2d 392 (1987). Section 97-29 provides compensation for total disability, while section 97-31 furnishes a menu of specific harms and corresponding compensations. The general rule is that "stacking of benefits covering the same injury for the same time period is prohibited." *Gupton v. Builders Transport*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987) (citations omitted). However, as noted in *Gupton*, this statutory scheme exists to prevent double recovery, not to dictate an exclusive remedy. *See id.* Our Supreme Court has stated, "Even if all injuries are covered under the scheduled injury section an employee may nevertheless elect to claim under N.C.G.S. § 97-29 if this section is more favorable; but he may not recover under both sec-

tions." *Hill* at 176, 353 S.E.2d at 398 (citation omitted). Thus, a totally disabled plaintiff, whose injuries are also completely covered by section 97-31, is entitled to determine which statutory remedy offers the more generous benefits and proceed under that statute.

However, our Supreme Court has held that recovery under both sections is available under certain circumstances. In *Hill*, the employee suffered twenty percent (20%) disability to both legs as a result of a fall. After reaching the point of maximum medical improvement for this scheduled injury, and within the time permitted to show a change of condition, *see* N.C. Gen. Stat. § 97-47 (1991), the employee was diagnosed with depression stemming from the original injury. Under these facts, our Supreme Court reasoned that the employee's psychological condition was directly related to, yet distinct from, his physical injury and held that there were "no double payments for the same injury." *Hill* at 177, 353 S.E.2d at 398. Because the employee's scheduled injury subsequently gave rise to a separate totally incapacitating psychiatric disorder within the statutory time limits, the employee was entitled to recover under both section 97-29 and section 97-31.

Despite plaintiff's argument to the contrary, we find *Hill* is not applicable here. The holding in *Hill* is specifically limited to cases involving unscheduled psychiatric or psychological injury, which results from physical trauma. "The question is whether an employee may be compensated for both a scheduled compensable injury under N.C.G.S. § 97-31 and total incapacity for work under N.C.G.S. § 97-29 *when the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury.* We conclude the answer is yes." *Hill* at 174, 353 S.E.2d at 397 (emphasis added). Psychological or psychiatric injuries are not covered by the schedule in section 97-31 and therefore "are compensable, if at all, under G.S. 97-29 or G.S. 97-30." *McLean v. Eaton Corp.*, 125 N.C. App. 391, 395, 481 S.E.2d 289, 291 (1997) (citation omitted). Here, unlike the injuries in *Hill* and *McLean*, all injuries suffered by plaintiff are covered under the schedule[1] in section 97-31.

[2] We hold that where an employee has received compensation for a brain injury under the total disability provisions of section 97-29, additional recovery is not available for concurrent symptoms caused

1. Partial loss of sight and hearing is covered under N.C. Gen. Stat. § 97-31(19) (1991); disfigurement is covered under N.C. Gen. Stat. § 97-31(21) (1991); and injury to the brain is covered under N.C. Gen. Stat. § 97-31(24) (1991).

by that injury. Otherwise, as defendant correctly observes, when carried to its logical limit, plaintiff's argument could result in compensation far beyond that apparently envisioned by the drafters of these statutes. Here, the trauma to plaintiff's head damaged the portions of his brain which control visual and auditory perception, which, in turn, caused plaintiff's loss of sight and hearing. Had a similar but more severe brain injury reduced an employee to a permanently comatose state, he or she would unquestionably be entitled to total disability payments under section 97-29. Under plaintiff's theory, such an employee, although otherwise physically unharmed, could also recover under section 97-31, subsections (1) and (19) for loss of the use of a thumb, (2) and (19) for loss of use of first finger, (3) and (19) for loss of use of second finger, and so on down the schedule. We do not perceive the legislative intent to allow such expansive recovery.

We also note that *Hill* is consistent with the standard rule disallowing double recovery for the same injury in the same time period. *See Gupton*, 320 N.C. 38, 357 S.E.2d 674. The victim in *Hill* was rated partially permanently disabled for a back injury in November, 1980, and since the disability was twenty percent (20%), pursuant to section 97-31(23), he received sixty weeks of compensation. The onset of the depression that rendered him permanently disabled was in November, 1982, by which time he was no longer receiving compensation for the back injury. The employee in *Hill* was not, therefore, receiving payments under both statutes at the same time for the same injury. By contrast, plaintiff here seeks multiple compensations at one time for a single injury. Since the rule in *Hill* does not apply to this case, we hold that plaintiff was obligated to elect to proceed under N.C. Gen. Stat. § 97-29 (1991) or N.C. Gen. Stat. § 97-31 (1991), and that he was not eligible to receive compensation under both.

Plaintiff next contends that there is no competent evidence on which the Commission could base its finding that plaintiff's disability resulted from injuries to his brain, vision, and hearing. Plaintiff argues that all four experts used in this case testified that plaintiff's total disability resulted from injury to his brain, not his vision and hearing, and that the Commission erred by finding contrary to the expert testimony. In *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 34, 384 S.E.2d 549, 552 (discussing *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980)), *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989), this Court stated, "[W]e do not read *Click* to require that the Industrial Commission must find in accordance with plaintiff's expert medical testimony if the defendant does not offer

expert medical testimony to the contrary." We interpret *Harvey* as establishing the rule that the Commission's findings, when supported by competent evidence, will not be overturned on appeal, even where there is expert testimony to the contrary. Accordingly, our review is limited to whether there is competent evidence on which the Commission could base its finding.

The record indicates that there was competent evidence on which the Commission could base its finding that total disability was caused by damage to plaintiff's brain, vision, and hearing. According to Dr. Timothy Saunders, plaintiff's vision impairment was the consequence of his brain injury. Similarly, according to Dr. Christ Koconis, plaintiff's hearing loss also resulted from the injury sustained when the warning light hit his head. The losses to plaintiff's vision and hearing are manifestations of the damage to the brain itself and, along with the disfigurement resulting from the initial blow, are all aspects of a single injury. We find that this and other evidence indicating plaintiff could no longer function in a work environment, is competent evidence to support the Commission's finding. Plaintiff's assignment of error is therefore overruled, and the Industrial Commission's decision is affirmed.

Affirmed.

Judges WYNN and HORTON concur.

WILMA LANG v. MANFRED LANG

KARIN LANG v. MANFRED LANG

No. COA98-466

(Filed 16 March 1999)

Appeal and Error— appealability—foreign support order—registration—order refusing to compel discovery

The trial court's order denying a motion by plaintiffs, a mother and daughter, to compel discovery by defendant father after registration of a foreign support order was interlocutory and not immediately appealable where plaintiffs had sought only to register the support order, not to enforce it, and plaintiffs' rights will be adequately protected by an appeal from the final judgment

should they file motions in the underlying causes to enforce the existing support order.

Appeal by plaintiffs from an order entered 26 November 1997 by Judge Robert S. Cilley in Henderson County District Court. Heard in the Court of Appeals 17 February 1999.

Jackson & Jackson, by Phillip T. Jackson, for plaintiffs-appellants.

Don H. Elkins for defendant-appellee.

HUNTER, Judge.

Briefly summarized, the record indicates that Wilma and Manfred Lang were married in Germany in 1962 and had a daughter, Karin, in 1969. The couple divorced in 1974 and entered into an agreement regarding child custody and support, alimony and the division of marital property.

In June of 1992 and August of 1994, the wife and daughter, respectively, filed Petition and Notice of Registration of Foreign Support Orders in Henderson County, North Carolina where Manfred Lang (defendant) resided. Although defendant objected to both registrations, the court entered an order in August 1995 confirming each. Defendant appealed and this Court affirmed the lower court's decision in *Lang v. Lang*, 125 N.C. App. 573, 481 S.E.2d 380 (1997).

On 15 October 1997, plaintiffs served defendant with discovery requests and defendant filed "Objections to Discovery and Motion for Protective Order." In his motion, defendant argued that "there is no pending action whatsoever that has been filed by plaintiffs against your defendant to enforce said registered Foreign Support Order pursuant to N.C.G.S. 52A-29 and N.C.G.S. 52A-30." Plaintiffs moved to compel and a hearing was scheduled. The court, in its order dated 26 November 1997, denied plaintiffs' motion to compel defendant to respond to discovery stating, in pertinent part:

> 2. . . . Enforcement proceedings are, however, distinguishable from registration proceedings, and this court finds nothing in the statute to exempt such an enforcement proceeding from the requirement that some sort of pleadings be filed, and a summons issued, giving the defendant the opportunity to plead in response.

3. Until an action is commenced as provided by the Rules of Civil Procedure, in such a way as to give the court personal jurisdiction over the defendant, the court lacks the authority to compel the defendant to provide discovery. The registration process neither requires nor results in personal jurisdiction.

Plaintiffs appealed from this ruling.

The particular issue before us is whether the trial court's order is immediately appealable. We conclude that it is not and dismiss the appeal.

"An interlocutory decree is immediately appealable only if permitted by N.C. Gen. Stat. § 1-277 (1996), N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990), or N.C. Gen. Stat. § 7A-27(d) (1995)." *Hunter v. Hunter*, 126 N.C. App. 705, 707, 486 S.E.2d 244, 245 (1997). "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *Id.* at 708, 486 S.E.2d at 245-46 (citation omitted). In keeping with this policy of discouraging fragmentary appeals, we conclude that the present order does not affect a substantial right or finally determine the action. Plaintiffs' rights will be adequately protected by an appeal timely taken, if necessary, from the final judgment following proper enforcement actions filed in the action.

To that end, we note that the Uniform Reciprocal Enforcement of Support Act (URESA) in Chapter 52A of the North Carolina General Statutes (repealed in 1995 and replaced by Chapter 52C) established a two-step procedure concerning foreign support orders in North Carolina: "(1) registration of the order, and if required, a hearing on whether to vacate the registration or grant the 'obligor' other relief; and (2) enforcement of the order. Under G.S. 52A-29, the obligee has the option to merely register the order or to register and enforce simultaneously." *Pinner v. Pinner*, 33 N.C. App. 204, 206, 234 S.E.2d 633, 635 (1977). "Personal jurisdiction is not a requisite for registration of an order under G.S. 52A-29." *Stevens v. Stevens*, 68 N.C. App. 234, 236, 314 S.E.2d 786, 788, *disc. review denied*, 312 N.C. 89, 321 S.E.2d 908 (1984). Furthermore, "[r]egistration does not prejudice any rights of the obligor; it merely changes the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina." *Pinner*, 33 N.C. App. at 207, 234 S.E.2d at 636. "Once the order is so treated the obligee or the obligor may request modifications in the order, and when the obligee

attempts to enforce the order, the court must determine whether jurisdiction exists over the person or property of the obligor and what amount, if any, is in arrears." *Id.* "In effect, URESA is an extension of the court of original jurisdiction for the purpose of enforcement of judgments lawfully rendered." *Stevens*, 68 N.C. App. at 237, 314 S.E.2d at 788.

In the present case, plaintiffs sought only to register the support order, not to enforce it. To do so, plaintiffs need merely file a motion in the underlying causes to enforce the existing judgment. "Since the statute is directed toward the enforcement of an existing judgment, no new suit need be commenced . . . . *Id.*

Appeal dismissed.

Judges MARTIN and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 MARCH 1999

BRYANT v. N.C. DEP'T OF CORRECTION No. 98-709	McDowell (97CVS23)	Affirmed
CARLTON v. QUINN CO. No. 98-567	Ind. Comm. (028431)	Reversed
CIOFFI v. CITY OF CHARLOTTE No. 98-138	Mecklenburg (97CVS8693)	Reversed and Remanded
GLENN v. GLENN No. 97-1021	Mecklenburg (97CVD00291)	Dismissed
GORE v. WAKE COUNTY HOSP. SYS., INC. No. 98-737	Wake (97CVS12566)	Affirmed
GREGORY v. EUSTATHIOU No. 98-550	Guilford (96CVD11301)	Reversed and Remanded
LAPETINA v. LAPETINA No. 98-721	Orange (97CVD431)	Affirmed
LENOIR COUNTY v. HILLCO, LTD. No. 98-510	Lenoir (96CVS1311)	Reversed and Remanded
LINEBACK v. WAKE COUNTY BD. OF COMM'RS No. 98-472	Ind. Comm. (466108)	Affirmed
MARTIN v. CUMMINS SOUTH No. 98-614	Ind. Comm. (552707)	Affirmed
MITCHELL v. BOONE CONSTR. CO. No. 98-247	Watauga (97CVS223)	Affirmed
POWERS v. SMITH No. 97-1111	Gaston (95CVS2890)	No Error
PRIOR v. PRUETT No. 97-787-2	Burke (94CVS943)	Affirmed
STATE v. ALLEN No. 98-524	Mecklenburg (94CRS79288) (94CRS79289) (95CRS12648)	Affirmed
STATE v. BROOKS No. 98-574	Durham (97CRS1719) (97CRS19607)	No Error

STATE v. EVERETTE No. 98-558	Richmond (93CRS5440) (93CRS5441) (93CRS5442) (93CRS5443)	No Error
STATE v. OKWARA No. 98-398	Union (96CRS015171)	No error in part; Vacated in part

FILED 16 MARCH 1999

ERIE INS. EXCHANGE v. BORDEAUX No. 98-773	Wake (97CVS3314)	Affirmed
GOODWIN v. SCHNEIDER NAT'L, INC. No. 98-584	Surry (97CVS1190)	Affirmed in part and Remanded for further proceedings regarding the claims of plaintiff Goettel
GOSSETT v. BL PARTNERS No. 98-476	Brunswick (97CVD432)	Dismissed
GRAVES v. PARKER'S DRUGSTORE No. 98-704	Ind. Comm. (047940)	Affirmed
GREEN v. SWIFT TEXTILES, INC. No. 98-609	Ind. Comm. (529833)	Affirmed in part Reversed in part
HAWKINS v. HAWKINS No. 98-683	Haywood (96CVS1205)	No Error
HORTON v. YELTON No. 98-458	Rutherford (95CVS903)	Affirmed
IN RE ELDRIDGE No. 98-537	Caldwell (96J10)	Reversed and Remanded
IN RE WELLNITZ No. 98-475	Catawba (95J216)	Affirmed
JOHNSON v. JOHNSON No. 98-725	Brunswick (94CVD1152)	Reversed and Remanded
MARR v. MARR No. 98-431	Guilford (93CVD6376) (94CVD6368)	Affirmed
MENDES v. SANTORIELLO No. 98-325	Cumberland (97CVS3429)	Affirmed

METAXAS v. HENDRICK No. 98-700	Ind. Comm. (604377)	Reversed and Remanded
NEWTON v. NEWTON No. 98-589	Forsyth (96CVS4147)	Affirmed
PATRICK v. ALLSTATE INS. CO. No. 98-669	Pitt (97CVS434)	Affirmed
SCOTT v. JONES No. 98-456	Orange (96CVS317)	Vacated and Remanded for a new trial
STATE v. ARRINGTON No. 98-281	Buncombe (97CRS7998) (97CRS62653) (97CRS62655) (97CRS62656)	No Error
STATE v. BROWN No. 98-593	Alamance (96CRS30405)	Vacated
STATE v. COOKE No. 98-302	Mecklenburg (96CRS048485) (96CRS048486) (96CRS048487) (96CRS048488)	Reversed
STATE v. McRAE No. 98-543	Montgomery (96CRS4828) (96CRS4829) (96CRS4830) (96CRS4831)	Affirmed in part Reversed in part, and Remanded for a new trial for first degree burglary
STATE v. STANBACK No. 98-163	Montgomery (96CRS1043) (96CRS1044) (96CRS1045)	No Error
STATE v. WHITAKER No. 96-1062	Nash (95CRS6662)	No error in defendant's trial, but remanded for new sentencing hearing
STATE v. WILLIAMS No. 98-336	Guilford (96CRS62029)	No Error
STATE v. YOUNGER No. 98-324	Pitt (96CRS6072) (96CRS6073) (96CRS6074) (96CRS6075) (96CRS6079)	No Error

STATE OF NORTH CAROLINA, ON RELATION OF JAMES E. LONG, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE INVESTMENT LIFE INSURANCE COMPANY OF AMERICA, PLAINTIFF v. ILA CORPORATION (FORMERLY FIRST REPUBLIC FINANCIAL CORPORATION); AND JAMES D. PETERSON, THE ONLY REMAINING DEFENDANT

No. COA98-780

(Filed 6 April 1999)

1. **Insurance— liquidation of company—standing of liquidator**

Plaintiff-Insurance Commissioner had standing to bring suit in an action for breach of fiduciary duties and negligent mismanagement of a liquidated insurance company where he brought the action as liquidator of the company. N.C.G.S. § 58-30-1(b) and (c) confer standing upon plaintiff to assert ILA's claims against defendant, particularly for breach of fiduciary duty and negligent mismanagement.

2. **Statute of Limitations— claims by insurance company liquidator—two-year extension**

Claims for breach of fiduciary duties and negligent mismanagement arising from the liquidation of an insurance company were not barred by the applicable statute of limitations where the alleged acts of misconduct occurred within three years of the order appointing plaintiff as liquidator and where plaintiff filed these actions within two years of his appointment. N.C.G.S. § 58-30-130(b).

3. **Insurance— liquidation of company—mismanagement and breach of fiduciary duties—findings**

There was substantial evidence supporting challenged findings of fact in a nonjury trial on claims for breach of fiduciary duties and negligent mismanagement arising from the liquidation of an insurer. Although defendant correctly pointed out a modicum of errors, none are material.

4. **Corporations— business judgment rule—breach of fiduciary duties and negligent mismanagement**

The trial court's findings in a nonjury trial on claims for breach of fiduciary duties and negligent mismanagement arising from the liquidation of an insurance company supported the conclusion that defendant is not protected by the business judgment

rule. Defendant was a leading participant in a plan to benefit himself and his interests at the expense of the company and his actions were more than mere errors in judgment. The court's findings also support its conclusion that defendant's actions did not comply with the requirements of N.C.G.S. § 55-8-30(b).

5. Corporations— business judgment rule—advice of professionals

There was substantial evidence in a nonjury trial on claims for breach of fiduciary duties and negligent mismanagement arising from the liquidation of an insurance company to support the conclusion that defendant breached his fiduciary duties and that his actions were not made in reliance on the advice of professionals. Defendant sought advice on corporate decisions, but ignored advice that was contrary to his efforts.

6. Insurance— liquidation of insurance company—negligent mismanagement and breach of fiduciary duties—evidence of damages—sufficient

There was substantial evidence to support the finding of the trial court in a nonjury trial on claims for negligent mismanagement and breach of fiduciary duties arising during the liquidation of an insurance company that plaintiff-insurance commissioner met his burden of showing that defendant's actions proximately caused damage to the company.

Appeal by defendant James D. Peterson from order and judgment entered 3 April 1998 by Judge L. Bradford Tillery in Wake County Superior Court. Heard in the Court of Appeals 15 February 1999.

Bode, Call & Stroupe, L.L.P., by V. Lane Wharton, Jr., for plaintiff-appellee.

Blanco Tackabery Combs & Matamoros, P.A., by Reginald F. Combs, for defendant-appellant James D. Peterson.

EDMUNDS, Judge.

Defendant James D. Peterson was a shareholder and a member of the board of directors of Investment Life & Trust Company (ILT). Faced with the possibility of a hostile corporate takeover of ILT by an unacceptable company, the South Carolina Commissioner of Insurance requested that defendant put together an alternative offer. In response, defendant set up a consortium of investors who formed

First Republic Financial Corporation (FRFC), of which defendant was a director, the Chief Executive Officer, and a shareholder. FRFC gained control of ILT around 1986. In acquiring ILT, FRFC borrowed a portion of the purchase price from Trust Company Bank (Trustco). Trustco secured the loan with ILT stock and defendant's personal guarantee. FRFC later refinanced this loan with Trustco, borrowing $5 million to be repaid by 1995.

In 1989, to ensure the long-term survival of ILT, FRFC planned to expand into new markets in which it was then unlicensed. To do so, FRFC acquired Triad Life Insurance Company of North Carolina (Triad) because it was licensed in numerous states. As required by the terms of its refinancing loan, FRFC needed Trustco to approve the Triad purchase. Trustco approved the purchase, on the condition that FRFC accelerate repayment of its loan from Trustco to June 1990 rather than 1995. In addition, acquisition of Triad required approval by the North Carolina Insurance Department (the Department). Accordingly, FRFC filed a "Form A[,] Statement Regarding the Acquisition of Control of or Merger With a Domestic Insurer" (Form A) with the Department. In its initial Form A, FRFC stated that it would contribute $5 million in capital to ILT. FRFC later amended its Form A to indicate that FRFC would contribute only $1.7 million in assets instead. These assets consisted of limited partnership units, a venture organized by defendant and his brother. Based on the amended statement, the Department approved FRFC's application.

FRFC next merged ILT with Triad, forming Investment Life Insurance Company of America (ILA). We note that ILA is not to be confused with non-appealing defendant ILA Corporation, which is a successor entity to FRFC. For clarity, we will continue to refer to FRFC throughout this opinion. The merger of ILT with Triad to form ILA also required the Department's approval. Accordingly, in February 1990, FRFC submitted a second Form A to the Department. The second Form A indicated that FRFC planned to obtain $10-12 million in equity financing, $4 million of which FRFC would use to prepay its debt to Trustco (now due in June 1990). Statements by FRFC about its debts to ILT created concern sufficient to lead the Department to request more information. FRFC responded that it had borrowed $2.25 million from ILT to make payments to Trustco. The Department approved the merger on 30 April 1990, but notified FRFC that future loans from ILA to FRFC were unacceptable.

With FRFC's debt to Trustco coming due, FRFC needed capital. As a result, FRFC sought the Department's approval of a proposed service agreement between ILA and FRFC. Defendant advised the Department that the purpose of the agreement was to shift ILA's risk of greater-than-expected operating expenses to FRFC and to ensure that any such expenses would not ultimately become the liability of ILA. As part of the Form A seeking approval of the service agreement, defendant personally guaranteed a line of credit to fund operational losses for 1990; however, he never obtained the line of credit. Based upon defendant's representation, the Department approved the agreement. From June 1990 to September 1990, ILA paid $2.6 million of FRFC's expenses, and ILA carried FRFC's debt as an asset on ILA's books in order to maintain its required capital and surplus.

In June 1990, when FRFC's debt to Trustco came due, FRFC investors put up $600,000 to extend the loan's due date until January 1991. Towards the end of 1990, FRFC's attempt to obtain equity financing failed. Moreover, pursuant to the Department's approval of the Triad/ILT merger, FRFC had agreed to repay its $2.25 million premerger debt to ILT. Under the service agreement, FRFC owed ILA $2.6 million. Expenses associated with a proposed public offering had also been advanced by ILA to FRFC, as a result of which, FRFC further owed ILA $600,000.

Faced with mounting financial pressure, defendant negotiated with Trustco to pay $1.5 million of FRFC's debt to Trustco by January 1991. FRFC also planned to repay ILA $600,000. To raise the money, defendant connected ILA and FRFC with John Googe, a Winston-Salem businessman with an interest in Air-Lift Associates (ALA), a company at the Raleigh-Durham airport. Defendant proposed that ILA take a mortgage on a leasehold interest held by ALA. Edward Shugart, a consulting actuary initially hired as president of ILT, later became president and director of both ILA and FRFC. Shugart and defendant devised a plan under which ILA loaned Googe an additional $2.5 million, using another of Googe's companies, Southeastern Employee Benefit Services (SEBS), as collateral. Googe immediately used the SEBS loan to purchase $2.5 million of FRFC's preferred stock, for which a dividend was to be paid to Googe periodically. Both loans were closed the same day. Simultaneously, defendant signed two interlocking "side letters," which provided that SEBS could force FRFC to repay the $2.5 million if ILA attempted to proceed against the collateral for the ALA loan. From the proceeds of the

sale of its stock to Googe, FRFC paid Trustco $1.6 million, paid ILA $637,000, and paid a company controlled by defendant $77,000.

When the Department discovered the true nature of the ALA/SEBS loans, it ordered them rescinded. However, the terms of the loans prevented recision by ILA. FRFC also re-dated its service agreement with ILA, which effectively wiped out $2 million of FRFC's debt, an asset on ILA's books. Without that asset, ILA's capital and surplus fell below the minimum level required by law. In addition, defendant held on to the limited partnership units he and his brother had contributed to ILA, causing them to lose their value. To make matters worse, FRFC transferred the SEBS loan to a reinsurance company as consideration for reinsurance. FRFC then stopped paying dividends on the preferred stock purchased by Googe, causing ALA and SEBS to default on their loans. When the SEBS loan failed and the reinsurer discovered the nature of the loans, it dropped ILA's coverage. As a result of these events, defendant put ILA in liquidation in April 1993.

On 2 April 1993, the Honorable James E. Long, in his capacity as Commissioner of Insurance of the State of North Carolina, was appointed as liquidator of ILA according to the provisions of Chapter 58 of the North Carolina General Statutes. Pursuant to his statutory powers as liquidator, Commissioner Long filed a complaint naming James D. Peterson and others as defendants. The complaint alleged two causes of action against defendant Peterson: Count II stated a claim for damages resulting from defendant's breach of fiduciary duties as a corporate director and officer, and Count V stated a claim for damages proximately caused by negligent mismanagement of the liquidated insurer. The parties waived their right to a jury trial, and this matter was heard before the Honorable L. Bradford Tillery, who, on 7 April 1998, entered judgment awarding over $7 million in damages to plaintiff. From this judgment, defendant Peterson appeals.

Defendant challenges certain of the trial court's findings of fact and conclusions of law. "On appeal, the findings of fact made below are binding on this Court if supported by the evidence, even though there be evidence to the contrary. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 25-26, 265 S.E.2d 123, 126-27 (1980) (citations omitted). Furthermore, our Supreme Court has stated,

> Where, as here, a case is tried without a jury, the fact-finding responsibility rests with the trial court. Absent a total lack of substantial evidence to support the trial court's findings, such findings will not be disturbed on appeal. The essential ingredient here is "substantial" evidence. The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined "substantial evidence" as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' "

Pulliam v. Smith, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (citations omitted). As there was substantial evidence to support the trial court's findings and as we conclude its conclusions are correct, we affirm the trial court's decision.

I. Standing

[1] Defendant first contends that plaintiff lacks standing to bring suit on behalf of policyholders and creditors under N.C. Gen. Stat. § 58-30-120 (1994). He argues that North Carolina recognizes no cause of action by a policyholder and only very limited causes of action by a creditor against an insurance company's officers or corporate directors. Defendant asserts that under these facts, neither creditors nor policyholders could prosecute actions on their own behalf and that plaintiff, as liquidator, may not do so either. While North Carolina Appellate Courts have not definitively addressed the issue of the duty of an officer or director of an insurance company to a policyholder, we do not reach that issue here, because plaintiff properly brought this suit on behalf of ILA.

The first paragraph of the complaint alleges that plaintiff "brings this action in his capacity as the Liquidator of the Investment Life Insurance Company of America ('ILA') and on behalf of the creditors and policyholders of ILA pursuant to the provisions of North Carolina General Statutes §§ 58-30-120(a)(12) and (13)." Section 58-30-120 is titled, "Powers of liquidator," and provides,

> (a) The liquidator has the power: . . .
>
> (12) To continue to prosecute and to institute in the name of the insurer or in his own name *any and all suits and other legal proceedings*, in this State or elsewhere, and to abandon the prosecution of claims he deems unprofitable to pursue further.

N.C. Gen. Stat. § 58-30-120(a)(12) (1994) (emphasis added). Subsection (a)(12) grants wide-ranging power to the liquidator to institute all types of suits and other legal proceedings in the name of the insurer. Defendant admits that the duties and liabilities of directors and officers run directly to the corporation and does not challenge plaintiff's standing to bring the action on behalf of ILA. Moreover, plaintiff's suit on behalf of ILA is consistent with the provisions of Article 30 of Chapter 58, which regulates liquidation of insurers. Article 30 provides:

> (b) This Article shall be liberally construed to effect the purpose stated in subsection (c) of this section.
>
> (c) The purpose of this Article is to protect the interests of policyholders, claimants, creditors, and the public generally with minimum interference with the normal prerogatives of the owners and managers of insurers . . . .

N.C. Gen. Stat. § 58-30-1(b) and (c) (1994). Construing section 58-30-120(a) liberally to effect the Article's stated purpose, we hold that the statute confers standing upon plaintiff to assert the claims of ILA against defendant. Particularly, plaintiff has standing to bring suit against defendant for breach of fiduciary duty and negligent mismanagement. Thus, we need not address the issue of the duty owed by defendant to policyholders or creditors.

II. Statutes of Limitations

[2] Defendant next contends that plaintiff's causes of action are barred by applicable statutes of limitations. He argues that because the suit was brought on behalf of policyholders, section 58-30-130(b) does not apply. Because we have already determined that plaintiff brought this suit on behalf of ILA, we hold that section 58-30-130(b) does apply to the facts of this case. That statute states,

> The liquidator may, upon or after an order for liquidation, within two years or such subsequent time period as applicable law may permit, institute an action or proceeding *on behalf of the estate of the insurer* upon any cause of action against which the period of the limitation fixed by applicable law has not expired at the time of the filing of the petition upon which such order is entered.

N.C. Gen. Stat. § 58-30-130(b) (1994) (emphasis added).

Furthermore, this Court has stated,

> [U]nder G.S. § 58-30-130(b), we must first decide whether the complaint reflects that plaintiff's claims expired before filing of the petition upon which the order of liquidation was entered. If not, we must then determine whether the complaint indicates the instant action was instituted prior to running of the statute of limitations period on the respective claims alleged therein, or within two years after entry of the order of liquidation, whichever period is longer.

State ex rel. Long v. Petree Stockton, L.L.P., 129 N.C. App. 432, 442, 499 S.E.2d 790, 796 (1998), *cert. dismissed*, 350 N.C. 57, 510 S.E.2d 374 (1999). Plaintiff was appointed liquidator of ILA by an order dated 2 April 1993. This suit was filed on behalf of ILA on 12 December 1994, within the two-year extension allowed by section 58-30-130(b). Thus, any causes of action not barred by the applicable statute of limitations as of 2 April 1993 were timely filed. We note that a cause of action need only survive to the date a petition for liquidation is filed; however, because the petition was not included in the record on appeal, our analysis utilizes the date of the order of liquidation and in that sense, is limited to the facts of this case.

The complaint alleged damages against defendant in Counts II and V for actions occurring after April 1990. The ALA/SEBS loans were closed on 1 January 1991, giving rise to Count II's claim for breach of fiduciary duties, which defendant concedes, and we agree, is subject to at least a three-year statute of limitations. Count V is an action for negligent mismanagement occurring after the ALA/SEBS loans and is therefore subject to a three-year statute of limitations. *See* N.C. Gen. Stat. § 1-52(5) (Cum. Supp. 1998). Because alleged acts of misconduct occurred within three years prior to the order appointing plaintiff as liquidator and because plaintiff filed these actions within two years of his appointment, Counts II and V are not barred by the applicable statutes of limitations. This assignment of error is overruled.

III. Challenges to Findings and Conclusions

Defendant next contends that the trial court's findings of fact are unsupported by or contrary to the evidence. In his brief, defendant enumerates specific challenges to the trial court's findings pertaining to the ALA/SEBS loans, the limited partnership units, and the service

agreement. We address defendant's concerns *seriatim*, and affirm the trial court.

(A) ALA/SEBS Loans

[3] Defendant contends there was insufficient evidence to support the trial court's findings that the "as-is" value of collateral for the ALA/SEBS loans was well beneath the minimum value approved by the boards of directors of ILA and FRFC. To the contrary, we find sufficient evidence to support this finding, primarily in the testimony of Ronald W. Loftis, who prepared the report appraising the collateral for the loans.

Defendant admits the court's finding that defendant failed to heed Ernst & Young's advice is "literally true," but states that it is "pregnant with an incorrect pejorative implication." Whatever the implication of the finding, there is substantial evidence to support it. The trial court found that Ernst & Young suggested the Department might not approve the ALA/SEBS loans and that defendant should provide an escape provision in the loan documents. Among the exhibits at trial was a letter that clearly stated Ernst & Young's concerns which, as the loan documents themselves indicate, fell on deaf ears.

Defendant next challenges the court's finding that the SEBS loan was subject to N.C. Gen. Stat. § 58-19-30(b)(2) (1994). He argues that the finding is a mixed matter of law and fact and is therefore reviewable *de novo*. While defendant is correct about the standard of review, we affirm the trial court's ruling. Section 58-19-30(b)(2) requires the following transactions to be approved by the Commissioner:

> Loans or extensions of credit to any person who is not affiliated, where the insurer makes the loans or extensions of credit with the agreement or understanding that the proceeds of the transactions, in whole or in substantial part, are to be used to make loans or extensions of credit to, to purchase assets of, or to make investments in, any affiliate of the insurer making the loans or extensions of credit provided the transactions equal or exceed: (i) with respect to nonlife insurers, the lesser of three percent (3%) of the insurer's admitted assets or twenty-five percent (25%) of surplus as regards policyholders; (ii) with respect to life insurers, three percent (3%) of the insurer's admitted assets; each as of the preceding December 31.

N.C. Gen. Stat. § 58-19-30(b)(2) (1994). Here, ILA's Annual Statement for the year ending 31 December 1990 reported assets worth less than

$75 million. The ILA-SEBS-FRFC transfer was worth $2.5 million and therefore exceeded the three percent (3%) requirement of section 58-19-30(b)(2)(i) or (ii). Furthermore, as Shugart testified, ILA was not impaired (having less than the required capital and surplus) as long as it maintained the $2.6 million debt of FRFC on its books. Based on this fact, the trial court could properly conclude that the ILA-SEBS-FRFC transfer of $2.5 million exceeded the twenty-five percent (25%) requirement of section 58-19-30(b)(2)(i).

In addition, defendant concedes that if the ILA loan to SEBS had been conditional upon the subsequent SEBS purchase of FRFC preferred stock, the statute would apply. The evidence before the trial court indicates that such a condition existed even though one was not expressly made in the carefully drafted loan documents. Eileen McDermott Taylor, attorney for FRFC, testified in her deposition that,

> A. [O]ne could look at the transaction and know that there were loans being made to Googe affiliates and investments being made at the same time in ILA and know the statute and know that there was a potential problem there. . . .
>
> Q. Were you aware before January 1, 1991, that ILA would not loan money to Air-Lift Associates unless SEBS borrowed money, which it would then reinvest in preferred stock of FRFC?
>
> A. I don't think that was ever put to me bluntly.
>
> Q. But you got that impression?
>
> A. Yes, because the transaction—well, my views on this are a little bit colored by looking at the Air-Lift documentation way after the fact, which I think probably colored my views about whether it would have been a reasonable transaction to enter into.
>
> But I think that the whole picture in the sense of the loans being accompanied by the stock was before us, yes.

Taylor's deposition supports the notion that the ILA loan to SEBS was conditional upon the subsequent purchase of FRFC stock, and thus, lends credence to the trial court's finding that the loan violated section 58-19-30(b)(2). Based on this evidence, we affirm this finding of the trial court.

Defendant further argues that violation of the statute did not necessarily result in a breach of his fiduciary duties as a director. The question of whether violation of the statute is a *per se* breach of

defendant's fiduciary duties is moot in light of more than ample evidence supporting the trial court's finding that defendant breached his fiduciary duty to ILA. As one example, while much of the $2.5 million proceeds from the purchase of stock went primarily to pay the debt to Trustco, $77,000 went to repay a debt to a company controlled by defendant. Furthermore, if Trustco had been unable to collect from FRFC, it had recourse against defendant, who had personally guaranteed the loan. Defendant's use of proceeds from the stock purchase staved off collection efforts against his personal assets. Because this Court has held that the duty of good faith requires directors to avoid self-dealing, s*ee Freese v. Smith*, 110 N.C. App. 28, 38, 428 S.E.2d 841, 848 (1993), the trial court did not err in finding that defendant breached his fiduciary duties.

Defendant argues that there was no evidence to support the court's finding that defendant's management decisions caused ILA's decline. However, in the record, there is competent evidence indicating that defendant caused $2 million of FRFC's debt to ILA to be eliminated without repayment and that ILA's interest in limited partnership units declined in value due to defendant's hesitancy to sell these units. Defendant correctly argues that the "side letters" only caused one prospective purchaser to lose interest in purchasing ILA, rather than the several prospective purchasers implied in the court's findings. However, even allowing for defendant's correction, there was evidence that the "side letters" discouraged at least one potential buyer. The trial court's finding was not materially erroneous. Defendant states the trial court found he should have foreseen the default of the ALA/SEBS loans. However, a more accurate characterization of the finding is that a reasonable director with defendant's knowledge would be able to forecast default by ALA/SEBS. We find that there was evidence from which the judge, in light of defendant's experience, could evaluate the reasonableness and viability of the ALA/SEBS loans. Thus, the trial court's findings with respect to the ALA/SEBS loans are supported by substantial evidence.

(B) Limited Partnership Units

Defendant next challenges the trial court's findings as to the limited partnership units. He claims that, contrary to the trial court's findings, the Department was aware of FRFC's contribution of limited partnership assets prior to 1 December 1989. Defendant is correct; the Department did receive an amended Form A on 28 November 1989. However, the resulting discrepancy is minor and has no effect

on the outcome of the case. Regardless of when defendant gave the Department notice of the substitution, the nub of the finding is that ILA suffered damages resulting from the substitution and loss of value in the units. Evidence adduced at trial supports this finding. Furthermore, while defendant is correct about the date of notification to the Department, he is in error when he alleges that FRFC's commitment to contribute additional capital to ILA did not specify that the capital would be cash. An amendment to FRFC's Form A, which is contained in the trial exhibits, states, "FRFC will contribute from FRFC funds $5 million in Cash to the capital of ILT. . . ."

(C) Service Agreement

Defendant next objects to the trial court's findings about the service agreement between ILA and FRFC. Initially, defendant challenges the trial court's finding that defendant never obtained a promised line of credit to secure this service agreement. He contends that the credit was in fact arranged, but because a condition to the extension of credit was not met, no credit was extended to the defendant. As the evidence at trial demonstrated, defendant represented that he would obtain credit, and the credit was not obtained. Therefore, the finding is supported by substantial evidence.

Defendant also argues that there is no evidence that he participated in a plan to re-date the service agreement, an action which resulted in a $2 million loss for ILA. However, Shugart, the president of FRFC, testified as follows:

> Q Now, there's a notation here, "Ed understands agreement was approved with 1/1/90 date and Department is waiting for a quarterly showing." Is that a correct statement?
>
> A. Yes, sir, I believe that is. . . .
>
> Q. Well, is it also a true statement that you wanted to see if you could wait until 1/1/91 to make the agreement effective?
>
> A. Yes, sir. . . .
>
> Q. If ILA had expensed those expenses, paid them itself and not characterized them as an asset receivable from its parent, ILA would have been impaired and would not have had the necessary capital and surplus, correct?
>
> [overruled objection]
>
> A. Yes, sir, it would have.

Q. Now after October of 1990, another quarterly statement was filed with the North Carolina Department of Insurance, is that correct?

A. We would have filed one as of the end of September 30. . . .

Q. Now does this quarterly statement show an admittable asset from First Republic to ILA?

A. Yes, sir, it does.

Q. In what amount?

A. $2,639,000.

Q. Is that likewise monies that had been spent by ILA for expenses that were being shown as the amount due to them from First Republic?

A. Yes, sir.

Q. And characterized as a good asset?

A. Yes, sir.

Q. First Republic didn't have $2.6 million, did it?

A. No, sir.

Q. If ILA, which had spent the money, had treated it as ILA's expense on its quarterly statement, that asset, $2.6 million would not have appeared, is that correct?

A. That's correct.

Q. And what would the effect have been on the company's required level of capital and surplus?

A. The company's capital and surplus would have been $2.6 million lower and that would have shown it to be impaired.

Q. Now did you sign this statement under oath?

A. Yes, sir. . . .

Q. Mr. Peterson was aware of the quarterly and annual financial statements that were being filed by the company, was he not?

A. Yes, sir.

Shugart went on to testify that despite realizing that FRFC would not be able to pay the debt it owed to ILA, ILA continued to maintain the debt of FRFC as an asset. This testimony and ILA's financial statements are sufficient evidence to support the trial court's finding of fact.

Defendant challenges the trial court's finding that he and Shugart "did away with" a $2.6 million debt owed by FRFC to ILA, arguing that there is no evidence to establish his participation in the debt reduction. However, ILA's annual statement for 1990 shows only $636,785 receivable from parent, subsidiaries, and affiliates, even though FRFC did not pay the service-agreement debt. Defendant is listed as ILA's Chief Executive Officer on this annual statement, and when viewed with Shugart's testimony surrounding the quarterly and annual statements, the evidence is substantial and supports the trial court's finding of defendant's complicity in the reduction. Moreover, conference notes of FRFC's attorney indicate that defendant was present at a meeting where re-dating the service agreement was openly discussed.

Defendant further alleges that there is no substantial evidence to show that he caused ILA to enter into another surplus relief agreement. Again, however, we turn to the notes and deposition of attorney Taylor. In her deposition, Taylor stated that her notes indicated that she discussed the surplus relief agreement in a conference with Stephen Bull, Ed Shugart, and defendant. She further stated that

> Jim Peterson had a practice—he was concerned about confidentiality, and he did have a practice of, if he thought that it was questionable whether a transaction would come to fruition or not, not identifying it until he was ready to say what—you know, that they were coming to the table and he thought he could close the deal.

From this evidence, a reasonable mind could conclude that defendant supported the surplus relief agreement. Thus, there is substantial evidence on which the trial court could properly base its finding.

Defendant correctly points out that no evidence exists to support the trial court's finding that he personally guaranteed to pay expenses under the service agreement. However, this is not a material error, for the record does establish that defendant agreed to secure a line of credit to cover the operating loss for 1990 but failed to do so. Thus, while the trial court erred in the detail, it was correct in basing its

finding in part on the fact that the Department and ILA relied on personal guarantees made by defendant, which he failed to honor.

In sum, although defendant has correctly pointed out a modicum of errors in the trial court's findings of fact, we find none to be material. Such errors are almost inevitable in a case of this complexity, and those identified by defendant have no effect on the court's conclusions of law. We have not addressed every objection to the trial court's findings raised by defendant in this appeal. However, because there is substantial evidence supporting the challenged findings, defendant's contention that the trial court's findings are not supported by sufficient evidence is overruled.

IV. Business Judgment Rule

[4] Defendant next asserts that the trial court improperly concluded that defendant's actions do not fall under the shield provided by the business judgment rule. We disagree. Initially, we note that the Business Corporation Act provides, "A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section." N.C. Gen. Stat. § 55-8-30(d) (1990) (amended 1993). As with other portions of the Business Corporation Act, this section is not meant to abrogate the common law. *See Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 426 S.E.2d 685 (1993) (stating that the common law rule permitting shareholders of a public corporation to inspect accounting records was not abrogated by the Business Corporation Act); *Two Way Radio Service v. Two Way Radio of Carolina*, 322 N.C. 809, 370 S.E.2d 408 (1988) (recognizing common law protection of trade names beyond the provisions for corporate names in the Business Corporation Act, which expressly preserved the common law). Rather, language in section 55-8-30 demonstrates the legislative intent to draw from the common law. Subsection (a) of section 55-8-30 requires that a director discharge his duties "(1) In good faith; (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) In a manner he reasonably believes to be in the best interests of the corporation." N.C. Gen. Stat. § 55-8-30(a) (1990) (amended 1993). As the official comment to this section states, the use of certain phrases "embodies long traditions of the common law." Therefore, section 55-8-30(d) does not abrogate the common law of the business judgment rule. Accordingly, proper analysis requires examination of defendant's actions in light of the statutory protections of N.C. Gen. Stat. § 55-8-30(d) (1990) (amended 1993) and the

business judgment rule, either or both of which could potentially insulate him from liability.

A leading authority on business law states,

> [The business judgment rule] operates primarily as a rule of evidence or judicial review and creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose.

Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.6, at 281 (5th ed. 1995). Additionally, this Court has held, "We are also mindful that the business judgment rule protects corporate directors from being judicially second-guessed when they exercise reasonable care and business judgment." *HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 10, 379 S.E.2d 868, 873, *review on additional issues allowed*, 325 N.C. 271, 382 S.E.2d 439 (1989), *and modified, aff'd in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). The evidence in the record reveals that defendant's actions were more than mere errors in judgment. Instead, he was a leading participant in a plan to benefit himself and his interests at the expense of ILA. The findings of the trial court, which we have held are based on substantial evidence, support its conclusion that defendant is not protected by the business judgment rule.

The trial court's findings also support its conclusion that defendant's actions did not comply with the requirements of N.C. Gen. Stat. § 55-8-30(d) (1990) (amended 1993). To receive the benefit of subsection (d), a director must discharge his duties in compliance with the requirements of subsection (a), enumerated above. Again, the trial court based its findings on substantial evidence, and its findings support the conclusion that defendant is liable for his actions, which failed to live up to the statutory standards.

V. Director's Breach of Duty

[5] Defendant next argues that N.C. Gen. Stat. § 55-8-30(b) (1990) (amended 1993) excuses any breaches of his fiduciary duty as a director because he relied on the opinions of attorneys and accountants. In support of this position, defendant states that he sought and

received the advice of a leading law firm in the state, that he sought and received the advice of a reliable national accounting firm, and that he relied on advice from Shugart, an experienced life insurance actuary. Plaintiff responds that defendant, although seeking and receiving advice on corporate decisions, ignored advice that was contrary to his efforts to maintain FRFC as a going concern. We conclude that the evidence in the record supports plaintiff's assertions and the trial court's conclusions. After speaking with ILA's attorney, who had expressed concern over the circularity of the ALA/SEBS loans, defendant told the attorney to defer to the judgment of Ernst & Young. In a letter dated 30 November 1990 and addressed to defendant, Ernst & Young revealed its assessment that ALA's liabilities exceeded its assets by 35% and that SEBS had "no real property, no significant personal property, and no significant assets that would have a cash market value to support a loan (mortgage on collateral) of the size contemplated." Ernst & Young suggested that "any transaction you enter contain escape provisions that enable you to call the [ALA/SEBS] loans in the event that they are determined not to be admitted assets by regulatory agencies." The same letter also advised defendant to obtain legal advice about loans to officers and directors. This letter is compelling evidence that defendant was actually aware that the ALA/SEBS loans were under-collateralized, potentially making them invalid assets under the Department's regulatory program. Despite this awareness, and despite words of caution from attorney Taylor in addition to those of Ernst & Young, defendant proceeded with the loans, leaving no way out when the Department ordered them rescinded. Thus, there was substantial evidence to support the trial court's conclusion that defendant breached his fiduciary duties and that his actions were not made in reliance on the advice of professionals.

VI. Causation of Damages

[6] Finally, defendant argues that no damages were proximately caused by his actions. We find that there is substantial evidence to support a finding to the contrary. Defendant was a director of both a parent company (FRFC) and a subsidiary (ILA). In this role, defendant participated in and directed the decision to permit the parent to utilize funds of the subsidiary to pay the parent's debts, which he had personally guaranteed. The complaint alleged, and evidence supported, damages to ILA brought about by defendant's actions. Defendant caused ILA to enter a reinsurance agreement while ILA was impaired. The impairment arose because FRFC re-dated its serv-

ice agreement with ILA, eliminating $2 million in assets from ILA's books. While the reinsurance agreement deepened ILA's statutory insolvency, defendant continued to operate ILA in a reckless manner. Other damages resulted from losses caused by default on the ALA/SEBS loans, which resulted from FRFC's failure to pay dividends on its preferred stock. Defendant damaged ILA even further by holding on to limited partnership units until their value to ILA was significantly diminished. The evidence further established that defendant breached his duty of good faith and care by participating in these transactions. Based on the findings of the trial court, which are supported by substantial evidence, we hold that plaintiff met his burden of showing that defendant's actions proximately caused damage to ILA.

In summary, we hold that plaintiff, as liquidator of ILA, has standing to bring the causes of action in Counts II and V of the complaint against defendant on behalf of ILA. Additionally, we hold that the causes of action in Counts II and V of the complaint were timely brought against defendant. Furthermore, the material findings of the trial court are based on substantial evidence and in turn support the trial court's conclusions that defendant breached his duties as a director, that defendant is not protected by the business judgment rule, that defendant did not reasonably rely on advice from professionals, and that defendant's actions proximately caused damage to ILA. We therefore affirm the decision of the trial court.

Affirmed.

Chief Judge EAGLES and Judge WYNN concur.

STATE OF NORTH CAROLINA v. CHARLES CARLO CINTRON

No. COA98-634

(Filed 6 April 1999)

1. Homicide— first-degree murder—sufficiency of evidence of corpus delicti

The trial court correctly denied defendant's motion to dismiss a charge of first-degree murder where there was enough evidence from which any rational trier of fact could find that the victim's death was not an accident and was caused by defendant.

2. Homicide— first-degree murder—premeditation and deliberation—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of first-degree murder where defendant alleged insufficient evidence of premeditation and deliberation but the victim was killed with defendant's 30.06 rifle, which was seen leaning against a couch on which defendant was seated just prior to the killing and which was normally kept in a bedroom closet; defendant made extensive efforts to conceal and dispose of the victim's body, including cleaning the apartment after the shooting; and the victim was shot in the face at close range with a 30.06 rifle.

3. Homicide— first-degree murder—instruction on second-degree murder denied—error

The trial court erred in a first-degree murder prosecution by not giving an instruction on second-degree murder where conflicting inferences can be drawn from the evidence on premeditation and deliberation.

Judge LEWIS dissenting.

Appeal by defendant from judgment filed 8 October 1997 by Judge Jerry Cash Martin in Guilford County Superior Court. Heard in the Court of Appeals 23 February 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Joan Herre Erwin, for the State.

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

GREENE, Judge.

Charles Carlo Cintron (Defendant) appeals from his jury conviction for the first-degree murder of Joel Anderson (Joel).[1]

The State's evidence at trial tended to show the following: On 5 February 1994, Defendant lived in Greensboro, North Carolina with his wife Niurka Cintron (Nikki) and their two children. Defendant was employed as a mechanic, and recently had obtained a 1983 Dodge Omni automobile. At approximately 12:30 a.m. on the morning of 5 February 1994, Defendant returned to his home with a white man he referred to as "Joel." The two men had been drinking, and continued drinking at Defendant's apartment. Nikki testified that she heard the two men arguing, but "couldn't hear what they were saying." She further testified that Joel stated that he "wanted to die." When Nikki went into the kitchen, she observed the men sitting in the living room; Defendant was sitting on a couch, and Joel was sitting in a lounge chair in the corner of the room. Nikki also observed that Defendant's 30.06 rifle was leaning against the couch and between the two men. The rifle normally was kept in the bedroom closet. Nikki then left the apartment to feed her cat, and while outside, heard a gunshot. She immediately returned to the apartment and saw Defendant standing in front of Joel with the rifle in Defendant's hand, and smelled the odor of gun smoke and burned flesh. Joel was still seated in the lounge chair in the corner of the room and had been shot in his right eye. Nikki testified that she wanted to call the police, but Defendant refused and informed her that she would "go down with him if [she] said anything." Defendant then had Nikki help him to hide the body in a shed behind their apartment, and to clean the apartment. She further testified, when shown a photograph of Joel Anderson, that he was the person in her apartment on the morning of 5 February 1994.

About two weeks later, Defendant decided to move his family to Denton, Maryland to stay with a friend. Due to the cold weather, Joel's body became frozen, and did not emit an odor. Defendant packed the dead body in the hatchback area of the Dodge Omni, in the spare tire well, and attached the entire car to the back of a U-Haul truck. Upon arriving in Maryland, both Defendant and Nikki continued driving the Dodge Omni with the dead body in the hatchback. Once the weather warmed, the dead body started to emit odoriferous fumes, and Defendant received several complaints from neighbors.

1. The indictment charged Defendant with killing Joel Anderson.

In June of 1994, Nikki decided to leave Defendant and take the children to Miami, her home. Defendant then moved in with a friend, Ben Crosden (Crosden), who owned a farm in Cordova, Maryland. The Crosden farm was cluttered with animals, farm equipment, stranded automobiles, and woods. In November of 1994, Defendant moved into his own apartment in Easton, Maryland, but left the Dodge Omni parked at the Crosden farm.

On 22 March 1996, Crosden was looking for a barrel to use in feeding his farm animals and discovered one approximately 500 yards from his house emitting a terrible odor. He placed the barrel on its side, but waited until the next day to explore its contents. The next day, he began emptying the barrel and discovered the remains of a human body. At first, Crosden thought the remains were those of Link Bornos, a man reported missing in the area and known by the Crosdens. Crosden then called the authorities, who seized the barrel and the remains and delivered them to the medical examiner's office. The police later searched the Crosden farm again, and recovered a note from the Dodge Omni written by Nikki to Defendant asking if "it" was still in the car. The police then spoke with Nikki, who eventually confessed to what she witnessed and the subsequent events.

The medical examiner collected the remains and determined the body was that of an approximately thirty-year-old Caucasian male. The examiner also determined the cause of death to be "blunt force head injuries . . . like somebody had pulverized the skull, with multiple blows, or . . . a car had run over the skull, or . . . a shotgun . . . rifle . . . or high-powered pistol wound to the head." Although there was "massive head trauma," the examiner noted that the "teeth were in fairly good shape." The medical examiner then requested and received Joel's dental records. These records were received from Joel's family, and bore Joel's name, address, date of birth, telephone number, and signature. Additionally, Joel's mother confirmed that her son had certain teeth extracted, and testified she had "[n]o doubt" the handwriting in the dental records was Joel's. The records labeled and sent as Joel's dental records, however, did not match the teeth of the remains because the records indicated that Joel had certain teeth extracted that were present in the reconstructed skull. Faced with this discrepancy, the examiner requested photographs of Joel and determined, from those photographs, that the body was Joel's, and that the dental records were "in error." The trial court overruled Defendant's objection to the examiner's opinion, offered at trial, that the dental records were "in error." The medical examiner further tes-

tified that it was unlikely that a victim could manipulate a 30.06 rifle as to place the weapon at his eye, and that most suicides caused by rifles occur "under [the] chin or in the middle of [the] forehead." The examiner added that the injuries observed from the remains were inconsistent with suicide because the injuries "would be a near contact wound, and . . . the whole eye would be disintegrated." It was conceded, however, that suicide by shooting yourself in the right eye with a 30.06 rifle "is possible, but highly unlikely." The evidence also revealed that two trinkets, which had been given to Joel by his niece and grandniece, were found with the skeletal remains.

At the conclusion of the State's evidence, Defendant moved to dismiss the case arguing there was insufficient evidence to prove he committed first-degree murder "because there was no evidence of premeditation [or] deliberation." Defendant commented, "all they have proven is second-degree murder at most." The court denied Defendant's motion to dismiss, determining "there [was] substantial evidence of each and every element of the offense of first-degree murder." Defendant did not present evidence in this case, and renewed his motion to dismiss at the close of all the evidence. This renewed motion also was denied.

At the charge conference, the trial court proposed only to submit the question and instruct the jury on whether Defendant was "guilty of the first-degree murder of Joel Anderson, or not guilty." Defendant objected to the court's proposed instructions on first-degree murder and "request[ed] instruction on second-degree murder and lesser-included offenses." Defendant also requested other instructions, including a special instruction on suicide. In response to Defendant's request for the submission of lesser-included offenses of first-degree murder, the trial court noted, "In reviewing this evidence, the Court is of the view that the evidence is positive as to each element of the offense of first-degree murder, there is no conflicting evidence. And the Court does continue to deny the request for an instruction on the lesser-included offense."

The court submitted only first-degree murder to the jury, and it returned a verdict of guilty. Defendant was sentenced to life imprisonment.

The dispositive issues are: (I) whether there was substantial evidence of first-degree murder; and if so, (II) whether there was conflicting evidence regarding the premeditation and deliberation ele-

ments of first-degree murder, thus entitling Defendant to a jury instruction on second-degree murder.

I

First-Degree Murder

"First degree murder is the unlawful killing of a human being with malice, premeditation and deliberation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). "Malice," which can be express or implied, is not necessarily "hatred or ill will," but rather "is an intentional taking of the life of another without just cause, excuse or justification." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). "Premeditation" occurs when the defendant forms the specific intent to kill some period of time, however short, before the actual killing. *State v. Weathers*, 339 N.C. 441, 451, 451 S.E.2d 266, 271-72 (1994). "Deliberation" is when the intent to kill is formed while the defendant is in a cool state of blood rather than under the influence of a violent passion suddenly aroused by sufficient provocation. *Id.*

Defendant contends his motion to dismiss should have been granted because there was not substantial evidence to show (A) that Defendant killed Joel, or if so, (B) that he did so with premeditation and deliberation. We disagree.[2]

"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).

A

Corpus Delicti

[1] In a criminal homicide case, the State has the burden of proving *corpus delicti*, or the body of the transgression, with competent evidence. *State v. Cade*, 215 N.C. 393, 395, 2 S.E.2d 7, 9 (1939). To establish *corpus delicti*, (1) there must be a corpse, or circumstantial evidence so strong and cogent that there can be no doubt of the death; and (2) criminal agency must be shown. *State v. Dawson*, 278 N.C. 351, 358, 180 S.E.2d 140, 145 (1971). "The independent evidence must tend to point to some reason for the loss of life other than natural causes, suicide or accident." *Id.*

2. Defendant does not contend there is inadequate evidence of malice and we therefore do not address that issue.

In this case, there is substantial evidence that the body found on the farm in Maryland was Joel's body, and that he was the person killed on 5 February 1994 in Defendant's apartment. The medical examiner testified, after examining photographs of Joel, that the body belonged to Joel because the teeth of the body matched the teeth of the person shown in the photograph, and that severe head injuries were the cause of death. Additionally, several trinkets were found with the body which matched those previously given to Joel by his relatives. Furthermore, Nikki testified, using the same photographs analyzed by the examiner, that Joel was the man who was killed in Defendant's apartment and that the cause of death was a shot to the head.

Even assuming the corpse found on the Maryland farm did not belong to Joel, there is circumstantial evidence so strong and cogent that there can be no doubt of the death of Joel. The man named Joel, who was killed in the Defendant's apartment, was identified later by Nikki as Joel Anderson, from a photograph of Joel Anderson.

Furthermore, there is substantial evidence that Joel's death came at the hands of Defendant and was not a result of "natural causes, suicide or accident," thus satisfying the criminal agency prong of the *corpus delicti* test. The testimony of Nikki confirms Joel was killed, and did not die from natural causes. Not only did she smell the gun smoke, but she also saw that Joel was shot through his right eye. Additionally, her testimony reveals that Defendant was standing over Joel directly after the shooting holding his rifle. Joel had not moved from the position in which Nikki last saw him. This is enough evidence from which any rational trier of fact could find Joel's death was not an accident[3] and was caused by Defendant. Finally, the testimony of the medical examiner regarding the "highly unlikely" possibility that Joel's death was a suicide was enough substantial evidence to satisfy this prong of the *corpus delicti* test. The trial court therefore correctly denied Defendant's motion to dismiss on this basis.

B

Premeditation and Deliberation

[2] Because premeditation and deliberation ordinarily are not susceptible of proof by direct evidence, they generally must be established by circumstantial evidence. *Weathers*, 339 N.C. at 451, 451

3. Defendant concedes in his brief to this Court that, "Based on the way the body was found, the pathologist determined this was a homicide instead of an accident."

S.E.2d at 271. Several factors are proper to consider in determining whether the killing was done with premeditation and deliberation, including: the killing was particularly cruel or brutal; preparations were made before the homicide for concealment of the crime; the position of the murder weapon prior to the killing; the nature and number of the victim's wounds; and the lack of provocation. *See* 2 Charles E. Torcia, *Wharton's Criminal Law* § 142 (15th ed. 1994); *State v. Mlo*, 335 N.C. 353, 369, 440 S.E.2d 98, 106, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994); *see also State v. Thomas*, 332 N.C. 544, 556, 423 S.E.2d 75, 82 (1992), *disapproved of on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998); 41 C.J.S. *Homicide* § 183, at 25-26 (1991).

In this case, there is substantial evidence of premeditation and deliberation: (1) Joel was killed with Defendant's 30.06 rifle, which normally was kept in the bedroom closet, but was seen leaning against the couch in which Defendant was seated just prior to the killing; (2) Defendant made extensive efforts to conceal and dispose of Joel's body, including the cleaning of the apartment after the shooting; and (3) the victim was shot in the face at close range with a 30.06 rifle. The trial court thus properly denied Defendant's motion to dismiss based on lack of premeditation and deliberation.

II

Second-Degree Murder

[3] Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation, and is a lesser-included offense of first-degree murder. *State v. Camacho*, 337 N.C. 224, 232-33, 446 S.E.2d 8, 12-13 (1994). A defendant is entitled to have any lesser-included offenses submitted to the jury, as possible alternative verdicts, *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E.2d 406, 413 (1977), unless the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence or conflicting inferences from the evidence with respect to any element of the charged crime, *State v. Phipps*, 331 N.C. 427, 457-59, 418 S.E.2d 178, 194-95 (1992); *State v. Perry*, 209 N.C. 604, 606, 184 S.E. 545, 546 (1936); *State v. Strickland*, 307 N.C. 274, 283 n.1, 298 S.E.2d 645, 652 n.1 (1983), *overruled on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

Although a defendant's efforts to dispose of a victim's body after a homicide can support a finding of premeditation and deliberation, it also can support the contrary inference. It does not follow that

every homicide followed by an effort to dispose of the victim's body was done with premeditation and deliberation. It is reasonable, in some cases, to infer that the defendant panicked after the killing and then attempted to hide or dispose of the body to prevent others from learning of a crime committed without premeditation and deliberation. The resolution of the conflicting inferences is for the jury.

In this case, we believe conflicting inferences can be drawn from the evidence supporting the submission of this case to the jury on premeditation and deliberation. Because the disposal of the body, the shooting in the face, and the placement of the gun beside the couch where Defendant was sitting do not mandate the sole inference of premeditation and deliberation, it was the prerogative of the jury to resolve the multiple inferences. *See State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 527-28 (disposal of body after homicide could support finding of premeditation and deliberation but trial court also submitted second-degree murder for jury to determine), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). Furthermore, the State's own witness testified that before the shooting, the two men had been drinking alcohol, and were arguing about something she could not decipher. From this evidence, a jury *could* conclude that Defendant was provoked by Joel, thus negating premeditation and deliberation. *Thomas*, 332 N.C. at 556, 423 S.E.2d at 82 (lack of provocation is circumstance that can show premeditation and deliberation). Because conflicting inferences could be drawn from the evidence with respect to premeditation and deliberation, the trial court erred in not submitting second-degree murder to the jury. Because the State has failed to show beyond a reasonable doubt that the outcome would have been the same if second-degree murder had been submitted to the jury, Defendant is entitled to a new trial. *See Camacho*, 337 N.C. at 234-35, 446 S.E.2d at 14 (failure to instruct on second-degree murder when warranted is error of constitutional dimensions, and entitles the defendant to a new trial unless the State proves beyond a reasonable doubt that the outcome would have been the same even if the lesser-included offense was submitted); N.C.G.S. § 15A-1443(b) (1997). We have considered Defendant's remaining assignments of error carefully, and overrule them.

New trial.

Judge HORTON concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

Because I do not believe sufficient evidence was presented to warrant submission of second-degree murder to the jury, I respectfully dissent. I note first that defendant filed a 41-page brief with this Court, in direct contravention of N.C.R. App. P. 28(j). Regardless of that ground for dismissing the appeal, however, I believe there is no error in this case.

Defendant presented no evidence at trial. The evidence presented by the State's witnesses tended to show that on the night of the murder, defendant and the victim had been drinking. Defendant's wife heard the two arguing while they were seated in the living room. Defendant's 30.06 rifle was not in its normal location in the bedroom closet, but rather was against the sofa beside defendant. Defendant's wife went outside briefly to feed her cat; while she was outside she heard a shot. When she returned to the living room, she smelled gun powder and saw defendant standing over the victim with the rifle pointed at the victim. The victim had been shot once through his right eye. Rather than call the police as his wife wanted to do, defendant threatened his wife and convinced her to help him hide the body and clean the living room. Defendant hid the body in a shed and later in the family car for months; defendant related elaborate stories to explain the stench of the rotting corpse. As the majority opinion correctly notes, this evidence is sufficient to support a finding of premeditated and deliberated murder. The majority believe, however, that the jury reasonably might find defendant lacked premeditation and deliberation when he killed the victim. The majority opinion holds a jury might reasonably conclude that defendant panicked and hid the body, or that defendant was legally provoked by the victim.

Defendant presented no evidence that he hid the body in panic after murdering the victim without premeditation and deliberation. Such a rationale for defendant's behavior is mere conjecture and not supported by the evidence. Furthermore, the majority opinion asserts that testimony from defendant's wife that the two men argued before the murder might raise the inference that defendant was provoked by the victim. "Anger and emotion frequently coincide with murder, but a court should instruct on murder in the second degree only when the evidence would permit a reasonable finding that the defendant's anger and emotion were strong enough to disturb the defendant's ability to reason." *State v. Perry*, 338 N.C. 457, 463, 450 S.E.2d 471, 474 (1994). No evidence whatsoever was presented that defendant

was so enraged as to be unable to reason, premeditate, or deliberate. Our Supreme Court explained:

> [E]vidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason. Without evidence showing that the defendant was incapable of deliberating his actions, the evidence could not support the lesser included offense of second-degree murder.

State v. Solomon, 340 N.C. 212, 222, 456 S.E.2d 778, 785, *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995). Defendant presented no such evidence, and as such a verdict of second-degree murder would not be supported by the evidence. *See State v. Rose*, 339 N.C. 172, 195, 451 S.E.2d 211, 224 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

The evidence viewed as a whole does not support the submission of a second-degree murder charge to the jury. The test is not whether the jury could have convicted defendant of a lesser included offense, but whether the State showed each element of the crime charged with no conflicting evidence presented. *See State v. Walker*, 343 N.C. 216, 221-22, 469 S.E.2d 919, 922, *cert. denied*, 117 S.Ct. 254, 136 L. Ed. 2d 180 (1996). Here, there was no conflicting evidence from defendant or anyone else to indicate that defendant did not commit premeditated and deliberated murder. Defendant took the rifle from its normal place in the home, stood, pointed the gun at the victim, inflicted a fatal wound, and enlisted help in hiding the victim's body and other evidence of his crime. Indeed, the victim apparently remained seated throughout most of his stay and was not armed. As stated above, there was no evidence of provocation by the victim, defendant's conduct after the crime was quite incriminating, and the parties had disagreed. These facts are evidence of premeditation and deliberation. *See State v. Williams*, 308 N.C. 47, 69, 301 S.E.2d 335, 349, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). Lesser included instructions are not to be given indiscriminately, *see State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986), and here the evidence raised no "material question as to the existence of premeditation [or] deliberation." *State v. Brown*, 339 N.C. 426, 439, 451 S.E.2d 181, 189 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995). Accordingly, a second-degree murder instruction had no basis, and the jury was properly instructed. I find no error.

STATE OF NORTH CAROLINA v. BARRY DEWAYNE REAVES

No. COA98-604

(Filed 6 April 1999)

1. Evidence— pistols marked as exhibits but not admitted— no abuse of discretion

There was no abuse of discretion in a prosecution resulting in a conviction for conspiracy to commit murder in allowing the State to mark as exhibits but not admit into evidence certain firearms which the State conceded were not the weapons used to commit the offense but which were used to illustrate testimony. Assuming that exhibiting the guns to the jury amounted to an admission into evidence, the evidence was relevant, the State made clear that the pistols shown to witnesses were not the ones used during the crime, and the court made specific findings that the probative value outweighed any danger of unfair prejudice.

2. Appeal and Error— evidence not included in record—trial court presumed correct

There was no error in a prosecution resulting in a conviction for conspiracy to murder where the defendant was ordered to produce to the State his investigator's report. The report was not included in the record on appeal and there was evidence from the transcript that the court reviewed the report, weighed its contents, and considered the applicable evidentiary rule. The correctness of the trial court's decision is presumed.

3. Evidence— prior crime or act—excluded—witness's testimony cumulative and minimal

There was no prejudicial error in a prosecution resulting in a conviction for conspiracy to murder in the exclusion of evidence of criminal charges pending against a State's witness. In light of *State v. Hoffman*, 349 N.C. 167, the relative status of a prosecution witness is no longer significant; however, this witness's testimony was merely cumulative and of minimal importance.

4. Appeal and Error— preservation of issues—issue raised at trial

An issue relating to the exclusion of pending criminal charges against a State's witness was adequately preserved where, although the State contended that defendant's assignment of error was not consistent with the argument on appeal, the tran-

script shows that defendant offered the evidence to show bias when the issue first arose.

5. Homicide— conspiracy to murder—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss charges of conspiracy to murder where there was abundant evidence of a conspiracy, and the nature and manner of the assault, the conduct of the parties, and other relevant circumstances constitute sufficient evidence from which a reasonable mind could infer that defendant harbored a specific intent to kill the victim.

6. Trial— motion to set aside verdict as contrary to weight of evidence—contradictions to be resolved by jury

The trial court did not abuse its discretion by denying defendant's motion to set aside a verdict of conspiracy to murder as against the weight of the evidence where the jury returned not guilty verdicts to attempted murder counts. Any contradictions or discrepancies in the evidence are for the jury to resolve.

7. Trial— inconsistent verdicts—conspiracy and attempt

A jury did not render inconsistent verdicts by finding defendant guilty of conspiracy to murder and not guilty of attempted murder; a conviction for conspiracy is not affected by the degree of the substantive crime or even by the nonoccurrence of the crime.

Appeal by defendant from judgment entered 9 January 1998 by Judge D. Jack Hooks, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 15 February 1999.

Michael F. Easley, Attorney General, by Teresa L. Harris, Assistant Attorney General, for the State.

Frink, Foy & Yount, P.A., by Christopher M. Roshong, for defendant-appellant.

EDMUNDS, Judge.

On 22 March 1997, defendant and Andre Gore (Gore) were being driven around the town of Pineville by Tyrone Hill (Hill). As they rode down a dead-end road, passing the mobile home where Anthony Cox (Cox) lived with his wife and two children, they observed six or seven people gathered on Cox's porch. Defendant and his compan-

ions traveled to the end of the street and turned around. As they passed Cox's residence going the other way, individuals at the Cox residence opened fire on the vehicle. Gore testified that he was able to identify Cox as one of the shooters. During testimony, Cox admitted participating in the shooting but denied firing directly at the car. Further, Cox testified that one of his guests had taken the first shot. The three occupants exited the vehicle to take cover. When the shooting ceased, they re-entered the vehicle and left the area. After stopping at a gas station, they examined the automobile and found approximately six bullet holes. All three stated that they wanted "to get them back."

The three drove to defendant's home. Defendant went inside and returned carrying a .38 caliber revolver. Once inside the vehicle, he handed Gore a .380 caliber semi-automatic handgun. Hill apparently already had his own 9 millimeter caliber pistol. No words were exchanged. The three returned to the vicinity of Cox's residence, parking approximately one-half mile away, and walked the remaining distance. Upon arrival, they set up a crossfire, with defendant and Gore positioning themselves in a wooded area across from Cox's home, while Hill took up station on the right side of the trailer. All three men then started shooting into Cox's house. The firing went on for about three minutes, and the shooters could hear the impact of bullets on the house and the sound of glass breaking. After firing numerous rounds into Cox's home, they returned to the car and left the area.

Cox, who suspected the possibility of further trouble after his guests fired on Hill's car, had left his house and walked to a friend's. As he was returning, he saw a car approaching and hid in nearby woods. Although hidden from view of the perpetrators, he maintained sight of his trailer. He heard gunshots and heard someone (he did not recognize the voice) say "I hope the m----- f-----'s dead." Police investigators found several bullet holes in the residence. Looking toward the front of the trailer (where Gore and defendant were positioned) and moving from left to right, there were three bullet holes in a window of the master bedroom, a single bullet hole, two bullet holes in the next window and one above that window, a bullet hole in the center of the front door, a bullet hole to the right of the front door, six in the front porch (including four in the porch's wooden foundation), and one under a window on the right-hand side of the trailer. Moving to the right-hand side of the trailer (where Hill was positioned), investigators found three more bullet holes in the side wall of the bedroom.

The investigators also found three .380 caliber shell casings across the street from Cox's residence, and several 9 millimeter caliber shell casings on the right side and in front of the home.

Defendant was indicted on four counts of attempted murder and one count of conspiracy to commit murder. A jury returned a verdict of guilty to the conspiracy charge and not guilty to the four counts of attempted murder, and the judge imposed a sentence of 220 to 273 months in prison. Defendant appeals. We affirm the conviction.

As a preliminary matter, we note that the State has filed a Motion to Add to the Record on Appeal. The Motion is denied.

I.

[1] Defendant first contends that he was improperly prejudiced when the trial court allowed the State to mark as exhibits certain firearms, which the State conceded were not the weapons used to commit the offense. During trial, the State showed a witness two pistols that were similar to the weapons used during the shooting for the purpose of illustrating the distinction between a revolver and a semi-automatic. Although these weapons were marked as exhibits and demonstrated to the jury, they were not admitted into evidence.

Defendant's counsel had argued in his opening statement that the State could present no evidence of shell casings from the revolver allegedly used by defendant. Although shell casings had been recovered from the crime scene, none were from a revolver (the type pistol defendant was alleged to have used). The State used the exhibits to illustrate testimony that a semi-automatic pistol ejects each spent shell casing as it is fired, while the shell casings of a revolver are retained in the weapon's cylinder after firing. Defendant argues that use of such weapons as demonstrative evidence was unduly prejudicial, outweighing any probative value the weapons may have had. The State's initial response is that there can be no error because the weapons were never admitted into evidence. While the State is correct in its argument, we choose to follow the procedure taken by this Court in *State v. McWhorter* and address this assignment of error "[a]ssuming *arguendo* . . . [that] the State's exhibiting the gun to the jury amounted to an admission of the gun into evidence." 34 N.C. App. 462, 465, 238 S.E.2d 639, 641 (1977), *disc. review denied*, 294 N.C. 443, 241 S.E.2d 844 (1978).

As a general rule, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prej-

udice, 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). The exclusion of evidence under this rule "is within the trial court's sound discretion . . . . Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). After conducting a thorough *voir dire*, the trial judge made specific findings that the probative value outweighed any danger of unfair prejudice and permitted the exhibition of the weapons.

We find no abuse of discretion. This evidence was relevant to the issue of the State's inability to present shell casings from the weapon allegedly used by defendant. Defendant's counsel raised this matter in his opening argument, and, having invited the State's response, cannot now claim he was improperly prejudiced by the State's exhibition of the weapons to the jury. Moreover, when eliciting testimony regarding the weapons, the State made clear that the pistols shown to the witness were not the ones used during the commission of the crime, but were being exhibited solely to demonstrate the difference between a revolver and a semi-automatic. This assignment of error is overruled.

II.

[2] Defendant next contends that the trial court erred in "order[ing] defendant to produce to the State the defendant's investigator's report." Defendant argues the report "clearly constituted work product . . . [because it contained] the impressions and conclusions of defendant's investigator which were pursued to assist defendant's counsel in forming his opinions, conclusions, legal theories and strategies in preparation for trial." However, defendant failed to include a copy of the private investigator's report in the record on appeal. His subsequent motion to amend the record on appeal to include the report was denied. We are limited in our review of the assignments of error by North Carolina Rule of Appellate Procedure 9(a), which states that "review is solely upon the record on appeal and the verbatim transcript of proceedings . . . ." This Court has held that where certain exhibits presented to the trial court were not included in the record on appeal, those exhibits could not be considered on review to this Court. *See Ronald G. Hinson Electric, Inc. v. Union County Bd. of Educ.*, 125 N.C. App. 373, 481 S.E.2d 326 (1997).

"To raise the issue of the sufficiency of the evidence to support that finding on appeal, defendant must preserve the record for appeal. Where the record is silent we will presume the trial court acted correctly." *State v. Blandford*, 66 N.C. App. 348, 350-51, 311 S.E.2d 338, 340 (1984) (citing *State v. Fennell*, 307 N.C. 258, 297 S.E.2d 393 (1982)). In this case, the record is not completely silent because the transcript of the proceeding indicates that the trial judge read the report before ruling. After defendant objected, the court conducted a *voir dire* hearing on the matter, then held:

> [T]he Court has examined the [report] and indeed it contains references to other matters other than the interview by Mr. Foss of Mr. Anthony Cox, but the Court finds that the vast majority is a paraphrasing of an interview of Mr. Cox and the circumstances surrounding the same.
>
> The Court rules that it is a statement, that[] the State's entitled to see it under 613.

In the absence of the report, and with evidence from the transcript that the court did review the report, weigh its contents, and consider the applicable evidentiary rule, we presume the correctness of the trial court's decision. This assignment of error is overruled.

III.

[3] Defendant next contends that the court erred in excluding evidence of criminal charges pending against State's witness, Anthony Cox, who was the victim of the crime. In an attempt to challenge the credibility of the witness, defense counsel sought to elicit testimony regarding pending unrelated charges against Cox and any leniency Cox might receive for those charges as a result of his testimony against defendant. Defendant argues "that the exclusion of such testimony prejudiced said jurors in their deliberations and verdict." We agree that it was error to exclude the testimony, but find the error harmless.

[4] The State initially contends that defendant's assignment of error is not consistent with the argument raised on appeal. We note, however, that the trial transcript shows that when the issue first arose, defendant offered the evidence of the witness' pending charges to show possible bias, and he raises bias before us now. The issue was adequately preserved.

[3] We find *State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997), and *State v. Hoffman*, 349 N.C. 167, 505 S.E.2d 80 (1998), controlling in this case. In *Prevatte*, the defendant shot the victim within sight of a neighbor. The neighbor, who was the only witness to the shooting and the State's key witness, had pending forgery charges in the same judicial district. When the defendant attempted to cross-examine the neighbor, the State objected. The trial court conducted a *voir dire*, during which both the witness and his attorney testified that no agreement existed regarding the pending charges in exchange for the witness' testimony. As a result, the trial court refused to allow cross-examination about these pending charges and whether the witness had been promised or expected anything in exchange for his testimony. The Supreme Court reversed, holding: "The effect of the handling of the pending forgery and uttering charges on the witness was for the jury to determine. Not letting the jury do so was error." *Prevatte*, 346 N.C. at 164, 484 S.E.2d at 379. Although this holding applies only to prosecution witnesses, *see State v. Graham*, 118 N.C. App. 231, 238, 454 S.E.2d 878, 882 (holding that evidence of pending charges or indictments may not be used to show bias of a *defense* witness), *disc. review denied*, 340 N.C. 262, 456 S.E.2d 834 (1995), any implication that this holding might also be limited to principal or key prosecution witnesses was rejected when our Supreme Court applied the same rule to cross-examination of a corroborating witness. *See Hoffman*, 349 N.C. 167, 505 S.E.2d 80. However, the *Hoffman* Court further held that a violation could be harmless error where "[t]he witness . . . was not a principal witness for the State but was a corroborating witness." *Id.* at 180, 505 S.E.2d at 88.

The State's brief, which was submitted prior to the *Hoffman* holding, argues that Cox was a peripheral witness. In light of *Hoffman*, the relative status of a prosecution witness is no longer significant. However, we do agree that Cox's testimony was merely cumulative and of minimal importance. In the case *sub judice*, the testimonial evidence against defendant consisted of testimony of co-defendant Andre Gore, Cox, and the investigating officer. Gore presented sufficient evidence that the shooting took place and that defendant was a participant. The investigating officer provided evidence of damage done both inside and outside the house by the bullets, which was corroborated by Cox. Although the State's evidence as to the reason defendant and his friends returned to Cox's house will be discussed in more detail below, Gore and the investigating officer's testimony and the logical inference therefrom provided sufficient evidence that the three went back for the purpose of killing Cox. The only area in

which Cox's testimony may arguably have added something new pertained to defendant's intent, in the form of Cox's testimony that he heard an unidentified speaker say: "I hope the m----- f-----'s dead." In light of the other evidence of intent to kill, we find this evidence cumulative. Thus, while the trial court did commit error in preventing questions about Cox's pending charges, the error was harmless beyond a reasonable doubt.

IV.

[5] Defendant next assigns error to the trial court's denial of his motions to dismiss the charges at the conclusion of the State's evidence and after all evidence had been presented. To withstand defendant's motion to dismiss, the State had to show substantial evidence as to each essential element of the crime. *See State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983). The trial court must then consider all evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *See State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

To establish criminal conspiracy, the State must prove the existence of an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *See State v. Littlejohn*, 264 N.C. 571, 142 S.E.2d 132 (1965). " 'It is not necessary . . . that the parties should have come together and agreed in express terms to unite for a common object. A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.' " *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953) (quoting *State v. Connor*, 179 N.C. 752, 103 S.E. 79 (1920)). A conspiracy may be proven by circumstantial evidence. *See State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). There was an abundance of evidence here of a conspiracy. The only question is whether there was sufficient evidence that the purpose of the conspiracy was to kill Cox.

As our Supreme Court has held, "[t]he defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988); *see also State v. Lyons*, 102 N.C. App. 174, 182, 401 S.E.2d 776, 781, *cert. denied*, 329 N.C. 791, 408 S.E.2d 527, *and aff'd*, 330 N.C. 298, 412 S.E.2d 308 (1991). In the case at bar, there was sufficient evidence presented as to the purpose of the conspiracy. Gore testified (and

Cox confirmed) that Cox, along with other individuals at his residence, was shooting at the time the car was hit. In an effort to "get back" at Cox, defendant retrieved two handguns from his home, keeping one and providing Gore with the other, and returned to Cox's home. Although no words were uttered, the three were aware of the purpose of returning to Cox's house. Gore testified as follows:

> Q. Was anything said about where you were going?
>
> A. I knew where we were going.
>
> Q. How did you know where you were going?
>
> A. Cause we was—we were wanting to get them back.
>
> . . . .
>
> Q. Well, was there any question in your mind about what the gun was for?
>
> A. No.
>
> Q. Was there any question in your mind when you left Mr. Reaves[']' house where you were going?
>
> A. No.

Further convincing evidence that the purpose of the conspiracy was to murder Cox may be found in the actions of the defendant and others when they arrived back at Cox's residence. The three individuals split into two groups so that they could shoot into different parts of the home from different angles. Had they intended merely to register their displeasure at having been fired at themselves, one or two admonitory shots into the air would have sufficed. Instead, defendant and his friends unleashed a barrage that hit almost every part of the house. Cox lived in a mobile home, which means both that the defendant and others were shooting into a confined area with little room to hide, and also that the structure itself would provide scant protection for anyone caught inside during the fusillade. Gore was concerned enough that he tried to find out the next day whether anyone had been hurt. We thus conclude that the nature and manner of the assault, the conduct of the parties, and the other relevant circumstances discussed above, when considered in a light most favorable to the State, constitute sufficient evidence from which a reasonable mind could infer that defendant harbored a specific intent to kill Cox. This assignment of error is overruled.

V.

[6] Defendant's final assignment of error is that the trial court erred in denying his motion to set aside the verdict because the verdict was inconsistent and against the greater weight of the evidence. He argues that "[o]ne must conclude from the jury's verdicts of not guilty on all four (4) attempted murder counts, that the defendant did not have the requisite intent to commit murder, therefore, it must follow that the defendant lacked the requisite intent to . . . form the basis of a union of minds . . . to have formed an agreement . . . ." This argument is without merit.

A motion to set aside the verdict is within the sound discretion of the trial court. *See State v. Peterson*, 337 N.C. 384, 446 S.E.2d 43 (1994), *disapproved of on other grounds by State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998). Thus, the trial court's decision can be overturned only if it is clear from the record that the trial judge abused or failed to exercise his discretion. After a careful review of the evidence in this case, we find no abuse of discretion in the judge's ruling that the verdict was not against the weight of the evidence. While Gore's testimony was not devoid of ambiguity, any contradictions or discrepancies in the evidence are for the jury to resolve. *See State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975). The jury apparently resolved any contradictions in Gore's testimony against defendant.

[7] As to defendant's contention that the verdicts are inconsistent, conspiracy occurs when the agreement is made, and a conviction for conspiracy is not affected by the degree of the substantive crime, or even by the nonoccurrence of the crime. *See State v. Guthrie*, 265 N.C. 659, 144 S.E.2d 891 (1965). The evidence here showed, and a jury found, that defendant conspired with Gore and Hill to commit murder. Defendant's acquittal on four counts of attempted murder has no bearing on the fact that the conspiracy existed or on his conviction for that conspiracy. The conspiracy conviction was based on defendant's illegal agreement with Gore and Hill to kill Cox. Therefore, the jury did not render inconsistent verdicts.

No error.

Chief Judge EAGLES and Judge WYNN concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; BELLSOUTH TELECOMMUNICATIONS, INC., APPLICANT; BELLSOUTH LONG DISTANCE, INC., INTERVENOR; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR; MICHAEL F. EASLEY, ATTORNEY GENERAL, INTERVENOR; CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., INTERVENOR; AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC., INTERVENOR; INTERMEDIA COMMUNICATIONS INC., INTERVENOR; NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION, INTERVENOR; SPRINT COMMUNICATIONS COMPANY L.P., INTERVENOR; LCI INTERNATIONAL TELECOM CORP., INTERVENOR; DELTACOM, INC., INTERVENOR; ICG TELECOM GROUP, INC., INTERVENOR; TCG OF THE CAROLINAS, INC., INTERVENOR; TELECOMMUNICATIONS RESELLERS ASSOCIATION, INTERVENOR; THE ALLIANCE OF NORTH CAROLINA INDEPENDENT TELEPHONE COMPANIES, INTERVENOR; CONCORD TELEPHONE COMPANY, INTERVENOR; COMMUNICATIONS WORKERS OF AMERICA, INTERVENOR; BUSINESS TELECOM, INC., INTERVENOR; INTERPATH COMMUNICATIONS, INC., INTERVENOR; WORLDCOM, INC., INTERVENOR; KMC TELECOM, INC., INTERVENOR; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, INTERVENOR; ICG ACCESS SERVICES, INC., INTERVENOR; BELLSOUTH PERSONAL COMMUNICATIONS, INC., INTERVENOR; BELLSOUTH ADVERTISING & PUBLISHING CORPORATION, INTERVENOR; NORTH CAROLINA PAYPHONE ASSOCIATION, INC., INTERVENOR; FIBERSOUTH, INC., INTERVENOR; US LEC OF NORTH CAROLINA L.L.C., INTERVENOR; ATLANTIC TELEPHONE COMPANY, INTERVENOR; LEXCOM TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR; PIEDMONT TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR; RANDOLPH TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR; SKYLINE TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR; STAR TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR; SURRY TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR; TRI-COUNTY TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR; WILKES TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR; AND YADKIN VALLEY TELEPHONE MEMBERSHIP CORPORATION, INTERVENOR, APPELLEES V. MCI TELECOMMUNICATIONS CORPORATION, INTERVENOR; MCIMETRO ACCESS TRANSMISSION SERVICES, INC., INTERVENOR; AND TIME WARNER COMMUNICATIONS OF NORTH CAROLINA, L.P., INTERVENOR, APPELLANTS, AND GTE COMMUNICATIONS, INTERVENOR, CROSS-APPELLANT

No. COA98-759

(Filed 6 April 1999)

1. Appeal and Error— appeal from petition for reconsideration—inferred intent to appeal from original order

Appeals from a Utilities Commission denial of a motion to reconsider an order declining to treat certain material as confidential were timely and adequate. Although the denial of a petition for reconsideration is a nonappealable order and the notices of appeal do not designate an appeal from the original order, it can be fairly inferred from the notices that the appellants intended to appeal from the original order and there is no indication in the record that the appellees were misled.

2. Public Records— Utilities Commission—telecommunications documents

The Utilities Commission erred by ordering that certain information submitted by telecommunications companies would not be protected from public disclosure. Public records under N.C.G.S. § 132-1.1 do not include trade secrets which are the property of private persons disclosed in compliance with the law and designated confidential. A private person under the Act is a non-governmental legal or commercial entity; although the appellants here are subject to government regulation by the Commission, the regulation is not comprehensive and does not overshadow the independent authority of the appellants over the operation of their own businesses. The information is a trade secret within the exception to the Act because it consists of a compilation of information which has actual or potential commercial value from not being generally known and is the subject of reasonable efforts to maintain its secrecy. The Legislature did not make any distinction in N.C.G.S. § 132-1.2 for regulated industries.

Appeal by appellants MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., and Time Warner Communications of North Carolina, L.P., and by cross-appellant GTE Communications from order filed 28 January 1998 by the North Carolina Utilities Commission. Heard in the Court of Appeals 23 February 1999.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Wade H. Hargrove, Marcus W. Trathen, and David Kushner, for appellants MCI Telecommunications Corporation, MCImetro Access Transmission Services, Inc., and Time Warner Communications of North Carolina, L.P.

Parker, Poe, Adams & Bernstein L.L.P., by Jack L. Cozort, for cross-appellant GTE Communications.

Chief Counsel Antoinette R. Wike, by Staff Attorney Robert S. Gillam, for appellee Public Staff—North Carolina Utilities Commission.

BellSouth Telecommunications, Inc., by Andrew D. Shore and Leon Lee, and Kilpatrick Stockton, by James P. Cain and Benjamin R. Kuhn, for appellee BellSouth Telecommunications, Inc.

Parker, Poe, Adams & Berstein L.L.P., by Jack L. Cozort, for appellees ICG Telecom Group, Inc., KMC Telecom, Inc., and Interpath Communications, Inc.

No briefs filed for other appellees.

GREENE, Judge.

MCI Telecommunications Corporation, MCImetro Access Transmission Services, Inc., and Time Warner Communications of North Carolina, L.P. (collectively, Appellants), and GTE Communications (Cross-Appellant) (collectively, Joint Appellants) appeal from the North Carolina Utilities Commission's (Commission) "Order Denying Motion For Reconsideration."

Local telephone service historically has been provided by a monopoly Incumbent Local Exchange Company (ILEC) in a specific local service area. In 1995, in an effort to foster competition in local telephone service, the General Assembly enacted legislation authorizing the certification of certain competitive local providers (CLPs) of telecommunication service. N.C.G.S. § 62-110(f1) (Supp. 1998). The Joint Appellants are some of those certified as CLPs by the Commission.

In February of 1996, the Commission adopted permanent rules governing the CLPs, and authorized them to compete in those service areas with over 200,000 access lines. One of the Commission's rules, Rule R17-2(k), requires the CLPs to file monthly "access line reports," "reflecting the number of local access lines subscribed to at the end of the preceding month by business and residence customers in each respective geographic area served by the CLP."

On 11 August 1997, the Commission, at the request of BellSouth Telecommunications, Inc. (BellSouth), issued an Order requiring, "all CLPs certified by this Commission shall file monthly reports responding to [a list of thirteen] questions" entitled "Questions For Competing Carriers [(QCC)]." Those thirteen questions are as follows:

1. Is (CLP name) providing telephone exchange service in North Carolina as defined in Section 3 (47) of the Telecommunications Act of 1996 ("the Act") but excluding exchange access?

2. Has (CLP name) requested interconnection and signed an agreement with BellSouth? If answer to this item is yes, please respond to the following questions.

3. As a competing provider of telephone exchange service, that has an agreement with BellSouth approved under Section 252 of the Act, is (CLP name) providing telephone exchange service to residential customers in North Carolina?

4. As a competing provider of telephone exchange service that has a binding agreement with BellSouth, is (CLP name) providing telephone exchange service to business customers in North Carolina?

5. Is (CLP name) providing such telephone exchange service in North Carolina exclusively over its own facilities?

6. Is (CLP name) providing such telephone exchange service in North Carolina predominantly over its own facilities in combination with the resale of telecommunications from another carrier?

7. How many business customers are served using your own facilities or unbundled elements and when did you begin providing service?

8. How many business customers are served by reselling BellSouth's retail services, and when did you begin providing service?

9. How many residential customers are served using your own facilities or unbundled elements and when did you begin providing service?

10. How many residential customers are served by reselling BellSouth's retail services, and when did you begin providing service?

11. If you are not currently offering local service, when do you plan to begin offering local service?

12. Please provide detailed plans of how you intend to serve business customers using your own facilities or unbundled elements.

13. Please provide detailed plans of how you intend to serve residential customers using your own facilities or unbundled elements.

On 21 October 1997, the Commission issued an "Order Concerning Confidentiality Of Report Filings" (Original Order) wherein it concluded that the information required to be disclosed in the "access line reports" and in response to questions 1-11 of the QCC, did not constitute a "trade secret" within the meaning of G.S. 66-152(3) and thus was not protected from public disclosure. The Commission acknowledged that answers to questions 12 and 13 of the QCC "may constitute trade secrets." The Commission thus rejected the claims of confidentiality asserted by a number of the CLPs, who previously had filed the required information under proprietary seal.

On 5 November 1997, several of the CLPs filed a "Joint Petition for Reconsideration," requesting the Commission "reconsider its Order dated October 21, 1997, declining to treat certain information as confidential." In their petition, the CLPs contended the information contained within the "access line reports" and QCC responses constituted trade secrets, and thus, pursuant to the "confidential information" exception to Chapter 132 of the North Carolina General Statutes (Public Records Act), was exempt from the Public Records Act's general requirement of public disclosure.

On 28 January 1998, the Commission denied the CLPs' "Joint Petition for Reconsideration," concluding, *inter alia*, that the trade secret exception to the Public Records Act must "be analyzed within the context of a regulated industry. This means that what may perhaps be deemed to be a 'trade secret' within a totally and freely competitive marketplace should not necessarily be construed to be a 'trade secret' within a regulated marketplace." The Commission also justified its decision stating, "the numerous public interests . . . have a legitimate—and, in some cases, a compelling—need for this information." Finally, the Commission cited several broad regulatory powers conferred to it by the General Assembly in support of its "public interest" justification for upholding its decision of public disclosure.[1] In denying the petition, the Commission concluded that its Original Order "should be upheld."

1. The Commission cited, among others, N.C. Gen. Stat. §§ 62-2 (power to provide fair regulation of Public Utilities in the interest of the public); 62-30 (general power and authority to supervise and control utilities); 62-31 (power to make and enforce reasonable rules); and 62-32 (general supervision power over rates and services).

The Joint Appellants now appeal the denial of the petition for reconsideration.

The dispositive issues are whether: (I) the appeals are timely and adequate; and (II) (A) the Joint Appellants are "private persons" within the meaning of section 132-1.2(2), and (B) the information included in the "access line reports" and QCC responses are "trade secrets" within the meaning of section 132-1.2(1).

I

Notices of Appeal

[1] Pursuant to section 62-80, the Commission has the authority, upon its own motion or upon motion by any party, "to reconsider its previously issued order, upon proper notice and hearing" and "upon the record already compiled, without requiring the institution of a new and independent proceeding by complaint or otherwise." *Utilities Comm. v. Edmisten*, 291 N.C. 575, 582, 232 S.E.2d 177, 181 (1977); N.C.G.S. § 62-80 (1989). At this rehearing, the Commission may rescind, alter, amend, or refuse to make any change to its earlier order. *Id.* An application for rehearing pursuant to section 62-80 "is addressed to and rests in the discretion of the [Commission]." *Utilities Comm. v. Services Unlimited, Inc.*, 9 N.C. App. 590, 591, 176 S.E.2d 870, 871 (1970). An appeal does not lie from the *denial* of a petition to rehear, as the appeal is from the original order, and the time for appealing the original order is tolled from the date of the filing of the petition for rehearing to the date of the denial of that petition. *Utilities Comm. v. R.R.*, 224 N.C. 762, 765, 32 S.E.2d 346, 348 (1944). An appeal from an order of the Commission must be made "within 30 days after [its] entry." N.C.G.S. § 62-90(a) (1989) (listing some exceptions to general rule).

Timeliness

In this case, the Original Order was entered on 21 October 1997. The petition for reconsideration was filed on 5 November 1997. The order of the Commission denying the motion for reconsideration was entered on 28 January 1998. Appellants filed their notice of appeal on 10 February 1998. Cross-Appellant filed its notice of appeal on 2 March 1998. Both appeals are timely.

Appellants, the first parties to appeal in this case, filed their appeal 112 days after the entry of the Original Order. Eighty-four of those days, however, are not considered in computing whether the

appeal is timely, as those days represent the time between the filing of the petition for reconsideration and the order denying that motion, and thus the running of the time for appeal was tolled during that period. The appeal by Appellants therefore was filed twenty-eight days after the entry of the Original Order.

Cross-Appellant's notice of appeal was filed 132 days after the entry of the original order and thus is outside the thirty-day period, even with the benefit of the tolling period. Cross-Appellant, however, is entitled to the benefit of section 62-90, which provides that a party, after another party has appealed, has twenty days after the first notice of appeal was filed to file a cross appeal. N.C.G.S. § 62-90(a); *cf.* N.C.R. App. P. 3(c) (second party to appeal has ten days after first notice of appeal to file appeal). In this case, Cross-Appellant filed its cross appeal on the 20th day after Appellants filed their notice of appeal.

Adequacy

Joint Appellants state in their notices of appeal that they are appealing from the denial of their petition for reconsideration, a non-appealable order. Although the notices of appeal do not designate an appeal from the Original Order, N.C.R. App. P. 3(d) (notice of appeal "shall designate the judgment or order from which appeal is taken"), it "can be fairly inferred" from the notices that Joint Appellants intended to appeal from the Original Order,[2] and because there is no indication in this record that the appellees were misled by the notices, we construe the notices as appeals from the Original Order. *See Foreman v. Sholl*, 113 N.C. App. 282, 291, 439 S.E.2d 169, 175 (1994), *disc. review dismissed as improvidently granted*, 339 N.C. 593, 453 S.E.2d 162, *and reh'g denied*, 340 N.C. 18, 456 S.E.2d 313 (1995); *see also In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 696, 364 S.E.2d 723, 725, *disc. review denied*, 322 N.C. 480, 370 S.E.2d 222 (1988) (appeal of final order permits review of intermediate orders necessarily affecting final order).

II

[2] The public records compiled by the agencies of North Carolina, including the Commission, "are the property of the people." N.C.G.S. § 132-1(b) (1995); N.C.G.S. § 132-1(a) (state agencies include all commissions of North Carolina). Thus, any person may obtain copies of

2. The issues raised in the Original Order and the order denying reconsideration of that order are precisely the same.

the public records. N.C.G.S. § 132-1(b). Public records are defined to include all documents and papers "made or received pursuant to law . . . in connection with the transaction of public business" by any state agency.[3] N.C.G.S. § 132-1(a). Public records, however, *do not* include: (1) written communications to any agency by an attorney serving that agency if made in the scope of the attorney-client relationship, N.C.G.S. § 132-1.1 (Supp. 1998); (2) information (a) constituting a trade secret as defined in N.C. Gen. Stat. § 66-152(3), (b) the property of a private person as defined in N.C. Gen. Stat. § 66-152(2), (c) disclosed in compliance with the law, and (d) designated as "confidential" at the time of its disclosure to the agency, N.C.G.S. § 132-1.2 (1995); or (3) records of criminal investigations conducted or criminal intelligence information compiled by public law enforcement agencies, N.C.G.S. § 132-1.4(a) (Supp. 1998).

(A) Private Persons

In this case, Joint Appellants first contend they are "private persons" within the meaning of section 132-1.2(a). We agree.[4]

A private person,[5] within the meaning of section 132-1.2(2), is any non-governmental "legal or commercial entity." N.C.G.S. § 66-152(2) (1992) (defining "person"); *Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 182, 480 S.E.2d 53, 57, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997) (defining "private"). Thus a governmental entity or agency, as defined in section 132-1(a), does not qualify as a private person within the meaning of section 132-1.2(2). It does not follow, however, that every entity excluded from the section 132-1(a) definition of public agency is a private person within the meaning of section 132-1.2(2). *See Publishing Co. v. Hospital System, Inc.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981) (private nonprofit hospital treated as governmental agency), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151, *and*

3. It is not disputed that the "access line reports" and QCC responses qualify as public records under section 132-1(a).

4. There is no dispute among the parties that the information was provided to the Commission in compliance with the law and has been designated by the provider as confidential. Thus the requirements of section 132-1.2(3) & (4) are satisfied.

5. Whether a person is a "private person" within the meaning of section 132-1.2(2) presents a mixed question of fact and law. *See Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) (if resolution of an issue requires application of legal principles, it is treated as one of law); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) (whether an injury is an accident arising out and in the course of the employment is a mixed question of law and fact). In this case, there is no dispute about the facts, and thus we are confronted with a question of law.

appeal dismissed and cert. denied, 459 U.S. 803, 74 L. Ed. 2d 42 (1982). Thus private corporations can be classified as a public agency, for the purposes of section 132-1.2(2). The critical inquiry, therefore, is whether the corporation's independent authority is overshadowed by the governmental control of that corporation. *Id.* at 9, 284 S.E.2d at 547. Thus the nature of the relationship between the corporation and the government is controlling, not the form of the entity. *Id.* at 10-11, 284 S.E.2d at 548.

In this case, Joint Appellants are all legal and/or commercial corporations in the business of conveying or transmitting messages or communications by telephone. They are not owned or operated by the government and do not qualify as an agency of the government within the meaning of section 132-1(a). Each of them, however, offers their services to the public for compensation and thus are classified as a "public utility" within the meaning of the Public Utilities Act, N.C.G.S. § 62-3(23)(a)(6) (Supp. 1998), and as such, are subject to "fair regulation" by the Commission, N.C.G.S. § 62-2(a)(1) (Supp. 1998). This regulation by the Commission, though material, is not comprehensive and therefore does not overshadow the independent authority exercised by Joint Appellants over the operation of their own businesses. *See Publishing Co.*, 55 N.C. App. at 11, 284 S.E.2d at 548-49 (Wake County's "supervisory responsibilities and control" over hospital were extensive and converted private nonprofit hospital into public agency). Thus Joint Appellants are "private persons" within the meaning of section 132-1.2(2).

(B) Trade Secrets

Joint Appellants next contend the information provided in the "access line reports" and QCC responses are "trade secrets"[6] within the meaning of section 132-1.2(1). We agree.

A trade secret is defined as:

> [B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

6. Whether information qualifies as "trade secrets" within the meaning of section 132-1.2(1) also presents a mixed question of fact and law. *See* note 4. Again, there is no dispute about the facts and we thus are confronted with a question of law.

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3).

When determining whether information is a trade secret, the following factors are proper to consider:

(1) the extent to which information is known outside the business;

(2) the extent to which it is known to employees and others involved in the business;

(3) the extent of measures taken to guard secrecy of the information;

(4) the value of information to business and its competitors;

(5) the amount of effort or money expended in developing the information; and

(6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Wilmington Star News, 125 N.C. App. at 180-81, 480 S.E.2d at 56.

Our review of the *Wilmington Star* factors in the context of section 66-152(3) reveals that the information sought in the "access line reports" and QCC responses consists of a "compilation of information" which has "actual or potential commercial value from not being generally known" and is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." The information thus constitutes "trade secret[s]" within the meaning of section 132-1.2(1).

The information sought is collected by the CLPs for their own use and, except for the requirement that it be disclosed to the Commission, is not available to the public. Indeed, to provide public access to this information would provide competitors rather extensive insight into the business plans and operations of a particular CLP, information that otherwise would not be available generally. Disclosure of this information would allow competitors to discover how a CLP serves its customers, a CLP's plans for entering the local market and how quickly it acquires new customers, and in which areas of the state the CLP is focusing its marketing efforts and the relative effectiveness of those efforts. Most importantly, disclosure of

such information would thwart the creativity and innovation that competition brings to the marketplace, and prohibit the competitive environment our legislature intended to create.

Accordingly, the information sought in the "access line reports" and QCC responses fit within the section 132-1.2 exception to the Public Records Act. In so holding, we specifically reject the position of the Commission that this exception must be construed differently because it arises in the context of a regulated industry. We acknowledge the broad powers of the Commission to provide fair regulation of our public utilities. The legislature, however, in promulgating the section 132-1.2 exception to the Public Records Act, did not make any distinction with respect to its application to regulated industries. We therefore are without authority to provide for one. Furthermore, we do not read the preamble to section 132-1.2, "Nothing in this article shall be construed to require or authorize a public agency to disclose any information," to permit the Commission, under its broad supervisory powers, to require disclosure of information that otherwise qualifies under section 132-1.2. To read section 132-1.2 in this manner would permit the Commission to choose either to apply this exception or refuse to apply it. In the absence of a more specific statute on this issue, we do not believe the Commission has that authority. *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969); *Highway Commission v. Hemphill*, 269 N.C. 535, 538-39, 153 S.E.2d 22, 26 (1967) (statute dealing with a specific situation controls other statutes which are general in their application). Indeed, the Commission is a public agency within the meaning of the Public Records Act and is bound by the Act and its exceptions. N.C.G.S. § 132-1(a).[7]

Reversed.

Judges LEWIS and HORTON concur.

7. BellSouth argues that it cannot offer long distance service until it proves to the Federal Communications Commission (FCC) that there is sufficient local telecommunications competition in North Carolina. *See* 47 U.S.C. § 271 (Supp. 1998). They further argue that without access to the information sought in the "access line reports" and QCC responses, they cannot satisfy the requirements of the FCC. Although we are sympathetic to the position of BellSouth, we cannot misconstrue section 132-1.2 because of their need for the information.

STATE OF NORTH CAROLINA v. ALLEN T. SUMMERS, JR., DEFENDANT

No. COA98-383

(Filed 6 April 1999)

1. **Motor Vehicles— driving while impaired—willful refusal of breath analysis—litigated at license revocation**

The trial court erred in a DWI prosecution by denying defendant's motion in limine and overruling his objection at trial to evidence of his single breath analysis. A single analysis is admissible only if the subsequent breath sample is a willful refusal; here, the issue of willful refusal had been litigated in defendant's favor at a prior DMV license revocation proceeding and appeal to superior court. The District Attorney was fully represented and protected by the appearance of the Attorney General in the license revocation appeal and both prongs of the collateral estoppel test are satisfied.

2. **Motor Vehicles— driving while impaired—admissibility of refusal of chemical analysis—previously litigated in license revocation**

The trial court erred in a DWI prosecution by admitting evidence of a refusal to submit to chemical analysis under N.C.G.S. § 20-139.1 when a prior court had considered "willful refusal" in a DMV license revocation appeal and determined that defendant never actually refused the intoxilyzer. This holding is limited to collaterally estopping the relitigation of issues in a criminal DWI case when those exact issues have been litigated in a civil license revocation hearing with the Attorney General representing DMV in superior court and in no way restricts the outcome of civil DMV license revocation and criminal DWI cases, as both may proceed independently with different outcomes.

Appeal by defendant from judgment entered 9 October 1997 by Judge Milton Read in Durham County Superior Court. Heard in the Court of Appeals 5 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Isaac T. Avery, III, for the State.

James D. Williams, Jr. for defendant-appellant.

HUNTER, Judge.

Defendant appeals from a conviction of driving while subject to an impairing substance (DWI) in violation of N.C. Gen. Stat. § 20-138.1 (1993).

The State's evidence shows that defendant was operating his vehicle on 23 March 1996 at approximately 10:55 p.m. in Durham, North Carolina. Trooper Tony Gibson of the North Carolina State Highway Patrol stopped defendant after he was observed overtaking and passing a vehicle while crossing a double yellow line. When Trooper Gibson stopped the vehicle he noticed an odor of alcohol emanating from the defendant. When questioned as to whether he had anything to drink that evening, defendant responded in the affirmative. Defendant walked to the trooper's patrol car with an unsteady gate. Once inside the patrol car, Trooper Gibson noticed defendant's red and glassy eyes and a strong odor of alcohol.

Trooper Gibson subsequently placed the defendant under arrest, read defendant his Miranda rights and proceeded to the magistrate's office, where defendant was escorted to a room where the chemical analysis test (intoxilyzer test) is given to determine a defendant's blood alcohol content. Defendant was informed of his right not to submit to the intoxilyzer test and the consequences of such a refusal.

Trooper Gibson waited the required observation period and then asked the defendant to submit to the intoxilyzer test. After several tries, the defendant gave a sufficient sample which the instrument declared invalid. Trooper Gibson reset the intoxilyzer and informed the defendant that he needed another breath sample. Defendant gave a sufficient sample on the first try and the intoxilyzer registered his alcohol concentration as 0.11, recorded at 00:08 (12:08 a.m.).

For the third test, Trooper Gibson warned the defendant three times to blow correctly or he would be marked as a refusal. Trooper Gibson testified that on the third chance, the defendant did not give a sufficient sample and he marked defendant as a refusal, recorded at 00:09 (12:09 a.m.). Defendant pleaded for another test and Trooper Gibson informed him that the intoxilyzer will not allow additional tests where a person is marked as a refusal. Subsequently, Trooper Gibson administered field sobriety tests on the defendant and charged him with driving while impaired.

On 24 March 1996, defendant was notified by the North Carolina Division of Motor Vehicles (DMV) that his driver's license would be

revoked pursuant to N.C. Gen. Stat. § 20-16.2(i) (1993) on the grounds that he willfully refused to submit to the intoxilyzer test. Defendant requested a hearing before the DMV pursuant to N.C. Gen. Stat. § 20-16.2(d), which was held 24 August 1996. At that time, the revocation of defendant's license was sustained by the DMV hearing officer. Defendant filed a petition for a hearing *de novo* on the issue of whether he willfully refused to submit to a chemical analysis. Defendant's petition was heard in the Civil Session of Superior Court by the Honorable David LaBarre. Judge LaBarre issued an order concluding that the defendant did not willfully refuse to submit to a chemical analysis and ordered that the revocation order be dismissed.

The record on appeal indicates that at his DWI district court trial, defendant was found guilty of DWI on 7 October 1996. Defendant appealed to superior court for a *de novo* review. The matter was tried at the 9 October 1997 Criminal Session of Superior Court of Durham County, the Honorable Milton Read presiding. Defendant was found guilty of DWI and the court sentenced the defendant at Level 5, imposing a suspended sentence and a fine. Defendant appeals.

[1] Defendant argues that the trial court erred by denying his motion *in limine* and overruling his objection at trial to exclude evidence of defendant's single breath analysis of 0.11. Sequential intoxilyzer test results are required in order to be admitted into evidence to prove a person's particular alcohol concentration; however, a single breath analysis is admissible only if the subsequent breath sample is a "willful refusal" under N.C. Gen. Stat. § 20-16.2(c). N.C. Gen. Stat. § 20-139.1(b3) (1993). Defendant's refusal to submit to the intoxilyzer test can give rise to proceedings to revoke his driver's license only if it is a "willful refusal." *See* N.C. Gen. Stat. § 20-16.2. In the appeal of his driver's license revocation, the defendant and the Attorney General, representing DMV, appeared before Superior Court Judge LaBarre and litigated the issue of defendant's "willful refusal" to take the intoxilyzer test under N.C. Gen. Stat. § 20-16.2. Judge LeBarre concluded that the defendant "did not willfully refuse to submit to a chemical analysis upon the request of the charging officer" and overruled the revocation of the defendant's driver's license. In defendant's DWI trial, Judge Read instructed the jury to consider the intoxilyzer test result only if they found the defendant had subsequently "willfully refused" the intoxilyzer test. Under the doctrine of collateral estoppel, defendant contends that the issue of willful refusal was resolved in the DMV license revocation appeal in superior court (case

I) and therefore could not be relitigated in the criminal DWI case (case II); subsequently, the intoxilyzer test result should not have been admitted into evidence.

Under the doctrine of collateral estoppel, a party will be estopped from relitigating an issue where (1) the issue has been necessarily determined previously, and (2) the parties to that prior action are identical to, or in privity with, the parties in the instant action. *State v. O'Rourke*, 114 N.C. App. 435, 439, 442 S.E.2d 137, 139 (1994) (*citing County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 75, 394 S.E.2d 263, 265 (1990)). The issue, willful refusal of the intoxilyzer test, was resolved in case I; therefore, our determination rests on the question of privity.

Whether or not a person was a party to a prior suit "must be determined as a matter of substance and not of mere form." *King v. Grindstaff*, 284 N.C. 348, 357, 200 S.E.2d 799, 806 (1973) (*quoting Chicago, R.I. & P. Ry. v. Schendel*, 270 U.S. 611, 618, 70 L. Ed. 757, 763 (1926)). "The courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest." *Id.* at 357, 200 S.E.2d at 806 (*quoting Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947)).

In *O'Rourke*, a similar case, the defendant argued that the DMV had concluded that he did not willfully refuse to submit to a chemical analysis; therefore, the doctrine of collateral estoppel should have barred the State from introducing evidence of his refusal at his DWI trial. This Court did not address the first prong of the collateral estoppel test, noting that defendant's testimony was the only evidence that DMV found that he did not willfully refuse to submit to the intoxilyzer. The Court emphasized that privity is not established merely because the parties are interested in the same question or in proving the same facts; and, a party should be estopped from contesting an issue only where that party was fully protected in the earlier proceeding. *O'Rourke*, 114 N.C. App. at 439-40, 442 S.E.2d at 139. Assuming that the first requirement of collateral estoppel had been met, the Court concluded that the privity requirement was not satisfied because (1) the district attorney in the criminal proceeding and DMV in a civil licensing hearing protect different interests, and (2) the district attorney was not represented or "fully protected" in the administrative proceeding held before a DMV hearing officer. *Id.* at 440, 442 S.E.2d at 139.

Following the *O'Rourke* decision, the North Carolina Supreme Court clarified that it is the people of the State of North Carolina, rather than district attorneys, who are the real parties in interest in criminal prosecutions. *Brower v. Killens*, 122 N.C. App. 685, 688, 472 S.E.2d 33, 35 (1996), *disc. review improv. allowed*, 345 N.C. 625, 481 S.E.2d 86 (1997) (*citing Simeon v. Hardin*, 339 N.C. 358, 368, 451 S.E.2d 858, 865 (1994)). In *Brower*, we determined that DMV is also a servant of the people, relying on the Constitution of the State of North Carolina: "All political power is vested in and derived from the people; all government . . . is instituted solely for the good of the whole." *Brower*, 122 N.C. App. at 688, 472 S.E.2d at 35 (*quoting* N.C. Const. art. I, § 2). This Court therefore concluded that the district attorney and DMV "actually represent the same interest in driving while impaired cases—that of the citizens of North Carolina in prohibiting individuals who drive under the influence of intoxicating substances from using their roads." *Brower*, 122 N.C. App. at 688, 472 S.E.2d at 35 (*citing Joyner v. Garrett*, 279 N.C. 226, 239, 182 S.E.2d 553, 562 (1971) (license revocation statute is designed to promote breathalyzer examinations which supply evidence directly related to the State's enforcement of motor vehicle laws)). Likewise, we find that the Attorney General, representing DMV in a license revocation appeal, and the district attorney, representing the State in a criminal DWI proceeding, represent the same interest in DWI cases as enunciated in *Brower*. Under the privity requirement established in *O'Rourke*, our next determination concerns whether the district attorney was represented and "fully protected" in the civil license revocation appeal hearing in superior court.

Our Constitution provides:

> The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.

N.C. Const. art. IV, § 18(1) (1984). The General Assembly is also authorized under Article III, § 18 of the North Carolina Constitution to create the Department of Justice, supervised by the Attorney General, and to enact laws defining the authority of the Attorney General. *Sotelo v. Drew*, 123 N.C. App. 464, 466, 473 S.E.2d 379, 380 (1996), *aff'd*, 345 N.C. 750, 483 S.E.2d 439 (1997) (citation omitted).

The General Assembly has provided that the Attorney General has the duty:

> (1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.
>
> (2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.

N. C. Gen Stat. § 114-2(1), (2) (1999). While the district attorney represents the State in the prosecution of criminal cases at the local level, the Attorney General represents the State in any appeal of a criminal case. The Attorney General has the same duties and responsibilities in representing the people of the State of North Carolina either in civil DMV license revocations or criminal DWI cases. Therefore, the district attorney is fully protected whenever the Attorney General represents DMV in a civil action when DMV and the district attorney have the same interest in the litigation. The State, however, relying on *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971), argues that the doctrine of collateral estoppel does not apply between civil DMV license revocation proceedings and criminal DWI cases.

The defendant in *Joyner* appealed the revocation of his driver's license by DMV on the basis that he was so drunk he was incapable of willfully refusing to take the breathalyzer (chemical analysis) test. After the hearing in superior court, the trial judge found that the defendant willfully refused to submit to the test, affirming the DMV decision. The defendant argued that the twelve month suspension of his license in his DWI trial, which followed his guilty plea to the charge of drunken driving, constituted his "full penalty," exempting him from a license revocation by DMV. The Court found this argument untenable, stating that "[p]etitioner's guilty plea in no way exempted him from the mandatory effects of the sixty-day suspension of his license if he had wilfully refused to take a chemical test." *Joyner*, 279 N.C. at 238, 182 S.E.2d at 561 (citation omitted). The Court found:

> Under implied consent statutes such as G.S. 20-16.2, the general rule is that neither an acquittal of a criminal charge of oper-

> ating a motor vehicle while under the influence of intoxicating liquor, nor a plea of guilty, nor a conviction has any bearing upon a proceeding before the licensing agency for the revocation of a driver's license for a refusal to submit to a chemical test. (Citation omitted.) "It is well established that the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other, and the outcome of one is of no consequence to the other. (Citation omitted.)

Id. at 238, 182 S.E.2d at 562. More recently, our Supreme Court fully examined the double jeopardy issue, holding that a revocation and fine invoked by DMV do not constitute punishment for purposes of double jeopardy analysis; therefore, defendant's subsequent criminal conviction for DWI did not amount to a second punishment for the same offense. *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996). The holding in *Joyner* establishes the rule that a civil license revocation case and a criminal DWI case are independent of each other in terms of outcome; however, it does not prohibit the application of collateral estoppel between the two cases.

In *Brower v. Killens*, this Court held that DMV was collaterally estopped from relitigation of a probable cause determination once it had been litigated in a companion DWI case, stating

> the quantum of proof necessary to establish probable cause to arrest in criminal driving while impaired cases and civil license revocation proceedings, notwithstanding the different burdens on the remaining elements, is virtually identical. Therefore, we can discern no rational reason to allow DMV to relitigate the probable cause determination from case I.

Brower, 122 N.C. App. at 690, 472 S.E.2d at 37. Likewise, in the present case, the issue of willful refusal is identical in the civil DMV license revocation case and criminal DWI case. As in *Brower*, we believe our Supreme Court's decision in *State v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984), is dispositive, where the Court stated:

> The state prosecuted the prior criminal action for nonsupport, just as it instituted the present civil action for indemnifica-

> tion of its payments of support to defendant's children and for a continuing order of support by defendant. The state was not a nominal party in the criminal action; it is likewise not a nominal party in this action. In both cases the state pursued its interest in having a parent financially support his children. Thus the state occupies identical positions in both the criminal action for non-support and the current civil action for indemnification and continued support.

Id. at 732, 319 S.E.2d at 149. Because the issue of paternity was litigated in the earlier criminal action instituted by the State, the Court found that the defendant was estopped from litigating the issue again in a civil action instituted by the State. *Id.* Collateral estoppel provides that "[o]nce a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Lewis*, 311 N.C. at 730, 319 S.E.2d at 148 (*quoting Commissioner v. Sunnen*, 333 U.S. 591, 598, 92 L. Ed. 898 (1948)). Applying the same standard in the case *sub judice*, we find that the district attorney was fully represented and protected by the appearance of the Attorney General in a license revocation appeal in superior court. Because both prongs of the collateral estoppel test outlined in *O'Rourke* are satisfied, we hold that the State is estopped from relitigation of the issue of willful refusal to submit to the intoxilyzer test in a criminal DWI case, when the same issue has been adjudicated in a civil DMV license revocation proceeding with the Attorney General representing DMV in superior court. Therefore, the trial court erred in denying defendant's motion *in limine* and overruling his objection to admitting defendant's single breath intoxilyzer analysis of 0.11. The issue of willful refusal should not have been relitigated in the criminal DWI case.

[2] Defendant also contends that, under collateral estoppel, evidence of a refusal should not have been admitted at trial when a prior court had determined that the defendant did not refuse to take the intoxilyzer test. Under N.C. Gen. Stat. § 20-139.1(f) (1993), evidence of defendant's refusal to submit to chemical analysis is admissible in his criminal DWI trial. "Refusal" is defined as "the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey." *Joyner*, 279 N.C. at 233, 182 S.E.2d at 558 (*quoting* Black's Law Dictionary (4th Ed., 1951)).

A defendant's refusal to submit to the intoxilyzer test after being charged with DWI can give rise to civil proceedings to revoke defend-

ant's driver license, but only if the refusal is a "willful refusal." *See* N.C. Gen. Stat. § 20-16.2. A willful refusal to submit to a chemical test within the meaning of N.C. Gen. Stat. § 20-16.2(c) occurs when a motorist: (1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test. *Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980).

The State contends that collateral estoppel does not apply because "willful refusal" and "refusal" are different issues; therefore, the first prong of the collateral estoppel test is not satisfied. The State relies on *State v. Pyatt*, 125 N.C. App. 147, 479 S.E.2d 218 (1997), for its contention, where this Court stated:

> However, G.S. 20-139.1(f) does not require a willful refusal before evidence of a refusal is admissible and we will not read in this additional requirement. The controlling factor in all statutory construction is the intent of the legislature . . . elsewhere in G.S. 20-139.1, the General Assembly used the term "willful refusal." Obviously, if it had intended to require a "willful refusal" in G.S.20-139.1(f), it would have done so.

Pyatt at 150-51, 479 S.E.2d at 220 (1997) (citations omitted). This Court held that the jury could consider defendant's refusal to take the intoxilyzer test without finding that the refusal was willful; however, the present case is distinguishable from *Pyatt*. The defendant in *Pyatt* argued that a refusal must be a "willful refusal" before it could be admitted as evidence under N.C. Gen. Stat. § 20-139.1. The defendant in the case *sub judice* contends that in the "willful refusal" determination, Judge LaBarre found that the defendant never actually refused the intoxilyzer, therefore, evidence of a refusal could not be presented to the jury.

The order of Judge LaBarre regarding the defendant and the intoxilyzer test states, in part:

> 5. That the defendant attempted to blow in the instrument and the machine did not record the sample of breath properly;
>
> 6. That the defendant attempted to blow into the instrument again and the instrument registered an adequate sample;

7. That the petitioner attempted to blow upon request into the machine a third time;

8. That the instrument registered an inadequate sample;

9. That the petitioner requested that the arresting officer allow him an opportunity to submit to the test one more time;

10. That the officer refused to allow him this opportunity even though only a minute had elapsed[.]

Judge LaBarre concluded that "the defendant attempted to take the test and never voluntarily elected not to take the intoxilyzer test." The other elements of "willful refusal" are not mentioned by Judge LaBarre; thus, it is evident, he bases his determination on the failure of the element of voluntarily electing not to take the test. This conclusion clearly states that the defendant did not refuse the intoxilyzer under the definition of refusal identified in *Joyner*. *See Joyner*, 279 N.C. at 233, 182 S.E.2d at 558. There was no appeal from Judge LaBarre's ruling, therefore it became the law of the case. *Pack v. Randolph Oil Company*, 130 N.C. App. 335, 337, 502 S.E.2d 677, 678 (1998) (*citing Duffer v. Royal Dodge, Inc.*, 51 N.C. App. 129, 130, 275 S.E.2d 206, 207 (1981); *Sutton v. Quinerly*, 231 N.C. 669, 677, 58 S.E.2d 709, 714 (1950) (the law of the case doctrine is the "little brother" of *res judicata*); 18 James W. Moore et al., *Moore's Federal Practice* § 134.20[1] (3d ed. 1997) (law of the case doctrine is "similar" to collateral estoppel "in that it limits relitigation of an issue once it has been decided")). We find, therefore, that the issue of "refusal" was litigated in case I. Having formerly determined that privity exists between the Attorney General and the district attorney in case I and case II, respectively, we hold that the court was collaterally estopped from submitting evidence of a refusal under N.C. Gen Stat. § 20-139.1 when the prior court had determined as a matter of law that a refusal, in fact, did not exist.

Our holding is limited to collaterally estopping the relitigation of issues in a criminal DWI case when those exact issues have been litigated in a civil license revocation hearing with the Attorney General representing DMV in superior court. This holding in no way restricts the outcome of civil DMV license revocation and criminal DWI cases, as both may proceed independently of each other with different outcomes, remaining true to *Joyner v. Garrett*.

Defendant conceded at oral argument that issue II in his brief is without merit. We have reviewed defendant's remaining argu-

ments, and find them without merit. For the foregoing reasons, this case is reversed and remanded for a new trial in accordance with this opinion.

New trial.

Judges GREENE and JOHN concur.

DEBORAH J. BRANDON, PLAINTIFF v. MICHAEL BRANDON, DEFENDANT

No. COA98-329

(Filed 6 April 1999)

1. **Assault— Domestic Violence Protective Order—form disapproved**

An AOC form for a Domestic Violence Protective Order (DVPO) was disapproved because it combined several possible findings disjunctively, so that a reviewing court would be uncertain whether the trial court found all or only some of the possibilities where evidence was presented on more than one possibility.

2. **Assault— Domestic Violence Protective Order—serious bodily injury to plaintiff—evidence sufficient**

The evidence was sufficient to support the trial court's determination when issuing a Domestic Violence Protective Order (DVPO) that serious bodily injury to plaintiff was close at hand.

3. **Assault— Domestic Violence Protective Order—conclusions insufficient**

The issuance of a Domestic Violence Protective Order (DVPO) was reversed where the trial court's conclusion that acts of domestic violence had occurred was unsupported by findings of fact in that there was no evidence that plaintiff caused or attempted to cause bodily injury against plaintiff or committed any sex offense, and the trial court made no finding regarding plaintiff's subjective fear. (It was noted that a trial court is not required to determine whether a plaintiff's subjective fear is objectively reasonable.) The conclusion that defendant had threatened plaintiff does not support the issuance of a DVPO.

Appeal by defendant from order filed 3 October 1997 by Judge Shelly S. Holt in New Hanover County District Court. Heard in the Court of Appeals 16 February 1999.

Lea, Clyburn & Rhine, by J. Albert Clyburn, for plaintiff-appellee.

John K. Burns for defendant-appellant.

GREENE, Judge.

Michael Brandon (Defendant) appeals from the trial court's entry of a Domestic Violence Protective Order (DVPO).

Deborah J. Brandon (Plaintiff) and Defendant were married in December of 1992. Plaintiff, her two children from a previous relationship, and Defendant all resided in the parties' marital residence through mid-September of 1997. During August[1] and early September of 1997, Defendant worked out of town during the week, and only resided in the marital residence on weekends. Plaintiff testified that she generally stayed at her mother-in-law's home on the weekends while Defendant was at the marital residence. Plaintiff had changed the locks on the marital residence as a result of prior problems, but testified that, on 1 August 1997, she was instructed by her attorney to allow Defendant access to the marital residence and immediately "had keys made available to [Defendant]." That evening while Plaintiff was away from the marital residence, Defendant "smashed in the door to the garage." Defendant later told Plaintiff he had not been aware that she had made keys available to him.

Plaintiff and Defendant owned a rental house, and on 18 September 1997, Plaintiff and her children moved out of the marital residence and into the parties' rental house because "I was afraid of [Defendant]; . . . I knew somebody was going to get hurt if we didn't get out of the [marital residence] soon." On 20 September 1997, Plaintiff's parents telephoned her at work to inform her that Defendant was "sitting outside the [rental] house in the dark in the car with the lights on drinking coffee, reading the paper." Plaintiff telephoned the sheriff and returned to the rental house. Shortly after she returned, two deputies arrived. While Plaintiff spoke with the deputies,

1. The trial court did not allow Plaintiff's testimony concerning Defendant's behavior prior to 1 August 1997 into evidence to justify issuance of a DVPO because these incidents had been the subject of previous petitions which had been dismissed by the court.

> [Defendant] went over to the garage door and was going to open that. And I put my hand and my foot on the handle so that [it] would not open. [Defendant] started carrying on, "Oh, she's attacking me; look, she's attacking me; I'm being abused." And the police stepped in at that point and said, no, I was not attacking him. And at that point that's when they asked him that he better leave.

Plaintiff continued:

> At that point I was so upset and so afraid of what was going to happen because the police indicated to me that he had a right to break in, he had a right to bust anything he wanted because we jointly own this piece of [rental] property. They could not prevent him from going in. I was scared to death.

Plaintiff testified that the deputies "finally had to tell [Defendant] to leave. . . . At that point, he finally did walk out, laughing. He mumbled to me he would see me later, and he left." Plaintiff testified that she immediately "removed [her children] from the [rental] house. I had them go stay with their grandmother." Within the next two days, Plaintiff was informed by a neighbor that, on the afternoon of 20 September 1997, Defendant had stated "he would put a bullet between [Plaintiff's] eyes if [she] came near his property." On 22 September 1997, Plaintiff filed a complaint and motion for a DVPO.

Deputy Sheriff Shawn Patrick Bowen (Deputy Bowen) testified that, on 20 September 1997, when he and another deputy arrived at the rental house Plaintiff had moved into with her children, Defendant was sitting in his car across the street. The deputies spoke with Defendant, then "went to the [rental] house. And [Defendant] followed us up to the house. And we asked him to please step back and let us go talk to [Plaintiff] first to get her side of the story." While the deputies were inside speaking with Plaintiff, Deputy Bowen "heard the garage door—I heard like a banging."

> And that's when [Plaintiff] ran outside of the [rental] house and said he's breaking into my garage. So, we followed right behind. . . . And I did observe his hand on the handle and he was trying to open the door. And then [Plaintiff] put her hand on the handle and her foot down on the door and told him to stop. And he backed up and said she—if I can recall correctly, he said, "She

> assaulted me. Did you see that?" And we said, "She did not assault you; let's end this now."

Deputy Bowen also testified that Plaintiff "was asking us is there anything we can do. Finally we had to stop him and we had to ask him to leave before there was [sic] any other problems." Deputy Bowen noted that as Defendant was leaving, "he did say, 'I will get you' [to Plaintiff]. And we did tell him we don't want to hear no threats here. And he said, 'in court.' " Deputy Bowen further testified that although Plaintiff did not call for further assistance that day, "we did keep checking back on the place."

Defendant also testified at the hearing, stating that he had telephoned the sheriff's department early on the morning of 20 September 1997 to ask them to meet him at the parties' rental house so he could retrieve his personal property. Defendant testified that when the deputies asked him to leave the premises, he "turned around to [Plaintiff] and I said I will get back or something there to that effect. And then the officer said don't make threats. And I said, 'Sir, I'm not making threats; I'll get her in court.' And I turned around and left." Defendant further testified that, after returning to the marital residence, he went to a neighbor's home and began discussing the parties' separation. A neighbor asked Defendant what he would do if Plaintiff came onto his property, and Defendant responded that he would call the police. The neighbor then asked what he would do if the police did not come, and Defendant replied: "I'm going to run in the house." Finally, the neighbor asked what Defendant would do if Plaintiff "comes at you with a gun?" Defendant responded: "I'm going to shoot her right between the damn eyes." It was Defendant's understanding that the neighbor later told Plaintiff that Defendant had threatened to shoot her between the eyes. Defendant testified that he "never ha[d] hurt her, never would hurt her, [and had] no desire to hurt anybody on this earth."

On cross-examination, Plaintiff's attorney asked Defendant if, after speaking to the deputies on the morning of 20 September 1997, he thought it was okay to attempt to break into the garage of the parties' rental house. Defendant responded:

> The conversation I had at length with the sheriff, the deputy sheriff, was as to what rights I would have. And yes, I had the right to touch my own [rental] house. Yes, I had the right to do a lot of things. Just as [Plaintiff] testified earlier, I had the right to break i[n] if I had to.

After hearing all the testimony, the trial court marked the following finding[2] on the Administrative Office of the Courts Form AOC-CV-306, a preprinted form DVPO:

> The defendant has attempted to cause or has intentionally caused bodily injury to the plaintiff or has threatened the plaintiff or a member of plaintiff's family or household with immediate serious bodily injury; or has committed a sexual offense against the plaintiff; the last act of violence occurred on or about *9/20/97 [Defendant] went to plaintiff's residence unannounced even though he knew both parties had attorneys & they had been in court previously, didn't follow request of NHCSD deputy to wait without entering the property in that he attempted to enter plaintiff's garage, and in front of deputies told plaintiff he'd get her.*

The trial court, based on these findings, marked the following conclusions on the form DVPO:

> The defendant has committed acts of domestic violence against the plaintiff.
>
> There is danger of serious and immediate injury to the plaintiff.

Finally, the trial court entered its order by marking the following:

> [T]he defendant shall not assault, threaten, abuse, follow, harass by telephone, visiting the home or workplace or other means, or interfere with the plaintiff. A law enforcement officer shall arrest the defendant if the officer has probable cause to believe the defendant has violated this provision.
>
> [T]he defendant shall not threaten a member of the plaintiff's family or household.
>
> [T]he defendant shall stay away from . . . the place where the plaintiff works.

Defendant appeals from entry of the DVPO.

The issues are whether: (I) the trial court's findings of fact are supported by competent evidence; and (II) the findings of fact support the trial court's conclusions of law.

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2. The trial court's handwritten additions to the DVPO are italicized.

[1] Before addressing the merits of Defendant's case, we note that the standard form for a DVPO, Form AOC-CV-306, combines several possible findings, disjunctively, in one group. For example, where the trial court marks block number three of the form, as it did in this case, it finds:

> The defendant has attempted to cause *or* has intentionally caused bodily injury to the plaintiff *or* has threatened the plaintiff *or* a member of plaintiff's family or household with immediate serious bodily injury; *or* has committed a sexual offense against the plaintiff . . . .

Form AOC-CV-306 (October 1996) (emphases added).[3] In a case where evidence is presented on more than one of the possibilities disjunctively listed, the trial court's mark leaves a reviewing court uncertain whether the trial court found all, or only some, of these possibilities. If, on review, we determine that no competent evidence exists to support one of the possibilities, we would be forced to remand because we would have no way of knowing whether the possibility unsupported by competent evidence was the only possibility which the trial court actually found. Accordingly, we specifically disapprove of the preprinted Form AOC-CV-306 as it is currently written.

In this case, it is clear from the trial court's handwritten additions to the form DVPO that it found Defendant threatened to "get" Plaintiff. We therefore review whether evidence supports this finding and whether this finding supports issuance of the DVPO.

I

[2] Where the trial court sits as the finder of fact, "and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial [court]." *Repair Co. v. Morris & Associates*, 2 N.C. App. 72, 75, 162 S.E.2d 611, 613 (1968).

> [This Court] can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

3. Form AOC-CV-306 has been revised since this case was before the trial court; however, the new Form AOC-CV-306 continues to group several possible findings together disjunctively. *See* Form AOC-CV-306 (May 1998).

State v. Sessoms, 119 N.C. App. 1, 6, 458 S.E.2d 200, 203 (1995), *aff'd per curiam*, 342 N.C. 892, 467 S.E.2d 243, *and cert. denied*, —— U.S. ——, 136 L. Ed. 2d 129 (1996). The trial court's findings "turn in large part on the credibility of the witnesses, [and] must be given great deference by this Court." *Id.* Accordingly, where the trial court's findings of fact are supported by competent evidence, they are binding on appeal. *Harris v. Harris*, 51 N.C. App. 103, 105, 275 S.E.2d 273, 275, *disc. review denied*, 303 N.C. 180, 280 S.E.2d 452 (1981).

In this case, a thorough review of the evidence reveals that the only portion of the finding marked by the trial court which is supported by the evidence is that Defendant "threatened the plaintiff . . . with immediate serious bodily injury . . . and in front of deputies told plaintiff he'd get her." Plaintiff testified that Defendant had "mumbled . . . he would see me later" and had stated "he would put a bullet between [Plaintiff's] eyes if [she] came near his property." Deputy Bowen testified that "we had to stop [Defendant] and we had to ask him to leave before there was [sic] any other problems," and that he heard Defendant say "I will get you" to Plaintiff as he left the premises. Accordingly, the record contains competent evidence that Defendant threatened Plaintiff with serious bodily injury.

Defendant, however, contends there is no competent evidence that he threatened "immediate" bodily injury. "Immediate" is defined as "[o]ccurring at once; instant; . . . [o]f or near the present time; . . . [c]lose at hand; near." *American Heritage College Dictionary* 678 (3d ed. 1993). In this case, competent evidence reveals that Defendant had attempted to enter the garage at the parties' rental house against Plaintiff's will on the morning of the 20th, and had threatened Plaintiff at that time in her presence and in the presence of deputies. After this confrontation, Plaintiff took her children to stay with their grandmother. Later that evening, out of Plaintiff's presence, Defendant threatened to shoot Plaintiff and this threat was relayed to her. Finally, Deputy Bowen testified that he and his partner "ke[pt] checking back on the place" after asking Defendant to leave the premises. Accordingly, despite Defendant's testimony that he did not intend to harm Plaintiff, the evidence supports the trial court's determination that serious bodily injury to Plaintiff was "close at hand." We emphasize that the trial court was present to see and hear the inflections, tone, and temperament of the witnesses, and that we are forced to review a cold record. We cannot say that the inferences drawn by the trial court from the evidence were unreasonable; therefore we are bound by this portion of the trial court's finding.

II

[3] The trial court's findings of fact must support its conclusions of law. *Blanton v. Blanton*, 40 N.C. App. 221, 225, 252 S.E.2d 530, 533 (1979).

In this case, the trial court first concluded Defendant "has committed acts of domestic violence against [Plaintiff]." "Domestic violence" is statutorily defined as "the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship"[4]:

> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury; or
>
> (3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7 [(*i.e.*, sex offenses)].

N.C.G.S. § 50B-1(a) (Supp. 1998).[5] No competent evidence was presented that Defendant caused or attempted to cause bodily injury or committed any sex offense against Plaintiff or a minor child in her custody,[6] therefore the trial court could not have concluded that an act of domestic violence had occurred pursuant to the definitions in subsection (1) or (3) of section 50B-1(a). Competent evidence was presented to support the trial court's finding that Defendant had "threatened the plaintiff . . . with immediate serious bodily injury . . . and in front of deputies told plaintiff he'd get her." It does not necessarily follow from this finding, however, that Plaintiff was "in fear of imminent serious bodily injury," as is required to show that an act of domestic violence has occurred pursuant to subsection (2). *Cf. Dickens v. Puryear*, 302 N.C. 437, 446, 276 S.E.2d 325, 331 (1981)

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4. It is undisputed that Plaintiff is an "aggrieved party" and that she and Defendant had a "personal relationship."

5. Although amendments were made to section 50B-1 effective 1 December 1997 for offenses committed on or after that date, *see* N.C.G.S. § 50B-1, Editor's Note, these amendments are not relevant to Defendant's appeal.

6. Although Plaintiff testified that Defendant "hit [her thirteen-year-old son] repeatedly over the head with siding," the trial court specifically stated that it would not consider this testimony as grounds for issuance of a DVPO because complaints based on these actions had previously been dismissed by the court.

("Ordinarily mere words . . . do not put the other in apprehension of an imminent bodily contact . . . ."). Although Plaintiff testified that she was afraid of Defendant and did not know what he would do, the trial court made no finding regarding Plaintiff's subjective fear.[7] We therefore cannot know whether the trial court believed Plaintiff actually feared Defendant. The trial court's conclusion of law that Defendant had committed an act of domestic violence against Plaintiff is, therefore, unsupported by sufficient findings of fact. As such, this conclusion cannot provide grounds for issuance of the DVPO.

We note that in the context of a common law action for civil assault, "[t]he determinative factor is often whether the plaintiff's apprehension of an imminent battery was reasonable in the circumstances. The courts have been reluctant to protect . . . actual, but unreasonable fear of contact." David A. Logan & Wayne A. Logan, *North Carolina Torts* § 18-20[1] (1996); *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979) (affirming dismissal of civil assault claim where the plaintiff contended he had been assaulted by the defendant's cigar smoke). It follows that an action for civil assault requires a plaintiff to show both her own actual subjective apprehension *and* that her actual subjective apprehension was objectively reasonable under the circumstances. *See, e.g., Dickens*, 302 N.C. at 445, 276 S.E.2d at 331 (noting that the plaintiff's apprehension must be reasonable). In contrast to common law civil assault, our General Assembly has statutorily defined actionable "domestic violence." N.C.G.S. § 50B-1(a). Section 50B-1(a)(2) defines domestic violence as "placing the aggrieved party . . . in fear of imminent serious bodily injury." *Id.* The plain language of section 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred. *Id.* As the legislature did not impose an objective standard, we decline to impose one judicially. *See Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (noting that clear and unambiguous language in a statute leaves "no room for judicial construction"). Accordingly, where the trial court finds that a plaintiff is actu-

7. This is another area where the current Form AOC-CV-306 is insufficient. The statutory definition of domestic violence does not depend on whether a threat has been uttered, but on whether the plaintiff is "in fear" of imminent serious bodily injury. *See* N.C.G.S. § 50B-1(a)(2). In addition, Form AOC-CV-306 uses the term "immediate" while the statute merely requires a showing that serious bodily injury is "imminent." *Id.* These two words, although similar, are not exact synonyms. *See Dickens*, 302 N.C. at 445-46, 276 S.E.2d at 331 (distinguishing "imminent" from "immediate"). The current Form AOC-CV-306 therefore implies that a higher showing is necessary for issuance of a DVPO than is required by statute.

ally subjectively in fear of imminent serious bodily injury, an act of domestic violence has occurred pursuant to section 50B-1(a)(2). The plain language used by our legislature does not require a trial court to attempt to determine whether the plaintiff's actual subjective fear is objectively reasonable under the circumstances.

The trial court also concluded "[t]here is danger of serious and immediate injury to [Plaintiff]." The trial court's finding that Defendant had threatened Plaintiff with "immediate serious bodily injury" and that "in front of deputies [Defendant had] told plaintiff he'd get her" supports this conclusion of law. This conclusion of law, however, does not support issuance of a DVPO. *Compare* N.C.G.S. § 50B-3(a) (1996) (authorizing issuance of a DVPO "to bring about a cessation of acts of domestic violence") *with* N.C.G.S. § 50B-2(c) (Supp. 1998) (authorizing issuance of an *ex parte* DVPO pending the hearing where the trial court finds "that there is a danger of acts of domestic violence"). In this case, the trial court's conclusion that acts of domestic violence had occurred is unsupported by findings of fact; accordingly, no acts of domestic violence have been shown of which the court may "bring about a cessation." We therefore must reverse the trial court's issuance of the DVPO against Defendant.

Reversed.

Judges LEWIS and HORTON concur.

JESSE WILLIAMS, PLAINTIFF-APPELLANT v. 100 BLOCK ASSOCIATES, LTD. PARTNERSHIP AND OTIS ELEVATOR COMPANY, DEFENDANT-APPELLEES

No. COA98-374

(Filed 6 April 1999)

1. Negligence— malfunctioning elevator—building owner—no knowledge of prior problems

The trial court did not err by granting summary judgment for defendant building owner in a personal injury action alleging negligent maintenance of an automatic elevator where plaintiff neither offered expert testimony nor forecast any evidence of any knowledge by or notice to the owner of prior problems with the

elevators. Any knowledge by a security guard employed by an independent contractor was not imputed to the owner.

2. **Negligence— malfunctioning elevator—no notice of prior problems to elevator company**

The trial court did not err by granting summary judgment for defendant elevator company in a personal injury action alleging negligent maintenance of an automatic elevator where defendant offered the affidavit of its regional field engineer that service had been performed pursuant to a maintenance agreement and plaintiff neither offered a counter-affidavit nor any forecast of evidence that defendant had been notified of prior problems or was negligent in repairing the elevators.

3. **Negligence— res ipsa loquitur—malfunctioning elevator**

The trial court did not err by not applying the doctrine of res ipsa loquitur to the owner of an office building in a personal injury action alleging negligent maintenance of an automatic elevator where plaintiff failed to offer evidence tending to establish exclusive control and management.

Appeal by plaintiff from order entered 12 November 1997 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 29 October 1998.

Hinton, Hewett & Wood, P.A., by Alan B. Hewett and J. Franklin Wood, Jr., for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by O. Craig Tierney, Jr. and Beth Y. Smoot, for defendant-appellee 100 Block Associates, Ltd. Partnership.

Maupin, Taylor & Ellis, P.A., by Thomas W. H. Alexander and Kevin W. Benedict, for defendant-appellee Otis Elevator Company.

McGEE, Judge.

Plaintiff filed a complaint for personal injury on 25 June 1996 alleging negligent maintenance of an automatic elevator. Plaintiff was employed by United Cleaning Specialist Corporation, which provided cleaning services to the First Union Capital Center in Raleigh, North Carolina. Defendant 100 Block Associates, Ltd. Partnership (100 Block) owned the First Union Capital Center. Defendant Otis

Elevator Company (Otis Elevator) had a contract with 100 Block to service and maintain the automatic elevators in the First Union Capital Center.

Plaintiff alleged in his complaint that he was a passenger on elevator number five in the First Union Capital Center at about 9:00 p.m. on 2 December 1994. Plaintiff stated that "the elevator started moving back and forth from the 24th to 25th floors, stopping suddenly on each floor, making a loud banging noise . . . causing the defendant [sic] to be suddenly hurled in a hard manner to the floor of the elevator several times causing him to injure his knee."

Plaintiff sought damages for past and future medical expenses, pain and suffering, and lost wages. Defendant 100 Block filed a motion for summary judgment on 27 June 1997. Defendant Otis Elevator filed a motion for summary judgment on 31 July 1997. The trial court granted defendants' motions for summary judgment in an order entered 12 November 1997. Plaintiff appeals.

I. 100 BLOCK

[1] Plaintiff argues the trial court erred in granting defendants' motions for summary judgment, contending that "[i]n the present case . . . there are genuine issues of material fact."

"Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' " *Snipes v. Jackson*, 69 N.C. App. 64, 71-72, 316 S.E.2d 657, 661 (1984); N.C. Gen. Stat. § 1A-1, Rule 56(c). "In ruling on [a motion for summary judgment] the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Snipes* at 72, 316 S.E.2d at 661 (citation omitted).

Plaintiff argues that "[t]here exist genuine issues of material fact as to the existence of a duty owed to plaintiff by defendant 100 Block Associates and the breach of that duty, where plaintiff [was] an invitee of defendant[.]" We disagree.

Our Supreme Court recently articulated a "new approach to premises liability in North Carolina" in *Nelson v. Freeland*, 349 N.C. 615, 631, 507 S.E.2d 882, 892 (1998). The Court summarized North Carolina law concerning premises liability, stating:

> [T]he standard of care a landowner owes to persons entering upon his land depends upon the entrant's status, that is, whether the entrant is a licensee, invitee, or trespasser. An invitee is one who goes onto another's premises in response to an express or implied invitation and does so for the mutual benefit of both the owner and himself. . . . A licensee, on the other hand, "is one who enters onto another's premises with the possessor's permission, express or implied, solely for his own purposes rather than the possessor's benefit." The classic example of a licensee is a social guest. Lastly, a trespasser is one who enters another's premises without permission or other right.

Nelson at 617, 507 S.E.2d at 883-84 (footnote omitted) (citations omitted).

Our Supreme Court said in *Nelson* that a landowner specifically owed an invitee the duty "to use ordinary care to keep his property reasonably safe and to warn of hidden perils or unsafe conditions that could be discovered by reasonable inspection and supervision." *Nelson* at 618, 507 S.E.2d at 884 (citation omitted). As to licensees, a landowner's duty has been "to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger." *Id.* With regard to trespassers, "a landowner need only refrain from the willful or wanton infliction of injury." *Id.*

Our Supreme Court further stated that past premises liability decisions have

> caused confusion amongst our citizens and the judiciary—a confusion exaggerated by the numerous exceptions and sub-classifications engrafted into it. Lastly, the trichotomy is unjust and unfair because it usurps the jury's function either by allowing the judge to dismiss or decide the case or by forcing the jury to apply mechanical rules instead of focusing upon the pertinent issue of whether the landowner acted reasonably under the circumstances.

Nelson at 631, 507 S.E.2d at 892.

Thus, the Court eliminated "the distinction between licensees and invitees" and established "a standard of reasonable care toward all lawful visitors." *Id.*

> Adoption of a true negligence standard eliminates the complex, confusing, and unpredictable state of premises-liability law and

> replaces it with a rule which focuses the jury's attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.
>
> In so holding, we note that we do not hold that owners and occupiers of land are now insurers of their premises. Moreover, we do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. Rather, we impose on them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.

Nelson at 631-32, 507 S.E.2d at 892.

The Supreme Court did not find "compelling reasons to apply this rule prospectively only and therefore [gave] it both prospective and retrospective application." *Nelson* at 633, 507 S.E.2d at 893.

In the case before us, plaintiff was present in the First Union Capital Center because of his duty to his employer, United Cleaning Specialist Corporation. As such, plaintiff was a "lawful visitor[]" and entered 100 Block's building "under color of right." *Id.* at 631-32, 507 S.E.2d at 892. The question, as framed by *Nelson*, is "whether the landowner acted as a reasonable person would under the circumstances." *Id.* at 632, 507 S.E.2d at 892.

Defendant 100 Block submitted the affidavit of Melony Girton, the property manager for 100 Block at the time of plaintiff's accident. Girton stated: "I am familiar with the injury reported by the plaintiff and I recall that I *had no knowledge* of any problem with any of the elevators at the First Union building prior to the incident complained of by the plaintiff." (Emphasis added.)

Plaintiff also submitted the affidavit of Tim Hunter, a security guard with Barton Protective Services, Inc., who was stationed at the First Union Capital Center. In his affidavit, Hunter stated: "I am familiar with the injury reported by the plaintiff and I recall that I had knowledge of problems with the elevators at the First Union building prior to the incident complained of by the plaintiff." In this affidavit, unlike Girton, Hunter acknowledged that he had notice of prior problems with the elevators.

Plaintiff cites *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E.2d 721 (1972), for the proposition that "[a] principal is chargeable with and bound by the knowledge of or notice to his agent, received while

the agent is acting as such within the scope of his authority and in reference to which his authority extends." *Id.* at 60, 187 S.E.2d at 728 (citation omitted). Plaintiff argues that Hunter is an agent of 100 Block, and that his notice should be imputed to 100 Block. We disagree.

In *Roberts*, a principal-agent relationship was found because "[t]he allegations in the complaint and the admissions in the answer established the relationship of principal and agent between defendant . . . and the corporate defendant at the times plaintiff complained of." *Roberts* at 60, 187 S.E.2d at 728.

In the present case, plaintiff alleged in his complaint that "the defendants, their agents, servants, and/or employees were . . . negligent"; however, plaintiff did not specifically allege the existence of a principal-agent relationship between Hunter and 100 Block, nor did 100 Block refer to such a relationship in its answer.

"There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978) (citations omitted), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979).

In *Simms v. Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974), plaintiff attempted to serve a summons on defendant, a retail department store, by delivering the summons to the store's security guard. Our Supreme Court held that the summons was not properly served because the security officer was not employed by defendant store, but rather was employed by an independent contractor who was rendering services to defendant store. The Court agreed with the trial court's findings of fact that:

> [The security guard] was not an employee or agent of defendant. She neither received nor handled any money for defendant. She exercised no control whatever over any of defendant's employees; nor was she under the supervision, direction or control of any officer or employee of defendant. [The security guard] was employed as a security officer by Link Security, Inc. . . . Link was then under contract to furnish defendant security officers to protect its property, and it had assigned [the security guard] to defendant's store . . . . She was subject to reassignment and relocation by Link at any time. With reference to her working hours,

> duties, and the manner in which she performed those duties she was responsible only to Link.

Simms at 147, 203 S.E.2d at 771. Further, our Court has previously stated:

> If the requisite right to control is found to exist, then an employer is held liable, albeit vicariously, for the negligent acts of its agents, servants, or employees which cause injuries to third persons; but an employer is not liable to third parties for the negligence of an independent contractor.
>
> Whether one is an independent contractor or an employee is a mixed question of law and fact. The factual issue is: What were the terms of the parties' agreement? Whether that agreement establishes a master-servant or employer-independent contractor relationship is ordinarily a question of law.

Yelverton v. Lamm, 94 N.C. App. 536, 538, 380 S.E.2d 621, 623 (1989) (citations omitted). *See also Hendricks v. Fay, Inc.*, 273 N.C. 59, 62, 159 S.E.2d 362, 365-66 (1968).

Plaintiff introduced no evidence tending to show that Hunter was an agent or employee of 100 Block. Included in the record on appeal is the incident report which Hunter filled out immediately after the accident. The bottom of each page of the report reads "Barton Protective Services Inc.," and lists the address of the security company. The evidence tends to show that Hunter, like the security guard in *Simms*, was employed not by defendant 100 Block, but by Barton Protective Services, Inc., an independent contractor that rendered services to 100 Block. Any knowledge of or notice to Hunter of prior problems with the elevators is not imputed to 100 Block.

As evidenced by Girton's affidavit, plaintiff has failed to show that: (1) 100 Block had notice of a problem with the elevator, and (2) 100 Block failed to exercise reasonable care in contacting Otis Elevator about the maintenance of the elevator. "To survive a motion for summary judgment, the nonmoving party must . . . " 'forecast sufficient evidence of all essential elements of [his] claim []" to make a *prima facie* case at trial.' " *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 203, 505 S.E.2d 131, 136 (1998) (citations omitted). In *Adams v. Western Host, Inc.*, 779 P.2d 281 (Wash. Ct. App. 1989), plaintiff was injured when an elevator misleveled, and he filed suit against the maintenance company for his injuries. Plaintiff presented expert testimony in support of his contention that the maintenance

company had been negligent in repairing the elevator. The trial court granted summary judgment for the maintenance company. The appellate court affirmed, stating that the plaintiff's expert testimony was insufficient to establish a prima facie case of the maintenance company's negligence. The court stated: "To rebut a properly supported summary judgment motion, the nonmoving party must set forth specific facts showing a genuine issue for trial." *Id.* at 284. In the case before our Court, plaintiff did not offer expert testimony, nor did he forecast evidence of any knowledge by or notice to 100 Block of prior problems with the elevators, thereby failing to create a genuine issue of material fact.

II. OTIS ELEVATOR

[2] Plaintiff argues the trial court erred in granting summary judgment to defendant Otis Elevator. Specifically, plaintiff argues that there is a question as to "the existence of a duty . . . and the breach of that duty, where plaintiff [was] injured while using an automatic elevator which defendant [had] contracted to maintain in proper working order." We disagree.

Otis Elevator manufactured the elevators in the First Union Capital Center and contracted with 100 Block to maintain and repair those elevators. The maintenance contract between Otis Elevator and 100 Block provides, in part:

> It is agreed that [Otis Elevator does] not assume possession or control of any part of the Units, that such remains yours solely as owner, lessee, or agent of the owner or lessee, and that you are solely responsible for all requirements imposed by any federal, state or local law, ordinance or regulation.
>
> . . .
>
> If any Unit is malfunctioning or in a dangerous condition, you should immediately notify [Otis Elevator] using the 24-hour OTISLINE service. Until we correct the problem, you agree to remove the Unit from service and take all necessary precautions to prevent access or use.

Pursuant to this contract, in the event of an elevator malfunction, 100 Block could notify Otis Elevator by calling the OTISLINE dispatch center. There is no evidence in the record of any call by 100 Block to OTISLINE prior to plaintiff's injury.

At the summary judgment hearing, Otis Elevator tendered the affidavit of Lee Hartley, a regional field engineer for Otis Elevator. Hartley stated in his affidavit that:

> [H]e [had] been an employee of the defendant Otis Elevator Company for 29 years . . . that he is familiar with how maintenance is conducted by Otis Elevator Company on the elevators located in the First Union Capitol Center, Raleigh, NC . . . that during all times complained of in the complaint in this action service performed by defendant Otis Elevator Company on the elevators in question were [sic] done pursuant to the maintenance agreement attached hereto as Exhibit A; that based on affiant's investigation of this matter it is his opinion that Otis complied fully with the requirements of the maintenance contract in all respects.

Plaintiff did not respond to Hartley's affidavit. Plaintiff neither offered a counter affidavit, nor forecast any evidence that Otis Elevator had been notified of any prior problems with the elevators, or that Otis Elevator may have been negligent in repairing the elevators.

"[S]ummary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence." *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995) (citations omitted), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

We, therefore, hold the trial court did not err in granting defendant Otis Elevator's motion for summary judgment.

III. RES IPSA LOQUITUR

[3] Plaintiff argues the trial court erred "by not applying the doctrine of *res ipsa loquitur*, as to defendant 100 Block Associates[.]" We disagree.

The doctrine of " '*[r]es ipsa loquitur*, in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause.' " *Kekelis v. Machine Works*, 273 N.C. 439, 443, 160 S.E.2d 320, 323 (1968) (citation omitted).

> In order to invoke the doctrine of *res ipsa loquitur* plaintiff must show, "(1) that there was an injury, (2) that the occurrence causing the injury is one which ordinarily doesn't happen without

> negligence on someone's part, (3) that the instrumentality which caused the injury was under the exclusive control and management of the defendant."

Johnson v. City of Winston-Salem, 75 N.C. App. 181, 182, 330 S.E.2d 222, 223 (1985) (citation omitted), *rev'd on other grounds*, 315 N.C. 384, 338 S.E.2d 105 (1986).

In *Bryan v. Elevator Co.*, 2 N.C. App. 593, 163 S.E.2d 534, (1968), our Court stated that:

> "The rule of *res ipsa loquitur* never applies when the facts of the occurrence, although indicating negligence on the part of some person, do not point to the defendant as the *only* probable tortfeasor. In such a case, unless *additional evidence*, which eliminates negligence on the part of all others who have had control of the instrument causing the plaintiff's injury is introduced, the court must nonsuit the case."

Bryan at 596, 163 S.E.2d at 536 (quoting *Kekelis* at 444, 160 S.E.2d at 323) (emphasis in original).

In *Kekelis*, plaintiff was injured while operating a yarn processing machine installed by defendant for plaintiff's employer, and plaintiff argued that the doctrine of *res ipsa loquitur* applied to her case. Our Supreme Court affirmed the trial court's judgment for defendants, stating:

> In this case, plaintiff's evidence is sufficient to allow the jury to find that she received an electric shock from a machine which defendant had installed between 9 and 18 hours earlier, and that the shock injured her. She has, however, offered no evidence tending to show any fault on the part of defendant. Therefore, unless—as plaintiff contends—the mere fact of injury, under the circumstances here disclosed, is evidence from which the jury may infer defendant's lack of due care, the judgment of nonsuit must be sustained.

Kekelis at 442-43, 160 S.E.2d at 322 (citation omitted).

Plaintiff alleged in his complaint, and Otis Elevator admitted in its answer, that Otis Elevator had a maintenance contract with 100 Block "to keep, service, and maintain [the elevators] in good repair[.]" In requests for admissions presented to Otis Elevator by 100 Block, 100 Block requested Otis Elevator to "[a]dmit that 100 Block Associates did not control the manner, method or the details of completing the

tasks and duties of Otis Elevator contained in the [maintenance] agreement[.]" Otis Elevator admitted in its response that, "as an independent contractor, *it* controlled the manner and methods of the maintenance, inspections and testing which it performed on the elevators pursuant to the [maintenance] contract[.]" (Emphasis added.)

Plaintiff has failed to offer evidence tending to establish the third element of the doctrine of *res ipsa loquitur*, as set forth in *Johnson*. *See Johnson* at 182, 330 S.E.2d at 223. As to the third element, that "the instrumentality causing the injury was in the exclusive control and management of defendant," plaintiff has forecast no evidence tending to establish 100 Block "as the only probable tortfeasor." *Bryan* at 596, 163 S.E.2d at 536. As in *Kekelis*, the mere fact that plaintiff was injured does not allow an inference that 100 Block failed to exercise due care.

We affirm the order of the trial court granting defendant 100 Block's motion for summary judgment and defendant Otis Elevator's motion for summary judgment.

Affirmed.

Judges JOHN and WALKER concur.

UNION CARBIDE CORPORATION, PLAINTIFF v. MURIEL K. OFFERMAN, SECRETARY OF REVENUE, DEFENDANT

No. COA97-956

(Filed 6 April 1999)

Taxation— nonbusiness income—reverted pension funds

Reverted funds from an overfunded pension plan, used to avoid a hostile takeover, constituted nonbusiness income because the reversion did not occur in the regular course of the corporation's trade or business (the transactional test) and there was no evidence that the pension plan was essential to the business's regular course of manufacturing and selling chemicals (the functional test). N.C.G.S. § 105-267.

Judge HORTON dissenting.

Reconsidered in light of *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998), pursuant to 30 December 1998 order of the North Carolina Supreme Court. Originally heard in the Court of Appeals 19 March 1998.

Alston & Bird, LLP, by Jasper L. Cummings, Jr.; Morrison & Foerster, by Paul H. Frankel; and Union Carbide Corporation, by Jerry L. Robinson, for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Kay Linn Miller Hobart, for defendant-appellant.

LEWIS, Judge.

Pursuant to the Supreme Court's order we have reconsidered the issues presented, and we affirm our prior decision.

Plaintiff Union Carbide Corporation is a New York corporation domiciled in Connecticut and qualified to do business in North Carolina. Its principal business is the manufacture and sale of chemical products. Fearing a hostile takeover after a 1984 chemical gas leak in Bhopal, India, Union Carbide adopted a restructuring plan designed to increase stock prices. In 1985, Union Carbide's defined benefit pension plan trust held more assets than legally necessary to provide benefits to Union Carbide employees; it was substantially overfunded because of better than expected investment returns. Although Union Carbide had some input in investment decisions, it did not own or manage the pension plan trust, and individual employees were the beneficiaries of the plan. As part of the corporate restructuring, Union Carbide effected a reversion of pension plan funds from the overfunded pension plan. Federal law permits such reversions under certain circumstances, and Union Carbide sought and received permission to effect a reversion of the excess funds by removing part of the pension trust's assets and creating a trust for a new plan. Union Carbide used the removed assets to purchase annuities to pay for employee benefits. The excess funds after the annuity purchase ($500 million) were used to buy the company's stock. Union Carbide thus used a reversion from the overfunded pension plan to avoid a hostile takeover.

Union Carbide classified the $500 million as nonbusiness income under N.C. Gen. Stat. § 105-130.4(a)(1) (1985) and allocated the entire amount to Connecticut for taxation there. The state of North Carolina

reclassified the reversionary income as business income and levied tax on the $500 million. Union Carbide brought this action under N.C. Gen. Stat. § 105-267 (1986), seeking a refund of taxes paid. In our first decision, we addressed three issues: whether the reversion was business income to Union Carbide, whether Union Carbide made timely protest, and whether interest was properly awarded. The latter two parts of our decision are unaffected by the recent *Polaroid II* decision, and we decline to revisit them in the absence of a mandate to do so. Accordingly, the lone issue we decide is whether the pension plan reversion income is properly classified as business income or nonbusiness income under the two-prong test of *Polaroid II*. We hold that the reversionary income is nonbusiness income, and we affirm our prior decision.

The statutory definition of business income has not changed since 1985. Business income is

> income arising from transactions and activity in the regular course of the corporation's trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations.

N.C. Gen. Stat. § 105-130.4 (a)(1) (1997). Nonbusiness income is "all income other than business income." N.C. Gen. Stat. § 105-130.4(a)(5) (1997). Our previous *Union Carbide* decision was based squarely on our decision in *Polaroid Corp. v. Offerman*, 128 N.C. App. 422, 496 S.E.2d 399 (*Polaroid I*), *rev'd*, 349 N.C. 290, 507 S.E.2d 284 (*Polaroid II*) (1998), and as such we applied only the transactional test in determining that the reversion was non-business income. Pursuant to *Polaroid II*, however, we must consider two tests for business income—the transactional test and the functional test—in determining if the reversion is business income. *See Polaroid II*, 349 N.C. at 301, 507 S.E.2d at 293.

The first clause of the definition of business income creates the transactional test. *See Polaroid II*, 349 N.C. 295, 507 S.E.2d at 289. Three aspects of the income must be considered under this test: "the frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income." *Id.* The main inquiry "revolves around the nature of the particular *transaction* giving rise to the income." *Id.* (emphasis added). In our previous *Union Carbide* opinion, we determined that the reversion of

excess pension funds, rather than the operation of the pension plan itself, was the transaction that created income. The removal of funds from an overfunded pension plan by Union Carbide was a rare and extraordinary event; the evidence indicates no such removal occurred before or since the reversion at issue. As such, the reversion to Union Carbide did not occur in the "regular course of the corporation's trade or business." N.C. Gen. Stat. § 105-130.4 (a)(1). The reversion is not business income under the transactional test.

We now address for the first time whether the monies received from the reversion of pension plan funds constitute business income under the second clause of the definition, the functional test. *Polaroid II* directs that the definition of business income is to be read grammatically as follows: "[business income] includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations." *Id.* at 298, 507 S.E.2d at 290-91. *Polaroid II* explains the test in differing ways, however. First, "[u]nder the functional test, income is classified as business income if it arises from the acquisition, management, and/or disposition of an asset that was *used* by the taxpayer in the *regular course* of business." *Polaroid II* at 296, 507 S.E.2d at 289 (emphasis added). Later, we see another phrasing, directing us that "reading the second clause as a whole, business income includes income obtained from acquiring, managing, and/or disposing of property which is *essential* to the corporation's business *operation*." *Id.* at 301, 507 S.E.2d at 292-93 (emphasis added). We believe that the second version, which follows more closely the terms of our statute, is the true directive intended by the Supreme Court, and we will apply that interpretation.

Under the functional test, the extraordinary or infrequent nature of the event is irrelevant. *Id.* at 296, 507 S.E.2d at 289. The relevant inquiry addresses the character of the *property* that generated the income; extraordinary transactions may generate business income if the relevant asset was an integral part of the corporation's regular trade or business. *Id.* at 296, 507 S.E.2d at 289-90. *Polaroid II* further explains the functional test and says that "the phrase 'acquisition, management, and/or disposition' contemplates the indicia of owning corporate property." *Id.* at 301, 507 S.E.2d at 292. Moreover, "integral" means "essential to completeness." *Id.* Therefore, we discern three important inquiries in determining if income is business income under the functional test as set forth in *Polaroid II*: (1) whether there

are indicia of corporate ownership of the property; and (2) whether the property is "essential to completeness" of the (3) regular trade or business. *Id.* at 301, 507 S.E.2d at 292-93.

The State asserts that *Polaroid II*, in finding that the patent infringement suit proceeds were business income, is dispositive of this case. We disagree. In *Polaroid I* and *Polaroid II*, there was no dispute about the ownership or the integral nature of the patents. Indeed, Polaroid's primary source of income was sale of products on which the corporation owned patents. As such, Polaroid owned the property at issue, and the patents were integral to the regular course of Polaroid's business. Each of the three factors above was satisfied, and the income was found to be business income under the functional test.

Here, however, Union Carbide did not own any interest in the pension plan trust. Union Carbide's only role was a legally created one of fiduciary; the trust was held and managed by a trustee and the beneficiaries were individual employees and retirees. Furthermore, there is no evidence that the pension plan was or is essential to Union Carbide's chemical business. It was not legally mandated; its creation by Union Carbide was voluntary. A pension may be an attractive aspect of a compensation package, but it is not indispensable to operating a profitable chemical business. And, unlike Polaroid which relied on its patents to create income in its regular course of business, Union Carbide does not rely on its employees' pension plan to create corporate income.

Therefore, we hold that there is no evidence that Union Carbide's pension plan was essential to its regular course of manufacturing and selling chemicals. As such, any income derived from the management, acquisition, or disposition of it is nonbusiness income to Union Carbide under the functional test. Since the income also is nonbusiness income under the transactional test, we affirm our prior decision in full.

Affirmed.

Judge GREENE concurs.

Judge HORTON dissents.

Judge HORTON dissenting.

I respectfully dissent from the conclusion of the majority that the reverted funds from the Union Carbide pension plan are the "non-business" income of Union Carbide and thus not taxable by North Carolina.

Union Carbide has been qualified to do business in North Carolina since 1949. Since 1951, it has maintained a defined-benefit pension plan (the plan) for the benefit of its employees. The plan is non-contributory in that the employees do not contribute a portion of their wages to the plan. Instead, Union Carbide makes substantial annual contributions to the plan entirely from its general business income. For example, during the years 1978 through 1985, Union Carbide contributed a total of $1.1 billion to the plan. The plan is "qualified" under the Internal Revenue Code, so that all contributions to the plan are deductible from corporate income, and thus are not taxed either by the federal or state governments. Although the funds in the plan are held by a trustee, Union Carbide retained the right to make investment decisions as a fiduciary, subject to the limitations imposed by the Employee Retirement and Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.* Further, under appropriate circumstances, Union Carbide was entitled to the return of excess funds in the plan, either during the life of the plan or upon its termination. As the result of corporate restructuring to avoid a hostile takeover following the Bhopal, India, disaster, Union Carbide recaptured $500 million of its pension plan contributions. It now argues, and the majority agree, that the reverted pension fund contributions, originally from corporate business income and deducted as business expenses, were somehow transmuted into non-business income on which no income tax is due to North Carolina, one of the states in which Union Carbide does business.

N.C. Gen. Stat. § 105-130.4(a)(1) (Cum. Supp. 1998), which defines business income, contains both "transactional" and "functional" tests which may be applied to determine whether a particular item of income received by a corporation is "business" or "non-business." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 295, 507 S.E.2d 284, 289 (1998). The distinction between business and non-business income for tax purposes is critical. A multi-state corporation pays tax on its business income to the several states in which it does business, using a formula based on its contacts with the various states to determine the amount of tax due each. However, where

income is non-business income, a corporation only pays tax on the income to its home state.

In this case, Union Carbide classified the entire $500 million from its pension plan as non-business income and allocated it to Connecticut. In determining its Connecticut tax liability, Union Carbide treated the income as "apportionable unitary income," apportioning it among all states in which it does business. Under Union Carbide's classification of the funds as non-business, no state other than Connecticut was paid state income tax on the reverted funds. Union Carbide did report, however, the entire $500 million as ordinary income for federal income tax purposes.

I do agree with the majority that the reversion of pension funds to Union Carbide does not satisfy the transactional test, because it was not in the "regular course of the corporation's trade or business." N.C. Gen. Stat. § 105-130.4(a)(1). Under the functional test, however, the second part of the statutory definition states that business income includes income from property "if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular . . . business operations." *Id.*

In the case before us, Union Carbide argues that the pension plan was not the property of the corporation nor was it integral to its operation. The majority agree, stressing that the business of the corporation was making chemicals; not operating pension plans. That argument loses sight of the fact that it is to the benefit of any business to attract and retain qualified and loyal employees. That goal is clearly an integral part of the successful operation of any business. The pension plan discussed in this case is a part of the Union Carbide employees' total compensation package, designed not only to compensate employees for their work, but to assist them with retirement planning and to assist the company in retaining its experienced employees. Under any commonly accepted meaning of the term, operation of the Union Carbide pension plan is integral, or essential, to its business operations. Indeed, to use the language of the Internal Revenue Code, Union Carbide deducted its contributions to the plan and the related costs of operation of the plan as ordinary and necessary business expenses. Having certified its contributions and the expenses of operation of the plan as being necessary expenses in the operation of its business in order that such expenses might be deducted from income, Union Carbide may not now contend that the operation of the pension plan was not integral, or necessary, to its business operations.

Furthermore, Union Carbide had a sufficient ownership interest in the pension fund to satisfy the "acquisition, management, and/or disposition" portion of the functional test. As required by federal law, the plan funds were held by a trustee. Union Carbide retained certain powers as a fiduciary to direct investment of plan funds, subject to the limitations placed on fiduciaries by ERISA. Union Carbide also had the right under some circumstances to seek a reversion of excess funds in the pension fund. It received permission to exercise that right in this case and did so. A part of the original plan's assets were removed and a new trust created for a plan to cover some retired employees. After purchasing annuities to guarantee retirement funds for the retired employees at the promised levels, $500 million was left over and was used by Union Carbide for corporate purposes. At all times, Union Carbide had the right to seek permission to withdraw excess funds from the plan. That contingent right, together with the right of Union Carbide to direct investments in the plan, is sufficient to demonstrate "the indicia of owning corporate property" contemplated by our Supreme Court in *Polaroid*, 349 N.C. at 301, 507 S.E.2d at 292.

The result I would reach is not fundamentally unfair to this corporate taxpayer. From 1951 to 1985, Union Carbide earned sums from its business operations which were subject to taxation as general *business* income. It deducted its contributions from business income to the pension plan as *business* expenses dollar-for-dollar, so that the contributions were not taxed. It has now recaptured a substantial portion of those funds and classified them as *non-business* income in order to avoid paying state income taxes on the reverted funds to any state except Connecticut. North Carolina seeks only to tax that portion of the reverted funds which represent Union Carbide's contacts with this state in the same fashion other business income is taxed. That is neither unfair nor unconstitutional. I vote to reverse.

SONDRA A. HAIGHT AND JIMMIE F. MILLS, ADMINISTRATOR OF THE ESTATE OF JAMES ROBERT SCOTT HAIGHT, DECEASED, PLAINTIFFS v. TRAVELERS/AETNA PROPERTY CASUALTY CORPORATION, STATE AUTO INSURANCE COMPANIES AND CHARLES WESTON HOLLEMAN, DEFENDANTS

No. COA98-686

(Filed 6 April 1999)

1. Insurance— automobile—liability—definition of persons insured

The trial court erred in a declaratory judgment action arising from an automobile accident by applying the definition of "persons insured" in N.C.G.S. § 20-279.21(b)(3) to the liability portion of the Financial Responsibility Act, N.C.G.S. § 20-279.21(b)(2), because the persons insured under a vehicle liability policy are expressly set out in (b)(2). Furthermore, applying the (b)(3) definition could bring about the absurd result of requiring motor vehicle liability coverage for nondrivers.

2. Insurance— automobile—exclusion—vehicle oriented

A family member owned vehicle exclusion to an automobile liability policy was valid under the Financial Responsibility Act. A distinction has consistently been recognized between UM/UIM, which is person oriented, and liability, which is vehicle oriented; the exclusion here is vehicle oriented in that it limits coverage to personal injury or property damage arising out of the ownership, maintenance, or use of the covered vehicle and it is not at odds with the scheme behind the Financial Responsibility Act. *Cartner v. Nationwide Mutual Fire Ins. Co.*, 123 N.C.App. 251, is not controlling because its exclusion was person oriented.

Appeal by defendants from judgment entered 30 April 1998 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 1999.

Weaver, Bennett & Bland, P.A., by Michael David Bland and Christopher M. Vann, for plaintiffs-appellees.

Crews & Klein, P.C., by James P. Crews, and Womble Carlyle Sandridge & Rice, A Professional Limited Liability Company, by Richard T. Rice and Alison R. Bost, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Travelers/Aetna Property Casualty Corporation ("Travelers") and State Auto Insurance Companies ("State Auto") (collectively, "defendants") appeal from a declaratory judgment in favor of Sondra A. Haight ("Haight") and Jimmie F. Mills, Administrator of the Estate of James Robert Scott Haight ("Robert"), (collectively, "plaintiffs"). In the judgment, the trial court ruled that an insurance provision excluding liability coverage for a vehicle owned by a relative residing with the named insured was invalid under the North Carolina Vehicle Safety and Financial Responsibility Act ("Financial Responsibility Act"), North Carolina General Statutes section 20-279.1, *et seq.* After carefully considering the issues raised by this appeal, we conclude that the trial judge erred in declaring that the challenged exclusion was void.

The relevant factual and procedural background is as follows: On 7 July 1997, an automobile owned and operated by Charles Weston Holleman ("Holleman") collided with an automobile driven by Haight and occupied by her minor son, Robert. Robert was killed in the accident and Haight sustained serious bodily injuries. At the time of the collision, Holleman resided with three family members: James, Mary Catherine, and Curtis. Holleman and each family member had separate personal automobile insurance policies that provided liability coverage in the amount of $100,000 per person/$300,000 per accident. Holleman, James, and Mary Catherine were insured by Travelers, and Curtis was insured by State Auto. Each of the individual policies contained a "family member-owned vehicle" exclusion denying liability coverage for the "ownership, maintenance, or use" of a vehicle owned by a family member.

Plaintiffs filed a claim under all four policies, seeking compensation for wrongful death and personal injuries arising out of the 7 July 1997 automobile collision. Relying on the exclusion contained within each policy, Travelers and State Auto denied plaintiffs' claims with respect to the policies held by James, Mary Catherine, and Curtis. Plaintiffs filed an action requesting a declaratory judgment determining the validity of the "family member-owned vehicle exclusion." Plaintiffs alleged that the exclusion was void because it violated the public policy inherent in the Financial Responsibility Act. Following a hearing on the matter, the trial court entered a judgment declaring that the exclusion was invalid, in that it denied the required coverage to "persons insured," as that term is defined in section

20-279.21(b)(3) of the General Statutes. Citing this Court's decision in *Cartner v. Nationwide Mutual Fire Ins. Co.*, 123 N.C. App. 251, 472 S.E.2d 389 (1996), the trial court concluded that the individual policies held by James, Mary Catherine, and Curtis covered the claims asserted by plaintiffs for wrongful death and personal injuries arising out of the 7 July 1997 accident. From this judgment, defendants appeal.

The questions presented by this appeal are: (1) whether the term "persons insured," as defined in section 20-279.21(b)(3) of the General Statutes, should be read into the liability clause of the Financial Responsibility Act; (2) whether under North Carolina law, a "family member-owned vehicle" exclusion is valid in the context of liability insurance; and (3) whether this Court's decision in *Cartner*, 123 N.C. App. 251, 472 S.E.2d 389, controls the outcome of the instant case. We will examine each question in turn.

[1] Defendants contend that the term "persons insured," defined in section 20-279.21(b)(3), does not apply to the liability provision of the Financial Responsibility Act (section 20-279.21(b)(2)), because (1) the term does not appear in the liability provision; (2) the liability provision explicitly lists those persons for whom liability coverage is required; and (3) the legislature could not have intended to require liability insurance for all persons included in the definition of "persons insured." Based on well-settled principles of statutory construction, we agree.

As a rule of construction, it is fundamental that the intent of the legislature controls in determining the meaning of a statute. *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996). Legislative intent may be determined from the language of the statute, the purpose of the statute, " 'and the consequences which would follow [from] its construction one way or the other.' " *Id.* at 494, 467 S.E.2d at 41 (quoting *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989)). Nonetheless, if a statute is facially clear and unambiguous, leaving no room for interpretation, the courts will enforce the statute as written. *Bowers v. City of High Point*, 339 N.C. 413, 419-20, 451 S.E.2d 284, 289 (1994) (citing *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973)).

The focus of our analysis is the definition contained in section 20-279.21(b)(3), the uninsured motorist (UM) provision of the Financial Responsibility Act, which pertinently provides that:

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of the motor vehicle.

N.C. Gen. Stat. § 20-279.21(b)(3) (Cum. Supp. 1997). Our courts have acknowledged the application of this definition to the underinsured (UIM) provision of the Financial Responsibility Act (section 20-279.21(b)(4)). *See, e.g., Mabe*, 342 N.C. 482, 467 S.E.2d 34 (distinguishing between two classes of "persons insured" for purposes of UIM coverage). Plaintiffs contend, and the trial court agreed, that the definition of "persons insured" should also be read into the liability provision of the Act. It is significant, however, that unlike the section pertaining to liability insurance, the UIM section specifically states that "[t]he provisions of subdivision (3) of this subsection shall apply to the coverage required by this subdivision." N.C.G.S. § 20-279.21(b)(4). Thus, the legislature's intent to provide UIM coverage to those individuals described as "persons insured" in subdivision (b)(3) is apparent from the language of section 20-279.21(b)(4). Such intent is not expressed in the liability provision of the Act, and, indeed, we have found no cases holding that the definition of "persons insured" applies to the mandate regarding liability coverage.

The intent of the legislature regarding those persons for whom liability coverage is required appears in the liability provision itself. Section 20-279.21(b)(2) of the General Statutes states that a "motor vehicle liability policy":

> Shall 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 or motor vehicles[.]

N.C.G.S. § 20-279.21(b)(2). The language of the provision is explicit. Liability insurance shall cover the named insured and any other person in lawful possession of the insured vehicle "for damages arising out of the ownership maintenance or use of such motor vehicle."

Therefore, we need not look to the definition of "persons insured" provided in subsection (b)(3) for an understanding of which persons are entitled to liability insurance coverage under the Financial Responsibility Act. Because the persons insured under a vehicle liability policy are expressly set out in section 20-279.21(b)(2), we conclude that the definition of "persons insured" in subsection (b)(3) does not apply to liability insurance coverage.

Furthermore, we note that our courts, "will, whenever possible, interpret a statute so as to avoid absurd consequences." *Insurance Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977). Applying the subsection (b)(3) definition of "persons insured" to the liability provision of the Financial Responsibility Act would require all liability policies to insure guests riding in the insured vehicle and pedestrians, i.e., the named insured and "resident relatives" who are not driving or riding in any vehicle. Unquestionably, these individuals would have no need for motor vehicle liability insurance, since they would not be operating an automobile. We do not believe that the legislature intended to require motor vehicle liability insurance for non-drivers, and such a reading would bring about "absurd consequences." Therefore, we hold that the trial court's construction of the term "persons insured," as it relates to liability insurance coverage, was error.

[2] Next, we examine whether the exclusion challenged in the present case is valid under the Financial Responsibility Act. The personal automobile policies issued by Travelers and State Auto to James, Mary Catherine, and Curtis Holleman contain the following relevant provisions:

> INSURING AGREEMENT
>
> We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an automobile accident. . . .
>
> "Insured" as used in this Part means:
>
> 1. You or any family member for the ownership, maintenance or use of any auto[.]
>
> 2. Any person using your covered auto.
>
> 3. For your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.

> 4. For any auto . . ., other than your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of you or any family member for whom coverage is afforded under this Part. This provision applies only if the person or organization does not own or hire the auto[.]
>
> . . .
>
> EXCLUSIONS
>
> . . .
>
> B. We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> . . .
>
> 2. Any vehicle, other than your covered auto, which is:
>
> a. owned by any family member[.]

The above exclusion purports to deny liability coverage for bodily injury or property damage arising out of an automobile accident involving a vehicle owned by a family member. Thus, under the policy terms, the automobile owned and operated by Holleman when the accident took place, was not covered under the liability provisions of the policies held by James, Mary Catherine, and Curtis. The question then becomes whether such an exclusion—a family member-owned vehicle exclusion—as to liability insurance is repugnant to the purpose of the Financial Responsibility Act. We hold that it is not.

The Financial Responsibility Act is a remedial statute and the underlying purpose is the protection of innocent victims who have been injured by financially irresponsible motorists. *Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 473 S.E.2d 427 (1996), *disc. review denied and cert. denied*, 345 N.C. 641, 483 S.E.2d 708 (1997). As our Supreme Court stated in *Mabe*, 342 N.C. 482, 467 S.E.2d 34,

> "The victim's rights against the insurer are not derived through the insured, as in the case of voluntary insurance. Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car, regardless of whether or not the nature or

> circumstances of the injury are covered by the contractual terms of the policy. The provisions of the Financial Responsibility Act are 'written' into every automobile policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail.

Id. at 493-94, 467 S.E.2d at 41 (quoting *Chantos*, 293 N.C. at 441, 238 S.E.2d at 604.

In applying the Financial Responsibility Act, our courts have consistently recognized a distinction between UM/UIM and liability insurance. Our Supreme Court has said that while UM/UIM insurance is person-oriented in nature, liability insurance is vehicle-oriented. *Mabe*, 342 N.C. 482, 467 S.E.2d 34; *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992); *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992). Mindful of this distinction, we note that the "family member-owned vehicle" exclusion is a vehicle-oriented exclusion, in that it limits liability coverage to personal injury or property damage arising out of the ownership, maintenance or use of the covered vehicle. As such, the exclusion contained in the policies held by James, Mary Catherine, and Curtis is not at odds with the scheme behind the Financial Responsibility Act, and we see no reason to invalidate the exclusion as repugnant to the Act. To so hold "would abrogate the distinctions between [vehicle-oriented] liability coverage and [person-oriented] UM/UIM coverage." *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 206, 444 S.E.2d 664, 672 (1994), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996).

The trial court, in voiding the exclusion, relied, in part, on our Supreme Court's holdings in *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 462 S.E.2d 650 (1995), and *Mabe*, 342 N.C. 482, 467 S.E.2d 34. In *Bray*, the Court considered whether a "family member/household-owned vehicle" exclusion for UM coverage was hostile to the purpose of UM/UIM coverage under the Financial Responsibility Act. The exclusion at issue "purpor[ted] to take coverage away from a 'family member' who sustains bodily injury while 'occupying' or when struck by any vehicle that is not a covered 'auto' and is owned by the individual insured or any 'family member' of the insured." *Bray*, 341 N.C. at 682, 462 S.E.2d at 652. The Court, acknowledging the distinction between liability and UM/UIM insurance, concluded that the vehicle-based exclusion contravened the purpose of the person-based statutory scheme for UM/UIM coverage and, thus, was void as against public policy.

Similarly, in *Mabe*, the Court addressed the issue of whether an "owned vehicle exclusion" for UIM coverage violated the Financial Responsibility Act with regard to UM/UIM insurance. The relevant exclusion endeavored to withhold UIM coverage from a family member injured while in a family member/household-owned vehicle not listed in the policy. Citing its decision in *Bray*, the Court held that the exclusion was inconsistent with the legislative intent of the Financial Responsibility Act. In rendering this decision, the Court noted the remedial purpose of UM/UIM coverage and recognized the difference between person-oriented UM/UIM insurance and vehicle-oriented liability insurance.

The trial court's reliance on *Bray* and *Mabe* is misplaced, because the decisions are inapposite to the instant case. Both cases deal with a vehicle-based exclusion in the context of UM/UIM coverage, and in both cases, the Court found that the exclusion was contrary to the person-oriented statutory scheme. Here, although the exclusion in question is also vehicle-based, it applies to liability insurance, which our courts have recognized as vehicle-oriented for purposes of the Financial Responsibility Act. *See Mabe*, 342 N.C. 482, 467 S.E.2d 34; *Harris*, 332 N.C. 184, 420 S.E.2d 124; *Bass*, 332 N.C. 109, 418 S.E.2d 221. Thus, *Bray* and *Mabe* do not apply, and the "family member-owned vehicle" exclusion at issue in the case *sub judice* comports with the legislative policy behind the Financial Responsibility Act.

Lastly, we consider whether this Court's holding in *Cartner*, 123 N.C. App. 251, 472 S.E.2d 389, is controlling on the facts of the instant case. Defendant argues that the trial court erroneously relied on *Cartner* as precedent for invalidating the "family member-owned vehicle" exclusion contained in the policies of James, Mary Catherine, and Curtis. Defendant contends that because *Cartner* dealt with a different exclusion, it has no bearing on the present case. We agree.

In *Cartner*, the plaintiff's decedent was killed when her husband, the driver of an automobile in which she was a passenger, lost control of the vehicle on a rural road in Haywood County. At the time of the accident, the vehicle was covered by a personal motor vehicle liability policy issued to the decedent and her husband. The liability section of the policy "contained a provision excluding coverage for bodily injury to any insured or any member of an insured's family residing in the insured's household." *Id.* at 252-53, 472 S.E.2d at 390. Although

the policy was issued in Florida, it included a conformity provision stating that the policy would be adjusted to include "the limits *and kinds of coverage* required of non-residents by any compulsory motor vehicle law or similar law of a state or province other than Florida." *Id.* at 252, 472 S.E.2d at 390. The plaintiff filed an action for a declaratory judgment holding the insurer liable for the fatal injuries sustained by the decedent in the accident. On appeal from a judgment in favor of the plaintiffs, this Court concluded that the "family member exclusion" was unenforceable to bar liability coverage for the bodily injuries to plaintiff's decedent. Articulating the basis for our decision, we said that:

> Following the rationale of *Bray* and *Mabe*, we are of the opinion that where, as here, a person is injured through the negligence of an insured family member while riding with that family member in an insured vehicle, North Carolina's Financial Responsibility Act prevents the operation of a family member exclusion in the policy's liability section to bar coverage. To reach any other result would be to deny plaintiff's decedent a means of recovering under the Policy for her injuries caused by her husband's negligence. We do not think North Carolina's legislature intended to sanction such a result. Therefore, as the trial court found, liability coverage for insured persons injured through the negligence of a family member while riding in an insured vehicle is a "kind of coverage" required by North Carolina's Financial Responsibility Act.

Id. at 255, 472 S.E.2d at 391.

In *Cartner*, the vehicle involved in the accident was covered under the policy in question, but the exclusion purported to deny liability coverage for personal injuries sustained by the insured and/or his family members. As such, the exclusion was person-oriented. However, as previously stated, the exclusion contained in the personal automobile insurance policies held by James, Mary Catherine, and Curtis Holleman denies liability coverage to vehicles owned by family members, and thus, is vehicle-oriented. Therefore, the rationale behind the *Cartner* decision does not apply to the facts of the instant case. Moreover, the exclusion at issue in the instant case does not operate to deny plaintiffs a means of recovering for the injuries caused by Holleman's negligence. Such injuries are covered by the policy insuring Holleman's personal automobile, and if the amount of coverage is insufficient to fully compensate plaintiffs, the UIM insur-

ance covering the vehicle driven by Haight would provide plaintiffs additional compensation. Accordingly, we hold that *Cartner* does not control the present set of facts, and the "family member-owned vehicle" exclusion in the liability section of the policies issued to James, Mary Catherine, and Curtis Holleman are valid and enforceable under the Financial Responsibility Act.

For the reasons articulated above, we reverse the judgment of the trial court and remand this matter for entry of a judgment consistent with this opinion.

Reversed and Remanded.

Judges LEWIS and WALKER concur.

VERONICA D. ROMIG, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF v. JEFFERSON-PILOT LIFE INSURANCE COMPANY, DEFENDANT

No. COA97-1303

(Filed 6 April 1999)

Appeal and Error— appealability—discovery order—class action certification

An appeal was dismissed as interlocutory where the court entered an order permitting further discovery before the court determined whether to grant class certification in an action alleging false and misleading insurance sales methods and presentations. Discovery orders are interlocutory and not ordinarily appealable, with a narrow exception where the order includes a finding of contempt or other sanctions. This order does not impose sanctions or adjudge defendant to be in contempt, the court did not certify the order under Rule 54, and defendant failed to show that a substantial right was affected.

Judge GREENE dissenting.

Appeal by defendant from order entered 14 July 1997 by Judge Melzer A. Morgan, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 18 August 1998.

McDaniel & Anderson, L.L.P., by L. Bruce McDaniel, and Wolf Haldenstein Adler Freeman & Herz, L.L.P., by David A.P. Brower, for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by Larry B. Sitton, James G. Exum, Jr. and Robert R. Marcus, and King & Spalding, by Frank C. Jones, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Jefferson-Pilot Life Insurance Company ("defendant") appeals from an order of the trial court permitting Veronica D. Romig ("plaintiff") to conduct further discovery before the court determined whether to grant class certification. For the reasons hereinafter stated, we dismiss this appeal as interlocutory.

Plaintiff filed a class action complaint against defendant on 6 November 1995 alleging that defendant engaged in a scheme or common course of conduct to use false and misleading sales materials and presentations in the sale of its interest sensitive life insurance policies. Specifically, plaintiff averred that defendant, through its agents, misrepresented the nature of its policies by stating that the premiums would "vanish" after a fixed number of years due to the accumulation of interest or dividends payable on the policies.

On 16 January 1996, the parties filed a Joint Motion for Extension of Time, wherein defendant requested additional time to respond to plaintiff's complaint, and the parties agreed to limit discovery to the issue of class certification until the issue was finally decided. The trial court granted the motion and entered a Scheduling Order, which set the time for completing discovery and submitting briefs on the class certification issue. Plaintiff thereafter served defendant with her First Request for Production of Documents Limited to the Issue of Class Certification. Defendant provided timely responses to plaintiff's requests, producing nearly 10,000 pages of documents.

On 23 January 1996, plaintiff filed a Motion for an Action Maintainable as a Class Action, which she subsequently amended on 3 October 1996. The trial court held a hearing regarding plaintiff's motion on 20 December 1996 and issued a written ruling on 10 February 1997 finding that plaintiff had failed to prove the existence of a "class" as required under North Carolina law. In particular, the court found as follows:

> The plaintiff has failed to establish, to the satisfaction of this trial court, the actual existence of a class. She has not established as a threshold matter that defendant Jefferson Pilot's alleged misrepresentations were either standardized representations uniformly made to all putative class members or were representations made as part of a common scheme or course of conduct orchestrated by the defendant and carried out by its agents.

This ruling also directed defendant's counsel to draft a proposed order denying class certification.

On 26 February 1997, before a written order denying class certification was entered, plaintiff filed a Motion for Reconsideration of the Court's Ruling Denying Class Certification and a Motion for Stay of Entry of an Order Denying Class Certification. By her motion for reconsideration, plaintiff requested the trial court to vacate its ruling, pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, and to allow plaintiff an opportunity to conduct additional discovery. The trial court granted plaintiff's motion to stay and ordered the parties to submit briefs addressing plaintiff's motion for reconsideration.

The trial court held a hearing on the motion for reconsideration on 26 March 1997. At the hearing, the parties were again afforded an opportunity to argue the issue of class certification. On 14 July 1997, after "review[ing] all of the submissions made by the parties to date," the trial court entered an Order Permitting Further Discovery Before Determination of Class Certification. The order stated that "[t]he plaintiff [shall] have 125 days from the date of the filing of this order to conduct full discovery, in a manner and sequence to be chosen by the plaintiff, regarding" matters specifically listed by the trial court. The order then set out specific materials which "plaintiff [was] authorized to seek and be provided with." These materials were consistent with those items sought by plaintiff in the request for additional discovery stated within her motion for reconsideration. From the order permitting further discovery, defendant appeals.

Plaintiff filed a motion to dismiss defendant's appeal as interlocutory. In response, defendant petitioned this Court for writ of certiorari. We will address these matters simultaneously.

"An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citing *Veazey v.*

Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950)). As a general rule, interlocutory orders are not immediately appealable. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 507 S.E.2d 56 (1998). The policy behind this rule is to " 'avoid[] fragmentary, premature and unnecessary appeals' " by allowing the trial court to completely and finally adjudicate the case before the appellate courts review it. *Florek v. Borror Realty Co.*, 129 N.C. App. 832, 836, 501 S.E.2d 107, 109 (1998) (quoting *Jarrell v. Coastal Emergency Services of the Carolinas*, 121 N.C. App. 198, 201, 464 S.E.2d 720, 722-23 (1995)).

Nevertheless, a party may appeal an interlocutory order in two instances. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). First, a party may appeal where the trial court enters a final judgment with respect to one or more, but less than all of the parties or claims, and the court certifies the judgment as immediately appealable under Rule 54(b) of the North Carolina Rules of Civil Procedure. *Abe*, 130 N.C. App. at 334, 502 S.E.2d at 881 (quoting *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253). A party may also appeal an interlocutory order "if it affects a substantial right and will work injury to the appellant[] if not corrected before final judgment." *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984). In either instance, the burden is on the appellant "to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253.

Discovery orders, such as that from which the present appeal stems, are interlocutory and, thus, are ordinarily not appealable. *Gibbons v. CIT Group/Sales Financing*, 101 N.C. App. 502, 505, 400 S.E.2d 104, 106 (1991). Our courts, however, have recognized a narrow exception to the rule against direct appeals from discovery orders where such orders include a finding of contempt or other sanctions. *See Sharpe v. Worland*, 132 N.C. App. 223, —— S.E.2d ——, —— (1999) (discovery order appealable when enforced by sanctions); *Wilson v. Wilson*, 124 N.C. App. 371, 477 S.E.2d 254 (1996) (discovery order immediately appealable when party adjudged to be in contempt); *Willis v. Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976) (discovery order directly appealable when litigant found to be in contempt for failure to comply). Under such circumstances, "the order is appealable as a final judgment." *Sharpe*, 132 N.C. App. 223, —— S.E.2d ——, —— (1999).

Because the discovery order at issue in the instant case does not impose sanctions or adjudge defendant to be in contempt and since the trial court did not certify the order under Rule 54, the propriety of this appeal rests upon a showing that the order affects a substantial right. *See Jeffreys*, 115 N.C. App. 377, 444 S.E.2d 252. Defendant, however, has failed to make such a showing. Defendant's principal argument is that the order deprives defendant of the "substantial right to a fair and impartial adjudication of the class certification issue." While we do not dispute that a litigant is entitled to an unbiased decision-maker and that the same is essential to due process, *Evers v. Pender County Bd. of Education*, 104 N.C. App. 1, 15, 407 S.E.2d 879, 887 (1991), defendant has not shown that this right is in peril because of the court's discovery order. Defendant charges the trial judge with being predisposed toward plaintiff's cause, but we find no support in the record for defendant's contention that the judge acted improperly. Indeed, there is a " 'presumption of honesty and integrity in those serving as adjudicator.' " *Taborn v. Hammonds*, 83 N.C. App. 461, 472, 350 S.E.2d 880, 887 (1986) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 724 (1975)). Therefore, we reject defendant's argument that the discovery order affects its right to a neutral decision on the issue of class certification.

Defendant further challenges the portion of the order requiring it to disclose the names, addresses, and telephone numbers of those policyholders who wrote complaint letters to the company. The files of the complainants were produced to plaintiff in response to a discovery request. These files were also submitted to the trial court as part of the record to be considered in determining the issue of class certification. The names and addresses of the complaining policyholders were redacted from the files prior to their production and submission. Defendant contends that in ordering discovery of the identities of these complainants, the trial court violated defendant's right to protect confidential and proprietary policyholder information. Defendant contends that this right is substantial and will be lost if immediate appeal of the order is denied. We cannot agree.

Initially, we note that our research has uncovered no North Carolina cases which stand for the proposition that an insurance company, as a party to a lawsuit, has a substantial right to prevent disclosure of the identities of complaining policyholders. It is true, as defendant contends, that North Carolina, by adopting the Insurance Information and Privacy Protection Act, N.C. Gen. Stat. § 58-39-1, *et. seq.*, recognizes the confidential nature of policyholder information.

This notwithstanding, the Act explicitly provides that an insurer may disclose "personal or privileged information about an individual collected or received in connection with an insurance transaction [where] the disclosure is: . . . [i]n response to a facially valid administrative or judicial order[.]" N.C. Gen. Stat. § 58-39-75(8) (Cum. Supp. 1997).

Generally, "orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480 (1977). "Judicial action [that is] supported by reason is not an abuse of discretion." *Gregorino v. Charlotte-Mecklenburg Hospital Authority*, 121 N.C. App. 593, 597, 468 S.E.2d 432, 435 (1996).

In its order permitting further discovery, the trial court stated that the documents submitted to date "d[id] not clearly address the issue of whether the life insurance product offered by the defendant was defective." The court further stated that if defendant knowingly put a defective product into the marketplace or if, knowing that its agents were misrepresenting the product, defendant allowed the product to remain in the marketplace, the interests of justice require that the affected consumers have an opportunity for legal redress, such as is available in a class action lawsuit. The court further indicated that questions remained as to whether plaintiff stood in the same relationship to defendant as did the proposed class members so that she could represent the class.

Given these unresolved questions, it was not unreasonable for the trial judge, in its effort to determine whether class certification was appropriate, to order disclosure of the names, addresses, and known telephone numbers of the complaining policyholders and their insurance agents. Moreover, we note that the order at issue was not without restrictions. The trial court limited the time period within which to complete said discovery and confined the scope of such discovery only to those policyholders who had complained. The court did not require defendant to disclose the identities of all existing policyholders or even those who had purchased the allegedly misrepresented policies. Therefore, we hold that the discovery ordered by the trial court was well within its discretionary power. Defendant's argument that the discovery ordered affects a substantial right, then, fails.

The concerns expressed by the dissent regarding the disclosure of confidential information about policyholders is misplaced for two

reasons. First, the individual policyholders whose names and addresses the court ordered disclosed had surrendered the cloak of confidentiality and, in fact, desired attention to their perceived injustices, when they expressed in writing their complaints regarding defendant's insurance. Second, the trial court has broad discretion to prevent abuses of discovery and is authorized to issue protective orders under the Rules of Civil Procedure that could preserve the confidentiality of the complaining policyholders, i.e., orders limiting the use of the information and/or prohibiting further disclosure. *See* N.C.R. Civ. P. 26(c). Certainly, defendant is not precluded from seeking a protective order from the trial court.

For the foregoing reasons, we conclude that defendant has failed to demonstrate that a substantial right will be irreparably harmed if immediate appeal is not allowed. Accordingly, defendant's appeal must be dismissed.

Dismissed.

Judge JOHN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree that the order appealed by defendant is interlocutory. I do not agree, however, that the order fails to affect a substantial right that will be irreparably harmed if the interlocutory appeal is denied.

"[D]iscovery matters are interlocutory and *ordinarily* are not appealable." *Gibbons v. CIT Group/Sales Financing*, 101 N.C. App. 502, 505, 400 S.E.2d 104, 106, *disc. review denied*, 329 N.C. 496, 407 S.E.2d 856 (1991) (emphasis added). I believe this case presents an exception to the general rule that discovery matters are not immediately appealable. In this case, the trial court ordered the disclosure of insurance policyholder information, including the identities of the insured. This information is recognized as confidential, N.C.G.S. ch. 58, art. 39 (1994 & Supp. 1998), and it follows that plaintiff has a substantial right to protect the disclosure of the information. Admittedly, the same statute providing that the policyholder information is confidential also provides that it is subject to disclosure by an appropriate court order. N.C.G.S. § 58-39-75(8) (Supp. 1998). It is the appropriateness of this order that the insurance company is entitled to have

immediately reviewed. If it is not immediately reviewed, the confidential material will be disclosed and the appellate court, after entry of a final judgment, will be helpless to correct any error it may find in the disclosure order. Once the information is disclosed, its confidentiality can never be restored. In other words, if the issue of the legality of the disclosure is not addressed in this interlocutory appeal, it can never be addressed effectively.

I, therefore, would allow this appeal.

TELEFLEX INFORMATION SYSTEMS, INC., PLAINTIFF v. DAVID J. ARNOLD, JR., DEFENDANT, AND DAVID J. ARNOLD, JR., THIRD-PARTY PLAINTIFF v. VANGUARD CELLULAR SYSTEMS, INC., THIRD-PARTY DEFENDANT

No. COA96-1067

(Filed 6 April 1999)

1. Employer and Employee— at-will employment contract— action for wrongful termination—public policy—not extended

The trial court did not err by granting summary judgment against Arnold (the original defendant who counterclaimed against the original plaintiff and then brought a third-party complaint against the original plaintiff's parent company, including many of the same claims) on a claim for wrongful termination of an at-will employment contract where Arnold alleged violation of public patent policy, the fruits of his labor clause of the North Carolina Constitution, the open door clause of the North Carolina Constitution, and his right to free speech. The Court of Appeals declined to expand public policy exceptions to essentially private contract disputes.

2. Employer and Employee— breach of implied covenant of fair dealing—summary judgment

The trial court did not err by granting summary judgment for Arnold on a claim against his employer for breach of an implied covenant of fair dealing in the context of an at-will employment contract.

3. Employer and Employee— interference with prospective economic relations—no action

The trial court did not err by granting summary judgment for Arnold on a claim for interference with prospective economic relations arising from a dispute over ownership of software. There is no basis for believing that a cause of action exists in North Carolina for interference with prospective contractual relationships.

Appeal by David J. Arnold, Jr., third-party plaintiff, from judgment entered 11 March 1996 by Judge W. Steven Allen, Sr., in Guilford County Superior Court. Heard in the Court of Appeals 16 February 1999.

This case arises out of a controversy between Teleflex Information Systems, Inc. (Teleflex), and David J. Arnold, Jr. (Arnold), over the ownership of certain methods and processes Arnold developed, or invented, while an employee of Teleflex. Teleflex is the wholly owned subsidiary of Vanguard Cellular Systems, Inc. (Vanguard). Teleflex instituted this action seeking an injunction from the trial court to prevent Arnold from divulging any trade secrets of Teleflex; seeking a declaration that Arnold was "hired to invent" the software in question, and a declaration that Teleflex owns all rights, including intellectual property rights, in the software; and seeking damages. Arnold counterclaimed, seeking similar relief against Teleflex and seeking damages for wrongful termination of his employment, among other things. Arnold brought a third-party complaint against Vanguard, which included many of the same claims he asserted against Teleflex. The nine causes of action in his third-party complaint against Vanguard included claims for wrongful termination of employment [Count II], breach of the duty of fair dealing [Count IV], and interference with prospective economic relations [Count V]. On motion of Vanguard, the trial court granted summary judgment on Counts II, IV, and V of Arnold's third-party complaint, certified there was "no just cause for delay," and Arnold appealed to this Court from the grant of summary judgment.

Upchurch & Galifianakis, by Nick Galifianakis; and Lee L. Corum, for third-party plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by William Sam Byassee, for third-party defendant-appellee.

HORTON, Judge.

A. Wrongful Termination of Employment [Count II]

[1] During the time Arnold was an at-will employee of Teleflex or Vanguard, or both, Arnold developed a "new batch billing architecture." Arnold contends, and Vanguard denies, that the new process resulted from work Arnold did on his own time, without any assistance from Vanguard or its employees, and that he is the sole owner of the process or "invention." Arnold agrees that he was an "at-will" employee of Vanguard, but argues that he was fired by Vanguard on 28 January 1994 in violation of the public policy of this State for refusing to sign a document acknowledging that he claimed no ownership interest in the process. Although there is a continuing factual dispute whether Arnold was in fact an employee of Vanguard, counsel for Vanguard stipulated in oral argument that Arnold could be considered an employee of Vanguard for purposes of this appeal.

Although the discharge of an employee-at-will normally does not support an action for wrongful termination of employment, North Carolina courts have developed a public policy exception to the general rule. There is no "bright-line" test for determining when the termination of an at-will employee violates public policy. Our Supreme Court held in *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992), that:

> [a]lthough the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good," at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Id. at 353, 416 S.E.2d at 169 (footnote omitted). The plaintiff employee in *Amos* was fired because she refused to work for less than the statutory minimum wage. The Court held that "defendants violated the public policy of North Carolina by firing plaintiffs for refusing to work for less than the statutory minimum wage." *Id.* at 354, 416 S.E.2d at 170.

Plaintiff alleges four public policy violations arising from termination of his at-will employment with Vanguard. Arnold contends that his discharge violates "public patent policy," as set out in Article I, § 8, cl. 8 of the U.S. Constitution; that his termination denies him the right to the fruits of his labors as found in Article I, § 1 of the N.C.

Constitution; that the action of Vanguard in terminating his employment operates to bar the courthouse door in violation of Article I, § 18 of the N.C. Constitution; and that his discharge violates his rights to free speech as guaranteed by both the U.S. and N.C. Constitutions. We disagree but will examine each of appellant's arguments.

Public Patent Policy

Plaintiff contends that defendant terminated his employment in violation of a "public patent policy." He contends that Article I, § 8, cl. 8 of the U.S. Constitution confers upon him a right to protect his inventions, and to terminate his employment in light of his alleged right violates the Constitution. He also claims that defendant's conduct harms the public at large because to deny plaintiff the ability to file a patent is to delay or deny the public's right to the future use of his inventions. In its brief, defendant cites Article I, § 8, cl. 8, which provides that "congress shall have power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries[.]" Defendant contends that the language of Article I, § 8, cl. 8 confers no patent right upon plaintiff, but rather grants Congress the power to enact laws that create property rights in inventions. We agree with defendant's contention, in light of the fact that after the Constitution was ratified, Congress passed the Patent Act in 1790. We follow the holdings of other jurisdictions that the "Patent Clause" of the U.S. Constitution "authorizes Congress to enact the patent laws, but does not confer any rights by itself upon an individual." *Brosso v. Devices for Vascular Intervention, Inc.*, 879 F. Supp. 473, 478, *aff'd*, 74 F.3d 1225 (E.D. Pa. 1995). We decline to create a "public patent policy" exception to the employment at-will doctrine.

Denial of the Fruits of His Labor

Plaintiff further contends that defendant's conduct violates public policy as promoted under the North Carolina Constitution. Article I, § 1 of the N.C. Constitution guarantees all citizens of North Carolina "certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." He claims that defendant terminated him in an effort to deny him "the enjoyment of the fruits" of his own labor. Defendant contends that Article I, § 1 creates no interest which limits the employment at-will doctrine, and argues that the constitutional provision guarantees to an individual only the right to pursue ordinary and simple occupations free from government regulation. In *Real Estate*

Licensing Board v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976), this Court determined that an amendment to our statutes regulating real estate brokers and requiring their licensure was unconstitutional as being overly broad, because the definition contained in the amendment purported to regulate business activities such as those of defendant, which "consist[ed] only of selling for a modest fee the addresses of property for rent, some information about the features of the properties, and the phone numbers of the lessors." *Id.* at 11, 228 S.E.2d at 495. This Court held, in part, that to regulate the defendant, and others like him, as real estate brokers was "a sharp and dangerous detour from any established and accepted definition" of real estate broker. *Id.* at 12, 228 S.E.2d at 496. In *Aikens*, the defendant argued that such regulation violated several provisions of our State Constitution, including Article I, § 1. We agreed, holding that the "fundamental provisions" of our State Constitution, such as Article I, § 1, were inserted to "guarantee the right to pursue ordinary and simple occupations free from *governmental* regulation." *Id.* at 13, 228 S.E.2d at 496 (emphasis added). *See also State v. Ballance*, 229 N.C. 764, 768, 51 S.E.2d 731, 734 (1949), in which Justice Ervin eloquently observed that the declaration of rights in our State Constitution was inserted "chiefly to protect the individual *from the State.*" *Id.* (emphasis added). Here, Arnold does not seek redress for any governmental action, and the cited provision of the State Constitution does not give him a remedy against a corporate defendant in an essentially private dispute over the ownership of property. We agree with defendant's position for the above reasons, and find that Article I, § 1 of the North Carolina Constitution does not apply to plaintiff's claim.

Barring the Courthouse Door

Plaintiff contends that defendant's conduct violates public policy as promoted under Article I, § 18 of the North Carolina Constitution. The section provides that:

> All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Plaintiff contends that, when defendant learned that plaintiff consulted a patent attorney and asserted his legal rights as an inventor, defendant made an effort to bar plaintiff from asserting his rights in court by confronting plaintiff with two options: either relinquish his ownership rights, or face termination of employment. Defendant con-

tends that the very fact plaintiff has asserted his claims in a court of law contradicts his own argument that defendant has somehow barred plaintiff a judicial remedy. We agree with defendant's contention, and we find no evidence that defendant illegally prohibited plaintiff from asserting his rights in a court of law.

Right to Free Speech

Plaintiff contends that defendant violated public policy by denying him his constitutionally protected right to free speech. He contends that defendant abridged his right to claim ownership of his inventions, and that defendant terminated his employment because he refused to disavow those rights. Defendant contends there is no free speech interest to be protected here; no free speech rights are implicated in a dispute between an employee and a private employer. If "state action" is responsible for restricting speech, then there is a potential constitutional violation. *See Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 S.E.2d 431 (1992). Defendant contends that, as a private entity, it is allowed to abridge plaintiff's free speech rights without violating public policy. We agree with defendant's contention for the above-stated reasons, and we find no public policy violation here.

In determining whether to enlarge the scope of the public policy exceptions to the employment-at-will doctrine, we must focus on the *public* interests involved. In *McLaughlin v. Barclays American Corp.*, plaintiff asked this Court "to recognize, as a public-policy exception to the employee-at-will doctrine, a cause of action for wrongful discharge when the termination results from the employee's use of self-defense." 95 N.C. App. 301, 304, 382 S.E.2d 836, 839, *cert. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989). We noted in *McLaughlin* that " '[p]ublic policy' is a 'vague expression' but has been defined as the principle of law holding that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 305, 382 S.E.2d at 839 (citations omitted). After analyzing the leading North Carolina cases of *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989), and *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. reviews denied*, 314 N.C. 331, 333 S.E.2d 490 and *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985), we stated:

> In each case, our courts focused on the *potential harm to the public at large* if those instructions [i.e., to give perjured testi-

> mony in *Sides* and to violate the state and federal highway safety regulations in *Coman*] were obeyed. Similar public-policy implications are not present in Mr. McLaughlin's case. We do not perceive the kind of deleterious consequences for the general public, if we uphold Barclays' action, as might have resulted from decisions favorable to the employers in *Sides* and *Coman*.

McLaughlin, 95 N.C. App. at 306, 382 S.E.2d at 840 (emphasis added). Here, we do not find the "potential harm to the public at large" as in *Sides*, *Coman*, and their successors. In those cases, the defendant-employer encouraged the plaintiff-employee to violate some law or risk being fired. In the case before us, the evidence does not suggest that Vanguard encouraged Arnold to violate any law. We know of no law requiring the plaintiff to claim an ownership interest in his inventions or to file a patent application. We decline to expand the public policy exceptions to essentially private contract disputes such as this. The assignment of error is overruled.

B. Breach of Duty of Fair Dealing [Count IV]

[2] Arnold contends that North Carolina recognizes a cause of action for an employer's alleged breach of an implied covenant of fair dealing in the context of an at-will employment. In support of his contention, Arnold cites *Speck v. N.C. Dairy Foundation*, 64 N.C. App. 419, 307 S.E.2d 785 (1983), *reversed*, 311 N.C. 679, 319 S.E.2d 139 (1984); and *Coman*, 325 N.C. at 174-75, 381 S.E.2d at 446-47. *Speck* provides no support for Arnold's argument, however. *Speck* involved the claim by two professors that they had an interest in a secret scientific process which made possible the production of "Sweet Acidophilus" milk, and which process they discovered while employed by North Carolina State University. The trial court in *Speck* granted summary judgment for the defendants, and this Court reversed, holding that there was a question of fact about the existence of a fiduciary relationship between plaintiffs and the defendants. In reversing the decision of this Court, the Supreme Court held that the plaintiffs never had any interest in the process which they developed while employed by the University: "As the secret process in question belonged to the University immediately upon its discovery by the plaintiffs, the plaintiffs never possessed any interest cognizable in equity or at law in the process." *Speck*, 311 N.C. at 687, 319 S.E.2d at 144. Therefore, defendants never stood in a fiduciary relationship with the plaintiffs with regard to their discovery. *Id.*

In *Coman*, our Supreme Court stated that courts in other states "have recognized wrongful discharge theories characterized either as the bad faith exception to the at-will doctrine or under the implied covenant of good faith and fair dealing." *Coman*, 325 N.C. at 177, 416 S.E.2d at 173 (citation omitted). In *Amos*, 331 N.C. 348, 416 S.E.2d 166, however, the Supreme Court stated that the above-quoted statements from *Coman* were "dicta," and specifically stated that the Court "did not recognize a separate claim for wrongful discharge in bad faith." *Id.* at 360, 416 S.E.2d at 173. The trial court properly entered summary judgment on this claim for relief.

C. Interference with Prospective Economic Relations [Count V]

[3] Our Supreme Court set out the elements of tortious interference with contract in *United Laboratories, Inc. v. Kuykendall*:

> The tort of interference with contract has five elements: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff. *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954).

322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

Plaintiff contends, however, that the interference is with his "prospective" contractual relationships. In *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 108 N.C. App. 24, 422 S.E.2d 338 (1992), *overruled on other grounds*, 347 N.C. 97, 489 S.E.2d 880 (1997), this Court reversed the trial court's denial of summary judgment, holding in part that "[p]laintiff was unable to point to any specific instance when these acts [*i.e.*, interference with prospective contractual relations] occurred, and this Court is unable to find any evidence of such in the record. *We find no basis for believing that such a cause of action even exists in North Carolina." Id.* at 31, 422 S.E.2d at 343 (emphasis added). Likewise, in the case before us, Arnold cannot point to any particular prospective relationships with which Vanguard tortiously interfered, and the trial court's grant of summary judgment must be affirmed. Arnold is not without a remedy, however. If he ultimately prevails at trial, he may seek damages from Vanguard for wrongfully obtaining an injunction against him. N.C. Gen. Stat. § 1A-1, Rule 65(e) (1990).

In summary, we affirm the grant of summary judgment by the trial court as to all three counts which are the subject of this appeal.

Affirmed.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. TONY RAY HYATT, DEFENDANT

No. COA98-577

(Filed 6 April 1999)

1. Criminal Law— pro se defendant—waiver of counsel not withdrawn—no inquiry necessary

The trial court did not err in a prosecution for possession of a firearm by a felon and other charges by not inquiring into whether a pro se defendant wanted or needed counsel or by failing to grant him a continuance to obtain counsel after the court had allowed defendant to sign a waiver, discharged the public defender, and continued the case twice, each time with a warning that there would be no more continuances. A criminal defendant must move the court to withdraw his prior waiver of counsel and statements by this defendant demonstrating his lack of legal skills do not equate to a motion or request to withdraw the previous waiver.

2. Constitutional Law— right to counsel—pro se representation—inadequate inquiry

The trial court erred by allowing a criminal defendant to proceed pro se without insuring that all constitutional standards were met where the written waiver signed by defendant asserted that he was informed of the charges against him, the nature of the statutory punishment, and the nature of the proceedings against him, but the record discloses that the trial court failed to inform defendant of any of those things. The record discloses only that the court met its mandate of informing defendant that he had the right to appointed counsel; this falls well short of the requirements of N.C.G.S. § 15A-1242.

Appeal by defendant from judgments entered 10 October 1996 by Winner, J., in Superior Court, Buncombe County. Heard in the Court of Appeals 28 January 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert T. Hargett, for the State.

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

WYNN, Judge.

On 10 January 1996, defendant Tony Ray Hyatt ("Hyatt") was indicted for possession of a firearm by a felon, driving with a revoked license, felonious driving while impaired, four counts of assault with a deadly weapon upon a government official, and six counts of being a habitual felon. Approximately five months thereafter, a public defender was appointed to represent Hyatt in Superior Court.

On 5 August 1996, Hyatt's case was called for trial. At that time, Hyatt expressed dissatisfaction with his assigned counsel and moved to continue the trial so that his mother could obtain private counsel for him. Upon hearing Hyatt's motion, the trial court engaged in the following colloquy with Hyatt:

> Q: Alright, Mr. Hyatt, let me ask you something. In your motion here you've asked for a continuance. Are you relying on your mother to hire this lawyer, because if you're telling me you want to waive your right to a Court Appointed lawyer, that's fine, but I don't want to let [the Court Appointed lawyer] out of the lawsuit, and then if your mother suddenly hasn't gotten her money from Social Security, or for whatever reason she decides she's not going to hire that lawyer or any other lawyer, for that matter, then we'll be up here again. Now, when is your mother supposed to have her situation where she can employ this lawyer for you?
>
> A: She has called down to Alabama where the checks and stuff come from, and they told her that within three to four weeks it would be there.
>
> Q: Well, now, we're not going to continue it for more than a month. Are you going to be prepared to proceed and go forward at that time?
>
> A: Yes, sir.

Q: Even if you haven't hired a lawyer?

A: I'm going to have one, Your Honor.

Q: So you're willing—What I'm asking you is, you've got a right to have a Court Appointed lawyer.

A: Right.

Q: Now, what I'm saying is, I won't let [the Court Appointed lawyer] out if you don't want to proceed without a Court Appointed lawyer.

A: No, I'd just rather—If I ain't got one at that time if I get it continued, we'll go with it by myself then.

Q: Alright, if you'll sign a Waiver, I'll let you out of the lawsuit, the case, Ms. Burner [the Court Appointed lawyer]. I will continue it, but I will put in there that it's not to be continued again. Do you understand what I'm saying?

A: Yes, sir.

Following this inquiry, Hyatt signed the Waiver of Counsel form indicating, *inter alia*, that he had been fully informed of the charges against him, the nature of and the statutory punishment for each such charge and his right to assigned counsel. Thereafter, the trial court granted Hyatt's motion to withdraw counsel and continued the case until 9 September 1996.

However on that date, Hyatt again appeared in court without counsel and asked for another continuance. At that session, Hyatt's mother informed the trial court that she still awaited her Social Security payments which she intended on using to obtain private counsel. The trial court granted Hyatt a continuance until 7 October 1996 after explicitly warning Hyatt and his mother that "this is the last time we're going to continue this, so you have to understand that, okay?"

When Hyatt's case came to trial on 7 October 1996, Hyatt once again appeared without counsel. At that time, the following exchange occurred:

COURT: Mr. Hyatt, do you have a lawyer?

HYATT: No, sir.

. . . .

COURT: My understanding is that the last time that this came on for trial, that you told Judge Payne you were going to hire your own lawyer, and he continued it for that purpose?

HYATT: Yes, sir.

COURT: And said it wasn't going to be continued again for that purpose.

Thereafter, the trial court, without further inquiry, brought Hyatt's case to trial. Indeed, the court never asked Hyatt whether he wanted to withdraw his previous waiver of assigned counsel or wanted the assistance of standby counsel.

During the trial, Hyatt stated on numerous occasions that he didn't have a lawyer and didn't know how to proceed. For example, when asked whether he was going to provide evidence on his previously-filed motion to change venue, Hyatt responded, "I ain't got no lawyer, so I don't know how to go into that." Similarly, when Hyatt was asked whether he wanted to make an opening statement he stated, "I don't have an attorney, and I don't know what to say or how to go about it." Ultimately, Hyatt was convicted on all counts.

On appeal, Hyatt contends that the trial court committed plain error by allowing him to proceed *pro se*. Specifically, Hyatt's appeal contains two distinct issues: (I) Whether the trial court erred by failing to inquire into whether he needed or wanted counsel or by failing to grant him a continuance to obtain counsel, and, (II) Whether the trial court erred by allowing Hyatt to proceed *pro se* without ensuring that all constitutional and statutory standards were satisfied.

I.

[1] It is well-settled that a criminal defendant can waive his right to be represented by counsel so long as he voluntarily and understandingly does so. *See State v. Clark*, 33 N.C. App. 628, 629, 235 S.E.2d 884, 886 (1977). Once given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41, *cert. denied*, 285 N.C. 595, 206 S.E.2d 866 (1974). Indeed, "[t]he burden of showing the change in the desire of the defendant for counsel rests upon the defendant." *Id.*

In the case *sub judice*, we are presented with the question of what actions a defendant must take to meet the aforementioned bur-

den. We find it unnecessary to articulate any particular standard in this case because Hyatt failed to meet the threshold requirement of moving the trial court to withdraw his waiver. Admittedly, this threshold requirement has never explicitly been articulated by this Court or our Supreme Court. Nonetheless, a close reading of our prior cases demonstrates that our holding today—that a criminal defendant must move the court to withdraw his prior waiver of counsel—has been an implicit part of our jurisprudence.

For example, in the factually similar case of *State v. Smith*, 27 N.C. App. 379, 381, 219 S.E. 277, 279 (1975), we stated that "the burden is on the defendant not only to *move* for withdrawal of the waiver, but also to show good cause for the delay." (Emphasis added.) Similarly, in *State v. Wilburn*, 57 N.C. App. 40, 44, 290 S.E.2d 782, 784 (1982), we noted that there was "no evidence that defendant ever *moved* to withdraw his waiver of assigned counsel." (Emphasis added.) Lastly, in *State v. Graham*, 76 N.C. App. 470, 474, 333 S.E.2d 547, 549 (1985), we granted the defendant who had previously waived counsel a new trial because the trial court failed to appoint counsel after he subsequently "*requested* that the court 'get someone to assist me in [my] case.' " (Emphasis added.) Thus, these and other cases implicitly hold that a criminal defendant must move or request the trial court to withdraw a previous waiver of counsel. *See also State v. Love*, 131 N.C. App. 350, 355, 507 S.E.2d 577, 581 (1998); *State v. Elliot*, 49 N.C. App. 141, 144, 270 S.E.2d 550, 551 (1980); *Clark*, 38 N.C. App. at 630, 235 S.E.2d at 886; *State v. Watts*, 32 N.C. App. 753, 755, 233 S.E.2d 669, 670, *disc. review denied*, 292 N.C. 734, 235 S.E.2d 788 (1977).

In the case *sub judice*, it is undisputed that Hyatt voluntarily signed a Waiver of Counsel form. Moreover, during Hyatt's 7 October 1996 trial, Hyatt neither moved nor requested the trial court to withdraw his prior waiver. Rather, Hyatt simply stated that because he didn't have an attorney, he did not know how to question jurors or prepare an opening statement. These statements, though demonstrating Hyatt's lack of legal skills, do not equate to a motion or request to withdraw his previous waiver. Therefore, the trial court was not required to inquire into whether Hyatt wanted or needed counsel.

We note that the case *sub judice* is distinguishable from *State v. Graham*, 76 N.C. App. 470, 333 S.E.2d 547 and *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 775. In those cases, it was determined that the

defendant was entitled to a new trial because the record showed that the defendant waived his right to appointed counsel, not to his right to all counsel. Specifically, in both cases "there is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel." *McCrowre*, 312 N.C. at 480, 322 S.E.2d at 776-77; *Graham*, 76 N.C. App. at 475, 333 S.E.2d at 549. In this case, however, Hyatt explicitly informed the court that if he could not obtain private counsel he would "go with it by myself then." Thus, unlike the defendants in *McCrowre* and *Graham* who informed the trial court that they desired counsel, Hyatt led the trial court to believe that he was willing to undertake this case by himself.

In sum, we hold that to obtain relief from a waiver of his right to counsel, a criminal defendant must move the court for withdrawal of the waiver. *See Smith*, 27 N.C. App. at 381, 219 S.E.2d at 279. In the case *sub judice*, Hyatt never moved the court to withdraw his waiver. Therefore, no further inquiry was required.

II.

[2] We next address whether the trial court properly allowed Hyatt to proceed *pro se*. A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963). A criminal defendant, on the other hand, also "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). The trial court, however, must insure that constitutional and statutory standards are satisfied before allowing a criminal defendant to waive in-court representation. *See State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992).

First, a criminal defendant's election to proceed *pro se* must be "clearly and unequivocally" expressed. *See State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). Second, the trial court must make a thorough inquiry into whether the defendant's waiver was knowingly, intelligently and voluntarily made. *Id.*

Our Supreme Court has stated that the inquiry mandated by N.C. Gen. Stat. § 15A-1242 satisfies these requirements. *Id.* Section 15-1242 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 judge makes a 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 his decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

The provisions of this statute are mandatory and failure to conduct this inquiry constitutes prejudicial error. *See State v. Godwin*, 95 N.C. App. 565, 572, 383 S.E.2d 234, 238 (1989).

In the instant case, Hyatt initially signed a Waiver of Counsel form which stated, *inter alia*, that he was informed of the charges against him, the nature and statutory punishment for each charge, and his right to appointed counsel. Moreover, the form stated that he understood and appreciated the consequences of his decision to waive his right to counsel.

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." *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). However, we have also stated that "a written waiver of counsel is no substitute for actual compliance by the trial court with G.S. 15A-1242." *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986). Moreover, we have held that although a written waiver sets forth a presumption of a knowing, intelligent and voluntary waiver, that presumption can be overcome if the record demonstrates otherwise. *See Love*, 131 N.C. App. at 355, 507 S.E.2d at 581. Indeed, our Supreme Court has considered a written waiver as something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not as an alternative to it. *See State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992).

In this case, while the written waiver asserts that Hyatt was informed (1) of the charges against him, (2) the nature of the statutory punishment for each charge, and (3) the nature of the proceed-

ings against him, the record discloses that the trial court failed to inform Hyatt of any of these things. Indeed, we have failed to discover any statements by the trial court which demonstrate that the defendant was informed of any of the above. Rather, the record discloses only that the trial court met its mandate of informing Hyatt that he had the right to appointed counsel. This falls well short of the requirements of N.C. Gen. Stat. § 15A-1242. Accordingly, because it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by N.C. Gen. Stat. § 15A-1242, we must grant this defendant a new trial.

New trial.

Judges HORTON and EDMUNDS concur.

DAVID DILLINGHAM, AS GUARDIAN AD LITEM FOR CHARLES B. DILLINGHAM, PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT-APPELLEE

No. COA98-820

(Filed 6 April 1999)

1. Administrative Law— standard of review—legal error

The appropriate standard of review for whether DHNR erred in requiring that petitioner rebut by clear and convincing written evidence the presumption of Medicaid ineligibility arising from a transfer of assets was de novo because petitioner asserted that the final agency decision was affected by legal error. The whole record test is utilized when appellant contends the agency decision was not supported by the evidence or was arbitrary or capricious.

2. Public Assistance— Medicaid—ineligibility—transfer of assets—form of evidence

Respondent agency's final decision was affected by an error of law where the agency concluded that a transfer of assets was not exclusively devoid of Medicaid considerations, which would result in denial of benefits and sanctions, in that the decision was based upon petitioner's failure to present sufficient written evidence to support his claim that the asset transfers occurred for

another purpose. The State Audit Medicaid Manual required that the presumption of ineligibility arising from a transfer of assets for less than their fair market value be rebutted by written evidence; however, federal law provides that an applicant may rebut the presumption upon a "satisfactory showing" and neither federal statutes nor regulations establish the form of evidence for a satisfactory showing. The requirement in the State manual for written evidence is an administrative rule which is not valid unless adopted in accordance with the provisions of the Administrative Procedure Act.

3. Public Assistance— Medicaid—ineligibility—transfer of assets—standard of evidence

Respondent agency's requirement that petitioner satisfy an unpromulgated standard of clear and convincing evidence for rebutting the presumption of ineligibility for Medicaid benefits raised by a transfer of assets for less than fair market value amounted to an error of law. The agency's requirement of clear and convincing evidence was an administrative rule which must be promulgated in accordance with Article 2A of Chapter 150B. Because it was not defined by statute or regulation, the applicable standard of proof was preponderance of the evidence.

Appeal by petitioner from order entered 29 April 1998 by Judge Claude S. Sitton in Buncombe County Superior Court. Heard in the Court of Appeals 24 February 1999.

Pisgah Legal Services, by Curtis B. Venable, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Kathryn J. Thomas, for respondent-appellee.

MARTIN, Judge.

In August of 1996, Charles Dillingham was discharged from a hospital to a nursing care facility after suffering a stroke. Mr. Dillingham was 86 years of age. In September 1996, Mr. Dillingham transferred assets worth $126,735.76 to his son, David Dillingham, the petitioner. In November 1996, petitioner applied to the Buncombe County Department of Social Services for Medicaid coverage for his father's long term nursing care. The Department of Social Services denied benefits and imposed sanctions based upon the uncompensated asset transfer. Contending the transfer of assets took place exclusively for

a purpose other than to qualify for Medicaid assistance, petitioner appealed to the Division of Social Services of the North Carolina Department of Human Resources (now North Carolina Department of Health and Human Resources) (hereinafter "DHR").

The Division of Social Services hearing officer issued a tentative decision in which he concluded "the greater weight of the written documentation [offered by petitioner] is not clear and convincing that the transfer was **exclusively** devoid of all Medicaid considerations" (emphasis original) and affirmed the decision of the Buncombe County Department of Social Services. The hearing officer cited the provisions of the North Carolina "Aged, Blind and Disabled Medicaid Manual", otherwise known as the "State Adult Medicaid Manual," § 2240, VIII.B (MA-2240 VIII B), which provides in pertinent part:

> 1 When a non-allowable transfer is verified, presume the transfer was made to establish Medicaid eligibility for cost of care. Determine the sanction penalty. . . .
>
> 2. Advise the a/r [applicant/recipient] he may rebut the presumption that the asset was transferred to establish or retain Medicaid eligibility. The a/r must present clear and convincing **written** evidence to show the asset was transferred **exclusively** for a reason other than qualifying for Medicaid. The evidence presented must be more persuasive than all evidence to the contrary (emphasis original).

At petitioner's request pursuant to G.S. § 108A-79, the hearing officer's tentative decision was reviewed by the Chief Hearing Officer for the Division of Social Services. Petitioner argued the requirement for "written evidence" contained in the Adult Medicaid Manual and applied by the hearing officer had not been enacted in accordance with the requirements of the Administrative Procedures Act and, thus, was of no consequence. The Chief Hearing Officer entered a Final Decision in which she concluded:

> It is conceded that the Medicaid manual reference requiring "written" evidence was not duly promulgated by the State in accordance with the requirements of the Administrative Procedures Act. However, the undersigned disagrees with the contention that the Tentative Decision turns upon this requirement of the Medicaid manual. Rather, this manual requirement citation must be construed as nothing more than incidental support for the decision to uphold the imposition of sanction.

> Irrespective of any reference to "written" documentation, and based solely on the cited Federal regulations, the totality of the evidence and testimony presented supports the essential conclusion that it is not clearly and convincingly documented that the transfer was exclusively void of Medicaid considerations (emphasis original).

Petitioner petitioned for judicial review of the final agency decision pursuant to G.S. § 108A-79(k) and G.S. § 150B-51(b). The superior court affirmed DHR's final agency decision, concluding that "the final agency decision was supported upon the whole record by substantial competent evidence, was within the statutory authority and jurisdiction of the agency, was made upon lawful procedure, was not arbitrary or capricious, was not in violation of constitutional provisions, and was not affected by error of law . . . ." Petitioner appeals.

Initially, we observe that petitioner-appellant's brief does not conform to the requirements of Rule 28 of the North Carolina Rules of Appellate Procedure. The brief fails to state the question or questions presented, N.C.R. App. P. 28(b)(2) & (5); fails to argue those questions separately, N.C.R. App. P. 28(b)(5); fails to reference the assignments of error pertinent to the arguments by number and location in the record on appeal, N.C.R. App. P. 28(b)(5); and does not contain the required headings in their prescribed order. N.C.R. App. P. 28(b) and Appendix E to the North Carolina Rules of Appellate Procedure. We remind counsel that the Rules of Appellate Procedure are mandatory and a party's failure to comply with them frustrates the review process and subjects the party to sanctions, which may include dismissal of the appeal. N.C.R. App. P. 25(b). *Steingress v. Steingress* 350 N.C. 64, 511 S.E.2d 298 (1999). Because of the potential importance of the issues involved in this case, we elect to exercise the discretion granted us by N.C.R. App. P. 2 and address the merits of petitioner's assignments of error.

By his assignments of error, petitioner contends DHR's final agency decision was affected by an error of law because the agency applied substantive standards with respect to the form of evidence and level of required proof which had not been promulgated as required by law. Specifically, petitioner argues the provisions of the State Adult Medicaid Manual, requiring the presumption of ineligibility arising from a transfer of assets for less than fair market value to be rebutted by written, clear and convincing evidence, are invalid because they have not been adopted in accordance with the adminis-

trative rule making procedures prescribed by Article 2A of Chapter 150B of the General Statutes.

[1] Appellate review of a judgment of the superior court entered upon review of an administrative agency decision requires that the appellate court determine whether the trial court utilized the appropriate scope of review and, if so, whether the trial court did so correctly. *Act-Up Triangle v. Com'n for Health Serv.*, 345 N.C. 699, 483 S.E.2d 388 (1997). The nature of the error asserted by the party seeking review dictates the appropriate manner of review: if the appellant contends the agency's decision was affected by a legal error, G.S. § 150B-51(1)(2)(3) & (4), *de novo* review is required; if the appellant contends the agency decision was not supported by the evidence, G.S. § 150B-51(5), or was arbitrary or capricious, G.S. § 150B-51(6), the whole record test is utilized. *In re Appeal by McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993).

In this case, petitioner's assignments of error assert DHR's final agency decision was affected by legal error, thus the appropriate standard of review for the trial court and this Court is *de novo* review. *Id.* Accordingly, we consider *de novo* whether DHR erred in requiring that petitioner rebut by written evidence which was clear and convincing the presumption of ineligibility arising from Mr. Dillingham's transfer of his assets.

[2] Congress established the Medicaid program as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, in 1965 to provide "federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301, 65 L.Ed.2d 784, 794 (1980). States participating in the optional program are reimbursed for a portion of their costs. *See Atkins v. Rivera*, 477 U.S. 154, 91 L.Ed.2d 131 (1986); *McKoy v. North Carolina Department of Human Resouces*, 101 N.C. App. 356, 399 S.E.2d 382 (1991). "Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX," *Harris*, 448 U.S. at 301, 65 L.Ed.2d at 794 and, the requirements of the Secretary of Health and Human Services. *Atkins*, 477 U.S. at 157, 91 L.Ed.2d at 137. Participating states must serve (1) the "categorically needy," defined as families with dependent children eligible for public assistance under the Aid to Families with Dependent Children ("AFDC") program, 42 U.S.C. § 601 *et seq.*, and (2) the aged, blind, and disabled persons eligible for benefits under the Supplemental Security

Income ("SSI") program, 42 U.S.C. § 1381 *et seq.* *See* 42 U.S.C. § 1396a(a)(10)(A); *Harris*, 448 U.S. at 301 n. 1, 65 L.Ed.2d at 795 n. 1; *Elliot v. North Carolina Dept. of Human Resources*, 115 N.C. App. 613, 446 S.E.2d 809 (1994), *affirmed*, 341 N.C. 191, 459 S.E.2d 273 (1995).

Federal and North Carolina law provides coverage for long term nursing facility care, but denies such coverage when applicants "dispose of assets for less than fair market value" within 36 months of filing their Medicaid application. 42 U.S.C. § 1396p(c)(1)(A) & (B)(i); 10 N.C.A.C. 50B .0312(1). An improper transfer within the three year look back period raises a statutory presumption of ineligibility. Federal law provides that an applicant may rebut this presumption upon a "satisfactory showing" that:

> (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) *the assets were transferred exclusively for a purpose other than to qualify for medical assistance*, or (iii) all assets transferred for less than fair market value have been returned to the individual.

42 U.S.C. § 1396p(c)(2)(C) (emphasis added). Neither federal statutes nor regulations establish either the form of evidence or the standard of proof required for a "satisfactory showing." The federal manual which provides interpretive guidelines for the states to assist in the administration of the Medicaid program contains the following statement:

> Pending publication of regulations on transfers of assets that will provide guidelines on what is meant by the term "satisfactory showing" you must determine what constitutes a satisfactory showing in your State.
>
> . . .
>
> 2. *Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid*—Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.

State Medicaid Manual, HCFA-Pub. 45-3 § 3258.10 C. G.S. § 108A-79(I) provides that Medicaid hearings be conducted "accord-

ing to applicable federal law and regulation and Article 3, Chapter 150B, of the General Statutes of North Carolina."

A.

We must first determine whether the provision of the North Carolina "Aged, Blind and Disabled Medicaid Manual" prescribing the standard that written evidence is required to rebut the presumption created by a transfer of assets for less than the fair market value is a "rule" within the meaning of the Administrative Procedures Act. G.S. § 150B-2(8a) defines "rule" as

> any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:
>
> . . .
>
> c. Nonbinding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

We believe the requirement of the manual that an applicant for Medicaid, who is seeking to show that a transfer of his assets was made exclusively for a purpose other than Medicaid eligibility, provide *written* evidence is an administrative "rule" within the foregoing definition; the requirement creates a binding standard which interprets the eligibility provisions of the Medicaid law and, in addition, describes the procedure and evidentiary requirements utilized by respondent agency in determining such eligibility. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 411, 269 S.E.2d 547, 568, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980) (Rules operate to " 'fill the interstices of the statutes,' " and " 'go beyond mere interpretation of statutory language or application of such language and within statutory limits set down additional substantive requirements.' "); *Beneficial North Carolina, Inc. v. State ex rel. North Carolina State Banking Com'n*, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

An administrative rule is not valid unless adopted in accordance with the provisions of Article 2A of the Administrative Procedure Act. N.C. Gen. Stat. § 150B-18. Respondent agency argues, however, that the provisions of 10 N.C. Admin. Code 50B .0202 & .0203 authorize the requirement of documentary evidence to verify the transfer of assets.

However, these regulations do not address the nature of the evidence required to *rebut* the presumptions arising from such transfers; rather they merely require "verification" of the transfer of assets. N.C.A.C. 50B .0211(66) defines "verification" as "the confirmation of facts and information used in determining eligibility," nowhere stating that documentary evidence is required for verification. Thus, we hold there is neither statutory nor regulatory authority for the requirement that a Medicaid applicant present *written* evidence to rebut the presumption that a transfer of assets for less than fair market value was for the purpose of establishing Medicaid eligibility. To the extent respondent agency's final decision was based upon petitioner's failure to present sufficient *written* evidence to support his claim that the asset transfers occurred for a purpose exclusive of eligibility for Medicaid benefits, the decision was affected by an error of law.

B.

[3] Petitioner also contends respondent agency's final decision requiring proof as to the underlying purpose of the assets transfer by "clear and convincing" evidence was legal error. As noted above, a "satisfactory showing" is required by federal law to rebut the presumption of ineligibility raised by a transfer of assets for less than fair market value, but neither federal statutes nor regulations establish the standard of proof required for a "satisfactory showing." *See* 42 U.S.C. § 1396p(c)(2).

For the same reasons as stated with respect to the *form of evidence* required for a "satisfactory showing," we also hold that respondent agency's requirement as to the *standard of evidence* required for a satisfactory showing is an administrative rule which, to have legal effect, must be promulgated in accordance with Article 2A of Chapter 150B. Respondent agency concedes it has not promulgated a rule as to the standard of proof required but, citing the law of resulting trusts, argues that common law rules of evidence require the presumption of a gift between parent and child to be rebutted by "clear, cogent and convincing" evidence. Thus, it argues, the hearing officer correctly required "clear and convincing" evidence to rebut the presumption of ineligibility created by the transfer in the present case. We reject the argument.

In the absence of a valid statute or regulation establishing the standard of proof, G.S. § 150B-29 requires that "the rules of evidence as applied in the trial division of the General Court of Justice shall be

followed." Our Supreme Court has stated that the standard of proof in administrative matters is by the greater weight of the evidence, and it is error to require a showing by clear, cogent and convincing evidence. *In re Thomas*, 281 N.C. 598, 189 S.E.2d 245 (1972).

> The Commission's requirement, therefore, placed too great a burden on her. . . . G.S. s 143—318(1) [now G.S. § 150B-29(a)] requires the State agencies and boards charged with the duty of finding facts to observe the rules of evidence "as applied in the superior and district courts." In the superior court, except in extraordinary cases, the burden of proof is by the greater weight of the evidence. Proof beyond a reasonable doubt is confined to criminal offenses. Proof by clear, cogent, and convincing evidence is required to establish parole trusts, contents of lost documents, and such matters.

Id. at 603, 189 S.E.2d at 248. This is not one of those "extraordinary cases," or "cases of an equitable nature," *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934), requiring clear and convincing proof. The statutory presumption of 42 U.S.C. § 1396p(c)(2) differs from the equitable presumption of resulting trusts in both purpose and effect.

Because the standard of proof required to make the "satisfactory showing" called for by 42 U.S.C. § 1396p(c)(2) is not defined by statute or regulation, the applicable standard was proof by a preponderance of the evidence. Respondent agency's requirement that petitioner satisfy the unpromulgated standard of clear and convincing evidence contained in the referenced manuals amounted to an error of law, requiring that we reverse the judgment of the superior court and remand this matter for further remand to the North Carolina Department of Health and Human Services for reconsideration in light of the appropriate evidentiary standards. *See Surgeon v. Division of Social Services*, 86 N.C. App. 252, 357 S.E.2d 388, *disc. review denied*, 320 N.C. 797, 361 S.E.2d 88 (1987).

Reversed and remanded.

Judges TIMMONS-GOODSON and HUNTER concur.

CAROLYN MILLER PEELER, EMPLOYEE, PLAINTIFF v. PIEDMONT ELASTIC, INC., EMPLOYER; COMPCAROLINA (FORMERLY "PCA SOLUTIONS" AND "CONSOLIDATED ADMINISTRATORS"), CARRIER, DEFENDANTS

No. 98-672

(Filed 6 April 1999)

1. Workers' Compensation— compensable condition—pulmonary condition related to back surgery—evidence sufficient

There was competent evidence in a workers' compensation action in letters from plaintiff's doctors to support the finding that her pulmonary condition was related to a back injury which she sustained while working for defendant. Although defendants point to evidence within each doctor's testimony that supports the position that the pneumonia was unrelated to the surgery, the Commission need not make specific findings rejecting portions of a statement by a witness.

2. Workers' Compensation— continuing compensable condition—evidence insufficient

A workers' compensation award requiring defendants to pay for treatment of a pulmonary problem after back surgery arising from employment was reversed where causation was not supported by the testimony cited by the Commission.

3. Workers' Compensation— attorney fees—improperly awarded

The Industrial Commission improperly penalized defendants under N.C.G.S. § 97-88.1 by awarding attorney fees for failure to comply with an order directing payment for pneumonia treatment without a determination that a hearing was brought, prosecuted, or defended without reasonable ground.

Appeal by defendants from opinion and award filed 27 January 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 January 1999.

Randy D. Duncan, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by William J. Garrity, for defendant-appellants.

LEWIS, Judge.

On 4 January 1995, plaintiff sustained an injury by accident to her back while working for defendant Piedmont Elastic, Inc. Plaintiff underwent two back surgeries for this compensable injury, the first on 13 June 1995 and the second on 15 February 1996. On 13 July 1995, approximately one month after the first surgery, plaintiff was hospitalized for pneumonia. At issue in this case is the extent of pulmonary treatments for which defendants must pay as a result of the pulmonary problems plaintiff has experienced since her first surgery.

Plaintiff has been a heavy smoker for many years and has had numerous bouts with bronchitis; her first surgery was postponed for two weeks to allow her to recover from one such illness. Her family physician, Dr. Rudisill, treated plaintiff both before and after her first surgery for various ailments, including continued back pain and more pulmonary problems. Plaintiff saw Dr. Rudisill on 4 July 1995, and he diagnosed her as having asthmatic bronchitis and sinusitis. Shortly thereafter, plaintiff's surgeon, Dr. McCloskey, requested that a pulmonologist, Dr. Owens, see plaintiff. On 13 July 1995, plaintiff was admitted to Frye Regional Medical Center by Dr. Owens for treatment for pneumonia. Plaintiff remained in the hospital until 17 July 1995 when she was discharged by Dr. Pollock, an associate of Dr. Owens and also a pulmonologist. Plaintiff has continued to experience breathing difficulty and bouts of bronchitis.

Plaintiff filed a Form 33 requesting a hearing regarding payment for the pneumonia medications on 28 July 1995. In August of 1995, Drs. McCloskey and Pollack each tendered letters to plaintiff's attorney indicating that plaintiff's pneumonia was a result of the anesthesia involved in her first back surgery. On 22 August, defendants filed a Form 33R contending that the pneumonia treatments were unrelated to the original compensable injury. By letter dated 24 August 1995, the Industrial Commission ordered defendants to pay for the pneumonia treatment; defendants' motion for reconsideration of this order was denied on 19 September 1995.

At a hearing before the deputy commissioner on 27 June 1996, plaintiff and her husband testified, and depositions of Drs. Rudisill, Pollock, Owens, and McCloskey were received as evidence. The deputy commissioner ordered that "[d]efendants shall provide and pay for all treatment of the employee's pulmonary problems after the June 13, 1995, surgery, including treatment by Dr. Rudisill, Dr.

Pollock, [and] Dr. Owens." Defendants were ordered to pay $700.00 in attorney's fees as well as costs due the Commission for their failure to comply with the Commission's order of 24 August 1995.

Defendants' appeal was heard by the Full Commission on 18 August 1997. The Full Commission affirmed the award of the deputy commissioner, and found the following facts which are the subject of this appeal:

> 4. Dr. Elbert Rudisill, a Hickory family practitioner, has been the employee's family doctor since before 1981. Before the employee's June 3, 1995, back surgery, the employee did not have any chronic pulmonary problems. Since the June 13, 1995, back surgery, the employee has had recurrent pulmonary infections which are still ongoing.
>
> 5. Dr. Rudisill saw the employee: 7/4/95, 8/26/95, 9/18/95, 9/21/95, 10/10/95, 1/4/96, 1/16/96, 2/1/96, 4/2/96, 6/3/97 [sic], 6/25/96, 6/28/96, 7/9/96, 7/13/96, and 7/30/96. That was more times than any of the other treating physicians. Dr. Rudisill became concerned that while the Hickory pulmonologist [sic] were telling the employee she was cured that [sic] he could readily detect ongoing pulmonary problems.
>
> 6. Dr. Rudisill is reasonably certain that the employee's June 13, 1995, back surgery caused an ongoing recurrent pulmonary infectious process.
>
> 7. Dr. Scott McCloskey, the employee's neurosurgeon, Dr. Joseph Pollock and Dr. Fred Owens believe at least the pneumonia, bronchitis and sinusitis after the June 1995 back surgery were in part caused or aggravated by the surgery. Anesthesia during surgery is a well-known risk factor in the development or aggravation of pulmonary problems. In the employee's situation, her June 13, 1995 surgery had been postponed because of that risk.
>
> 8. While some of the doctors felt the employee's pulmonary problems caused by the June 13, 1995, surgery had ended after the employee's July 13, 1995-July 17, 1995, Frye Regional Medical Center hospitalization for pulmonary complications, the undersigned believes Dr. Rudisill is correct, and that surgery-caused pulmonary problems have continued.
>
> 9. The employee properly applied to the Commission for approval of the pulmonary expenses. By letter/order dated

> August 24, 1995, the Industrial Commission ordered Defendants to cover the pneumonia treatment. Defendants did not appeal from that order and have continuously refused to comply.

Based on these findings of fact, the Full Commission made the following conclusions of law:

> 1. One of the causes of the employee's continuing pulmonary problems of pneumonia, bronchitis and sinusitis was her June 13, 1995, back surgery for the injury at work and the Defendants shall provide treatment. G.S. §97-25.
>
> 2. The Defendants have continuously refused to comply with the Commission's August 24, 1995, order to provide treatment without filing an appeal and they shall be sanctioned pursuant to G.S. §97-88.1.

The Defendants were ordered to pay for "all treatment of the employee's pulmonary problems after the June 13, 1995, surgery," and to pay $700.00 directly to plaintiff's attorney as a reasonable attorney fee.

Defendants appeal and argue four assignments of error. In our review of an Industrial Commission opinion and award, we determine whether the findings of fact are supported by any competent evidence and whether the findings of fact so supported justify the conclusions of law drawn therefrom. *See Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 334, 499 S.E.2d 470, 472, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998). "The Commission's conclusions of law, however, are reviewable *de novo*." *Id.* at 335, 499 S.E.2d at 472. The findings of fact of the Full Commission are binding if supported by any competent evidence. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). In this case, we are mindful that "implicit in the authority accorded the Commission to order additional compensation under G.S. § 97-47 and further medical treatment under G.S. § 97-25 is the requirement that the supplemental compensation and future treatment be directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286 (emphasis omitted), *disc. rev. denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). *See also Errante v. Cumberland County Solid Waste Mgmt.*, 106 N.C. App. 114, 121, 415 S.E.2d 583, 587 (1992) (holding that " 'reasonable and necessary' worker's compensation awards for continuing medical expenses pursuant to Sections 97-29 and 97-25

contemplate only those reasonable and necessary expenses that are related to the *compensable* injury or injuries").

[1] Defendants first contend that there was no competent evidence to support the finding of fact that plaintiff's pulmonary condition was related to her first back surgery. We disagree. Dr. McCloskey's letter of 7 August 1995 is in the record and states his opinion that "the sinusitis and subsequent pneumonia (developing so close to the immediate postoperative period) was a condition caused or at least aggravated by the general anesthesia the patient had for the operation." Additionally, Dr. Owens' letter of 14 August 1995 says the plaintiff "developed purulent bronchitis and pneumonia which were directly attributable to her operative procedure." These statements are competent evidence, and they are further supported by deposition testimony from these doctors and Dr. Pollack indicating the causal connection between the first surgery and the pneumonia of 13 July 1995. Although defendants point to evidence within each doctor's testimony that supports their position that the pneumonia was unrelated to the surgery, the Commission need not make specific findings rejecting portions of a statement by a witness. *See Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998). This assignment of error is overruled.

[2] Second, defendants contend that the Commission erred in finding that the plaintiff's pulmonary conditions stemming from the surgery have continued. We have reviewed the record exhaustively, and we agree.

In its finding of fact number six, the Commission stated that "Dr. Rudisill is reasonably certain that the employee's June 13, 1995, back surgery caused an ongoing pulmonary infectious process." Dr. Rudisill stated that the plaintiff's pulmonary problems are ongoing, and he said that since the first surgery she has "had her share of pulmonary infections." He also admitted that pulmonary problems may arise after surgery. However, Dr. Rudisill never expressed anywhere in the record that he was "reasonably certain" the surgery caused plaintiff's ongoing pulmonary problems. He never even testified such a connection is *probable*. For example, Dr. Rudisill testified at his deposition:

> Q. And you see the asthma as a condition that could have resulted from or been aggravated by the surgery, back surgery?
>
> MR. GARRITY: Objection to the form.

A. The way you asked the question, that's a yes. It's ***possible*** it could have been aggravated by the surgery.

. . . .

Q. Well, let me ask it a different way: Do you see a relationship between the complication of surgery and these ongoing pulmonary problems that she has been experiencing?

MR. GARRITY: Objection to the form.

A. I see that, since her surgery, she has had a tremendous increase in pulmonary problems associated with infection and asthma.

Q. And could that be related to the surgery or surgery complications?

A. It's ***possible*** that could be related to that.

. . . .

Q. And do I understand you correctly that the extent to which you are able to draw some causal connection between some post-surgical complication and her current respiratory condition or the condition for which you treated her is ***only*** to the extent of a ***possible*** relationship?

A. ***Correct***.

(Emphasis added).

Drs. Owens and McCloskey testified that the surgery caused the plaintiff's pneumonia of July 1995. Dr. Rudisill testified that the plaintiff continues to suffer from pulmonary problems. The Commission bridged the gap between these two statements in a manner not supported by the evidence. The Commission found in fact number eight that it "believe[d] Dr. Rudisill is correct, and that surgery-caused pulmonary problems have continued." Dr. Rudisill said plaintiff's pulmonary problems were ongoing, but he was never more positive than "possible" that the continuing problems were caused by the surgery. Apparently, the Commission relied in part on the conclusion of the pulmonologists—that the surgery caused the July 1995 pneumonia—and in part on Dr. Rudisill's conclusion—that the plaintiff has ongoing lung problems. The crucial link between these two statements for workers compensation purposes—causation—is nowhere supported by the testimony the Commission cites. Causation must be shown by

evidence that " 'indicate[s] a reasonable scientific *probability* that the stated cause produced the stated result.' " *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) (emphasis added) (quoting *Hinson v. Nat'l Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990) (citations omitted)), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996). Because Dr. Rudisill nowhere states to a reasonable scientific probability, or any probability at all, that "*surgery-caused* pulmonary problems have continued," this finding of fact is not supported by competent evidence.

Because findings of fact six and eight are unsupported by any competent evidence, the Commission's conclusion of law that "[o]ne of the causes of the employee's continuing pulmonary problems . . . was her June 13, 1995, back surgery" fails. Defendants are obligated to pay only for treatments "required to effect a cure or give relief" for conditions related to the compensable injury. N.C. Gen. Stat. § 97-2 (Supp. 1999). *See Pittman*, 122 N.C. App. at 130, 468 S.E.2d at 286. The award requiring defendants to pay for "all treatment of employee's pulmonary problems after the June 13, 1995, surgery," is reversed.

[3] Finally, defendants contend that the Full Commission erred in finding that attorney fees should be assessed for defendants' failure to comply with the 24 August 1995 order. The Commission awarded attorney fees pursuant to N.C. Gen. Stat. section 97-88.1 (1991), which provides for such an assessment if the Commission "determine[s] that any hearing has been brought, prosecuted, or defended without reasonable ground."

The Commission found the following fact:

> 9. The employee properly applied to the Commission for approval of the pulmonary expenses. By letter/order dated August 24, 1995, the Industrial Commission ordered Defendants to cover the pneumonia treatment. Defendants did not appeal from that order and have continuously refused to comply.

There is no determination by the Industrial Commission, as required by G.S. 97-88.1, that a hearing was "brought, prosecuted or defended without reasonable ground." *Id.* Therefore, the Commission improperly penalized defendants under G.S. 97-88.1. The order for attorney fees is reversed.

The portion of the award ordering payment for plaintiff's July 1995 pneumonia treatment is affirmed. All other parts are reversed.

We remand to the Industrial Commission for the purpose of entering an order stating the amount to be paid for plaintiff's July 1995 pneumonia treatment.

Affirmed in part, reversed in part, and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

TOMMY HIGGINS, EMPLOYEE, PLAINTIFF v. MICHAEL POWELL BUILDERS, EMPLOYER, AND KEY BENEFIT SERVICES, CARRIER, DEFENDANTS

No. COA98-812

(Filed 6 April 1999)

1. **Workers' Compensation— period for contesting compensability—material information reasonably discoverable—award final**

The Industrial Commission did not err in a workers' compensation action in its determination that defendants were not entitled to contest the compensability of plaintiff's claim after the expiration of the statutory period provided by N.C.G.S. § 97-18(d) where defendant employer had actual notice of plaintiff's injury on the date it occurred, the statutory period for contesting the claim expired with no application for an extension having been made, and neither defendant-employer nor the carrier gave notice that the compensability of plaintiff's claim was being contested. There is competent evidence in the record to support the finding that plaintiff's employment status was at all times reasonably discoverable by both the employer and the carrier and the award has become final as provided by N.C.G.S. § 97-82(b).

2. **Workers' Compensation— employment status—newly discovered evidence**

A workers' compensation carrier was not entitled to relief from an award of compensation based on newly discovered evidence concerning plaintiff's employment status where competent evidence supports the Commission's findings that plaintiff's employment status was reasonably available at all times and that the carrier did not exercise due diligence in its investigation of the matter during the statutory period.

3. Workers' Compensation— compensability—employment status—excusable neglect by carrier

The Industrial Commission did not err by refusing to grant a carrier relief from an award based upon excusable neglect where plaintiff's status as a subcontractor should have prompted a reasonable investigation by the carrier. The failure of the carrier to investigate plaintiff's status fell short of the diligence reasonably expected of a party paying proper attention to his case.

4. Workers' Compensation— compensability—not contested—mutual mistake, misrepresentation or fraud

The Industrial Commission correctly refused to set aside a workers' compensation award on the grounds of mutual mistake, misrepresentation or fraud concerning plaintiff's status as an employee or subcontractor where the award derived from defendant carrier's unilateral initiation of payment of compensation and subsequent failure to contest the claim under N.C.G.S. § 97-18(d). The basis of the award was not an agreement and the doctrines of mutual mistake, misrepresentation, and fraud do not operate to afford the carrier relief. Moreover, even if these doctrines were applicable, competent evidence supports the Commission's findings and conclusions.

Appeal by defendant Key Benefit Services from opinion and award entered 9 April 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 February 1999.

Michaels Jones Martin Parris & Tessener, PLLC, by James S. Walker, for plaintiff-appellee.

Orbock Bowden Ruark & Dillard, PC, by Barbara E. Ruark, for defendant-appellant Key Benefit Services.

MARTIN, Judge.

Defendant Key Benefit Services (Key Benefit), the servicing agent for the North Carolina Mutual Employer Self-Insured Workers' Compensation Fund, appeals from an opinion and award of the Full Commission awarding plaintiff continuing total disability benefits for an injury sustained by plaintiff on 16 September 1996, when plaintiff fell out of a window while working for defendant Michael W. Powell Builders, Inc. (Powell Builders). Powell Builders was self-insured for

workers' compensation purposes through the North Carolina Mutual Employer Self-Insured Workers' Compensation Fund.

Powell Builders prepared an I.C. Form 19, Employer's Report of Injury to Employee and forwarded it to Key Benefits. The Form 19 indicated in some places that plaintiff had been employed for 2 and one-half years as a carpenter; in another place the form indicated plaintiff's occupation was "framer-subcontractor." After receiving the report of plaintiff's injury from Powell Builders, Key Benefit initiated compensation payments pursuant to the provisions of G.S. § 97-18(d), without prejudice and without accepting liability, and filed an I.C Form 63, Notice to Employee of Payment of Compensation Without Prejudice, providing copies to plaintiff and to Powell Builders. The Form 63 indicated that plaintiff was an employee of Powell Builders.

Key Benefits continued to pay compensation to plaintiff until sometime in January when it received information from Powell Builders' attorney that, in his opinion, plaintiff was not an employee of Powell Builders but was, instead, a subcontractor. Key Benefits immediately discontinued payments, and plaintiff filed his claim and requested that it be assigned for hearing. On 24 February 1997, Key Benefit filed an I.C. Form 61, denying plaintiff's claim on the ground plaintiff was not an employee of Powell Builders.

The deputy commissioner awarded plaintiff benefits, determining that defendants' failure to contest the claim within the period for payment without prejudice provided by G.S. § 97-18(d) constituted an award of the Industrial Commission pursuant to G.S. § 97-82(b), that plaintiff's employment status was known or reasonably should have been known prior to the expiration of the statutory period had the servicing agent made any investigation thereof, that there was no excusable neglect on defendants' part, and that the reward was not subject to being set aside as a mutual mistake.

Defendants appealed to the Full Commission, which adopted, with minor modifications, the deputy commissioner's findings and conclusions and affirmed the award.

By the arguments brought forward in support of its assignments of error, Key Benefit contends the Commission erred when: (1) it determined that plaintiff's employment status could have been reasonably discovered before the expiration of the statutory period for contesting the claim; (2) it refused to grant relief from the binding

effect of the Form 63 on the grounds that plaintiff's employment status was newly discovered evidence; (3) it refused to grant such relief on the grounds of excusable neglect; and (4) it refused to set aside the award on the grounds of misrepresentation or mutual mistake. For the following reasons, we affirm the Commission's opinion and award.

I.

"The standard of appellate review of an opinion and award of the Industrial Commission is limited to whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify the Commission's legal conclusions and decision." *Harris v. North American Products*, 125 N.C. App. 349, 352, 481 S.E.2d 321, 323 (1997); *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 129, 468 S.E.2d 283, 285-86, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996) (citations omitted). "The Commission's findings 'will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding.' " *Harris* at 352, 481 S.E.2d at 323 (quoting *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986)). The Commission, and not this Court, is "the sole judge of the credibility of witnesses" and the weight given to their testimony. *Pittman* at 129, 468 S.E.2d at 286 (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)).

II.

[1] First, Key Benefit argues the Commission erred in its determination that defendants are not entitled to contest the compensability of plaintiff's claim after the expiration of the statutory period provided by G.S. § 97-18(d). Key Benefit takes issue with the Commission's findings and conclusion that plaintiff's employment status was known to Powell Builders, and could have been reasonably discovered by Key Benefit had it conducted a diligent investigation, within the time period for contesting the claim.

Under the statutory scheme provided by G.S. § 97-18(d), in those cases in which an employer or insurer is uncertain about the compensability of a claim, the employer or insurer may commence payment of compensation without admitting liability and without prejudice to its rights to contest the claim. The employer or insurer is required to file the prescribed form, I.C. Form 63, stating that the pay-

ments are made without prejudice, and that such payments continue until the claim is either accepted or contested or until 90 days from the date upon which the employer first obtains written or actual notice of the injury. If, during the 90 day period, which may be extended by the Commission for an additional 30 days upon application, the employer or insurer contests compensability, it may cease payment upon giving the proper notice specifying the grounds upon which liability is contested. However, if the employer or insurer does not contest compensability of the claim or its liability therefor within the statutory period, it waives its right to do so and the entitlement to compensation becomes an award of the Commission pursuant to G.S. § 97-82(b). In such event, after the expiration of the 90 day period, the employer or insurer may cease payments and contest compensability only upon showing that material evidence became available after the expiration of the statutory period which could not have reasonably been discovered earlier. N.C. Gen. Stat. § 97-18(d) (1997).

Here, defendant employer, Powell Builders, had actual notice of plaintiff's injury on the date it occurred; the statutory period for contesting the claim expired 16 December 1996, no application for an extension having been made, and neither Powell Builders nor Key Benefit gave notice that the compensability of plaintiff's claim was being contested. Key Benefit argues, however, that it is still entitled to contest the compensability of plaintiff's claim because material information concerning plaintiff's employment status was not discovered, and was not reasonably discoverable, until after the expiration of the statutory period.

We hold there is competent evidence in the record to support the Commission's finding that plaintiff's employment status was "at all times reasonably discoverable" by both the employer and the carrier. The testimony of Powell Builders' owner, Michael Powell, showed that Powell Builders became aware of plaintiff's injury on the day it occurred and filed I.C. Form 19, the employer's report of the injury. Line 28 of the injury report listed plaintiff as a "framer-subcontractor." Mr. Powell testified that he spoke with Key Benefit's claims director, Jeff Millett, and that Powell Builders' other employees were available to provide information concerning plaintiff's injury and employment status. Mr. Millett never inquired about plaintiff's status as a "framer-subcontractor," even though he discussed plaintiff's medical bills with Powell Builders' office manager. Mr. Millett also testified, admitting that he did not inquire whether plaintiff was an employee or whether plaintiff was paid via an independent

contractor Form 1099. When asked whether the information was reasonably available, Mr. Millett replied "I don't know if it was reasonably available because I didn't ask, so how would I know."

Noting that "defendant-employer had actual knowledge of the plaintiff's employment status equal to that of the plaintiff," the Commission correctly concluded that Key Benefit could have discovered plaintiff's employment status "had it made a reasonable investigation of the claim." Having failed to reasonably investigate the claim, Key Benefit cannot now assert that the information was not reasonably available. Pursuant to the provisions of G.S. § 97-18(d), defendants have waived their right to contest the compensability of plaintiff's injuries, and the award of compensation has become final as provided by G.S. § 97-82(b).

III.

Key Benefit next argues that it is entitled to relief from the award of compensation made final by G.S. § 97-82(b). Analogizing the award to a judgment in a civil case, Key Benefit asserts three grounds for affording it relief: (1) newly discovered evidence, (2) excusable neglect, and (3) mutual mistake or misrepresentation.

A.

[2] First, Key Benefit argues the evidence with respect to plaintiff's employment status was "newly discovered evidence." The standard for providing relief on the grounds of newly discovered evidence, as applied in the context of the Workers' Compensation Act, requires that the evidence be *new*, i.e., available only after the initial hearing, *Andrews v. Fulcher Tire Sales and Service*, 120 N.C. App. 602, 463 S.E.2d 425 (1995), and that the party seeking relief "show that when the award was entered evidence material to the case existed that he did not learn about, through due diligence, until later." *Wall v. N.C. Dept. of Human Resources: Div. of Youth Services*, 99 N.C. App. 330, 332, 393 S.E.2d 109, 110 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

As discussed above, competent evidence of record supports the Commission's findings that plaintiff's employment status was "reasonably available at all times" and that Key Benefit did not exercise due diligence in its investigation of the matter during the statutory period. Key Benefit is not entitled to relief on the grounds of newly discovered evidence.

B.

[3] Next, Key Benefit suggests the award should be set aside on the grounds of excusable neglect, as permitted by G.S. § 1A-1, Rule 60(b). Whether a litigant's actions constitute excusable neglect is a question of law, reviewed on appeal based upon the facts as found below. *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 554-55 (1986). "To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense." *Id.* at 424, 349 S.E.2d at 554.

> While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case. Excusable neglect must have occurred at or before entry of judgment and must be the cause of the default judgment being entered.

Id. at 425, 349 S.E.2d at 554-55 (citations omitted). Based upon the Commission's findings of fact, plaintiff's status as a "framer-subcontractor" in the employer's report of injury should have prompted a reasonable investigation by Key Benefit; its failure to investigate plaintiff's status fell short of the diligence "reasonably expected of a party in paying proper attention to his case." The Commission did not err in refusing to grant Key Benefit relief based upon excusable neglect.

C.

[4] Finally, defendant contends that the Industrial Commission should have set aside the award on the grounds of mutual mistake, misrepresentation, or fraud. The Industrial Commission "possesses such judicial power as is necessary to administer the Worker's Compensation Act" and has the "power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 138, 337 S.E.2d 477, 483 (1985). Because the doctrines of mutual mistake, misrepresentation, and fraud generally apply to *agreements* between parties, these doctrines will not provide grounds to set aside an award not based upon such an agreement. *McAninch v. Buncombe County Schools*, 347

N.C. 126, 132, 489 S.E.2d 375, 379 (1997) ("Thus, where there is no finding that the agreement itself was obtained by fraud, misrepresentation, mutual mistake, or undue influence, the Full Commission may not set aside the agreement, once approved."); *Brookover v. Borden, Inc.*, 100 N.C. App. 754, 755-56, 398 S.E.2d 604, 606 (1990), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 450 (1991); *Neal v. Clary*, 259 N.C. 163, 130 S.E.2d 39 (1963). G.S. § 97-17 expressly provides that:

> [N]o party to any *agreement* for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such *agreement*.

N.C. Gen. Stat. § 97-17 (1997) (emphasis added); *see also* N.C. Gen. Stat. § 97-87 (1997) (Filing agreements approved by Commission or awards; judgment in accordance therewith; discharge or restoration of lien). Limitation of these doctrines to agreements, in this context, reenforces the doctrinal basis of these doctrines, i.e., that when there has been a mutual mistake, misrepresentation, or fraud, no enforceable agreement exists because a meaningful 'meeting of the minds' is lacking. *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998) ("It is essential to the formation of any contract that there be 'mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds.' "). Agreements formed under these circumstances lack the requisite mutuality to become legally binding.

Here, the basis of the award is not an agreement, hence, there was no need for a "meeting of the minds." The Commission's award does not adopt an agreement between the parties; rather, the award derives from defendant's unilateral initiation of payment of compensation and subsequent failure to contest the claim under G.S. § 97-18(d). Therefore, the doctrines of mutual mistake, misrepresentation, and fraud do not operate to afford Key Benefit relief from the award.

Even if these doctrines were applicable, competent evidence supports the Commission's findings and its conclusion that defendant's mistake was

> a unilateral decision of defendant's servicing agent, who knew or should have known of plaintiff's actual employment status prior

to the entry of the same award. Plaintiff did not say or do anything to induce defendant to enter the disputed award; rather, plaintiff was merely the beneficiary of defendant's unilateral action.

Under these circumstances, the Commission correctly refused to set aside the award on the grounds of mutual mistake, misrepresentation or fraud.

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

JOHNNY RICHARD GIBSON, PETITIONER/APPELLANT v. JANICE FAULKNER, COMMISSIONER NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT/APPELLEE

No. COA98-712

(Filed 6 April 1999)

1. **Motor Vehicles— driver's license revocation—reasonable grounds to believe implied consent offense committed—hearsay**

The trial court did not err in a superior court proceeding following a DMV driver's license suspension by concluding that the trooper had reasonable grounds to believe that petitioner had committed an implied consent offense. The Court of Appeals declined to review the holding in *Melton v. Hodges*, 114 N.C.App. 795, that reasonable grounds to believe petitioner had committed the offense could be based on information given to the officer by another.

2. **Motor Vehicles— driver's license revocation—refusal to give sequential breath samples—warning of rights**

The trial court did not err in a superior court challenge to a driver's license revocation by determining that petitioner had been advised of his rights under the appropriate statute when he refused to give a second breath sample. The reference in the district attorney's question to N.C.G.S. § 20-16.2(b) rather than (a)

appears to be either a transcription error or a mere lapsus linguae. Moreover, there was other competent evidence to support the court's findings.

3. Motor Vehicles— driver's license revocation—willful refusal to submit to a chemical analysis—evidence

The trial court did not err in a superior court proceeding arising from a DMV license revocation by concluding that petitioner had wilfully refused to submit to a chemical analysis. There was competent evidence that petitioner's conduct constituted willful refusal to give sequential breath samples; it is irrelevant in the civil revocation proceeding whether the test was performed according to applicable rules and regulations.

4. Motor Vehicles— driver's license revocation—acquittal in criminal proceeding

The trial court did not err by finding that DMV was not estopped from revoking petitioner's driving privileges for refusing sequential breath samples even though he was found not guilty in criminal court of driving while impaired and leaving the scene of an accident. Despite the criminal verdict, there is competent evidence to support the finding that the trooper had probable cause to believe that petitioner had committed an implied consent offense.

Appeal by petitioner from judgment entered 8 January 1998 by Judge Jesse B. Caldwell, III, in Haywood County Superior Court. Heard in the Court of Appeals 16 March 1999.

On 7 July 1996, Trooper J.D. Silver of the North Carolina Highway Patrol responded to a report of an accident on Highway 215 in Haywood County. According to the report, Gary Reece, an off-duty Deputy Sheriff, was involved in a collision with a truck which swerved left of the centerline and struck the driver's side mirror of the vehicle driven by Deputy Reece. Johnny Richard Gibson (petitioner), who was identified by Deputy Reece as the driver of the truck, left the scene of the accident after Reece indicated he was going to call the Highway Patrol to investigate the accident. A short time later, Waynesville police officers stopped a vehicle matching the description of the truck. At the time the truck was stopped, a woman was driving and petitioner was a passenger. In response to radio transmissions, Trooper Silver came to the scene of the stop. When Trooper Silver approached petitioner, he detected a strong odor of

alcohol on petitioner's breath; he also noticed that petitioner's eyes were red and glassy and that petitioner was unsteady on his feet. Deputy Reece then arrived at the scene of the stop and identified petitioner as the driver of the truck at the time of the collision with his vehicle. Based on the information received from Reece and upon his own observations of petitioner, Trooper Silver arrested petitioner for driving while impaired and for leaving the scene of an accident.

Trooper Silver then transported petitioner to the Haywood County Sheriff's Department for a chemical analysis of his breath. The trial court found that Trooper Silver, who was a certified chemical analyst, orally advised petitioner of his rights pursuant to N.C. Gen. Stat. § 20-16.2(a) (1993 & 1998 Cum. Supp.) and gave petitioner a written copy of those same rights. Although petitioner understood his rights, he refused to sign the written copy acknowledging he had been advised of his rights. Trooper Silver observed petitioner for the statutory period, and then requested petitioner to submit to a chemical analysis of his breath. The petitioner provided a breath sample which registered .11 blood-alcohol content. When Trooper Silver requested petitioner to furnish a second sequential sample, petitioner refused. Trooper Silver advised petitioner of the consequences of his refusal, stating that, if petitioner did not provide a second sample, he would be marked as having refused the test and his driving privilege would be subject to revocation. Petitioner again refused to submit a second breath sample, and Trooper Silver recorded him as having refused the test. Trooper Silver prepared an Affidavit and Revocation Report with regards to petitioner's refusal to submit to the breath test. In that Affidavit, which was later introduced into evidence in this case, Trooper Silver confirmed that prior to petitioner's refusal, he advised petitioner of his rights pursuant to N.C. Gen. Stat. § 20-16.2(a), both orally and in writing.

In the criminal proceeding, the Haywood County District Court found petitioner not guilty of driving while impaired and leaving the scene of an accident. Following an administrative hearing, however, the Division of Motor Vehicles (DMV) suspended petitioner's driving privilege for 12 months based on his willful refusal to submit to the chemical analysis. Petitioner challenged the administrative suspension by filing an action in Haywood County Superior Court. Hearings were held on 13 October and 15 December 1997 in Haywood County Superior Court, following which the trial court entered a written judgment denying petitioner's claim for relief, dissolving prior restraining orders, and authorizing DMV to proceed with revocation

of petitioner's driver's license pursuant to N.C. Gen. Stat. § 20-16.2. Petitioner appealed, assigning error.

Hyler Lopez & Walton, P.A., by George B. Hyler, Jr., and Robert J. Lopez, for petitioner appellant.

Attorney General Michael F. Easley, by Associate Attorney General Jeffrey R. Edwards, for respondent appellee.

HORTON, Judge.

Petitioner contends the trial court erred in, among other things, (I) concluding, as a matter of law, that Trooper Silver had reasonable grounds to believe that petitioner committed an implied consent offense; (II) finding as fact that petitioner had been advised of his rights under the appropriate statute; (III) concluding, as a matter of law, that petitioner wilfully refused to submit to a chemical analysis upon the request of Trooper Silver; and (IV) finding that DMV could proceed to revoke petitioner's driver's license, despite petitioner being found not guilty of the related criminal offenses in district court.

I. Reasonable Grounds Based on Hearsay Evidence

[1] Defendant contends that the trial court erred in concluding as a matter of law that Trooper Silver had "reasonable grounds" to believe that petitioner committed an implied consent offense. Petitioner claims that Trooper Silver based his arrest upon hearsay information submitted to him by Deputy Reece, and that such hearsay testimony is inadmissible in court. Petitioner asks this Court to review its holding in *Melton v. Hodges*, 114 N.C. App. 795, 443 S.E.2d 83 (1994), that "reasonable grounds for belief may be based upon information given to the officer by another, the source of the information being reasonably reliable, and it is immaterial that the hearsay information itself may not be competent in evidence at the [criminal] trial of the person arrested." *Id.* at 798, 443 S.E.2d at 85.

We are bound by our holding in *Melton*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Since our ruling in *Melton* has not been overturned by a higher court, it is binding upon this panel. This assignment of error is overruled.

II. Advice of Chemical Test Rights

[2] Petitioner argues that the trial court erred in determining that he had been advised of his rights under the appropriate statute. Petitioner relies on the following excerpt from the transcript of proceedings before the trial court, and argues that Trooper Silver advised him of his rights under the incorrect statute:

> Q [District Attorney]: At that point did you advise Mr. Gibson of his rights pursuant to GS20-16.2b?
>
> A [Trooper Silver]: Yes, sir, I did.
>
> Q [District Attorney]: Did you advise him of those rights orally?
>
> A [Trooper Silver]: Yes, sir.
>
> Q [District Attorney]: Did you make a written copy of the rights read to him—
>
> A [Trooper Silver]: Yes, sir. Yes, sir, I did.
>
> Q [District Attorney]: Did he indicate to you whether or not he understood those rights?
>
> A [Trooper Silver]: Yes, sir, he did.
>
> Q [District Attorney]: Did you present him with the written rights form and ask him to sign it?
>
> A [Trooper Silver]: Yes, sir, I did.
>
> Q [District Attorney]: Did he sign it?
>
> A [Trooper Silver]: No, sir, he refused.
>
> Q [District Attorney]: After you advised him of his rights, did he exercise his right to call a witness or to speak with an attorney?
>
> A [Trooper Silver]: Yes, sir. He exercised that right and he used the phone.

Petitioner contends that the rights to which he was entitled to be advised are actually found in N.C. Gen. Stat. § 20-16.2*(a)*, and that based on Trooper Silver's testimony the trial court did not have competent evidence to conclude as a matter of law that petitioner had been properly advised of his rights. We disagree.

Where the trial judge sits as the trier of fact, "[t]he court's findings of fact are conclusive on appeal if supported by competent evi-

dence, even though there may be evidence to the contrary." *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 858, *disc. review denied*, 314 N.C. 329, 333 S.E.2d 485 (1985). In the case before us, we find there was competent evidence to support the trial judge's findings of fact. We note that N.C. Gen. Stat. § 20-16.2(b) does not even contain a recital of rights. Further, the written form referred to by Trooper Silver appears of record as an exhibit at the hearing in this matter. The written form, which the petitioner understood but refused to sign, sets out in detail the rights found in N.C. Gen. Stat. § 20-16.2(a). One of the rights enumerated in N.C. Gen. Stat. § 20-16.2(a) is the right to telephone an attorney and select a witness to view the testing procedure. The written notice of rights indicates that Trooper Silver advised petitioner of his rights at 10:10 p.m., and that petitioner called an attorney or witness at 10:11 p.m. The conduct of the petitioner in making telephone calls immediately after being advised that he had the right to do so supports the finding of the trial court that petitioner was fully advised of his rights under the correct statutory section. There is other competent evidence of record in the form of the Affidavit signed and filed by Trooper Silver affirming that he advised the petitioner of his rights pursuant to N.C. Gen. Stat. § 20-16.2*(a)*. The reference in the district attorney's question to advising petitioner of his rights under N.C. Gen. Stat. § 20-16.2*(b)* rather than *(a)* appears to be either a transcription error or a mere *lapsus linguae* by the district attorney. *See State v. Kandies*, 342 N.C. 419, 445, 467 S.E.2d 67, 81, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). In any event, there was other competent evidence to support the trial court's findings of fact, and those findings support its conclusion of law that petitioner had been advised of his rights under N.C. Gen. Stat. § 20-16.2(a). Petitioner's assignment of error is overruled.

III. Willful Refusal

[3] Petitioner next contends that the trial court erred in concluding, as a matter of law, that he willfully refused to submit to a chemical analysis upon request of the officer. N.C. Gen. Stat. § 20-139.1(b3) provides, among other things, that

> [a] person's willful refusal to give the sequential breath samples necessary to constitute a valid chemical analysis is a willful refusal . . . .

Petitioner does not contend that he actually furnished the sequential breath samples requested of him by the trooper. He argues, how-

ever, that to constitute a "valid chemical analysis" N.C. Gen. Stat. § 20-139.1(b) requires that the test be "performed according to methods approved by the Commission for Health Services and by an individual possessing a valid permit" for that type of chemical analysis. *State v. Gray*, 28 N.C. App. 506, 507, 221 S.E.2d 765, 765 (1976). He argues that "[t]he burden of proving compliance with G.S. 20-139.1(b) lies with the State[,]" *id.*, and that, in the case *sub judice*, "[t]he failure of the State to produce evidence of the test operator's compliance with G.S. 20-139.1(b) must be deemed prejudicial error." *Id.* at 506, 221 S.E.2d at 765.

Our holding in *Gray* addressed the issue of admitting the results of the chemical test into evidence in a *criminal* proceeding. The administrative hearing referred to in N.C. Gen. Stat. § 20-16.2(d) addresses the issue of revoking one's driving privilege based upon a willful refusal to submit to a chemical analysis, and is in the nature of a civil proceeding. N.C. Gen. Stat. § 20-16.2(d) lists five issues to be considered in the hearing:

> The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:
>
> (1) The person was charged with an implied-consent offense;
>
> (2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;
>
> (3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;
>
> (4) The person was notified of his or her rights as required by subsection (a); and
>
> (5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

Since the gist of the revocation proceeding is to determine whether a person willfully refused to submit to a chemical analysis, it is irrelevant in the civil proceeding whether the test was performed according to the applicable rules and regulations. In the case before us, there is competent evidence that petitioner refused to give sequential breath samples, and this evidence supports the trial judge's conclusion that petitioner's conduct constituted willful refusal under N.C. Gen. Stat. § 20-139.1(b3). Petitioner's assignment of error is overruled.

IV. Collateral Estoppel

[4] Petitioner contends the trial court erred in finding that DMV could revoke his driving privilege, since he was found not guilty in the district court criminal proceeding. Our courts have confronted this issue before and held that

> [u]nder implied consent statutes such as G.S. 20-16.2, the general rule is that neither an acquittal of a criminal charge of operating a motor vehicle while under the influence of intoxicating liquor, nor a plea of guilty, nor a conviction has any bearing upon a proceeding before the licensing agency for the revocation of a driver's license for a refusal to submit to a chemical test. "It is well established that the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other, and the outcome of one is of no consequence to the other."

Joyner v. Garrett, Comr. of Motor Vehicles, 279 N.C. 226, 238, 182 S.E.2d 553, 562 (citations omitted), *reh'g denied*, 279 N.C. 397, 183 S.E.2d 241 (1971).

Petitioner argues that his acquittal in criminal court collaterally estops DMV from relitigating at the administrative hearing the existence of reasonable grounds to believe he was driving while impaired. In support of his argument, petitioner relies on *Brower v. Killens*, 122 N.C. App. 685, 472 S.E.2d 33, *disc. review allowed*, 344 N.C. 435, 476 S.E.2d 112 (1996), *disc. review improvidently allowed*, 345 N.C. 625, 481 S.E.2d 86 (1997). In *Brower*, we held that DMV was collaterally estopped from relitigating in a license revocation hearing the determination of "no probable cause" by the district court in a related criminal proceeding. *Id.* at 690, 472 S.E.2d at 37. Petitioner argues that it logically follows from the finding of not guilty in district criminal court that Trooper Silver had no probable cause to believe he had committed an implied consent offense. We find petitioner's argument to be without merit.

We first note that "there is no legal distinction between probable cause to arrest in a criminal proceeding and 'reasonable grounds to believe' that the accused was driving while impaired in a license revo-

cation hearing." *Id.* However, "beyond a reasonable doubt" and "probable cause" are two different standards applied at different stages of a criminal prosecution. To arrest petitioner, Trooper Silver needed probable cause to believe that he committed an implied consent offense. To convict petitioner of the charge of driving while impaired, the State was required to prove its case beyond a reasonable doubt, and the verdict of not guilty indicates that the district court judge did not find that the State met its burden. Despite the criminal verdict, however, there is competent evidence to support the finding of the trial court in the case before us that Trooper Silver had probable cause to believe petitioner committed an implied consent offense. Consistent with the holding in *Joyner*, we hold that petitioner's acquittal of the criminal charge of operating a motor vehicle while under the influence of intoxicating liquor does not estop DMV from revoking his driving privilege based on his willful refusal to submit to sequential breath tests. This assignment of error is overruled.

We have carefully reviewed and considered petitioner's other arguments and assignments of error and find them to be without merit. Petitioner had a fair hearing, free from prejudicial error.

Affirmed.

Judges GREENE and LEWIS concur.

JENNIFER P. RICE, PLAINTIFF v. DANAS, INCORPORATED, DEFENDANT

No. COA98-726

(Filed 6 April 1999)

1. Pleadings— Rule 11 sanctions—time for filing motion

A motion for Rule 11 sanctions was not filed within a reasonable time where defendant obviously formed an opinion of the alleged impropriety of plaintiff's pleadings long before the filing of its motion for sanctions. The Court of Appeals declined to impose any time limits contrary to the plain language of the rules, which do not contain explicit time limits for Rule 11 motions; however, a party should make a motion within a reasonable time after discovering an alleged impropriety.

2. Pleadings— Rule 11 sanctions—effect of jury verdict

The fact that the jury found against plaintiff is not proof as a matter of law that her pleadings were unfounded, baseless, improper, or interposed for an improper purpose.

3. Costs— fees denied—no abuse of discretion

The trial court was well within its discretionary powers in denying defendant's motion for attorney fees under N.C.G.S. § 95-25.22(d) where the court had presided over a week-long jury trial as well as these post-judgment matters, had the advantage of being able to consider the evidence presented at the trial, and had concluded that plaintiff's action was not frivolous.

4. Appeal and Error— notice of appeal—timeliness—motion for attorney fees—separate proceeding

The trial court did not err in dismissing plaintiff's appeal from a judgment on a jury verdict where plaintiff did not deny that her notice of appeal from that judgment was entered more than one year after entry but contended that she did not have to appeal from the judgment on the verdict until all claims arising from the action were determined. Defendant's motion for attorney fees was a separate proceeding which did not toll the time in which plaintiff had to give notice of appeal.

5. Appeal and Error— notice of appeal from sanctions—timeliness

Plaintiff's appeal from an order denying Rule 11 sanctions must be dismissed where plaintiff did not give notice of appeal until more than 30 days after denial of her motion, although she did file a notice of appeal within ten days of defendant's notice of appeal of the denial of its motion for sanctions. Plaintiff's motion for sanctions was an independent motion and the 10-day extension provided by Rule 3 of the Rules of Appellate Procedure does not apply.

Appeal by plaintiff from orders entered 19 November 1997, 23 December 1997, and 17 April 1998 by Judge Edward H. McCormick in Lee County District Court; and appeal by defendant from order entered 23 December 1997 by Judge Edward H. McCormick in Lee County District Court. Heard in the Court of Appeals 23 February 1999.

On 19 October 1995, Jennifer P. Rice (plaintiff) filed a complaint against her former employer, Danas, Incorporated (defendant), seeking unpaid wages and attorney fees pursuant to the Wage and Hour Act, and damages for her funds and property allegedly retained by defendant. Defendant filed an answer and counterclaims for unfair and deceptive acts and practices, constructive fraud, and punitive damages on 3 January 1996. The case was tried before a jury for almost eight days beginning 12 November 1996. The jury returned a verdict favorable to defendant upon its counterclaims finding that plaintiff breached her employment with defendant by diverting business which she was hired to produce for defendant, finding that defendant was actually damaged in the sum of $2,489.32, and awarding punitive damages in the sum of $12,500.00 to defendant. On 5 December 1996, the trial court entered judgment on the jury verdict in the above amounts of actual and punitive damages, and taxed plaintiff with the costs.

On 10 December 1996, defendant moved that the costs of this action, including deposition costs, be taxed to plaintiff. On 30 June 1997, defendant filed an amendment to its motion for costs, asking that the trial court require plaintiff to pay defendant's attorney fees pursuant to provisions of the Wage and Hour Act. On the same date, defendant also filed a motion for sanctions against plaintiff and her counsel pursuant to the provisions of Rule 11 of the North Carolina Rules of Civil Procedure. On 22 July 1997, plaintiff filed a Rule 11 motion for sanctions against defendant's counsel based on defendant's motion for sanctions against plaintiff and her counsel. The trial court heard all the post-judgment motions on 17 November 1997, denying plaintiff's motion for sanctions by order entered 19 November 1997. The trial court allowed defendant's motion for recovery of its deposition costs, but denied defendant's motion for sanctions and attorney fees by order entered 23 December 1997.

On 21 January 1998 defendant appealed from the denial of its motions. On 2 February 1998, plaintiff attempted to appeal from the denial of her motion for sanctions, from the order taxing deposition costs, and from the judgment on the verdict entered 5 December 1996. Defendant then moved to dismiss plaintiff's appeal from the judgment entered on the jury verdict and moved to dismiss plaintiff's appeal from the denial of her motion for sanctions. On 20 April 1998, the trial court allowed defendant's motion to dismiss plaintiff's appeal from the judgment on the jury verdict, but denied defendant's motion to dismiss plaintiff's appeal from the denial of plaintiff's

motion for sanctions. Plaintiff appealed from the trial court's order partially dismissing her appeal. On 18 August 1998, defendant moved in this Court to dismiss plaintiff's appeal from the denial of her motion for sanctions on the grounds that notice of appeal was given more than 30 days from the entry of the order denying sanctions.

G. Hugh Moore for plaintiff appellant/appellee.

Wilson & Waller, P.A., by Betty S. Waller, for defendant appellant/appellee.

HORTON, Judge.

The following issues are raised by the parties on appeal: (I) whether the trial court erred in denying defendant's motion for sanctions; (II) whether the trial court erred in denying defendant's motion for attorney fees; (III) whether the plaintiff (A) appealed in apt time from the 5 December 1996 judgment entered on the jury verdict, and (B) from the 19 December 1997 order of the trial court denying her motion for sanctions. We note that despite her notice of appeal, the plaintiff did not assign error to the trial court's award of costs, including deposition costs, to defendant nor did plaintiff make any argument or advance any authority on the propriety of the award of costs. Therefore, plaintiff has abandoned her appeal as to that aspect of the 23 December 1997 order. N.C.R. App. P. 28(b)(5).

I. Defendant's Motion for Sanctions

On 27 June 1997, almost seven months after judgment was entered on the jury verdict, defendant filed a motion for sanctions against plaintiff and her counsel, alleging that counsel for plaintiff commenced this action without investigating to determine whether "it was well grounded in fact and in law"; that early in the course of litigation, information was presented to counsel for plaintiff which demonstrated the fraudulent nature of plaintiff's conduct, but counsel never investigated the information or talked with available witnesses; that counsel for plaintiff pursued the unfounded claims of plaintiff to a jury verdict, even calling plaintiff as a witness and eliciting testimony which "any reasonable attorney experienced in civil litigation would have known to be patently false"; that counsel for plaintiff filed documents with the trial court in an effort to interfere with defendant's discovery efforts, and refused to cooperate with the efforts of defendant's counsel to carry out meaningful discovery. Defendant further alleged that the Rule 11 violations "were the result

of collaboration between plaintiff and her counsel, however her counsel's conduct was at least equal to plaintiff's . . . ."

Defendant's motion for sanctions was presented to the same trial judge who presided at the jury trial of this matter. After hearing the arguments of counsel and considering the record in the case including the testimony offered at the trial of this case, the trial court made findings of fact and concluded that:

> (a) The papers were well grounded in fact with factual disputes having been submitted to the jury.
>
> (b) The papers filed by plaintiff presented claims warranted by existing law or a good faith argument for the extension of existing law.
>
> (c) The papers filed by plaintiff were not interposed for an improper purpose.
>
> (d) The action filed by plaintiff was not frivolous.
>
> (e) The defendant should recover its deposition and court costs.

The trial court then awarded defendant court costs in the amount of $2,078.08, but denied defendant's claims for attorney fees and for sanctions.

[1] In this case, a preliminary question about the timeliness of defendant's motion for sanctions must be examined first. The North Carolina Rules of Civil Procedure do not set forth explicit requirements about when a motion for Rule 11 sanctions must be filed. Here, the record reflects that the judgment on the jury verdict was entered on 5 December 1996. On 10 December 1996, defendant moved that it recover its costs, including deposition costs. Apparently, there was no further action in the case until 27 June 1997 when defendant moved to amend her motion for costs to include attorney fees under the Wage and Hour Act, and filed a separate motion for Rule 11 sanctions.

This Court dealt with the question of the timeliness of a Rule 11 motion in *Renner v. Hawk*, 125 N.C. App. 483, 481 S.E.2d 370, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997). In *Renner*, defendant Hawk filed a motion for sanctions and attorney fees one month after plaintiff Renner voluntarily dismissed his complaint. *Id.* at 488, 481 S.E.2d at 373. Plaintiff argued that the trial court had no

jurisdiction to enter sanctions against him following the entry of the voluntary dismissal, and noted that in prior North Carolina appellate decisions, the motion for sanctions was pending at the time of the voluntary dismissal. *Id. See also, e.g., Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). The *Renner* Court declined to set time limits for filing Rule 11 motions, noting that "[n]either Rule 11 nor Rule 41 of the North Carolina Rules of Civil Procedure contains explicit time limits for filing Rule 11 sanctions motions. We find the reasoning in *Cooter* [*& Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359 (1990)] persuasive and decline to impose any time limits contrary to the plain language of the rules. We agree, though, that 'a party should make a Rule 11 motion within a reasonable time' after he discovers an alleged impropriety." *Renner*, 125 N.C. App. at 491, 481 S.E.2d at 374 (quoting *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604 (1st Cir. 1988)).

In *Renner*, defendant argued that "the alleged impropriety became apparent not when the complaint was filed, but only during the course of discovery." *Id.* at 491, 481 S.E.2d at 375. We held, based on that line of argument, that "defendant [Hawk] filed her Rule 11 sanctions motion *within a reasonable time of detecting her alleged impropriety." Id.* (emphasis added).

Applying the reasoning of *Renner* to the present case, we conclude as a matter of law that defendant's motion for Rule 11 sanctions was not filed within a "reasonable time of detecting [the] alleged impropriet[ies]." In its motion for sanctions, defendant alleged that "[e]vidence abounded at the time of filing plaintiff's complaint to suggest to a reasonable attorney, experienced in civil litigation, that the claims of plaintiff were baseless." Further, defendant alleged that prior to filing its answer, information was given to plaintiff's counsel which cast doubt on the validity of plaintiff's claim against defendant. Defendant further alleged that "[b]y the time this matter was tried to a Lee County jury, numerous instances of plaintiff's untruthfulness under oath and falsification in the preparation of documentary evidence had been disclosed through discovery and by other witnesses. Nevertheless, counsel pursued the unfounded claims of plaintiff to a jury verdict . . . ." Defendant obviously formed an opinion of the alleged impropriety of plaintiff's pleadings long before the filing of its motion for sanctions. Indeed, the suspect pleadings were signed months before trial by plaintiff and/or her counsel. Yet, no motion for sanctions was filed until well after the verdict of the jury was rendered.

[2] The fact that the jury found against plaintiff is not proof, as a matter of law, that her pleadings were unfounded, baseless, improper, or interposed for an improper purpose. We must be cautious not to allow an adverse jury verdict to dictate the decision on a sanctions motion, as that would amount to taxing the costs of litigation to the losing party, an approach that our legislature has not seen fit to embrace. Therefore, this assignment of error is overruled.

II. Defendant's Motion for Attorney Fees

[3] Plaintiff brought her action for unpaid wages under the provisions of N.C. Gen. Stat. § 95-25.22 (1993), a portion of the Wage and Hour Act. N.C. Gen. Stat. § 95-25.22(d) provides in pertinent part that "[t]he court may order costs and fees of the action and reasonable attorneys' fees to be paid by the plaintiff if the court determines that the action was frivolous." This language shows that the decision whether to award the fees is discretionary with the trial court if it finds the action to be frivolous.

In this case, the same able trial judge presided over a week-long jury trial as well as these post-judgment matters. Thus, in ruling on defendant's motion for attorney fees, the trial court had the advantage of being able to consider the evidence presented at the trial. In its order denying defendant's motion, the trial court found that defendant's motion for summary judgment was denied prior to trial; that it denied defendant's motions for directed verdict both at the close of plaintiff's evidence and at the close of all the evidence; and that all claims, including plaintiff's claim for unpaid wages, were submitted to the jury. The trial court then concluded that the plaintiff's action was not frivolous, and ordered that it should be denied. Because the trial court concluded that plaintiff's action was not frivolous, it was well within its discretionary powers in denying defendant's motion for attorney fees under N.C. Gen. Stat. § 95-25.22(d). This assignment of error is overruled.

III. Plaintiff's Appeals

[4] As stated above, plaintiff filed a notice of appeal on 2 February 1998, purporting to give notice of her appeal from (A) the 5 December 1996 judgment based on the jury verdict and (B) the 19 November 1997 order denying her motion for sanctions.

A. Appeal from 5 December 1996 Judgment on Jury Verdict

Rule 3 of the North Carolina Rules of Appellate Procedure provides that an "[a]ppeal from a judgment or order in a civil action or

special proceeding must be taken within 30 days after its entry." N.C.R. App. P. 3(c). The time for filing a notice of appeal is tolled as to all of the parties if one party files one of the following motions: (1) a Rule 50(b) motion for judgment notwithstanding the verdict; (2) a motion under Rule 52(b) to amend or make additional findings of fact; (3) a Rule 59 motion to alter or amend a judgment; (4) a motion under Rule 59 for a new trial. *Id.* The rule further provides that, if a party files a timely notice of appeal, "any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party." *Id.*

Plaintiff does not deny that her notice of appeal from the judgment based on the jury verdict was entered more than one year after the entry of that judgment on 5 December 1996. Plaintiff contends, however, that she did not have to appeal from the judgment on the verdict until all claims arising from the action, including post-trial motions, were determined. According to plaintiff, she was within the time limits of Rule 3 because she gave notice within ten days of the notice of appeal filed by defendant on 21 January 1998. We disagree.

Although this Court discourages interlocutory appeals, *see Veasey v. Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950), the situation in the present case is not of an interlocutory nature as plaintiff attempts to argue. Indeed, the United States Supreme Court has stated that "motions for costs or attorney's fees are 'independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree.' " *Cooter*, 496 U.S. at 395, 110 L. Ed. 2d at 375 (quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170, 83 L. Ed. 1184, 1189 (1939)). Therefore, an award of attorney fees can be considered several years after the entry of a judgment. *Id.* As a result, defendant's motion for attorney fees, which was filed several days after the judgment on the verdict, was a separate proceeding which did not toll the time in which plaintiff had to give notice of appeal. Accordingly, the trial court did not err in dismissing plaintiff's appeal from the judgment on the jury verdict.

B. Appeal from 19 November 1997 Order Denying Sanctions

[5] Plaintiff also appeals from the 19 November 1997 order which denied her motion for Rule 11 sanctions. Plaintiff did not give notice of appeal from the denial of this motion, however, until 2 February 1998, clearly more than thirty days after the denial of her motion for

sanctions on 19 November 1997. Although plaintiff did file a notice of appeal within 10 days of defendant's notice of appeal of denial of defendant's motion for sanctions, plaintiff's motion for sanctions was an independent motion from that of defendant's motion for sanctions and therefore the 10-day extension provided by Rule 3 of the Rules of Appellate Procedure does not apply. Rule 3 allows a party an additional 10 days to give notice when that party is appealing from the same action as the first appealing party. Unlike a situation which involves a claim and counterclaim, this case concerned two separate sanctions motions and the judgments rendered in each were distinct and separate judgments. As a result, plaintiff did not meet the requirements of Rule 3 and this portion of her appeal must be dismissed. *See Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990).

Affirmed.

Judges GREENE and LEWIS concur.

DANIEL CHARLES HOLCOMB v. PATRICIA C. HOLCOMB

No. COA98-783

(Filed 6 April 1999)

Divorce— alimony—reciprocal agreement—merger clause inadequate

A trial court finding that monthly payments were not true alimony or true child support but were reciprocal consideration for property settlement provisions and that the agreement was integrated and not modifiable was remanded where the clause relied upon by the trial court was not an integration clause but instead a standard merger clause often used in contracts. An integration clause is designed to express the intent of the parties as to whether the provisions of an agreement were reciprocal consideration for each other so that the agreement is an integrated agreement and no such clause or language was present.

Appeal by plaintiff from order entered 30 March 1998 by Judge Sarah F. Patterson in Wilson County District Court. Heard in the Court of Appeals 23 February 1999.

Daniel Charles Holcomb (plaintiff) and Patricia C. Holcomb (defendant) were married on 17 September 1966 and lived together as husband and wife until 29 March 1990, when they separated. Two children were born to their marriage: Michael James Holcomb, who was emancipated at the time of the parties' separation, and Christian Allen Holcomb (Christian), born 18 November 1975. Both defendant and Christian are insulin-dependent diabetics. Several months prior to their separation, plaintiff and defendant purchased a business known as Air Compressor Equipment Company (the business) and located in Wilson, for the sum of $300,000.00. They borrowed funds from several sources, including $40,000.00 from plaintiff's father, to pay the purchase price of the business. At the time of their separation they still owed $300,000.00 on the business, so that it had little or no net value.

On 17 July 1990, plaintiff and defendant entered into a written Separation Agreement (the Agreement). Each of the parties was then represented by counsel. The Agreement provided that the consideration for the Agreement "[was] the mutual promises and agreements [t]herein contained." The Agreement then provided that the parties agreed to live separate and apart from each other, and agreed to release each other from all claims, specifically including claims "arising from or existing because of said marriage," and further including the right to administer the estate of the other.

A section entitled "ALIMONY" read as follows:

> HUSBAND and WIFE have agreed that WIFE is entitled to a specific amount to be set for alimony with no increase or decrease. HUSBAND agrees to pay child support in the sum of $500.00 per month and when his obligation for child support terminates as hereinafter set out, then the alimony payments of $500.00 per month to the WIFE will begin and will be due on the first of each month after the termination of the child support payments. These payments shall continue until the death or remarriage of the WIFE, whichever occurs first. Additionally, HUSBAND shall carry hospitalization and medical insurance on WIFE which will be at least equal in coverage to the existing policy and shall keep same in full force and effect until WIFE's remarriage or death, whichever occurs first. WIFE shall be responsible for the

> deductible as well as the twenty percent (20%) not covered by insurance, as well as any non-elective surgery not covered by health insurance and those medical expenses which are deemed uncovered items by the health insurance provider. In the event WIFE cannot be covered by the group policy, HUSBAND agrees to be responsible for a share of the cost of medical insurance coverage on WIFE in at least an amount equal to what he is paying at the time such group insurance becomes no longer available.

A section entitled "CHILDREN" follows the ALIMONY section, and provides in pertinent part that:

> WIFE shall have the custody of the minor child [Christian] with HUSBAND having the right to reasonable visitation. HUSBAND shall carry hospital and medical insurance on the minor child and be responsible for the deductible as well as the 20 percent not covered by insurance. HUSBAND will not be responsible for the cost of any medical expenses which are deemed noncovered items by the health insurance provider and any elective surgery not covered by health insurance. HUSBAND agrees to pay WIFE the sum of $500.00 per month for the support and maintenance of the minor child. This support obligation shall continue so long as the child attends college or a school of higher education, including but not limited to a technical school, universities or colleges. As stated above, when the $500.00 child support obligation ceases for HUSBAND, WIFE'S alimony payments that she is to receive from HUSBAND shall begin.

The Agreement then provided for a generally equal division of the real and personal property of the parties. Defendant agreed to transfer all interest in the business to plaintiff, and plaintiff agreed to assume all debts in connection with the business. The parties agreed that the division of property in the Agreement was in settlement of their rights under the Equitable Distribution Act. The Agreement also included a merger clause, which read:

> ENTIRE AGREEMENT. This agreement contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressed and set forth herein.

The Agreement was incorporated in the divorce judgment entered herein on 12 December 1991.

The parties divided their property in accordance with the Agreement. Christian resided with defendant during his freshman and sophomore years in high school, and with plaintiff during his junior and senior years in high school. Since his graduation from high school, Christian has not lived with either of his parents, although both have contributed to his support and to certain legal fees. Christian has attended Pitt Community College since his graduation from high school, although he has not done so continuously, and was still attending Pitt Community College at the time the order was entered herein.

Plaintiff paid the sum of $500.00 each month to defendant after the execution of the Agreement, even during the two years when Christian lived with him, and plaintiff also performed his obligations under the medical insurance section of the Agreement. The parties do not agree whether the $500.00 monthly payments were child support or alimony. Plaintiff stopped making the monthly $500.00 payments to defendant after October of 1997, and also stopped making the quarterly payment on defendant's medical insurance policy.

On 8 January 1998, defendant filed a motion asking that plaintiff be held in contempt for failing to make the monthly payments to her and failing to maintain her medical insurance. An Order to Show Cause was issued by a district court judge directing plaintiff to appear and show cause why he should not be punished for contempt for failing to make the payments to defendant.

On 28 January 1998, plaintiff filed a motion to terminate or reduce any alimony obligation he might have to defendant on the grounds that she was openly cohabiting with a male person as if they were married, and the grounds that defendant was no longer a dependent spouse. The trial court heard both motions on 26 February 1998 and entered an order on 30 March 1998 granting defendant's motion that plaintiff be held in contempt for failing to make the monthly payments and failing to pay the medical insurance premiums. The trial court ordered that plaintiff be taken into the custody of the Sheriff until he purged himself of contempt by paying the sums due defendant.

The trial court determined that the $500.00 monthly payments were not "true alimony or true child support" but were reciprocal consideration for the property settlement provisions of the order in which defendant released her interest in plaintiff's business, and therefore concluded that the Agreement was integrated and not mod-

ifiable. Plaintiff appealed, assigning error to the trial court's determination that the Agreement was a "fully integrated agreement," and also arguing that the evidence of defendant was not sufficient to rebut the presumption that the provisions of the Agreement were separable. Plaintiff contends that the trial court's findings of fact are not supported by the evidence, that the findings do not support the conclusions of law, and that the trial court erred in denying his motion to terminate or reduce alimony payments to defendant.

W. Michael Spivey for plaintiff appellant.

George A. Weaver for defendant appellee.

HORTON, Judge.

The trial court was called upon to determine whether the monthly $500.00 payments to defendant, which were designated as alimony in the Agreement, were in fact "true" alimony payments and thus modifiable, or were reciprocal consideration for property settlement provisions in the Agreement, and thus not modifiable. In order to rule upon plaintiff's assignments of error, we must determine whether the trial court applied the correct legal principles in concluding that the Agreement was an integrated agreement and denying plaintiff's motion to reduce or terminate his monthly "alimony" obligation to defendant.

Justice (later, Chief Justice) Sharp explained the reciprocal consideration principle of integrated agreements in *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964):

> [A]n agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. *However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties.*

Id. at 70, 136 S.E.2d at 243 (citations omitted) (emphasis added).

In *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979), our Supreme Court quoted the above language from *Bunn* with ap-

proval and then proceeded to consider whether the periodic payments ordered to be made to Mrs. White were actually "alimony," or were non-modifiable portions of an integrated property settlement agreement.

> The question, [before us] then, is whether the provision for support payments and the provision for property division in the 17 November 1969 consent judgment are independent and separable. The answer depends on the construction of the consent judgment as a contract between the parties. "The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed."
>
> The parties here have not indicated their intent regarding separability of the two provisions by the language of the contract itself.

Id. at 667-68, 252 S.E.2d at 702 (citations omitted). Because the parties had not clearly indicated their intention by the language of their agreement, the *White* Court then held that the trial court would have to conduct an evidentiary hearing to determine their intent at the time of their agreement. *Id.* at 670, 252 S.E.2d at 703. Further, the *White* Court established a presumption that the provisions in a separation agreement or consent judgment are separable, so that the burden of proof is upon the party contending that the support and property settlement provisions are not separable to rebut the presumption by the greater weight of the evidence. *Id.* at 672, 252 S.E.2d at 704.

The Supreme Court reaffirmed the *White* approach and presumption of separability in *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986). Because there was no language in the *Marks* agreement relative to the separability of its provisions, the Supreme Court held that the *White* presumption arose. *Id.* at 456, 342 S.E.2d at 864. The wife, however, presented no evidence to rebut the non-integration presumption, therefore, the trial court correctly held the support provisions to be separate and modifiable. *Id.* at 458, 342 S.E.2d at 866.

In the case before us, the periodic payments to the wife are set out in a section of the Agreement labeled "ALIMONY." The payments are specifically referred to as "alimony," but such a characterization is not conclusive. *White*, 296 N.C. at 667, 252 S.E.2d at 702. Indeed,

other language in the Agreement tends to indicate that the payments may not be "true" alimony. The Agreement provides that the monthly payments are not to be "increase[d] or decrease[d]." Further, there are no recitations in the Agreement that defendant was a dependent spouse, nor were there recitations as to fault grounds, need, ability to pay, or reasonableness of amount. While those factors may be considered by the trial court on the question of whether an agreement is integrated, they are not conclusive. *See id.* at 669, 252 S.E.2d at 702.

This Court considered a similar situation in *Hayes v. Hayes*, 100 N.C. App. 138, 394 S.E.2d 675 (1990). In *Hayes*, the trial court held that as a matter of law certain periodic payments to the wife were not "true" alimony, although labeled as such, where (1) there was no finding that the wife was a dependent spouse, (2) there were no findings of need, ability to pay, or that the amount ordered was reasonable, (3) the wife gave up her right to ask for an increase in the amount, and (4) payments were to be made for a definite term of five years. *Id.* at 143-44, 394 S.E.2d at 678. This Court reversed, holding that it was error for the trial court to refuse to hold an evidentiary hearing where there were no "explicit, unequivocal provisions on integration or non-integration." *Id.* at 148, 394 S.E.2d at 680.

In this case, the Agreement contained the following merger clause:

> ENTIRE AGREEMENT. This agreement contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressed and set forth herein.

At the urging of counsel for defendant, the trial court considered this merger clause as an integration clause, and found as a fact that:

> 14. The Separation Agreement between the parties, dated July 17, 1990, is a fully integrated agreement as set forth in the portion of said agreement entitled, ENTIRE AGREEMENT which says, "This agreement contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressed and set forth herein."

This clause quoted by the trial court, however, is not an integration clause but instead is a standard merger clause which is often used in contracts to merge prior discussions, negotiations, and representations into the written document and avoid litigation over the question of whether there were oral representations made outside the

written agreement. *See Zinn v. Walker*, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987), *disc. review denied*, 321 N.C. 747, 366 S.E.2d 871 (1988). An integration clause, on the other hand, is designed to express the intent of the parties as to whether the provisions of an agreement were reciprocal consideration for each other so that the agreement is an integrated agreement. *See Bunn*, 262 N.C. at 70, 136 S.E.2d at 243. For example, in *Britt v. Britt*, 36 N.C. App. 705, 245 S.E.2d 381 (1978), the parties included the following language in their agreement:

> The provisions for the support, maintenance and alimony of wife are independent of any division or agreement for division of property between the parties, and shall not for any purpose be deemed to be a part of or merged in or integrated with a property settlement of the parties.

Id. at 711, 245 S.E.2d at 385. Likewise, in *Acosta v. Clark*, 70 N.C. App. 111, 318 S.E.2d 551 (1984), the parties' separation agreement provided that

> [t]he provisions of alimony to the Wife are independent of any division or agreement for division of property between the parties, and shall not for any purpose be deemed to be a part of or merged in or integrated with a property settlement of the parties.

Id. at 112, 318 S.E.2d at 552.

No such clause or language was present in the Agreement before us in this case and the trial court erred in treating the merger clause as an integration clause. Although the trial court heard other evidence and made other findings which support its conclusion that the Agreement was integrated, we cannot say what weight it gave to the erroneous consideration of the merger clause as evidence that the Agreement was integrated. Moreover, even though there are many indications on the face of the instrument that it was an integrated agreement, we cannot say as a matter of law that the provisions were intended as reciprocal consideration for one another. Such a determination of the intent of the parties is for the trial court. Therefore, this matter must be remanded for reconsideration and entry of a new judgment by the trial court.

On remand, the trial court is to weigh the credible evidence and determine whether defendant has met her burden of showing that the "alimony" provisions and the "property settlement" provisions were

intended to be reciprocal consideration for each other, so that the Agreement is an integrated agreement, and thus the "alimony" payments are non-modifiable. The trial court may make its new order based on the existing record, unless in its discretion it chooses to open the record to take additional evidence.

Plaintiff did not appeal from the trial court's findings that he had failed to make the ordered monthly payments or the conclusion that he was in contempt. He also did not appeal the order to confine him based on his contemptuous failure to make the payments, and setting out the manner in which he might purge himself. Because there was no appeal from or error assigned to those portions of the trial court's order, such provisions are affirmed.

Affirmed in part; vacated and remanded in part.

Judges GREENE and LEWIS concur.

PATRICIA WIGGINS, PLAINTIFF v. PELIKAN, INC., DEFENDANT

No. COA98-790

(Filed 6 April 1999)

Workers' Compensation— exclusivity of remedy—substantial certainty of death or serious injury

The trial court properly directed a verdict in defendant's favor in a personal injury action arising from an industrial cart turning over onto plaintiff where plaintiff failed to offer evidence demonstrating that defendant knew its conduct was substantially certain to result in serious injury or death so as to support a verdict in her favor under the *Woodson* exception to the exclusivity provision of the Workers' Compensation Act. When deciding whether a defendant-employer acted with substantial certainty of the consequences of its conduct courts have considered several factors: (1) whether the risk that caused the harm existed for a long period of time without causing injury; (2) whether the risk was created by a defective instrumentality with a high probability of causing the harm at issue; (3) whether there was evidence the employer attempted to remedy the risk that caused the harm

prior to the accident; (4) whether the employer's conduct which created the risk violated state of federal work safety regulations; (5) whether the defendant-employer created a risk by failing to adhere to an industry practice; and (6) whether the defendant-employer offered training in the safe behavior appropriate in the context of the risk causing the harm.

Appeal by plaintiff from judgment entered 2 January 1998 by Judge J. Richard Parker in Gates County Superior Court. Heard in the Court of Appeals 24 February 1999.

Alexy, Merrell, Wills & Wills, L.L.P., by Gregory E. Wills, for plaintiff-appellant.

King & Ballow, by Steven C. Douse, for defendant-appellee.

The Twiford Law Firm, by John S. Morrison, for defendant-appellee.

MARTIN, Judge.

Plaintiff appeals from a judgment directing a verdict in favor of defendant and dismissing plaintiff's action for damages for personal injury. In her complaint, plaintiff alleged that while employed by defendant, she sustained an on-the-job injury as a result of defendant's intentional conduct which it knew or should have known was substantially certain to cause serious injury or death to an employee. Defendant Pelikan, Inc. (Pelikan) denied the material allegations of the complaint and asserted as an affirmative defense, the exclusivity provisions of Chapter 97 of the North Carolina General Statutes, The Workers' Compensation Act.

Plaintiff's evidence at trial tended to show that defendant operates a film processing plant in Chowan County. Plaintiff was employed at the plant as a "slitter;" she operated a machine used to cut large rolls of film into strips to produce computer ribbons. Her job required that she load large rolls of film onto one end of the machine, which automatically cut the film into smaller strips and spooled it onto a rod at the other end. The large rolls of film were located on a rack on the opposite side of the plant floor from the slitting machines; to obtain a new roll of film, slitter operators used a cart specially designed to lift the film from the rack, transport it across the floor, and lower it onto the slitting machine. On the date of her injury, plaintiff had worked at the plant between two and four years.

On 25 July 1990, while plaintiff was maneuvering the cart to a position where she could obtain a roll of film from the storage rack, the cart tipped back and struck her head. Plaintiff fell on the floor and the cart fell on her back. She was taken to the hospital by ambulance, underwent surgery on her back and sustained a five percent (5%) permanent partial disability to her cervical spine and a ten percent (10%) permanent partial disability to her lower back.

The film cart is mounted on four wheels; two of the wheels are fixed and two are mounted on swivels. At its base, the cart is eighteen and one-half (18½) inches long and twenty-five (25) inches wide; its height is eighty-two and one-half (82½) inches and it weighs 453 pounds.

There was evidence tending to show that the cart was unstable and had been taken to the plant maintenance shop for repairs on several occasions, but that it had not been repaired due to production requirements. Other plant employees testified that the cart had tipped over several times and that the incidents had been reported to supervisors. Until plaintiff's injury, however, no one had ever been injured by the cart. It had been used to retrieve thousands of rolls of film each year for more than twenty-seven years.

There was no evidence the film cart violated government safety regulations or industry standards. However, plaintiff's expert mechanical engineer testified that "the top heavy design with the short wheel base creates a guarantee that the cart will overturn when subjected to normal dynamic forces associated with its movement. . . ," and that a knee brace or stop guard would have prevented the cart from falling on the person using it. After plaintiff's injury, a knee brace was welded onto the cart.

Plaintiff assigns error to the trial court's granting defendant's motion for directed verdict; she contends her evidence was sufficient to support a finding by the jury that defendant intentionally engaged in conduct substantially certain to cause injury to the plaintiff, thus meeting the standard set forth in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). We disagree and affirm the judgment of the trial court.

A defendant's motion for directed verdict tests the legal sufficiency of the evidence, taken as true and considered in the light most favorable to the plaintiff, to sustain a jury verdict in the plaintiff's favor. *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 411 S.E.2d 133 (1991);

West v. King's Dept. Store, 321 N.C. 698, 365 S.E.2d 621 (1988). In ruling upon the motion, the trial court must give the plaintiff the benefit of every reasonable inference which can be drawn from the evidence, *Samuel v. Simmons*, 50 N.C. App. 406, 273 S.E.2d 761 (1981), such benefit, however, does not extend to "conjecture, surmise, and speculation." *Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990).

The Workers' Compensation Act has traditionally provided the sole remedy for an employee injured on the job as a result of an accident. N.C. Gen. Stat. §§ 97-9 and 97-10.1 (1998), *Rose v. Isenhour Brick & Tile Co., Inc.*, 344 N.C. 153, 472 S.E.2d 774 (1996); *Tinch v. Video Indus. Serv., Inc.*, 129 N.C. App. 69, 497 S.E.2d 295 (1998). In *Woodson v. Rowland*, however, the North Carolina Supreme Court established an exception to the exclusivity provisions of the Act and held:

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

329 N.C. at 340-41, 407 S.E.2d at 228. To make out a claim under *Woodson*, a plaintiff must establish

> that the employer intentionally engaged in misconduct and that the employer knew that such misconduct was "substantially certain" to cause serious injury or death and, thus, the conduct was "so egregious as to be tantamount to an intentional tort."

Owens v. W.K. Deal Printing, Inc., 339 N.C. 603, 604, 453 S.E.2d 160, 161 (1995) (quoting *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993)); *see Kolbinsky v. Paramount Homes, Inc.*, 126 N.C. App. 533, 485 S.E.2d 900, *disc. review denied*, 347 N.C. 267, 493 S.E.2d 457 (1997); *Regan v. Amerimark Bldg. Products, Inc.*, 127 N.C. App. 225, 489 S.E.2d 421 (1997), *affirmed*, 347 N.C. 665, 496 S.E.2d 378 (1998) (*Regan I*); *Pastva v. Naegele Outdoor Advertising, Inc.*, 121 N.C. App. 656, 468 S.E.2d 491, *disc. review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996). "Substantial certainty is more than a possibility or substantial probability of serious injury but is less than

actual certainty." *Regan* at 227, 489 S.E.2d at 423. The Court must consider whether circumstances existed prior to the injury from which the defendant-employer was aware of a high probability of serious injury to employees. *Rose v. Isenhour Brick & Tile Co., Inc., supra*; *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995).

While the case law has been less than certain as to what constitutes "substantial certainty," the cases offer some guidance as to factors which must be considered when determining whether a defendant-employer acted with knowledge of a "substantial certainty" of injury or death as a consequence of its conduct. "No one factor is determinative in evaluating whether a plaintiff has stated a valid *Woodson* claim; rather, all of the facts taken together must be considered." *Regan v. Amerimark Bldg. Products, Inc.*, 118 N.C. App. 328, 331, 454 S.E.2d 849, 852, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995), *cert. denied*, 342 N.C. 659, 467 S.E.2d 723 (1996) (*Regan II*). When deciding whether a defendant-employer acted with "substantial certainty" of the consequences of its conduct, courts have considered several questions, including the following:

(1) Whether the risk that caused the harm existed for a long period of time without causing injury. *See Rose v. Isenhour Brick & Tile Co., Inc., supra; Mickles v. Duke Power Co., supra*; *Regan I, supra*. If the risk has existed in the workplace for a long period of time without causing substantial injury, it is less likely the employer acted with "substantial certainty" when subjecting employees to that risk.

(2) Whether the risk was created by a defective instrumentality with a high probability of causing the harm at issue. *See Rose v. Isenhour Brick & Tile Co., Inc., supra; Mickles v. Duke Power Co., supra*. However, expert testimony of a design defect should be given less weight than the prior accident history, especially if the allegedly defective instrumentality has a relatively safe prior history of use. *See Rose v. Isenhour Brick & Tile Co., Inc.*, at 159, 472 S.E.2d at 778 ("defendant's accident history fails to bear out plaintiff's expert's probability calculations" because defendant's "employees had been operating brick-setting machine number three with weights and wires for approximately six years prior to Rose's death, and in all this time, no operator of brick-setting machine number three suffered a serious injury or death due to an accident involving the carriage head."); *Mickles v. Duke Power Co.* at 111, 463 S.E.2d at 211-12 ("In view of the uncontroverted evidence that while roll-out occurs, it is rare, and

that except for three widely scattered instances over a sixteen-year period, defendant's linemen had spent millions of manhours aloft with no roll-out, [the expert's] opinion is inherently incredible.").

(3) Whether there was evidence the employer, prior to the accident, attempted to remedy the risk that caused the harm. *See Kelly v. Parkdale Mills, Inc.*, 121 N.C. App. 758, 468 S.E.2d 458 (1996). A good faith attempt to remedy the problem reduces the likelihood that the employer acted with the requisite intent to cause harm. *See Mickles, supra.* On the other hand, if the employer knew of the existence of feasible safety precautions that would have reduced the risk causing the harm and failed to take such precautions, such failure could tend to show disregard for the safety of workers. *See Arroyo v. Scottie's Professional Window Cleaning, Inc.*, 120 N.C. App. 154, 461 S.E.2d 13 (1995), *review improv. allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996) (supervisor's refusal to allow minimum safety precautions was substantially certain to result in serious injury or death); *Regan II, supra* (danger which existed from design of machine was increased by inoperable corrective emergency switches).

(4) Whether the employer's conduct which created the risk violated state or federal work safety regulations. *See Rose v. Isenhour Brick & Tile Co., Inc., supra* (defendant never cited for OSHA violation, and no safety regulation required defendant to equip machine with safety guards); *Mickles v. Duke Power Co., supra* (defendant never cited for OSHA violation concerning condition which caused death); *Tinch v. Video Indus. Serv., Inc., supra* (OSHA regulations did not apply to the specific instrumentality of harm at issue); *Kelly v. Parkdale Mills, Inc., supra,* (OSHA violations, though not determinative, are a factor in determining whether a *Woodson* claim has been established); *Arroyo v. Scottie's Professional Window Cleaning, Inc., supra,* (defendant did not enforce safety measures required by the Federal and State Occupational Safety and Health Acts (OSHA) or industry safety guidelines).

However, although a violation of state and federal regulations is an important factor in determining whether the employer's conduct can be found to have been substantially certain to cause injury or death, such violation, without more, is insufficient evidence of the employer's state of mind to make out a case of liability under the *Woodson* exception to the exclusivity rule. *See Pendergrass v. Card Care, Inc., supra; Tinch v. Video Indus. Serv., Inc., supra; Kolbinsky v. Paramount Homes, Inc., supra.*

(5) Whether the defendant-employer created a risk by failing to adhere to an industry practice, even though there was no violation of a state or federal safety regulation. *See Kelly v. Parkdale Mills, Inc., supra.*

(6) Whether the defendant-employer offered training in the safe behavior appropriate in the context of the risk causing the harm. *See Mickles v. Duke Power Co., supra; Kelly v. Parkdale Mills, Inc., supra.*

Obviously, the foregoing inquiries may not be relevant to every case, and the evidence in each case may give rise to other factors which touch upon the question of whether a defendant-employer has intentionally engaged in conduct which it knew was substantially certain to cause serious injury or death to an employee. Applying the relevant factors to the evidence presented by plaintiff in the present case, however, leads us to the conclusion that plaintiff has failed to show that defendant's conduct with respect to the use of the film cart was such that defendant knew that it was substantially certain to result in death or serious injury to plaintiff or other employees. The evidence showed that the cart had been used for many years without causing injury, rendering incredible the testimony of plaintiff's expert that the cart's design was "guaranteed" to cause injury. Moreover, there was no evidence that alleged defects in the cart's design violated state or federal workplace safety regulations or industry safety standards. Likewise, there was no evidence that defendant was aware of, and refused to implement, measures which would have rendered plaintiff's injury less likely. Thus, we hold plaintiff has failed to offer evidence demonstrating that defendant knew its conduct was substantially certain to result in serious injury or death so as to support a verdict in her favor under the *Woodson* exception to the exclusivity provision of the Workers' Compensation Act. The trial court properly directed a verdict in defendant's favor.

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

CENTURA BANK, PLAINTIFF v. EXECUTIVE LEATHER, INC. AND JAMES E. KILLIAN, DEFENDANTS

No. COA98-794

(Filed 6 April 1999)

Fraud— failure to read guaranty agreement

The trial court did not err by granting summary judgment for plaintiff on its suit against Killian as guarantor of sums owed by Executive Leather. Killian did not dispute that he signed the guaranty, but instead contended that his signature was obtained fraudulently in that he assumed that the documents were similar in nature and carried the same consequences as previous documents signed in past dealings and did not read the guaranty before signing it.

Appeal by defendants from judgment entered 12 March 1998 by Judge James R. Vosburgh in Nash County Superior Court. Heard in the Court of Appeals 24 February 1999.

Poyner & Spruill, L.L.P., by J. Nicholas Ellis, for plaintiff-appellee.

Whitesides & Walker, L.L.P., by H.M. Whitesides, Jr., for defendants-appellants.

TIMMONS-GOODSON, Judge.

Executive Leather, Inc. ("Executive") and James E. Killian ("Killian") (collectively, "defendants") appeal from an order granting summary judgment to Centura Bank ("Centura") on its claims for monies owed under two notes and a guaranty agreement. For the reasons hereinafter stated, we affirm the order of summary judgment.

The evidence presented at the hearing on Centura's motion for summary judgment tended to show that Killian founded Executive, a leather furniture and upholstery manufacturer, in 1981. Killian served as the president and sole voting shareholder of Executive from its inception until it ceased operations in 1996. Prior to establishing Executive, Killian had worked as an accountant, and although he had passed all parts of the Certified Public Accountant examination, he never completed the experience requirements to become certified.

In 1984 and 1985, Executive entered into Factoring and Security Agreements ("the 1984-85 Agreements") with Phillips Factors Corporation ("Phillips") wherein Phillips agreed to purchase certain accounts receivable from Executive at a discount. Under the terms of the 1984-85 Agreements, Executive was not responsible to Phillips for non-payment on any of the factored accounts receivable. After several years of operations pursuant to the 1984-85 Agreements, Executive requested that Phillips check credit ratings and approve orders for customers whose accounts Phillips was unwilling to guarantee. When Phillips refused to guarantee the accounts, Executive terminated the 1984-85 Agreements with Phillips and established a relationship with another factoring company.

In 1994, Killian contacted Phillips about entering into a new factoring agreement with Executive. Killian wanted the new agreement to include the same terms as those set out in the 1984-85 Agreements. However, Phillips was unwilling to finance Executive's accounts receivable; therefore, it encouraged Executive to obtain a loan from Centura to finance its operations. On 14 November 1994, Centura provided Killian and Executive with a commitment letter explaining the terms of the financing arrangement offered by Centura. The commitment letter described the financing as a "$600,000.00 one-year revolving line of credit" coupled with a "$95,000.00 two-year loan" with a "five-year amortization," with the purpose of providing an "[o]perating line of credit to fund timing differences of accounts receivable conversion to cash" and a "[p]ermanent working capital loan." The commitment letter also stated that the financing offered by Centura was to be unconditionally guaranteed by Killian and required Killian to provide Centura with personal financial statements. Killian furnished Centura with such a statement dated as of September 15, 1994.

On 15 November 1994, Executive and Phillips entered into a Factoring and Security Agreement ("the 1994 Agreement"). Under the terms of the 1994 Agreement, Phillips was not required to pay for the accounts receivable until payments were actually received on the accounts or until after ninety (90) days had expired. In order for Executive to receive funds sooner, it would draw on the funds borrowed from Centura and send its accounts receivable to Phillips. Phillips would then collect on the accounts receivable and pay the collected amounts minus its commission to Centura. Thereafter, Centura would credit Executive's loan balances with the payments made by Phillips. Killian did not ask any specific questions regarding

the transaction at the time he executed the agreement on behalf of Executive.

On 16 November 1994, Killian acknowledged and accepted the commitment letter on behalf of Executive, as Borrower, and by Killian himself, as Guarantor. Again, Killian failed to ask any questions about the terms and conditions of the 1994 Agreement when he acknowledged and accepted the commitment letter. On the same day, Executive executed and delivered to Centura two commercial notes in the amounts of $600,000.00 and $95,000.00 for the loans described in the commitment letter. Killian also executed and delivered to Centura an Unconditional Guaranty in the amount of $695,000.00. At the time he executed these documents, Killian did not ask any questions or express any uncertainty about the meaning and effect of the guaranty.

On 28 December 1995, Centura and Executive entered into a Modification Agreement whereby the $600,000.00 line of credit was reduced to $500,000.00 and the maturity date for repayment of the principal amount was modified from 28 December 1995 to 2 May 1996. On 2 May 1996, Centura and Executive entered into another modification Agreement whereby the existing $500,000.00 line of credit was further reduced to $460,000.00, the maturity date for the repayment of the principal amount was extended to 2 October 1996, and the interest rate was increased from prime plus 1.5% to prime plus 2%. Killian also entered into a Guarantor's Consent on 2 May 1996 signifying his consent to the loan modifications and reaffirming his obligations under the terms and conditions of the guaranty.

Executive defaulted on its obligations under the commercial notes, and Centura made demand on both Executive and Killian for payment pursuant to the terms and conditions of the notes and the guaranty. Still, Executive and Killian failed to make any payments on their obligations to Centura. Centura filed a complaint against both Executive and Killian on 28 January 1997 for non-payment of sums owed to Centura. At the time of filing, payment was due and owing to Centura in the amount of $452,779.52 on the line of credit and $66,448.00 on the working capital loan.

In their joint answer to Centura's complaint, Executive admitted that it executed the notes and that it "owe[d] Plaintiff a sum of money." Killian also admitted executing the guaranty, but asserted, among other defenses, that Centura procured his signature on the guaranty through fraud and/or misrepresentation as to the nature and

effect of the instrument. On 9 January 1998, Centura filed a motion for summary judgment. After reviewing the pleadings and other matters of record and hearing oral arguments, the trial court entered an order granting summary judgment to Centura on 12 March 1998. Defendants filed timely notice of appeal.

The sole issue presented by this appeal is whether the trial court erred in granting summary judgment to Centura on its suit against Killian as guarantor of the sums owed by Executive under the notes. Killian claims that summary judgment was improperly awarded, because a question of fact remains as to whether Centura misrepresented the terms of the guaranty such that Killian did not fully understand his obligations under the instrument. We must disagree.

Summary judgment is appropriate when the pleadings, depositions, affidavits, answers to interrogatories, admissions and other evidence establish the absence of any genuine issue of material fact and the moving party's entitlement to judgment as a matter of law. *Yamaha Corp. v. Parks*, 72 N.C. App. 625, 325 S.E.2d 55 (1985); N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). As our courts have held,

> "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated 'genuine' if it may be maintained by substantial evidence."

Northwestern Bank v. Roseman, 81 N.C. App. 228, 231, 344 S.E.2d 120, 123 (1986), *aff'd*, 319 N.C. 394, 354 S.E.2d 238 (1987) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)).

In the present case, Killian does not dispute that he signed the Unconditional Guaranty or that, under its terms, he guaranteed payment of the balances due Centura under the notes executed by Executive. Killian, instead, contends that his signature on the guaranty was obtained fraudulently. To establish the defense of fraud, Killian was required to produce a forecast of evidence showing the following: " '(1) [A] [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *Id.* at 231, 344 S.E.2d at 123 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). It was also

incumbent on Killian to show that he reasonably relied on the false representation. *Id.*

After carefully examining the record, we conclude that Killian failed to forecast evidence that would sustain his burden of proof on the issue of whether he was fraudulently induced to sign the guaranty. Although Killian asserts that Centura and Phillips misrepresented the nature of the 1994 Agreement, of which the guaranty was a part, he cannot point to any false or misleading statements made by Centura or Phillips which were reasonably calculated to trick him into signing the guaranty. Killian argues, instead, that he failed to read the guaranty before signing it, because he assumed that "the documents that he was signing were similar in nature and carried the same consequences as others he had signed in past dealings with Phillips." Relying on this Court's decision in *Roseman*, 81 N.C. App. 228, 344 S.E.2d 120, Killian contends that Centura and Phillips had an affirmative duty to explain his obligations under the Unconditional Guaranty. This contention is without merit.

In *Roseman*, we stated the following:

> [E]ven though a creditor and a guarantor are not in a fiduciary relationship, the obligation of good and fair dealing imposes a duty on the creditor to disclose material facts that the guarantor is unlikely to discover. This duty arises when the creditor knows or has grounds to believe that the guarantor is being misled or "induced to enter into the contract in ignorance of facts materially increasing the risks," and the creditor has the opportunity to inform the guarantor. In such a case, "non-disclosure would in effect amount to a contrary representation to the [guarantor]." "Where there is a duty to speak, fraud can be practiced by silence as well as by a positive misrepresentation."

Id. at 232, 344 S.E.2d at 123-24 (quoting *First-Citizens Bank and Trust Co. v. Akelaitis*, 25 N.C. App. 522, 526, 214 S.E.2d 281, 284 (1975)).

In the record before the trial court, there was no evidence that Centura knew or had reason to believe that Killian was being misled or that he was induced to execute the guaranty in ignorance of its terms. Furthermore, contrary to Killian's contention, the evidence reveals that prior to entering into the 1994 Agreement, he knew that its terms would be different than those of the 1984-85 Agreements. In

arguments before the trial court, Killian's attorney conceded that when Killian approached Phillips in 1994 about making the same deal that the parties had under the 1984-85 Agreements, Phillips refused, stating that it did not want to guarantee collection on Executive's accounts receivable. While Phillips was willing to factor the accounts, it was not willing to advance any money on the accounts until payment was actually received on the invoices or until 90 days after the invoices were generated. To address Executive's immediate need for funds, Phillips proposed that Executive obtain a loan from Centura and Phillips agreed to make payments on the loan from the monies received on the factored accounts. Thus, Killian was aware that the 1994 Agreement was significantly different from the 1984-85 Agreements, and it was unreasonable for him to assume that his rights and responsibilities would remain the same under the new agreement. Because Centura and Phillips had no cause to know that Killian did not appreciate the terms and consequences of the guaranty, they were under no duty to speak. The trial court, therefore, was correct in concluding that the evidence presented no genuine issue of material fact and that Centura was entitled to judgment as a matter of law.

In sum, because the evidence, when considered in the light most favorable to Killian, failed to raise an issue of material fact as to whether his signature on the Unconditional Guaranty was procured by the fraudulent acts of Phillips or Centura, the trial court correctly entered summary judgment for Centura. The order of the trial court is, therefore, affirmed.

Affirmed.

Judges MARTIN and HUNTER concur.

STATE OF NORTH CAROLINA v. KENNETH RAY PHILLIPS

No. COA98-460

(Filed 6 April 1999)

1. **Search and Seizure— motion to suppress—affidavit—insufficient**

The trial court did not err in summarily dismissing defendant's motion to suppress evidence in a narcotics prosecution where the accompanying affidavit failed to meet the mandatory requirements of N.C.G.S. § 15A-977 in that it did not have a single fact in support of the motion to suppress and did not state how defendant's constitutional rights were violated when police searched his mailbox without a warrant.

2. **Search and Seizure— motion to suppress—evidence hidden by third party—no expectation of privacy**

The trial court did not err by denying defendant's motion to suppress drugs seized from defendant's mailbox where a companion traveling with defendant testified that he had thrown the drugs in her lap and pushed her out of the van, and that she had put the package in defendant's mailbox. Defendant lost any expectation of privacy he might have had in his property by throwing the drugs into her lap.

Appeal by defendant from judgment entered 29 May 1997 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 1999.

Defendant was indicted for trafficking cocaine and for conspiring to traffic cocaine. Defendant was first tried at the 21 April 1997 Criminal Session of Superior Court of Mecklenburg County but the trial judge declared a mistrial after the jury was unable to reach a verdict. The case was tried again and defendant was found guilty of trafficking cocaine. Defendant was sentenced to a minimum of 35 months and a maximum of 42 months in prison.

The State's evidence tended to show that on 25 June 1996, Charlotte-Mecklenburg police officer Johnny L. Jennings was told by a confidential informant that a heavy set black male, approximately thirty years old with medium skin complexion would be going to 3515 Bernard Avenue, Apartment 2. The informant said that the black male would arrive at approximately 7:30 p.m., go into the residence, obtain

at least four and a half ounces of crack cocaine and then leave. The informant went on to state that after leaving, the suspect would then go to Clanton Park. Officer Jennings picked up the informant and the informant showed Officer Jennings the exact location of the apartment. Afterwards, Officer Jennings gathered the members of the Street Drug Interdiction team. At 6:30 p.m. or 7:00 p.m., Officer Jennings went to the residence in question and set up surveillance in an undercover vehicle so he could see the subject enter the apartment.

At 7:30 p.m., a tan Mazda van pulled into the parking lot of the Bernard Avenue complex. A black male, defendant, meeting the informant's description, got out of the van and went into the targeted apartment. Approximately one minute later, defendant left the residence, got into the van and traveled south on North Tryon Street. Officer Jennings could not see defendant's hands as defendant approached or left the apartment. Defendant stopped at a residence on North Church Street and picked up a young black female, later identified as LaShanda Long. The informant had said nothing about a female. The defendant continued traveling southbound on North Tryon going about forty-five in a thirty-five mile per hour zone. Officer Jennings told uniformed officers to stop the van.

Officer Keresztesi turned on her blue light and then her siren. Defendant turned into a parking lot, took his seat belt off and reached under the seat. Defendant then turned the van around and accelerated the vehicle on to North Tryon. Keresztesi followed the van but did not chase it due to department policy. Officer Elliot went back to the Bernard Avenue apartment and recognized the van. Officer Elliott turned on his blue lights and stopped the van. The female passenger was no longer in the van. Officer Elliot had defendant get out of the van and lie on his stomach on the asphalt. Officer Elliott handcuffed defendant and placed him under arrest. Officers Elliot and Keresztesi went to look for the female passenger and found her walking behind the Bernard Avenue apartments and detained her. Officer Keresztesi asked her where she put the drugs and she (Ms. Long) denied ownership of the drugs. Long then told the officers that she put the drugs in "the second mailbox from the end apartment." Officer Keresztesi ran over to the mailbox, lifted the lid to open it, and looked inside. Officer Keresztesi removed from the mailbox a plastic bag which appeared to have crack cocaine inside. Officer Jennings weighed the package; its weight including the packaging was 129 grams.

Officer Jennings searched defendant's van and found a handgun sitting in plain view in the console. Defendant gave consent to search his apartment. No drugs were found but the officers found a handgun and two pill bottles which they believed contained cocaine residue.

Long testified that she had paged defendant and asked him to pick her up and take her to the store so she could get medicine for her daughter. As they were going south on North Tryon, Long saw police cars with their blue lights on behind them. Defendant pulled into a parking lot and then went back on North Tryon heading in the opposite direction. Defendant was weaving in and out of traffic and Long asked defendant to let her out of the van. As defendant approached his apartment, defendant threw the drugs on Long's lap. Defendant pushed her out of the van and told her to put the "stuff in my [his] house [apartment]." When Ms. Long arrived at defendant's apartment, defendant's door was locked so she put the package in defendant's mailbox. Long was charged with three counts of trafficking in cocaine. Her case was dismissed prior to defendant's trial.

Defendant presented evidence at trial that showed that defendant was renting the apartment in question and that a female named Trina, defendant's girlfriend, was also living there. Defendant testified that in May 1996, defendant spoke to his landlord, Eric Lowery, about changing the locks on his apartment because defendant thought someone was coming in the apartment during the day. Defendant testified that on the day in question, defendant went to the car wash in the mini-van owned by Tony Miller. As he was washing the van, some men approached him. Defendant had previously had trouble with the men. Later, defendant was driving Ms. Long to the store when he saw the same men in a blue Sierra following him. Defendant testified he turned into a parking lot and started heading back toward his apartment. Defendant stated he never saw any blue lights. Defendant testified that he wanted to get back to his apartment to drop off Ms. Long so she would not be hurt. Defendant stated that the first time he saw a police car was at his apartment. He got out of the van and was arrested.

On 5 March 1997, defendant moved to suppress evidence and statements made by defendant alleging that his constitutional rights were violated by the officers. An affidavit was attached to the motion and incorporated by reference. The sworn affidavit stated:

> 1) My name is Edward A. Fliorella, Jr.. I am an attorney actively engaged in the practice of criminal law for the past ten years.

2) I have reviewed the discovery provided by the State with my client and, based upon those specific facts, and as alleged in this Motion to Suppress, it is the opinion of the undersigned that the relief requested should be granted.

3) That this affidavit is being filed pursuant to N.C.G.S. § § 15A-977.

The trial court summarily denied the defendant's motion to suppress stating that the facts in the affidavit were insufficient to support the motion. The trial court also denied defendant's request to have defendant swear to the facts in the defense attorney's affidavit.

At the 21 April 1997 session of Mecklenburg County Superior Court, the jury was unable to reach a unanimous verdict and the court declared a mistrial. The case was retried at the 27 May 1997 session. At the second trial, the defendant had filed a new affidavit in support of his motion to suppress and the trial judge granted a hearing on the suppression motion. After making findings of fact, the trial court concluded that the evidence obtained as the result of the search of the car and the mailbox was admissible and denied defendant's motion to suppress. The jury found defendant guilty of trafficking cocaine. Defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General Anne M. Middleton, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

EAGLES, Chief Judge.

[1] First we consider whether the trial court erred in summarily denying defendant's motion to suppress. Defendant argues that the affidavit implicitly adopted the specific facts "as alleged in this Motion to Suppress" and identified the source of that information as the discovery provided by the State. Defendant contends that when read together, the affidavit and motion to suppress are sufficient to meet the requirements of G.S. 15A-977(a) and the trial court did not have the discretion to summarily deny the motion without conducting a hearing. After careful review, we disagree.

G.S. 15A-977(a) states:

(a) A motion to suppress evidence in superior court made before the 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. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated.

Here, the sworn affidavit defendant filed in conjunction with his motion to suppress stated:

> 1) My name is Edward A. Fliorella, Jr.. I am an attorney actively engaged in the practice of criminal law for the past ten years.
>
> 2) I have reviewed the discovery provided by the State with my client and, based upon those specific facts, and as alleged in this Motion to Suppress, it is the opinion of the undersigned that the relief requested should be granted.
>
> 3) That this affidavit is being filed pursuant to N.C.G.S. § § 15A-977.

The affidavit fails to meet the mandatory requirements of G.S. 15A-977. If the motion fails to allege a legal or factual basis for suppressing the evidence, it may be summarily denied by the trial judge. *State v. Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980).

The affidavit here does not have a single fact in support of the motion to suppress. G.S. 15A-977(a) explicitly and clearly states that "[t]he motion must be accompanied by an affidavit **containing facts** supporting the motion." [Emphasis added]. Further, the motion does not state how defendant's constitutional rights were violated when the police officer searched his mailbox without a search warrant. The defendant never stated in his motion or affidavit that he had a reasonable expectation of privacy in his mailbox or its contents. Accordingly, the trial court did not err in summarily dismissing defendant's motion to dismiss. This assignment of error is overruled.

[2] Finally, we consider whether the trial court in the second trial erred in denying defendant's renewed motion to suppress. Defendant argues that his rights under the Fourth Amendment and Fourteenth Amendment of the United States Constitution as well as Article I § 19 and § 20 of the North Carolina Constitution were violated when officers searched his mailbox without first obtaining a search warrant because defendant had a reasonable expectation of privacy in his

closed but not locked mailbox which was affixed to his front door. We need not address that issue.

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. A warrantless search is unconstitutional unless (1) probable cause to search exists and (2) the State satisfies its burden of showing that the exigencies of the situation made search without a warrant imperative. *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979) (citing *Chimel v. California*, 395 U.S. 752, 23 L. E. 2d 685 (1969)). "Our state constitution, like the Federal Constitution, requires the exclusion of evidence obtained by unreasonable search and seizure." *State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988).

The United States Supreme Court has held that the touchstone of the Fourth Amendment analysis has been "whether a person has a 'constitutionally protected reasonable expectation of privacy.' " *Oliver v. United States*, 466 U.S. 170, 177, 80 L. E. 2d 214, 223 (1984) (quoting *Katz v. United States*, 389 U.S. 347, 360, 19 L. E. 2d 576, 587 (1967)).

> The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.' "
>
> No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. In assessing the degree to which a search infringes upon individual privacy, the Court has given great weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion,[.]

Id. at 177-78, 19 L. E. 2d at 223-24. (Citations omitted). However, "[w]hen one voluntarily puts property under the control of another, he must be viewed as having relinquished any prior legitimate expectation of privacy with regard to that property, as it becomes subject to public exposure upon the whim of the other person." *State v. Jordan*, 40 N.C. App. 412, 415, 252 S.E.2d 857, 859 (1979) (holding that

the defendant did not have an expectation in privacy when he put the drugs in the purse of a passenger in the car that defendant was driving).

Here, by throwing the drugs in Long's lap, defendant lost any expectation of privacy he might have had in his property. After giving the drugs to Ms. Long, defendant had no control over what Ms. Long did with the drugs and because defendant had no control over the drugs, he relinquished his prior expectation of privacy in the property. Accordingly, the trial court did not err in denying defendant's motion to suppress because the evidence was not obtained in violation of defendant's Fourth Amendment constitutional right. This assignment of error is overruled.

No error.

Judges MARTIN and McGEE concur.

WILLIAM M. DAVIS, EMPLOYEE, PLAINTIFF v. WEYERHAEUSER COMPANY, EMPLOYER, SELF-INSURED (CRAWFORD & COMPANY), DEFENDANTS

No. COA97-869

(Filed 6 April 1999)

1. Appeal and Error— assignments of error—abandoned

Plaintiff abandoned his assignments of error in a workers' compensation appeal by appealing from and assigning error to the opinion and award of the full Industrial Commission, but contending in his brief that the opinion and award of the Deputy Commissioner was erroneous. The opinion and award of the Deputy Commissioner was not properly before the court.

2. Workers' Compensation— asbestosis—disability—not shown

A workers' compensation plaintiff was not entitled to compensation for total or partial incapacity to earn wages from his asbestosis under N.C.G.S. § 97-29 or N.C.G.S. § 97-30 where he did not meet his burden of showing that his asbestosis resulted in disablement other than by a prior award of 104 weeks of compensation pursuant to N.C.G.S. § 97-61.5. Plaintiff was entitled to

compensation pursuant to N.C.G.S. § 97-31(24), which does not require a showing of disablement. The Industrial Commission was strongly discouraged from merely reciting an expert's opinion as its only finding on an issue because it is then unclear whether the Commission was showing only that it considered the opinion or whether it agreed with and found the opinion as expressed by the expert.

Appeal by plaintiff from Opinion and Award filed 21 January 1997 from of the North Carolina Industrial Commission. Heard in the Court of Appeals 16 February 1999.

The Law Office of Robin Hudson, by Robin E. Hudson and Faith Herndon, for plaintiff-appellant.

Wallace, Morris & Barwick, P.A., by Elizabeth A. Heath, for defendant-appellees.

GREENE, Judge.

William M. Davis (Plaintiff) appeals from the Opinion and Award of the North Carolina Industrial Commission (Commission).

On 2 November 1995, pursuant to Plaintiff's claims for workers' compensation, the Deputy Commissioner entered an Opinion and Award containing the following conclusions of law:

> 1. [P]laintiff has failed to carry the burden of proof to establish that he is entitled to compensation for total disability as a result of his asbestosis. The competent evidence in the record clearly establishes that [Plaintiff] voluntarily retired from his employment in 1985 for reasons unrelated to his asbestosis. [P]laintiff did not inform either the employer or any of his physicians that he was retiring due to physical limitations. Further, medical evidence clearly establishes that [Plaintiff's] condition was not such as to render [P]laintiff unable to work. No physician has found [P]laintiff unable to engage in work. Any limitation of [P]laintiff's ability to earn wages was due to factors other than his asbestosis.
>
> 2. Plaintiff has made no effort following his voluntary retirement to seek other employment. Therefore, [Plaintiff] is not entitled to elect a remedy under N.C. Gen. Stat. § 97-30.

3. [P]laintiff is entitled to compensation pursuant to N.C. Gen. Stat. § 97-31(24) for permanent injury to his lungs in the amount of $20,000.00. Defendants are entitled to a credit for the 104 weeks of compensation paid at the rate of $194.00 per week, pursuant to N.C. Gen. Stat. § 97-61.5(b).

The Deputy Commissioner then entered the following award:

1. Defendants shall pay $20,000.00 to [P]laintiff pursuant to N.C. Gen. Stat. § 97-31(24) for the permanent injury to his lungs, subject to a credit for the one hundred and four (104) weeks of compensation paid at the rate of $194.00 per week.

2. Defendants shall pay the costs, including expert witness fees of $312.50 to Dr. D. Allen Hayes, $275.00 to Dr. Cecil Holmes Rand, Jr., and $150.00 to Dr. Liebert Devine.

Plaintiff appealed from the decision of the Deputy Commissioner to the Full Commission pursuant to section 97-85, and the Full Commission entered an Opinion and Award on 21 January 1997. The Full Commission adopted the findings of fact made by the Deputy Commissioner, and then made the following conclusions of law:

1. Plaintiff has failed to carry the burden of proof to establish that he is entitled to compensation for total disability as a result of his asbestosis. N.C. Gen. Stat. § 97-2(9); 97-29.

2. Plaintiff has made no effort following his voluntary retirement to seek other employment. Therefore, [P]laintiff is not entitled to elect a remedy under N.C. Gen. Stat. § 97-30.

3. Plaintiff is entitled to compensation pursuant to N.C. Gen. Stat. § 97-31(24) for permanent injury to his lungs in the amount of $20,000.00.

4. Defendant is not entitled to a credit for the 104 weeks paid to [P]laintiff pursuant to N.C. Gen. Stat. § 97-61.5(b).

5. Plaintiff is entitled to payment, by [D]efendant, of all medical expenses incurred, or to be incurred, as a result of his asbestosis. N.C. Gen. Stat. § 97-25.

The Full Commission entered the following award:

1. Defendant shall pay $20,000.00 to [P]laintiff pursuant to N.C. Gen. Stat. § 97-31(24) for the permanent injury to his lungs.

Defendant shall pay interest on this amount in accordance with N.C. Gen. Stat. § 97-86.2.

2. Defendant shall pay all medical expenses incurred, or to be incurred, as a result of [Plaintiff's] asbestosis.

3. A reasonable attorney's fee of twenty-five percent of the compensation due [P]laintiff under Paragraph 1 of this Award, excluding the interest due, is approved for [P]laintiff's counsel. Twenty-five percent of the lump sum due [P]laintiff shall be deducted from that sum and paid directly to his counsel.

4. Defendant shall pay the costs of this appeal.

Plaintiff appealed to this Court from the Opinion and Award of the Full Commission pursuant to section 97-86, and assigned error to the Full Commission's findings of fact and conclusions of law.

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[1] The dispositive issue is whether Plaintiff has abandoned his assignments of error.

Our review on appeal is limited to issues presented by assignment of error. N.C.R. App. P. 10(a). "Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." N.C.R. App. P. 28(a).

In this case, Plaintiff appealed from, and assigned error to, the final Opinion and Award of the Full Commission. Plaintiff does not, however, bring forward these assignments of error on appeal. A thorough reading of Plaintiff's brief reveals he instead contends the Opinion and Award *of the Deputy Commissioner* was erroneous. In Plaintiff's first argument to this Court, he states: "[T]he Commission's conclusion that [P]laintiff voluntarily resigned for reasons unrelated to the asbestosis is contrary to its own factual findings . . . ." Although the Deputy Commissioner made such a conclusion, the Full Commission did not. Plaintiff also argues his "disability was not based on 'factors other than his asbestosis,' as Conclusion No. 1 states . . . ." This quote is taken from the Opinion and Award of the Deputy Commissioner; the Full Commission made no such conclusion. Plaintiff further contends the "Opinion and Award incorrectly concluded that [P]laintiff quit his job for reasons unrelated to his breathing problems." Again, this is not a conclusion of the Full Commission, but of the Deputy Commissioner. Plaintiff next contends "Conclusion of Law No. 1 states that [P]laintiff has not estab-

lished that he 'was unable to work.' " This quote and contention are likewise related to the Deputy Commissioner's Opinion and Award rather than that of the Full Commission. Finally, Plaintiff contends "[t]he Opinion and Award did not even address [P]laintiff's request for payment of ongoing medical expenses." Although the Deputy Commissioner's Opinion and Award did not address payment of Plaintiff's ongoing medical expenses, the Opinion and Award of the Full Commission explicitly addressed that issue and ordered Defendant to "pay all medical expenses incurred, or to be incurred, as a result of [Plaintiff's] asbestosis." Accordingly, Plaintiff's assignments of error to the Opinion and Award of the Full Commission are deemed abandoned due to his failure to bring them forward in his brief to this Court.

Furthermore, the Opinion and Award *of the Deputy Commissioner* is not properly before this Court. Appellate courts do not review the Opinion and Award of a Deputy Commissioner unless it has been affirmed or adopted by the Full Commission. *Brewer v. Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962); *see also Adams v. AVX Corp.*, 349 N.C. 676, —, 509 S.E.2d 411, 413 (1998) (noting that section 97-85 "places the ultimate fact-finding function with the Commission—not the hearing officer"); N.C.G.S. § 97-85 (1991) (providing for review of an award of the Deputy Commissioner by the Full Commission); N.C.G.S. § 97-86 (Supp. 1998) (providing for appeal from final decisions of the Full Commission to this Court).

[2] Although Plaintiff's assignments of error are deemed abandoned, we nonetheless have thoroughly reviewed the record and the Opinion and Award entered by the Full Commission. *See* N.C.R. App. P. 2. We specifically reject Plaintiff's contention that his prior award of 104-weeks compensation pursuant to section 97-61.5 established his disablement, *see* Leonard T. Jernigan, Jr., *North Carolina Workers' Compensation Law and Practice* § 16-2 (3d ed. 1999) (noting that asbestosis and silicosis claims are unique in that "they do not require a finding of disablement . . . in order to receive [section 97-61.5's] compensation benefits"); *Roberts v. Southeastern Magnesia and Asbestos Co.*, 61 N.C. App. 706, 711, 301 S.E.2d 742, 745 (1983) (noting that a claimant must "establish[] that his earning capacity was diminished due to the asbestosis [to] . . . recover an additional amount" in excess of the 104-weeks compensation), and we agree with the Full Commission that Plaintiff has not otherwise met his burden of showing his asbestosis resulted in disablement, *see Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454,

457 (1993) (listing the ways by which a claimant may show disablement). Accordingly, Plaintiff was not entitled to compensation pursuant to sections 97-29 (for total incapacity to earn wages) or 97-30 (for partial incapacity to earn wages), both of which require a showing of disablement. *See Wood v. Stevens & Co.*, 297 N.C. 636, 644, 256 S.E.2d 692, 697 (1979). Plaintiff was entitled to, and was awarded, compensation pursuant to section 97-31(24), which does not require a showing of disablement. *See Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52 (1985).

Finally, we note the Commission stated some of its "findings" in the form of recitations of expert testimony without declaring whether it found the testimony to be a fact. For example, the Commission "found" that "Dr. Hayes noted that [P]laintiff's condition of moderately severe impairment is a permanent condition which is related to the asbestosis." Although we "interpret the Commission's practice of reciting testimony to mean that it does find the recited testimony to be a fact," *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 442 n.7, 342 S.E.2d 798, 808 n.7 (1986), it is the Commission's duty to find the ultimate determinative facts, not to merely recite evidentiary facts and the opinions of experts. This is especially important in light of the requirement that the Commission demonstrate its consideration of the relevant evidence. *See Bryant v. Weyerhaeuser*, 130 N.C. App. 135, ——, 502 S.E.2d 58, 62 (1998). Unless the Commission specifically makes its own determination of the relevant facts of the case, especially where those facts are conflicting, it is unclear to reviewing courts whether the Commission merely included an expert's opinion to show its consideration of that opinion or whether the Commission actually agreed with (and found) the opinion as expressed by the expert. Accordingly, we strongly discourage the Commission from merely reciting that "Expert A opined . . ." as its *only* finding on a given issue; rather, the Commission should, at some point, also make its *own* determination on that issue, based on its consideration and evaluation of all the evidence, and include that determination in its findings.

Affirmed.

Judges LEWIS and HORTON concur.

GIBBONS v. COLE

[132 N.C. App. 777 (1999)]

VIRGINIA GIBBONS, ALBERTA G. COVINGTON, BRIDGET GIBBONS McNAIR AND KATHLEEN GIBBONS SHUE, PLAINTIFFS-APPELLANTS v. DAWN ROYSTON COLE, PHILIP ROYSTON, WACHOVIA BANK OF NORTH CAROLINA, N.A., TRUSTEE OF THE JOHN P. GIBBONS TRUST, AND MARY ELIZABTH GIBBONS SUTHERLAND, NOW DECEASED, DEFENDANTS-APPELLEES

No. COA98-764

(Filed 6 April 1999)

1. Adoption— adopted children as trust beneficiaries—1935 trust

Two adopted children were entitled to take as "issue" or "descendants" under the terms of an irrevocable inter vivos trust created in 1935 where the natural children contended that adopted children were presumptively excluded in 1935 from taking as issue or descendants unless the terms of the trust clearly indicated an intent to include them; that the settlor here had given stock to the adoptive mother on the assumption that the adopted children could not take under the trust; and that the application of N.C.G.S. § 48-1-106(e) to allow the children to take ignores the circumstances existing at the time of the trust and the intent of the settlor, resulting in a windfall to the adopted children. The terms of the statute are clear and unambiguous; the trust was a written instrument executed before 1 October 1985 and no intention to exclude the adopted grandchildren plainly appears from the terms of the instrument. Also, the court did not err by granting defendant's motion to strike plaintiff's allegations regarding the purported gift of stock since N.C.G.S. § 48-1-106(e) precludes looking beyond the terms of the trust instrument in determining whether defendants share in the distribution of the trust.

2. Appeal and Error— notice of appeal—subsequent ruling on motion for attorney fees

The trial court erred in a declaratory judgment action to determine whether adopted children could take under a trust by ruling on defendants' motion for attorney fees pursuant to N.C.G.S. § 6-21(2) after plaintiffs gave notice of appeal from a judgment on the pleadings. The court stated that plaintiffs' action was without merit and the decision to award attorney fees was clearly affected by the outcome of the judgment from which plaintiffs appealed.

Appeal by plaintiffs from judgments entered 31 March 1998 and 13 August 1998 by Judge Sanford L. Steelman in Richmond County Superior Court. Heard in the Court of Appeals 15 February 1999.

On 31 December 1935, John Gibbons, Sr. ("Gibbons") created an irrevocable inter vivos trust for the benefit of his wife, Virginia Ware Gibbons, their four children, and "their successors." The trust provisions directed the trustee Wachovia Bank to distribute income to Gibbons' wife and their children during their lives. The trust further created a contingent remainder interest in the trust principal to those surviving "issue" or "descendants" of Gibbons' children per stirpes at the time of final termination and distribution of the trust. The trust instrument provided that the trust would terminate and the principal would be distributed to the surviving "issue" or "descendants" after the death of the "last survivor of Grantor's wife and children hereinabove named and when the youngest living grandchild of the Grantor shall attain the age of twenty-one (21) years." The trust instrument made no mention of adopted children or grandchildren.

In 1947, one of Gibbons' daughters, Virginia Gibbons Royston, adopted defendants Dawn Royston Cole and Philip Royston. According to plaintiffs, after Virginia adopted Cole and Royston, Gibbons gave "a substantial gift of stock" to Virginia for the benefit of Cole and Royston. Gibbons died on 27 December 1962. All of Gibbons' grandchildren, natural and adopted, have reached 21 years of age and Gibbons' last surviving child died on 2 February 1998, triggering termination of the trust.

On 20 November 1997, Gibbons' four natural grandchildren filed a declaratory judgment action, requesting the court to enter an order declaring that the adopted grandchildren, defendants Cole and Royston, are not entitled to share in the distribution of the trust. Defendants Cole and Royston moved to dismiss, requested judgment on the pleadings, and moved to strike the portions of plaintiffs' complaint that referred to the alleged gift of stock to Virginia Gibbons Royston. Defendant trustee Wachovia Bank agreed not to distribute the trust corpus until the trial court determined whether defendants were entitled to share in the distribution.

On 3 April 1998, the trial court granted defendants' motions to strike and for judgment on the pleadings, concluding that "defendants . . . are entitled to share in the distribution of income and principal of

the trust." In a written order, the trial court stated that defendants' motion for attorneys fees should be placed on the trial court calendar for 13 April 1998. On 27 April 1998, plaintiff-appellants gave notice of appeal from the trial court's entry of judgment on the pleadings. On 1 June 1998, the trial court held a hearing on defendants' motion for attorneys fees. On 13 August 1998, the trial court entered a final order granting defendants' attorneys fees motion. On 17 August 1998, plaintiffs gave notice of appeal from the trial court's award of attorneys fees to defendants. Plaintiffs' appeals have been consolidated here.

Shipman & Associates, L.L.P., by Gary K. Shipman and C. Wes Hodges, Jr., for plaintiff-appellants.

Etheridge, Moser, Garner & Bruner, P.A., by Terry R. Garner and Christopher N. Heiskell, for defendant-appellees.

Hunton & Williams, by Albert Diaz, for defendant Wachovia.

Thigpen & Jenkins, L.L.P., by James H. Jenkins, for defendant Mary Elizabeth Gibbons Sutherland (deceased).

EAGLES, Chief Judge.

[1] The primary issue before us is whether, pursuant to G.S. 48-1-106(e), the two adopted children of Gibbons' daughter, Virginia Gibbons Royston, are entitled to take as "issue" or "descendants" under the terms of the irrevocable inter vivos trust created by Gibbons in 1935. G.S. 48-1-106(e) provides:

> In any deed, grant, will, or other written instrument executed before October 1, 1985, the words "child," "grandchild," "heir," "issue," "descendant," or an equivalent, or any other word of like import, shall be held to include any adopted person after the entry of the decree of adoption, unless a contrary intention plainly appears from the terms of the instrument, whether the instrument was executed before or after the entry of the decree of adoption. The use of the phrase "hereafter born" or similar language in any such instrument to establish a class of persons shall not by itself be sufficient to exclude adoptees from inclusion in the class. In any deed, grant, will, or other written instrument executed on or after October 1, 1985, any reference to a natural person shall include any adopted person after the entry of the decree of adoption unless the instrument explicitly states that

> adopted persons are excluded, whether the instrument was executed before or after the entry of the decree of adoption.

G.S. 48-1-106(e) (1996). As its text clearly indicates, G.S. 48-1-106(e) must be applied retroactively and gives adopted children the same rights as natural children to share in property conveyed through deeds, grants, wills, or other written instruments, unless the instruments expressly exclude them. Plaintiffs argue that G.S. 48-1-106(e) should not apply to defendants. Plaintiffs first contend that to allow defendants to share in the distribution conflicts with the intent of the settlor Gibbons. Plaintiffs contend that Gibbons' intent not to include defendants is evidenced by the "substantial gift of stock" that Gibbons purportedly gave to the defendants' mother for the benefit of the defendants. Plaintiffs argue that when the trust was executed in 1935 (before enactment of G.S. 48-1-106(e) in 1996), adopted children were presumptively excluded from taking as "issue" or "descendants" under the trust unless the terms of the trust clearly indicated an intent to include them. Plaintiffs contend that Gibbons wanted to provide equally for Gibbons' natural and adopted grandchildren and that he gave the stock to Virginia Gibbons Royston after she adopted the children on his assumption that they could not take as "issue" or "descendants" under the trust. According to plaintiffs, "the trial court's strict application of [G.S. 48-1-106(e)] ignores the circumstances existing at the time of the creation of the Trust, the intent of the settlor, and results in a windfall to the appellees, which clearly was not intended by the General Assembly in enacting the adoption statutes."

Plaintiffs' argument fails. The terms of the statute are clear and unambiguous. Accordingly, we must give G.S. 48-1-106(e) its plain and definite meaning. We are without power to create provisions and limitations not contained in the language of the statute itself. *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998). Here, the irrevocable inter vivos trust created in 1935 was clearly a "written instrument executed before October 1, 1985," and no intention to exclude the adopted grandchildren plainly appears from the terms of the instrument. Accordingly, we are required by G.S. 48-1-106(e) to conclude that the defendants are entitled to share in the distribution of the trust as "issue" or "descendants" of their adoptive mother, Virginia Gibbons Royston. In *Peele v. Finch*, 284 N.C. 375, 383, 200 S.E.2d 635, 641 (1973), the Supreme Court construed G.S. 48-23(3), the predecessor to 48-1-106(e), concluding that an adopted child was entitled to take under a will as "issue" of the testator's children pursuant to the statute. The *Peele* Court stated:

> Clearly, the purpose of the Legislature in adding to G.S. 48-23[3], [now G.S. 48-1-106(e)] enacted almost immediately after the decision of this Court in Thomas v. Thomas, supra, was to change the law as there declared. The express provision of the statute is that in any will the word 'issue' shall be held to include any adopted person, unless the contrary plainly appears by the terms of the will itself. It is also expressly provided by the statute that such rule of construction shall apply whether the will was executed before or after the final order of adoption and irrespective of whether the will was executed before or after the enactment of the statute.

Peele v. Finch, 284 N.C. 375, 381-82, 200 S.E.2d 635, 640 (1973). *See also Wachovia Bank and Trust Co. v. Chambless*, 44 N.C. App. 95, 105, 260 S.E.2d 688, 695 (1979); and *Stoney v. MacDougall*, 31 N.C. App. 678, 681, 230 S.E.2d 592, 593 (1976), *cert. denied*, 291 N.C. 716, 232 S.E.2d 208 (1977).

We recognize that the application of G.S. 48-1-106(e) may cause arguably unfair results. However,

> [t]he terms of the statute being clear, no construction of its provisions by this Court is required. In such event, it is our duty to apply the statute so as to carry out the intent of the Legislature, irrespective of any opinion we may have as to its wisdom or its injustice to the deceased testator, unless the statute exceeds the power of the Legislature under the Constitution.

Peele v. Finch, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973) (citations omitted) (holding that G.S. 48-23 [now G.S. 48-1-106(e)] does not exceed the power of the legislature under the Constitution).

We also conclude that the trial court did not err in granting defendants' motion to strike plaintiffs' allegations regarding the purported gift of stock since G.S. 48-1-106(e) precludes us from looking beyond the terms of the trust instrument in determining whether defendants share in the distribution of the trust.

[2] We next address whether the trial court erred when it ruled on defendants' motion for attorneys fees pursuant to G.S. 6-21(2) after plaintiffs gave notice of appeal to this Court from the trial court's judgment on the pleadings. G.S. 1-294 (1996). G.S. 6-21(2) governs attorneys fees in this case and provides in pertinent part:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . .
>
> 2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; . . . .

G.S. 6-21(2) (1997). Plaintiffs contend that the trial court erred in granting defendants' motion for fees because the court was without jurisdiction to proceed on the motion after appellants filed an appeal in this Court. We agree. The record shows that the trial court granted defendants' motion for judgment on the pleadings on 3 April 1998. On 27 April 1998, plaintiffs gave notice of appeal from the trial court's entry of judgment on the pleadings. On 1 June 1998, the trial court held a hearing on defendants' motion for attorneys fees. On 27 July 1998, the trial court entered a final order granting defendants' motion. G.S. 1-294 provides in pertinent part:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from . . . .

G.S. 1-294 (1996). In the final order granting defendants' motion for attorneys fees, while defendants appeal from judgment on the pleadings was pending, the trial court stated: "[T]he action of the plaintiffs was without merit. It would be inappropriate in such a matter to tax attorneys fees and costs against the trust corpus. In this matter, costs, including the defendants' reasonable attorneys fees, should be taxed against the plaintiffs." Here, the trial court's decision to award attorneys fees was clearly affected by the outcome of the judgment from which plaintiffs appealed. Accordingly, the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns from this Court. G.S. 1-294. *Oshita v. Hill*, 65 N.C. App. 326, 330, 308 S.E.2d 923, 927 (1983). We vacate the trial court's award of attorneys fees and we remand to the trial court for further consideration regarding attorneys fees as the circumstances require.

We need not address plaintiffs' remaining assignments of error.

Affirmed in part and vacated and remanded in part.

Judges WYNN and EDMUNDS concur.

INA J. SEIGEL, PLAINTIFF v. RAMAN K. PATEL AND VISHNU, INC., DEFENDANTS

No. COA98-627

(Filed 6 April 1999)

1. Appeal and Error— record—not settled

Although the Court of Appeals invoked Appellate Rule 2 to prevent manifest injustice, it was noted that the appeal could have been dismissed where plaintiff served the proposed case on appeal upon defendants, who responded with notice of objections and proposed amendments; plaintiff's attorney agreed to all but one of defendants' objections and proposals and added stipulations; plaintiff's attorney indicated that he would consider the record settled if he did not hear from defendants' attorney; and plaintiff's counsel filed the record without an indication that it had been settled. It is ultimately the appellant's responsibility to settle the record on appeal; members of the bar should exercise a certain degree of caution in their expectations of one another and not be so willing to rely on common courtesy that they neglect to follow the Rules of Appellate Procedure.

2. Fraud— agreement to pay medical expenses by employer—summary judgment for employer—no cause of action

The trial court properly granted summary judgment for defendants in an action arising from defendants' failure to pay as promised medical expenses incurred by plaintiff from a fall at work where defendant did not have workers' compensation insurance and plaintiff attempted to bring a claim for fraud and unfair trade practices against her employer. Such a claim cannot be brought in North Carolina; moreover, the suit was barred by the statute of limitations.

Appeal by plaintiff from order granting summary judgment entered 31 October 1997 by Judge Richard L. Doughton and order denying reconsideration entered 13 March 1998 by Judge Henry E. Frye, Jr., in Yadkin County Superior Court. Heard in the Court of Appeals 13 January 1999.

Gordon & Nesbit, P.L.L.C., by Thomas L. Nesbit, for plaintiff-appellant.

Rightsell, Shumate, Forrester & Eggleston, L.L.P., by Donald P. Eggleston, for defendant-appellees.

LEWIS, Judge.

Plaintiff was the manager of a motel owned by defendant Vishnu, Inc. ("Vishnu"), of which defendant Patel is a shareholder and authorized agent. While at work on 10 July 1992, the then-sixty year-old plaintiff fell and broke her ankle. The injury required surgery and, according to plaintiff, a woman in the hospital's admitting department told her that Patel "said that he would take care of all the medical expense—not to worry." Patel made a similar statement to plaintiff's son, and the hospital's records confirm that Patel promised the hospital on multiple occasions that he would pay for plaintiff's treatment. Although Vishnu had more than three full-time employees at the time of plaintiff's accident, the company did not have worker's compensation insurance, in violation of N.C. Gen. Stat. § 97-93 (Cum. Supp. 1998).

After receiving statements from the hospital and filing them for Patel, plaintiff realized in early 1993 that Patel had not paid the bills. Plaintiff saw a lawyer, who offered to write a letter to Patel on her behalf. Plaintiff declined the attorney's services at that time, preferring instead to talk to Patel about the situation. When plaintiff did so, Patel again assured her that he would pay. Plaintiff saw no more statements from the hospital and believed that Patel had kept his word.

Plaintiff realized when the hospital sued her in 1995 that Patel still had not paid the bills. The hospital obtained a default judgment against plaintiff in the amount of $6,733.50 on 8 August 1995. Faced with significant medical debts, plaintiff filed for bankruptcy under Chapter 7 on 10 October 1995. She has since been discharged of these debts.

Plaintiff filed suit on 20 November 1996 in Yadkin County Superior Court. After the trial court denied defendants' motion to dismiss the case under N.C.R. Civ. P. 12(b)(6) on 11 April 1997, defendants answered and counterclaimed, and the parties conducted discovery. Defendants moved for summary judgment on 25 August 1997, and this motion was granted on 31 October 1997. Because

defendants still had pending a counterclaim to recover fees, plaintiff did not appeal from the trial court's summary judgment order at that time.

After the trial court denied defendants' motion to recover their fees on 27 February 1998, the court denied plaintiff's motion for reconsideration on 13 March 1998. Plaintiff then gave notice of appeal on 27 March 1998 and served her proposed case on appeal upon defendants on 17 April 1998. Defendants served upon plaintiff their notice of objections and proposed amendments to the record on appeal pursuant to N.C.R. App. P. 11. In a letter dated 12 May 1998, plaintiff's attorney agreed to all but one of defendants' objections and proposals, and he added stipulations. Counsel for plaintiff indicated that he would "consider the record settled" if he did not hear from defendants' attorney. Receiving no response, plaintiff filed the record 1 June 1998 without an indication that it had been settled. Defendants then moved to dismiss plaintiff's appeal for violations of the Rules of Appellate Procedure. The motion has been referred to this panel for consideration, and our decision to grant or deny the motion will produce the same ultimate result for plaintiff.

[1] Despicable as the behavior of defendant Patel appears, plaintiff cannot win on this appeal. First, while plaintiff's counsel may have relied in good faith on defendants' counsel to respond to his letter of 12 May 1998, and while the failure of defendants' counsel to do so may appear suspicious, it is ultimately the appellant's responsibility to settle the record on appeal. *See* N.C.R. App. P. 9(a)(1)(I); *Edwards v. West*, 128 N.C. App. 570, 572, 495 S.E.2d 920, 922, *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998). Members of the bar should exercise a certain degree of caution in their expectations of one another and not be so willing to rely on common courtesy that they neglect to follow the Rules of Appellate Procedure. There is no settled record on this appeal, and we could dismiss it for this failure to comply with the Rules. Although we may invoke Rule 2 and deny defendants' motion to dismiss this appeal in an effort "[t]o prevent manifest injustice to [plaintiff]," plaintiff loses on other procedural grounds.

[2] Plaintiff must next overcome questions regarding the subject matter jurisdiction of her suit. Defendants argue that the exclusive venue for a claim by an employee against an employer for injuries arising in the course of employment is the North Carolina Industrial Commission, citing N.C. Gen. Stat. § 97-10.1 (1991), but plaintiff did not file her claim there. A closer reading of section 97-10.1 reveals

defendants' omission of important language at the beginning of this statute when quoting it in their brief: "If the employee and the employer are subject to *and have complied with* the provisions of this Article," it is the employee's exclusive source of her rights and remedies. *Id.* (emphasis added). Because Vishnu has not complied with the provisions of the article by failing to secure compensation, plaintiff argues that section 97-94 permits her to bring this claim outside the Industrial Commission. Specifically, this section provides in pertinent part:

> Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a penalty of one dollar ($1.00) for each employee, but not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00) for each day of such refusal or neglect, and until the same ceases; and the employer shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Article *or at law at the election of the injured employee.*

N.C. Gen. Stat. § 97-94(b) (Cum. Supp. 1998) (emphasis added). It is worth noting from the plain language of the statute that while the statute may arguably permit plaintiff to bring her claim at law, the Industrial Commission is not precluded from hearing claims against noncompliant employers.

Plaintiff's actual complaint, however, makes no reference to Chapter 97. The complaint indicates not that this is a worker's compensation claim brought in a court of law at plaintiff's election, but a claim for fraud and unfair trade practices against her employer under Chapter 75. It is the law of this state that plaintiff cannot bring such an action against her employer. *See Buie v. Daniel Int'l*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119-20 ("Unlike buyer-seller relationships, we find that employer-employee relationships do not fall within the intended scope of G.S. 75-1.1 . . . . Employment practices fall within the purview of other statutes adopted for that express purpose."), *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982).

Plaintiff argues that our recent decision in *Johnson v. First Union Corp.*, 128 N.C. App. 450, 496 S.E.2d 1 (1998), which was filed after summary judgment was granted in the instant case, establishes that a superior court can have subject matter jurisdiction over a Chapter 75 claim by an employee against her employer. This reliance

is misplaced not only because of significant factual distinctions between that case and the one before us now, but because of subsequent developments in *Johnson*. The case was reheard, *see Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808 (1998), *review allowed*, and the outcome on which plaintiff relies no longer stands. On rehearing, we noted that "[o]ther case law has shown that the Industrial Commission is authorized to deal with matters such as fraud," *id.* at 144, 504 S.E.2d at 810 (citing *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 260, 221 S.E.2d 355, 359 (1976)), and concluded that "the Workers' Compensation Act is a comprehensive regulatory scheme, and collateral attacks are inappropriate." *Id.*

Plaintiff also faces hurdles she cannot clear with regard to the statute of limitations. A 7 January 1993 entry on plaintiff's account at the hospital reads in part: "Employee is sueing [sic] employer—for hospital accounts." While plaintiff now argues that she was not actually suing at that date but had merely consulted an attorney, she was certainly aware of the potential for litigation at that time. An entry on those same records dated 5 April 1993 states, "Comp denied—case closed." Plaintiff did not file this suit alleging fraud and unfair trade practices until November of 1996, nearly four years after she knew or should have known of the misrepresentation by defendants. The statute of limitations for fraud is three years, and begins to run at the time the aggrieved party discovered or should have reasonably discovered the facts constituting the fraud. N.C. Gen. Stat. § 1-52(9) (Cum. Supp. 1998); *Nash v. Motorola Communications and Electronics*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989), *aff'd per curiam*, 328 N.C. 267, 400 S.E.2d 36 (1991). The statute of limitations for an unfair trade practice claim is four years under N.C. Gen. Stat. § 75-16.2 (1994), but as set out above plaintiff has no Chapter 75 action against her employer. Even if the fraud claim were somehow found valid, which it cannot be in light of plaintiff's failure to properly state a claim for fraud, *see, e.g.*, *Claggett v. Wake Forest University*, 126 N.C. App. 602, 610, 486 S.E.2d 443, 447 (1997), this suit was not timely filed and cannot be heard in the trial court.

In light of these many factors, the trial court was unable to consider any genuine issues of material fact and defendants were entitled to judgment as a matter of law. The order granting summary judgment is affirmed. The court's decision to deny defendants' motion for a reasonable attorney fee under section 75-16.1 was, by that statute, a matter within the trial court's discretion. We find no abuse of discretion in that decision.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. MYRNA SILVER WOODY, DEFENDANT

No. COA98-626

(Filed 6 April 1999)

Indictment and Information— conversion—corporate victim—identity not sufficiently alleged

An indictment for conversion by a bailee was fatally defective and could not support either a felony or misdemeanor conviction where the indictment alleged that the property belonged to "P&R Unlimited." While "ltd." or "limited" are proper corporate identifiers, "unlimited" is not a term capable of notifying a criminal defendant either directly or by clear import that the victim is a legal entity capable of holding property. The indictment also fails to name the persons composing a partnership. The exception in *State v. Wooten*, 18 N.C.App. 652, for the shoplifting statute does not apply to this statute.

Appeal by defendant from judgment entered 10 February 1998 by Judge Forrest Bridges in Mitchell County Superior Court. Heard in the Court of Appeals 22 February 1999.

Michael F. Easley, Attorney General, by Daniel D. Addison, Assistant Attorney General, for the State.

The Law Offices of Wesley E. Starnes, by Wesley E. Starnes, for defendant-appellant.

EDMUNDS, Judge.

During 1990, defendant worked for Tandy Computers and was responsible for leasing a Tandy 3000 computer and movie-rental inventory software to P&R Unlimited, Incorporated (P&R, Inc.). P&R, Inc. was formed with two shareholders, Patrick Phillips and Mark Robinson for the purpose of operating "P&R Unlimited," a convenience store. Defendant subsequently began working elsewhere, but she continued to service the computer that P&R, Inc. had leased from

Tandy. Phillips later purchased Robinson's shares in P&R, Inc., and at trial he referred to the resulting business as a partnership.

Prior to 15 May 1994, defendant picked up the computer from Phillips' store for service. Phillips has not since seen the computer. Phillips made several unavailing attempts to contact defendant and inquire about the computer. On one occasion when he spoke with defendant, she told him she had taken his computer to Radio Shack in Asheville; however, the records at that store did not show delivery of a computer by defendant.

On 21 April 1997, the grand jury returned a true bill of indictment against defendant for conversion by a bailee, pursuant to N.C. Gen. Stat. § 14-168.1 (1993). The indictment alleged the converted property belonged to "P& R unlimited." When the matter was called for trial on 10 February 1998, the State noted a problem with the indictment and proposed that defendant sign a bill of information. After consulting with her attorney, defendant declined to sign, and the State proceeded to trial on the original indictment. The trial court instructed the jury on both felony and misdemeanor conversion, and the jury found defendant guilty of the felony. Upon defendant's motion to set aside the verdict, the trial court arrested judgment as to the felony charge and entered judgment for misdemeanor conversion by a bailee. Defendant received a two-year suspended sentence and was placed on supervised probation for three years. As a condition of probation, defendant was ordered to serve six months in county jail and pay the victim $3,500 restitution. From this judgment, defendant appeals. We vacate the judgment.

Defendant was charged and tried pursuant to section 14-168.1, which states in relevant part:

> Every person entrusted with any property as bailee, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a misdemeanor.

N.C. Gen. Stat. § 14-168.1 (1993). This crime, like larceny and embezzlement, occurs when a defendant offends the ownership rights of another. The statute applies to certain specified relationships involving an owner of property and a non-owner, *e.g.*, bailee, lessee, and tenant. Moreover, an essential component of the crime is the intent to

convert or the act of conversion, which by definition requires proof that someone other than a defendant owned the relevant property. Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property. An indictment that insufficiently alleges the identity of the victim is fatally defective and cannot support conviction of either a misdemeanor or a felony.

Defendant argues that the indictment in this case was fatally defective because it improperly alleged ownership of property converted. We agree. Our Supreme Court has stated, "Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal." *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994) (citing *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967)). The *Abraham* Court also stated that misidentifying the victim in the indictment "required the State to prove injury to someone other than the true victim." *Id.* (citing *State v. Overman*, 257 N.C. 464, 125 S.E.2d 920 (1962)). The *Abraham* Court relied in part on *State v. Harper*, 64 N.C. 129, 131 (1870), which stated, "[a] variance or omission in the name of the person injured, is more serious than a variance in the name of the defendant . . . ."

Where the victim is not an individual, our Supreme Court has additionally held that if there was no allegation that the victim was a legal entity capable of owning property, the bill of indictment is fatally defective. *See State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 904 (1960). In *Thornton*, the defendant was charged with embezzlement from "The Chuck Wagon." In arresting judgment, our Supreme Court held that the victim's name must be given, along with "the fact that it is a corporation . . . unless the name itself imports a corporation." *Id.* at 662, 111 S.E.2d at 903 (citing *Nickles v. State*, 86 Ga. App. 290, 71 S.E.2d 578 (1952)); *see also State v. Strange*, 58 N.C. App. 756, 294 S.E.2d 403, *disc. review denied*, 307 N.C. 128, 297 S.E.2d 403 (1982) (holding an indictment for larceny from "Granville County Law Enforcement Association" insufficient); *State v. Perkins*, 57 N.C. App. 516, 291 S.E.2d 865 (1982) (indictment for larceny from "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" insufficient); *State v. Ellis*, 33 N.C. App. 667, 236 S.E.2d 299 (holding an indictment for embezzlement adequate by naming "Providence Finance Company," which clearly imported a corporation), *disc. review denied*, 293 N.C. 255, 236 S.E.2d 708 (1977); *State v. Roberts*, 14 N.C. App. 648, 188 S.E.2d 610 (1972) (indictment for larceny from "Ken's Quickie Mart" insufficient); *State v. Thompson*, 6 N.C. App. 64,

169 S.E.2d 241 (1969) (indictment for larceny from "Belk's Department Store" insufficient). A variant of the same rule applies for partnerships. "If the property alleged to have been stolen . . . is the property of a partnership, or other *quasi* artificial person, the names of the persons composing the partnership, or *quasi* artificial person, should be given." *Thornton*, 251 N.C. at 662, 111 S.E.2d at 903.

The State argues that in the indictment, the word "unlimited" sufficiently connotes the proper legal status of the victim. We disagree. While the abbreviation "ltd." or the word "limited" is a proper corporate identifier, *see* N.C. Gen. Stat. § 55-4-01 (Cum. Supp. 1997), "unlimited" enjoys no such status. It is not a term capable of notifying a criminal defendant either directly or by clear import that the victim is a legal entity capable of holding property. "Unlimited" is of no more significance than was the term "association," found in *Strange*. The indictment also fails to name persons composing a partnership. In short, the indictment lacks any indication of the legal ownership status of the victim.

An exception to the general rule may be found in *State v. Wooten*, 18 N.C. App. 652, 197 S.E.2d 614, *cert. denied*, 283 N.C. 758, 198 S.E.2d 728 (1973), a shoplifting case brought under N.C. Gen. Stat. § 14-72.1 (1971). We held in *Wooten* that the trial court did not err where the warrant alleged merchandise had been concealed on the premises of "Kings Dept. Store." The Court reasoned that, under the shoplifting statute, the only victim could be a store, and that the statute did not "cover property in a residence, bank, school or church . . . ." *Id.* at 655, 197 S.E.2d at 615. Because the victim could only be a "store," this Court concluded that the shoplifting statute did not require the State to include the victim's corporate status in the warrant. We find that *Wooten* does not apply to the offenses covered by N.C. Gen. Stat. § 14.168.1 (1993). In comparison with the narrow scope of the concealment statute, the General Assembly drafted section 14-168.1 with broad and sweeping language covering many classes of victims. Therefore, as with larceny and embezzlement, applying the policy of strictly construing indictments is appropriate here. By insufficiently alleging the identity of the victim, the indictment was fatally defective, and could not support either a felony or misdemeanor conviction. Accordingly, the judgment of the trial court is vacated.

In light of this result, we need not address the other issues raised by the parties.

Judgment vacated.

Chief Judge EAGLES and Judge WYNN concur.

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

No. COA98-757

(Filed 6 April 1999)

1. **Appeal and Error— mandate—allocation of damages on remand—authority of trial court**

The trial court followed the Court of Appeals mandate in the previous opinion of this case, 126 N.C.App 1, by entering a judgment that the Life Insurance Company of Georgia (LOG) was to pay the entire amount of damages to plaintiffs and then be reimbursed by the two other defendants (Russell and Brook). A trial court does not have the authority to modify parts of its own order which are affirmed by an appellate court and cannot go beyond the mandate of the reviewing appellate court; in this case, the trial court was specifically instructed to enter a judgment which reflected the contractual agreement for allocation of damages and that is what the court did. It did not go beyond its authority.

2. **Appeal and Error— mandate—prejudgment interest—no specific instructions**

The trial court did not err on remand by taxing prejudgment interest in an action arising from failure to pay insurance benefits where there was no specific instruction to reallocate prejudgment interest and the trial court was correct in reallocating it in accordance with the contract between the parties. The case was remanded for a judgment of damages reflecting the allocation contractually agreed upon by the parties and prejudgment interest is a part of the damages.

Appeal by Life Insurance Company of Georgia from order and judgment entered 2 February 1998 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 23 February 1999.

Floyd and Jacobs, L.L.P., by Robert V. Shaver, Jr., for The Russell Group and Brooke Licensing, defendant-appellees.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for Life Insurance Company of Georgia, defendant-appellant.

Smith, James, Rowlett & Cohen, L.L.P. by J. David James for plaintiff-appellees.

HORTON, Judge.

This Court has previously published an opinion in this case at 126 N.C. App. 1, 483 S.E.2d 727, *disc. review denied*, 346 N.C. 548, 488 S.E.2d 805 (1997), and dealt with a variety of issues which are not a part of this appeal. As a result, we need not state the facts in great detail and only focus on those which are relevant in this appeal. In 1993 James Allan Middleton, Jr., and Julie T. Middleton (plaintiffs), filed a complaint against The Russell Group (Russell), Brooke Licensing (Brooke), and Life Insurance Company Of Georgia (LOG), (collectively defendants), asserting claims for breach of contractual duty to pay medical insurance benefits for medical expenses, breach of an employment contract to pay for the premiums for health insurance benefits, failure to provide benefits under ERISA, a claim for injunctive relief to provide COBRA benefits, breach of fiduciary duty, misrepresentation, emotional distress, and unfair and deceptive trade practices.

Before the trial began, the trial court granted defendants' motion for summary judgment on all the common law claims except negligent misrepresentation. At the close of all the evidence, the trial court directed a verdict for LOG as to the claim for negligent misrepresentation. After the jury trial, the trial court held defendants jointly and severally liable for the sum of $351,906.28, plus post-judgment interest at the legal rate from the date of the judgment, along with costs in the amount of $6,125.27. Russell and Brooke were found responsible for $78,563.41 in attorneys' fees and LOG was responsible for $19,640.85 in attorneys' fees. All of the pre-judgment interest was taxed to Russell and Brooke.

All of the parties appealed various portions of the trial court's order and judgment to this Court, and we affirmed in part and reversed and remanded in part. On remand, we instructed the trial court to: "(1) reduce defendants' liability for plaintiffs' medical bills by the amount of any co-payment, deductibles or premiums; (2)

determine whether the evidence supports the making of findings to support an enhancement of attorneys' fees based on exceptional performance; (3) determine whether LOG may be entitled to any further recovery from ADS/Russell and Brooke Licensing on its cross-claim; and (4) enter a judgment for damages which reflects the allocation contractually agreed upon by the defendants." *Middleton*, 126 N.C. App. at 30, 483 S.E.2d at 743-44.

On 2 February 1998, the trial court entered a revised order and judgment and held, among other things, that LOG was to pay all of plaintiffs' medical bills and then be reimbursed by Russell and Brooke. It further taxed all of the pre-judgment interest to LOG and ordered Russell and Brooke to reimburse LOG for the pre-judgment interest on their share of the medical expenses. LOG appeals from this revised order and judgment.

On appeal, LOG contends that the trial court erred by (I) requiring LOG to pay all of the medical bills to plaintiffs and be reimbursed for $85,000.00 by Russell and Brooke, and (II) taxing all of the pre-judgment interest to LOG because this Court had affirmed that portion of the trial court's first order where it had taxed the pre-judgment interest to Russell and Brooke.

I

[1] LOG argues that the trial court ignored this Court's instructions on remand when it entered a judgment that LOG was to pay the entire amount of the damages to plaintiffs and then be reimbursed by Russell and Brooke. LOG contends that this Court instructed the trial court to require LOG to pay $266,090.28 and Russell and Brooke to pay $85,000.00. We disagree.

LOG correctly argues that a trial court does not have authority to modify parts of its own order which are affirmed by an appellate court and cannot go beyond the mandate of the reviewing appellate court. *See Lea Co. v. N.C. Board of Transportation*, 323 N.C. 697, 699-700, 374 S.E.2d 866, 868 (1989). In this case, the trial court did not go beyond its authority when it required LOG to pay the entire amount of the damages and be reimbursed by the other defendants. Our instructions were as follows:

> In the instant case, the defendants had contractually allocated the insurance risk among themselves. Thus, the trial court had no basis for imposing joint and several liability for the full amount of the unpaid claims. Accordingly, we reverse the trial

court's decision to impose joint and several liability and remand the issue with instructions to enter a judgment for damages reflecting the allocation contractually agreed upon by the parties.

Middleton, 126 N.C. App. at 24, 483 S.E.2d at 740.

It is clear that we specifically instructed the trial court to enter a judgment which reflected the contractual agreement for allocation of damages and that is what the trial court did. The findings of fact of the trial court state, in part, the following:

> 3. ADS/Russell provided a group health plan (hereinafter "the Plan") for its employees through a policy of health insurance issued by defendant LOG to defendant Brooke. Brooke was the Plan Administrator. Three separate companies participated in the Plan, one of which was ADS/Russell. The policy of insurance was admitted into evidence . . . .
>
> 4. The insurance plan between Brooke and LOG was partially self-funded. The insurance policy and a Minimum Premium Agreement between Brooke and LOG, admitted at trial as Plaintiffs' Exhibit 23, governed the relationship between Brooke and LOG. . . . LOG paid covered expenses, either by paying the health care provider or reimbursing the insured patient. LOG was then reimbursed, up to certain limits, by directly drafting the Medical Bank Account.
>
> . . . .
>
> 6. The minimum premium agreement entitled LOG to reimbursement for amounts paid up to $35,000 per insured for the plan year November 1, 1991 until October 31, 1992. For the plan year November 1, 1992 until October 31, 1993, the minimum premium agreement entitled LOG to reimbursement by Brooke up to $50,000 per insured. Beyond these amounts, LOG was not reimbursed by ADS/Russell or Brooke and was itself responsible for payment of bills in excess of those amounts. . . .
>
> . . . .
>
> 18. . . . Under the Plan, LOG would have paid the entire amount and then would have been reimbursed by Brooke from the Medical Bank Account for $35,000 for the plan year ending October 30, 1992 and $50,000 for the plan year ending October 31, 1993.

(Footnotes omitted.)

The contractual agreement required LOG to pay the entire amount of the covered expenses and then be reimbursed up to $50,000.00 by Brooke. Therefore, it argues, the trial court was correct in ordering LOG to pay the entire amount of damages and then be reimbursed because that is how defendants contractually agreed to allocate expenses.

II

[2] LOG also contends that the trial court erred in taxing all of the pre-judgment interest to it because this Court did not remand the pre-judgment issue to the trial court for further consideration. Therefore, the modifications made by the trial court in taxing the entire pre-judgment interest to LOG were beyond its scope of authority. We disagree.

In remanding the case, we specifically instructed the trial court, as discussed above, "to enter a judgment for damages reflecting the allocation contractually agreed upon by the parties." Although there was no specific instruction to reallocate the pre-judgment interest, the trial court was correct in reallocating it in accordance with the contract. Pre-judgment interest is necessarily included in damages because it is "an element of complete compensation." *West Virginia v. U.S.*, 479 U.S. 305, 310, 93 L. Ed. 2d 639, 646 (1987). Indeed, pre-judgment interest is presumed to be an element of damages compensation in ERISA cases because of the time value of money. *See Lorenzen v. Emp. Ret. Plan of Sperry & Hutchinson*, 896 F.2d 228, 236 (7th Cir. 1990); *Lutheran Med. Ctr. v. Contractors Health Plan*, 25 F.3d 616, 623 (8th Cir. 1994). *See also, Baxley v. Nationwide Mutual Ins. Co.* 334 N.C. 1, 8, 430 S.E.2d 895, 900 (1993) ("interest paid to compensate a plaintiff for loss-of-use of the money during the pendency of a lawsuit is an element of that plaintiff's damages").

In this case, the trial court, on remand, found that:

> 27. . . . The Court has reviewed this decision in light of the contractual nature of the dispute as made clear by the Court of Appeals and in light of the facts that LOG has had the use of the money it did not spend to pay for Mrs. Middleton's medical bills and LOG joined ADS/Russell in contending there was no coverage and even asserted additional defenses to coverage. Moreover, it does not make sense to require ADS/Brooke to pay interest when the obligation to pay belongs to, and the judgment is being entered against, LOG for the amount of the covered medical bills. The Court therefore finds that LOG should pay this interest to the

plaintiffs. . . . ADS/Russell and Brooke shall be responsible for paying interest to LOG on the $85,000 . . . .

LOG had agreed in the contract to pay medical expenses and be reimbursed by Russell and Brooke and because the pre-judgment interest is a part of the damages, it necessarily follows that the trial court correctly reallocated the pre-judgment interest to LOG. Russell and Brooke, of course, must then reimburse LOG the pre-judgment interest on the $85,000.00 as stated by the order.

Affirmed.

Judges GREENE and LEWIS concur.

BRUCE VOGL, PLAINTIFF v. LVD CORPORATION, KRAUSS EQUIPMENT CORPORATION, INC. D/B/A HURCO COMPANIES INC. D/B/A HURCO MANUFACTURING CO., INC., DEFENDANTS

No. COA98-673

(Filed 6 April 1999)

1. **Statute of Limitations— statute of repose—products liability—date of purchase of particular product—evidence insufficient**

Summary judgment was properly granted for defendants based on the statute of repose in an action arising from injuries suffered by plaintiff while using a press brake with an allegedly defective flip-finger assembly. The statute of repose required plaintiff to institute suit within six years from the installation of the defective flip fingers in the press brake that crushed his fingers. The trial court found that the plaintiff's evidence was insufficient to prove that any of the flip fingers purchased within the applicable time period were used in this press brake on the day of the accident.

2. **Statute of Limitations— statute of repose—industrial accident—products liability**

The trial court did not err by granting summary judgment for defendant Hurco based on the statute of repose in a negligence action arising from plaintiff's fingers being crushed in an industrial accident. Although plaintiff contended that his action was

within the statute of limitations of N.C.G.S. § 1-52 because defendant had visited the factory for service on 7 January 1994 and the action was brought on 24 March 1996, an action for the recovery of personal injury for products liability must be brought within six years of the date of purchase under N.C.G.S. § 1-50(6). The generality of the language in that statute indicates that the legislature intended to cover the multiplicity of claims that can arise out of a defective product.

Appeal by plaintiff from judgment entered on 14 August 1997 by Deramus, J., in Superior Court, Mecklenburg County. Heard in the Court of Appeals 22 February 1999.

Cox, Gage & Sasser by Charles McB. Sasser and Michael Weinberger for plaintiff.

Hedrick, Eatman, Garner & Kincheloe, L.L.P. by Hatcher Kincheloe and Sara R. Lincoln for defendants.

WYNN, Judge.

On 23 March 1995, plaintiff Bruce Vogl as an employee of Sheet Metal Specialties worked on a press brake manufactured by LVD Corporation ("LVD") when the material that he was handling misgaged causing his hand to go into the machine. The resulting crushing injury led to the amputation of four fingers.

Defendant Hurco Companies, Inc. manufactured and sold the material-position gage which is a component part of the press brake installed at the same time as the machine. The material-position gage contained a non-permanent part called the flip-finger assembly ("flip finger") which could be removed from the machine without interrupting its use.

Defendant Krauss Equipment, Inc. sold that press brake to Sheet Metal Specialties in 1988 with a final installation date of February 1989.

On 24 May 1996, Vogl brought an action for personal injury against LVD, Krauss Equipment, and Hurco Companies in Superior Court, Mecklenburg County. However, the trial judge found that North Carolina's six-year statute of repose barred his actions against LVD and Krauss.

In the remaining action against Hurco, Vogl alleged that the flip-finger assembly was defective because its contact area was too small to prevent misgaging. He alleged that Hurco negligently failed to correct and cure this defect during its repair trips to Sheet Metal Specialties in 1991, 1993, and 1994.

On 14 August 1997, the trial judge summarily adjudged that the statute of repose likewise barred Vogl's action against Hurco. Afterwards, the trial court denied Vogl's motion for alteration or reconsideration of the judgment under North Carolina Civil Procedure Rules 52, 59, and 60. This appeal followed.

Preliminarily, we exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure and address the merits of this appeal rather than act upon the procedural violations alleged by Hurco. We note that Vogl timely appealed since his post-judgment motions tolled the appeal filing time.

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[1] Vogl first contends that the following issues of fact precluded summary judgment based on the statute of repose: (1) whether the purchase date of the defective flip fingers was within this repose period, and (2) whether the flip fingers were used on the day of the accident. We disagree.

"A statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit." *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 605 (1994). Therefore,

> [i]f the action is not brought within the specified period, the plaintiff 'literally has no cause of action. . . . '

Id. at 117-118, 446 S.E.2d at 605 (quoting *Boudreau v. Baughman*, 322 N.C. 331, 341, 368 S.E.2d 849, 857 (1988)).

North Carolina's statute of repose provides that "[n]o action for the recovery of damages for personal injury, death, or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." N.C. Gen. Stat. § 1-50(6) (1995). Applied to the subject case, our statute of repose required Vogl to institute suit within six years from the installation of the defective flip fingers in the press brake that crushed Vogl's fingers.

In moving for summary judgment, Hurco presented evidence showing that the defective flip fingers used in the press brake the day of the accident were the original flip fingers sold with the machine in 1988 thereby invoking the commencement of the statute of repose no later than the final installation in February 1989. In support of this contention, it presented Vogl's deposition testimony that photographs of the 1988 flip fingers looked like what was used on the machine the day of the accident. Vogl also testified that he never used a flip finger that looked any different from the one presented to him during his deposition. Moreover, Hurco presented the affidavit of its employee Michael Trisler who stated that the flip fingers sold in 1988 looked different from the flip fingers sold after December 1993.

In opposition, Vogl referred to specific portions of the deposition testimony of Ervin John Hufstickler, his supervisor who set up the press brake on the day of the accident, including: (1) that after Hufstickler came to work in August 1993, Sheet Metal Specialties purchased four flip fingers; (2) the flip fingers are interchangeable among the three press machines at Sheet Metal Specialties; and (3) that Sheet Metal Specialties had a total of eight to ten flip fingers. Vogl also presented the affidavits of two expert witnesses who concluded that the flip fingers on the press machine were no more than two to three years old at the time of the accident.

"Whether a statue of repose has expired is a question of law." *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 426, 391 S.E.2d 211, 213 (1990). In making this determination, the trial court found Vogl's evidence insufficient to prove that any of the flip fingers purchased after 1993 were used in the press machine on the day of the accident. We find no impropriety in the trial court's assessment.

Here, Hufstickler's deposition did not provide a purchase date for the flip fingers involved in the accident. Additionally, he could not specify the date that the additional four flip fingers were purchased and according to his testimony only two of the new flip fingers were received prior to the accident. Furthermore, the expert witnesses in reaching their conclusions merely relied on: (1) witness testimony that the flip fingers "break, get loose, wobble, and are meant to be replaced" and (2) the testimony that at least four additional flip fingers were purchased after the press brake's final installation.

Given that the flip fingers are used interchangeably between the three press machines, Sheet Metal Specialities' purchase of four flip

fingers after 1993 does not establish that the new flip fingers were actually used in Vogl's machine on the day of the accident. This evidence is speculative at best that the defective flip fingers used in Vogl's machine were purchased after the press brakes' final installation. Therefore, Vogl failed to meet its burden of showing that there is a genuine issue of material fact as to whether his action was brought within the six year limit under the statute of repose.

[2] Next, Vogl asserts that the trial court erred in granting summary judgment on his negligence claim because N.C. Gen. Stat. § 1-52 provides that a claimant has three years from the time in which bodily harm becomes apparent to bring an action as long as this time frame is not more than ten years from the defendant's last act giving rise to the cause of action. *See* N.C. Gen. Stat. § 1-52 (1991). Since his injury occurred on 23 March 1995 and Hurco visited Sheet Metal Specialties for service on 7 January 1994, Vogl contends that he timely brought his action on 24 March 1996.

However, an action for the recovery of personal injury for a products liability action must be brought within six years after the date of initial purchase for use. See N.C.G.S. § 1-50(6). Under N.C. Gen. Stat. § 99B-1(3), a

> [p]roduct liability action includes any action brought for or on account of personal injury . . . caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling or any product.

N.C. Gen. Stat. § 99B-1(3) (1995).

Although the issue at hand has not been addressed previously by our Courts, we are guided by similar cases regarding the scope of the statute of repose for products liability actions.

For instance, in *Davidson v. Volkswagenwerk*, 78 N.C. App. 193, 336 S.E.2d 714 (1985), this Court held that the statute of repose applies where a defendant negligently failed to warn a plaintiff of an alleged defect in an automobile manufactured by the defendant. Similarly, in *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 320 S.E.2d 273 (1984), we held that plaintiff's array of claims against defendant manufacturers of a prefabricated fireplace including a breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of

express warranty, failure to warn, and negligence in the design of the fireplace were based upon or arose out of an alleged defect of a product. Significantly in that case, we commented that "[t]he generality of the language in Section 1-50(6) indicates that the legislature intended to cover the multiplicity of claims that can arise out of a defective product." *Id.* at 396, 320 S.E.2d at 277; *see also Lindsay v. Public Serv. Co. of North Carolina*, 725 F. Supp. 278 (1989) (holding that a manufacturer's failure to warn of a product's defect was within the purview of the statute of repose).

Following this guidance, we conclude that Vogl's negligence claim against Hurco falls within the purview of the statute of repose and is therefore, timely barred.

Affirmed.

Chief Judge EAGLES and Judge EDMUNDS concur.

STATE OF NORTH CAROLINA v. CHARLES SAMUEL MOORE

No. COA98-530

(Filed 6 April 1999)

Motor Vehicles— driving while impaired—Intoxilyzer—third test—necessary steps

The trial court erred by suppressing the results of an Intoxilyzer test where the first two samples differed by more than .02 and the required third sample was taken without additional procedures being performed between the second and third samples. The key phrase in the regulations governing repeating steps for a third or subsequent test is "as applicable"; the trooper properly interpreted the regulations such that the only applicable step to repeat was step (6), "PLEASE BLOW."

Appeal by the State from an order entered 11 February 1998 by Judge W. Erwin Spainhour in Guilford County Superior Court. Heard in the Court of Appeals 27 January 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Adams, Kleemeier, Hagan, Hannah & Fouts, A Professional Limited Liability Company, by Amiel J. Rossabi and R. Stuart Albright; and Joel N. Oakley, for defendant-appellant.

WALKER, Judge.

The State appeals from the trial court's order suppressing the results of a breath alcohol content test administered to the defendant. On 13 December 1996, at approximately 4:45 p.m., defendant was arrested and charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1. Trooper J.G. George, a twenty-six year veteran of the North Carolina Highway Patrol, was the arresting officer. Trooper George, who is also a certified chemical analyst, administered a breath test to defendant using an Intoxilyzer, Model 5000 (Intoxilyzer). At 6:39 p.m., Trooper George advised defendant of his rights and began the required observation period. At 7:14 p.m., Trooper George began the test, and the calibration check resulted in a reading of .07 alcohol concentration. Alcohol concentration is measured in terms of grams of alcohol per 210 liters of breath. Trooper George testified that if the machine read .07 or .08 it was considered properly calibrated. The first breath sample taken at 7:15 p.m. registered a reading of .20. The second sample taken at 7:17 p.m. registered a reading of .23. Because the first two samples differed by more than .02, a required third sample was taken at 7:18 p.m. which registered a reading of .23. No additional procedures were performed between the collection of the second and third samples.

At trial, defendant moved to suppress the results of the test on the grounds that the procedures for the operation of the Intoxilyzer were not followed and that the results could not then be admissible under N.C. Gen. Stat. § 20-139.1 as a valid chemical analysis. Specifically, defendant argued that because Trooper George did not repeat certain steps in the testing process between the second and third tests, the third test was invalid. The trial court found that Trooper George failed to repeat all of the steps between the second and third tests. For that reason, the trial court granted the motion to suppress the evidence.

The State assigns as error the trial court's granting of the motion to suppress the test results.

The Intoxilyzer is a breath-testing instrument approved for use by the North Carolina Commission for Health Services (Commission). Pursuant to N.C. Gen. Stat. § 20-139.1 (Cum. Supp. 1997), the Commission has adopted procedures for the use of this instrument which are codified at 15A NCAC 19B.0320 (June 1998):

> The operational procedures to be followed in using the Intoxilyzer, Model 5000 are:
>
> (1) Insure instrument displays time and date;
>
> (2) Insure observation period requirements have been met;
>
> (3) Press "START TEST"; when "INSERT CARD" appears, insert test record;
>
> (4) Enter appropriate information;
>
> (5) Verify instrument calibration;
>
> (6) When "PLEASE BLOW" appears, collect breath sample;
>
> (7) When "PLEASE BLOW" appears, collect breath sample;
>
> (8) When test record ejects, remove.
>
> If the alcohol concentrations differ by more than 0.02, a third or subsequent test shall be administered as soon as feasible by repeating steps (1) through (8), *as applicable.*

(Emphasis added). These procedures are the only regulations approved by the Commission for the operation of the Intoxilyzer.

The trial court made the following findings:

> The defendant has offered uncontradicted evidence which shows, and the Court Finds, that after the second sample was taken at 7:17 p.m., reading .23, that the investigating officer did not repeat steps (1) through (8) as required by the regulations.
>
> A repeat of some or all of the steps numbered (1) through (8) in N.C. Administrative Code title 15A r. 19B.0320 (the "Steps") was required by the specific provisions of the regulations before Trooper George administered a third or any subsequent tests to the defendant. There is no evidence that Trooper George repeated any of the steps before he administered the third test to

the defendant. The only evidence before the Court is that he did not repeat any of the steps before administering the third test.

The regulations as enacted by the Department of Environment, Health and Natural Resources, must be followed and clearly not all of the required steps detailed in the requirements of the regulations have been met that would be applicable.

The sole issue presented by this appeal is what steps in the testing process must be repeated before a third or subsequent test is performed in situations where the first two readings differ by more than .02.

Defendant concedes that steps (1) and (2) are satisfied automatically and are thus "inapplicable" for the purposes of collecting a third breath sample. However, defendant argues that steps (3) through (8) are "relevant" and therefore "applicable" and should have been "repeated" before a third test was given. The State argues that the Intoxilyzer is programmed to automatically ask for a third breath sample if the first and second tests differ by more than .02.

In his testimony, Trooper George explained that the Intoxilyzer is programmed and when the test card is inserted in step (3), the machine automatically prompts a third test if the first two tests differ by more than the minimum amount (.02). The cue for the third test on the Intoxilyzer appears as "PLEASE BLOW," the same message displayed for steps (6) and (7) of the procedure. After the third test is performed, if this test again differs by more than .02 from the previous test, the machine then ejects the test card and the process must begin anew with a second test card at which time steps (1) through (8) would be applicable. Trooper George also testified that it was unnecessary to repeat the first five steps in the process before giving a third test because the information about the subject had already been entered, the waiting period had been observed and the Intoxilyzer, once having been calibrated, continues to be operational for the third test.

As previously noted, the Intoxilyzer regulations require that where the alcohol concentrations in the first two tests differ by more than .02 a third or subsequent test is to be given "as soon as feasible by repeating steps (1) through (8), as applicable." 15A NCAC 19B.0320 (June 1998). The key phrase in the regulations governing a third or subsequent test is "as applicable." "Where an issue of statutory interpretation arises, the construction adopted by those who

execute and administer the law in question is highly relevant." *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990). The Intoxilyzers are provided and programmed by the Commission for use by chemical analysts throughout this State. "The construction adopted by the Commission . . . is particularly instructive since the subject matter involves the proper use of a scientific instrument for which the Commission was authorized to determine the rules of operation." *Id.* at 739-40, 392 S.E.2d at 607. In *Tew*, the defendant challenged the procedures that were established by the Commission for taking readings from the Breathalyzer, Model 200. *Id.* Citing N.C. Gen. Stat. § 20-139.1, our Supreme Court held that it was clearly the legislative intent for the Commission to be responsible for the implementation of procedures for the use of this machine. *Id.* Likewise, in this case, the Commission has been given the responsibility for creating the guidelines for the Intoxilyzer.

In *State v. Lockwood*, 78 N.C. App. 205, 336 S.E.2d 678 (1985), the defendant contended that the Commission failed to establish the appropriate times for the taking of sequential breath samples. This Court relied on the steps programmed into the Breathalyzer to find that the Commission had indeed established those times. *Id.* at 207, 336 S.E.2d at 679.

Defendant further argues that because N.C. Gen. Stat. § 20-139.1 is a criminal statute both the statute and regulations implementing it should be construed strictly against the State and in favor of the accused. However, in doing so, we note that the Commission is charged with the responsibility for creating the appropriate guidelines which only require the repetition of steps that are applicable. As Trooper George testified, steps (1) through (4) are not necessary to the completion of a third test. Further, there is no requirement in the regulations that the Intoxilyzer must be re-calibrated, per step (5), for subsequent tests. By prompting a third test with the message "PLEASE BLOW," the Intoxilyzer is directing the analyst to repeat step (6) or (7). These steps are identical, but the repetition of only one of these steps is required to obtain a third test.

We conclude from all the evidence that Trooper George properly interpreted the regulations such that the only applicable step to repeat was step (6) before administering a third test. Therefore, the trial court erred in concluding that "[t]he provisions of the foregoing regulation issued by the Department of Environment, Health and Natural Resources have not been followed as required by law."

For the reasons stated herein, the order of the trial court suppressing the results of the Intoxilyzer test is

Reversed.

Judges LEWIS and TIMMONS-GOODSON concur.

FALK INTEGRATED TECHNOLOGIES, INC., D/B/A SSA SOUTHEAST, PLAINTIFF v. LINDA STACK, DEFENDANT

No. COA98-451

(Filed 6 April 1999)

1. Jurisdiction— matter exceeding magistrate's dollar amount—district court dismissal

The trial court erred by granting summary judgment for defendant where plaintiff had originally filed two claims in small claims court seeking to recover overpayments and the magistrate dismissed the claims with prejudice, noting that they arose from the same cause and exceeded jurisdiction, plaintiff instituted an action in district court, and defendant moved for summary judgment because the causes of action had previously been dismissed with prejudice. N.C.G.S. § 7A-212 is directed at circumstances wherein a party asserts that the action taken by a magistrate is void for the reason that the action was not properly assignable to the magistrate; in this case, plaintiff's district court action did not challenge assignment of its claim to the magistrate court and N.C.G.S. § 7A-212 is inapplicable.

2. Collateral Estoppel and Res Judicata— res judicata—dismissal in small claims court—action in district court

The trial court erred by determining that a dismissal in small claims court barred an action in district court under res judicata where plaintiff filed two claims in small claims court to recover overpayments and the magistrate dismissed the claims with prejudice, noting that they arose from the same cause and exceeded jurisdiction. As the magistrate lacked jurisdiction over plaintiff's total claim, that court's order dismissing plaintiff's consolidated claim is as if it had never happened and cannot bar plaintiff's dis-

trict court action under res judicata. The "with prejudice" phraseology relied upon by defendant was mere surplusage.

Appeal by plaintiff from judgment entered 7 October 1997 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 26 January 1999.

Brooks, Pierce, Mclendon, Humphrey & Leonard, L.L.P., by David W. Sar, for plaintiff-appellant.

Linda Stack pro se.

JOHN, Judge.

Plaintiff Falk Integrated Technologies, Inc., d/b/a SSA Southeast appeals the trial court's grant of summary judgment in favor of defendant. Plaintiff also contends the court erred by denying plaintiff's "Motion to Reconsider, or in the Alternative, for a New Trial or for Relief from Judgment." We reverse the trial court.

Pertinent facts and procedural history as alleged in plaintiff's complaint include the following: Plaintiff is a "developer and integrator of information systems for manufacturing and supply-chain management." On 5 February 1996, plaintiff employed defendant as an at-will employee. Defendant was to be paid for days actually worked at a rate of $4,333.33 per month. Due to an error in plaintiff's payment practices, however, defendant was overpaid a total of $5,421.43 in the months of December 1996 and January 1997.

Defendant subsequently declined plaintiff's request to return the overpayments. Plaintiff thereupon filed two claims in the Small Claims Court Division of District Court in Forsyth County, seeking to recover the December overpayment of $2,269.80 in the first, and the January overpayment of $3,000.00 in the second.

Prior to the presentation of evidence, the magistrate's court dismissed plaintiff's claims with prejudice, noting "Plaintiff's action file nos. 97 CVM 5114 and 97 CVM 5115 arise from the same cause [and] exceeds jurisdiction." Although the section is not specifically referenced, the parties do not dispute that the court was referring to the three thousand dollar ($3,000.00) jurisdictional amount provided in N.C.G.S. § 7A-210 (1995).

On 18 August 1997, plaintiff instituted an action in Forsyth County District Court consolidating the two claims against defendant.

The latter thereupon moved for summary judgment pursuant to N.C.G.S. § 1A-1, Rule 56 (1995), asserting:

> the same causes of action alleged in the complaint herein have previously been dismissed "With Prejudice" by a North Carolina Court of competent jurisdiction . . . and Plaintiff herein filed no appeal from these prior adverse decisions within the time allowed.

The trial court granted defendant's motion by order filed 7 October 1997. Following subsequent denial of its "Motion to Reconsider," plaintiff filed timely notice of appeal.

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) (citations omitted). Alleged errors of law are subject to *de novo* review on appeal. *See Va. Electric Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

[1] Plaintiff first contends N.C.G.S. § 7A-212 (1995) does not "apply to [plaintiff's] district court action" and therefore "d[oes] not mandate dismissal and/or judgment in favor of [d]efendant." We agree.

G.S. § 7A-212 provides in relevant portion:

> No judgment of the district court rendered by a magistrate in a civil action assigned to him by the chief district judge is void, voidable, or irregular for the reason that the action is not one properly assignable to the magistrate under this article. The sole remedy for improper assignment is appeal for trial de novo

> before a district judge in the manner provided in [N.C.G.S. § 7A-228 (1995)].

G.S. § 7A-212.

The plain language of G.S. § 7A-212 thus indicates it is directed at those circumstances wherein a party asserts "that the action" taken by the magistrate is "void, voidable, or irregular for the reason that the action is not properly assignable to the magistrate." *Id.*

The assignment of small claims to magistrates is governed by N.C.G.S. § 7A-211 (1995), which states in pertinent part:

> In the interest of speedy and convenient determination, the chief district judge may, in his discretion, by specific order or general rule, assign to any magistrate of his district any small claim action pending . . . .

Id.

Read *in pari materia*, therefore, the statutes prohibit a party from asserting improper assignment by a chief district judge as a basis for attacking a magistrate's ruling, and require instead a *de novo* proceeding by "an aggrieved party . . . before a district court judge or a jury." N.C.G.S. § 7A-228(a) (1995).

In the case *sub judice*, plaintiff's district court action did not challenge assignment of its claim to the magistrate court. Rather, in the words of plaintiff,

> [plaintiff] bowed to the [m]agistrate's judgment and refiled [since] . . . the [m]agistrate evidently believed that [plaintiff] should have originally filed the consolidated action.

Accordingly, G.S. § 7A-212 is inapplicable to the instant case and the trial court's dismissal can not be sustained upon this ground.

[2] Plaintiff next argues the trial court erred "in determining that the principals of *res judicata* barred [plaintiff's action]." Plaintiff's contention in this regard is likewise well founded.

The magistrate court dismissed plaintiff's consolidated claims as arising from the same cause of action and thus exceeding the court's jurisdictional amount. "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). Thus, "[w]hen a court decides a matter without . . . jurisdic-

tion, then the whole proceeding is . . . as if it had never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970). As the magistrate court lacked jurisdiction over plaintiff's total claim, that court's order dismissing plaintiff's consolidated claim is "as if it had never happened," *id.*, and cannot operate to bar plaintiff's district court action under the principle of *res judicata*. The "with prejudice" phraseology relied upon heavily by defendant constituted in the present instance mere surplusage. *See Symons Corp. v. Quality Concrete Construction*, 108 N.C. App. 17, 21, 422 S.E.2d 365, 367 (1992) (language stating "this action shall be tried on the issue of damages only" in trial court's partial summary judgment on liability issue "was mere surplusage" where summary judgment motion "specifically limited the court's consideration to the issue of liability and preserved the issue of damages for later determination").

Having found error in entry of summary judgment for defendant, we decline to address plaintiff's final assignment of error that the trial court erred in denying its "Motion to Reconsider."

Reversed.

Judges GREENE and HUNTER concur.

ALSIE CORNELIA ANDREWS, PLAINTIFF-APPELLEE v. ALAMANCE COUNTY, A COUNTY IN THE STATE OF NORTH CAROLINA, AND THE ALAMANCE COUNTY BOARD OF COMMISSIONERS, LARRY SHARPE, CHAIRMAN, RICKEY MOOREFIELD, JUNIOR TEAGUE, JOHN PATTERSON, AND TIM SUTTON, IN THEIR OFFICIAL CAPACITIES AS COUNTY COMMISSIONERS, DEFENDANTS-APPELLANTS

No. COA98-485

(Filed 6 April 1999)

Zoning— action for declaratory relief—standing—action precipitous

The trial court erred by denying defendants' motion to dismiss plaintiff's complaint seeking declaratory relief from an ordinance establishing minimum size requirements for manufactured home communities. Plaintiff's complaint only contains general allegations that she would be subject to the ordinance and that she intends to develop her property for a manufactured home community; she makes no assertions that she developed a site

plan or attempted to file a subdivision plat with the County, took any steps to begin development of her property, or applied for or was denied a permit of any kind by the County. It is precipitous to presume that plaintiff will be prohibited at this stage from developing her property due to the requirements of the ordinance.

Appeal by defendants from judgment entered 19 February 1998 and signed 2 March 1998 by Judge Wade Barber in Alamance County Superior Court. Heard in the Court of Appeals 18 February 1999.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by E. Lawson Brown, Jr. and Thomas R. Peake, II, for plaintiff-appellee.

David I. Smith, Alamance County Attorney, for defendants-appellants.

WALKER, Judge.

On 7 October 1996, the Alamance County ("the County") Board of Commissioners adopted a Manufactured Home Park Ordinance ("the Ordinance"). The Ordinance establishes standards for the construction and development of new manufactured home communities in the County that are served by a community/public water system and located outside the water shed critical area. The Ordinance established a minimum lot size requirement of 30,000 square feet and a minimum lot frontage of 125 feet. This was in contrast to the subdivision ordinance adopted on 3 July 1972, which established standards for construction and development of residential subdivisions in the County. Under the subdivision ordinance, the minimum lot size requirement is 20,000 square feet for lots served by a community/public water system and septic tank and a minimum lot frontage of 60 feet.

Plaintiff owns three tracts of land in the County consisting of approximately 4.83 acres. The property is not located in a water shed critical area. On 1 November 1996, plaintiff filed this action in which she alleges that she intends to develop her property as a manufactured home community with lots to be served with a community water system and individual septic tanks. Plaintiff also alleged, among other things, that the minimum lot frontage requirements of the Ordinance have no rational basis or connection to any legitimate goal of the County and have no relationship to the public health,

safety or welfare, and, as applied to plaintiff, is arbitrary and capricious and deprives the plaintiff of her constitutional rights. For relief, plaintiff asked the trial court to enter a declaratory judgment declaring the minimum lot requirements invalid and unenforceable and to enter an injunction prohibiting defendants from enforcing the Ordinance.

On 6 January 1997, the Board of Commissioners adopted an amendment to the Ordinance reducing the minimum lot size requirement from 30,000 to 20,000 square feet in conformity with the subdivision ordinance. Plaintiff no longer disputes this section as amended.

The defendants filed a motion to dismiss pursuant to Rules 12(b)(2) and (6). On 19 February 1997, the trial court entered an order denying defendants' motion to dismiss. The trial court found:

> 3. That the Court finds and concludes as a matter of law that the Plaintiff has standing to commence this action and to seek the relief for which she has prayed in her Complaint;
>
> . . .
>
> 5. That the Court further finds and concludes as a matter of law that Plaintiff's claims for Declaratory Judgment against Alamance County and the Board of Commissioners are not barred by governmental immunity, and the Plaintiff's claims against Defendants, Alamance County and the Board of Commissioners, should not be dismissed.
>
> The trial court then ordered:
>
> A. That the Defendants' Motion to Dismiss the Plaintiff's Complaint is denied;

On appeal defendants contend the trial court erred when it ruled plaintiff had standing to sue and defendants were not immune from suit.

First, defendants contend that plaintiff does not have standing to commence this action for declaratory and injunctive relief. Although not labeled as such, plaintiff's complaint is in the nature of a declaratory action as noted in her prayer for relief. "[A]n action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the

matter in dispute." *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 703, 249 S.E.2d 402, 413-14 (1978) (*quoting Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949)). The resources of the judicial system "should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions." *Id.* at 703, 249 S.E.2d at 414.

In order for a plaintiff to challenge the constitutionality of an ordinance under the Declaratory Judgment Act, she must produce evidence that she "has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement of the challenged ordinance." *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987). A plaintiff does not have to wait to be sued and may go to court and seek a declaration of her rights if she believes her rights to be affected and litigation is imminent. *Baucom's Nursery Co. v. Mecklenburg Co.*, 62 N.C. App. 396, 398, 303 S.E.2d 236, 237-38 (1983).

Plaintiff argues her claim for standing is supported by *Grace Baptist Church*, 320 N.C. at 444, 358 S.E.2d at 375, in which the plaintiff was found to have standing to challenge a city ordinance that required paved parking lots. There the plaintiff's complaint contained an allegation that the city intended to require it to pave its parking lot. *Id.* The Court said the allegation was not enough to give the plaintiff standing; however, the defendant's answer asked the trial court to order the plaintiff to immediately cease using the property until plaintiff complied with it. *Id.* Thus, the answer by the defendant, as well as the finding by the trial court that defendant would enforce the provision, led our Supreme Court to hold that the plaintiff was in immediate danger of sustaining injury and therefore properly had standing to bring this action. *Id.*

Plaintiff also points to *Baucom's Nursery Co.*, 62 N.C. App. at 397-98, 303 S.E.2d at 237-38, to support her claim for standing. There, the county had informed the plaintiff that its 19.6-acre tract was zoned for single family residences and was not exempt from the ordinance as a bona fide farm. *Id.* As a result, the plaintiff brought a declaratory judgment action to determine if his right to use his property was affected by the zoning ordinance. *Id.* This Court found that the plaintiff had standing to bring this action and noted several factors which created a genuine controversy, including the existence of the ordinance at the time in question, the issue of whether the plaintiff's property was used as a bona fide farm and therefore exempt

from the ordinance, and whether the tract was used as a plant nursery and greenhouses and not for farm purposes, and the history of dealings between the parties. *Id.*

Here, the plaintiff's complaint only contains general allegations that, as a property owner in the County, she would be subject to the Ordinance and that she "plans and intends to develop her property for a manufactured home/park community. . . ." Plaintiff makes no assertions in her complaint that she (1) has developed a site plan or attempted to file a subdivision plat with the County, (2) has taken any steps to begin the development of her property, or (3) has applied for or been denied a permit of any kind by the County.

Furthermore, the United States Supreme Court cases that deal with challenges to ordinances affecting property "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1011, 120 L. Ed. 2d 798, 810 (1992) (*quoting MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 91 L. Ed. 2d 285, 295-96 (1986)). Any challenges relating to land use are not ripe until there has been a final determination about what uses of the land will be permitted. *Id.* at 1041, 120 L. Ed. 2d at 892 (Blackmun, J., dissenting).

The plaintiff has failed to show that she is harmed by the Ordinance or that she has been discriminated against in its application. It is precipitous to presume plaintiff will be prohibited at this stage from developing her property due to the requirements of the Ordinance. Thus, we conclude there is no genuine controversy and plaintiff does not have standing to bring this action. We need not address defendants' remaining assignment of error. The order of the trial court is

Reversed.

Judges JOHN and McGEE concur.

DON WEBB AND SUSAN WEBB, PLAINTIFFS v. DANNY CARROLL McKEEL, DEFENDANT

No. COA98-368

(Filed 6 April 1999)

Appeal and Error— delay in serving record on appeal—appellate rules not suspended

An appeal was dismissed for untimely service of the proposed record on appeal where there were delays of approximately five and six weeks in moving to enlarge the time for service of the proposed record on appeal and actual service thereof. Granting plaintiffs' request for suspension of the rules under Rule 2 would be tantamount to a retroactive grant of an extension of time for service, which would overrule a prior decision of the Court of Appeals in this case. Moreover, plaintiff's request must be denied under the circumstances.

Appeal by plaintiffs from judgment entered 28 April 1997 by Judge Frank Brown in Wilson County Superior Court. Heard in the Court of Appeals 5 January 1999.

King & Bryant, P.A., by D. Mitchell King, for plaintiffs-appellants.

Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiffs-appellants.

Walker, Barwick, Clark & Allen, L.L.P., by Jerry A. Allen, Jr., for defendant-appellee McKell.

Moore & Van Allen, P.L.L.C., by Christopher J. Blake, for defendant-appellee North Carolina Guaranty Insurance Association.

Cranfill, Summer & Hartzog, L.L.P., by Gregory M. Kash, for defendant-appellee Great American Insurance Company.

PER CURIAM.

Plaintiffs appeal the trial court's entry of judgment, bringing forward thirty-eight (38) assignments of error. However, we are unable to reach the merits of these arguments as plaintiffs' appeal must be dismissed.

On 27 October 1997, plaintiffs filed timely notice of appeal from a jury verdict awarding plaintiff Don Webb $75,000.00 in compensatory damages arising from a motor vehicle collision, but finding against appellant Susan Webb on her loss of consortium claim. On 4 December 1997, the trial court granted plaintiffs' "Motion for Extension of Time to Serve a Proposed Record on Appeal" filed that same date, thereby extending until 31 December 1997 plaintiffs' time to serve the proposed record on appeal [hereinafter PROA] on all parties.

Having failed to meet the trial court's extended deadline, however, plaintiffs filed with this Court on 5 February 1998 a "Motion for Enlargement of Time" within which to serve the PROA. Plaintiffs sought extension "through and including February 13, 1998," citing as grounds that

> [c]ounsel for [a]ppellant was not able to finalize and serve the [PROA] within the time allowed . . . [a]s a result of his obligations at the law school, the relocation of his office and his need to attend to [a] family crisis.

This Court denied plaintiffs' motion 12 February 1998.

Notwithstanding, on 13 February 1998, plaintiffs served the PROA on all parties. Defendant subsequently moved to dismiss plaintiffs' appeal 11 May 1998, asserting the PROA was not timely filed under the Rules of Appellate Procedure.

It is well established that the appellant "bears the burden of seeing that the record on appeal is properly settled and filed with this Court." *McLeod v. Faust*, 92 N.C. App. 370, 371, 374 S.E.2d 417, 418 (1988). Further,

> [i]f after giving notice of appeal from any court . . . the appellant shall fail within the times allowed by these rules . . . to take action required to present the appeal for decision, the appeal may on motion of any other party be dismissed.

N.C.R. App. P. 25(a) (1999).

It is similarly well settled that the "Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). "Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process," *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361

(1979) (citations omitted), because the rules "are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Id.*

In the case *sub judice*, plaintiffs' service of the PROA was accomplished forty-four (44) days following expiration of the trial court's extended deadline within which to serve such record. Significantly, that service was subsequent to denial by this Court of plaintiffs' motion to extend the service time, which motion itself was filed thirty-six (36) days after expiration of the time allotted by the trial court.

Plaintiffs concede untimely service of the PROA, but respond to defendant's motion to dismiss by requesting

> this Court, pursuant to its [discretionary] authority under Rule 2, [to] suspend the Rules . . . [and] to treat the [PROA] as having been timely filed . . . [so as to] consider the merits of this case.

Plaintiffs cite as grounds essentially the identical arguments earlier asserted in the "Motion for Extension of Time" denied by this Court.

We conclude that permitting plaintiffs' appeal to go forward at this point would be tantamount to retroactive grant of an extension of time within which to serve the PROA, and that such grant would in effect overrule the prior decision of this Court denying an extension. This we may not do. *See Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984) (issuance of writ of certiorari by one panel of Court "is the law of the case and cannot be overruled by . . . any other panel of the Court of Appeals"); *cf. In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (when "panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

Moreover, assuming *arguendo* this panel is not bound by the previous ruling on plaintiffs' motion, the "Rules of Appellate Procedure are mandatory unless the Appellate Division suspends them under App. R. 2." *City of Hickory v. Machinery Co.*, 38 N.C. App. 387, 388, 248 S.E.2d 71, 72 (1978). Under the instant circumstances, involving delays of approximately five and six weeks respectively in moving to enlarge the time for service of the PROA and actual service thereof, we must decline plaintiffs' request for suspension of the Rules and allow defendant's motion to dismiss plaintiffs' appeal.

Appeal dismissed.

Panel consisting of Judges GREENE, JOHN and HUNTER.

STATE OF NORTH CAROLINA v. RYAN JEFFERY ADAMS, DEFENDANT

No. COA98-373

(Filed 6 April 1999)

Appeal and Error— effect of Fourth Circuit decision—tax on seized narcotics

The trial court erred by dismissing charges against defendant for controlled substances violations based on double jeopardy where a judgment against defendant had been docketed for a tax liability on the seized drugs and a portion of that amount had been paid. The trial court ruling conflicted with decisions of the North Carolina appellate courts; although defendant proffered a Fourth Circuit decision as sustaining the trial court's action, federal appellate decisions are not binding upon either the appellate or trial courts of North Carolina with the exception of decisions of the United States Supreme Court. Reexamining the North Carolina appellate holdings in light of the Fourth Circuit opinion or modifying the statute are not within the province of the Court of Appeals.

Appeal by the State from judgment filed 24 February 1998 by Judge W. Douglas Albright in Randolph County Superior Court. Heard in the Court of Appeals 18 February 1999.

Attorney General Michael F. Easley, by Special Counsel Hampton Y. Dellinger and Assistant Attorney General William B. Crumpler, for the State.

Jonathan L. Megerian for defendant-appellee.

JOHN, Judge.

The State appeals the trial court's grant of defendant's motion to dismiss. We reverse the trial court.

Pertinent facts and procedural history include the following: In the course of defendant's 8 August 1997 arrest on charges of violations of the North Carolina Controlled Substances Act, N.C.G.S. §§ 90-86 through 90-113.8 (Supp. 1995), approximately 1,300 grams of cocaine and 9,000 grams of marijuana were seized. Subsequently, the North Carolina Department of Revenue sought to collect unpaid taxes on the seized drugs pursuant to the North Carolina Controlled Substance Tax Act, N.C.G.S. §§ 105-113.105 through 105-113.113 (1995) (the Drug Tax). On 3 September 1997, a Certificate of Tax Liability in the amount of $456,574.26 was docketed as a judgment against defendant in the Office of the Randolph County Clerk of Superior Court. Defendant paid a portion of that amount prior to the scheduled trial date of 17 February 1998.

Defendant subsequently moved to dismiss the charges against him, alleging prosecution thereon was barred under the principle of double jeopardy. Defendant's motion was allowed 17 February 1998 and the State thereafter filed timely notice of appeal.

In the main, the State submits the trial court's ruling must be reversed because it conflicts with the decisions of our appellate courts in *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84, *cert. denied*, U.S. , 139 L. Ed. 2d 29 (1997), and *State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997). We agree.

Defendant does not dispute that *Ballenger* and *Creason* upheld assessment and collection of the Drug Tax pursuant to G.S. § 105-113.105 through 105-113.113 against a constitutional challenge indistinguishable from that mounted by defendant herein. *See Ballenger*, 123 N.C. App. at 180, 472 S.E.2d at 573, and *Creason*, 123 N.C. App. at 498-99, 473 S.E.2d at 772. Notwithstanding, in his appellate brief and at oral argument, defendant proffered the decision of the United States Court of Appeals for the Fourth Circuit in *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. denied*, U.S. , 142 L. Ed. 2d 36 (1998), as sustaining the trial court's action.

However, with the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State. *See State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (state courts should treat "decisions of the United States Supreme Court as binding and accord[] to decisions of lower federal courts such persuasiveness as

these decisions might reasonably command"). It is axiomatic, moreover, that one panel of this Court is bound by the prior decision of another panel addressing the same issue, although in a different case, absent modification by our Supreme Court, *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and that this Court is "responsib[le] to follow" decisions of the North Carolina Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993).

Accordingly, while our Supreme Court may wish to reexamine the holding of *Ballenger* and *Creason* in light of the Fourth Circuit's decision in *Lynn v. West* or the General Assembly may seek to modify G.S. §§ 105-113.105 through 105-113.113, neither action is within the province of this Court. *See Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Pate*, 334 N.C. at 118, 431 S.E.2d at 180; and *McDowell*, 310 N.C. at 74, 310 S.E.2d at 310. The trial court's dismissal of the charges against defendant is reversed.

Reversed.

Judges WALKER and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 APRIL 1999

BRADFIELD v. BRADFIELD No. 98-791	Craven (95CVD1169)	Affirmed
BRAME v. SHARPE No. 98-1044	Mecklenburg (93CVD13666JVH)	Affirmed
CLAY v. CLAY No. 98-975	Buncombe (96CVD1795)	Dismissed
CROWDER v. CROWDER No. 98-706	Vance (95CVD749)	Reversed and remanded with instructions
FARISS v. BRIDGESTONE/ FIRESTONE, INC. No. 98-776	Ind. Comm. (173665)	Affirmed
GOVERNMENT EMPLOYEES INS. CO. v. EATON No. 98-784	Mecklenburg (97CVS5731)	Affirmed
HESS v. RADIUS MOTORSPORTS, INC. No. 98-454	Lincoln (95CVS498)	Affirmed
HUGHES v. TRIANGLE WATERPROOFING No. 98-566	Orange (97CVD50)	Affirmed
IN RE BAILEY No. 97-1471	Caldwell (96J52)	Affirmed; costs taxed personally to counsel for appellee
IN RE BENTLEY No. 97-1042	Alexander (95J25)	Affirmed
IN RE JOHNSON No. 98-1045	Mecklenburg (98J99)	Affirmed
IN RE ROBERTS No. 98-217	Buncombe (96CVS5526)	Reversed and Remanded
IN RE TREMBLAY No. 98-860	Buncombe (97J265)	Affirmed
IRELAND v. LAM No. 98-653	Buncombe (96CVD2298)	Affirmed in part and vacated in part
JONES v. SANDERS No. 98-576	Wilson (95CVS1613)	Affirmed

LATHAM v. McBRIDE No. 98-529	Montgomery (92CVD74)	As to the order denying plaintiffs' motion to reopen the case, affirmed. As to the amended judgment, no error.
LUARD v. ROSS ANGEL ASSOC. No. 98-710	Guilford (97CVS3959)	Affirmed
MORGAN v. AMERICAN AIRLINES No. 98-719	Ind. Comm. (435683)	Affirmed
NECAISE v. MITCHELL No. 98-693	Cumberland (97CVS4129)	Reversed and Remanded
PARKER v. SOUTH CAROLINA INS. CO. No. 98-743	Onslow (96CVS3041)	Affirmed
SIMMONS v. GARDNER No. 98-516	Surry (97CVS278)	Affirmed
SMITH v. BLANKENSHIP No. 98-246	Montgomery (96-CVS-58)	Affirmed
STARTOWN FENCE CO. v. NEWSOM CONSTR., INC. No. 98-723	Catawba (96CVD516)	Appeal Dismissed
STATE v. BENJAMIN No. 98-879	Forsyth (97CRS35189) (98CRS4461)	No Error
STATE v. BITTING No. 98-309	Forsyth (97CRS23155) (97CRS35760)	Affirmed
STATE v. BOONE No. 98-608	Wayne (96CRS4594)	No Error
STATE v. BOOTHE No. 97-1454	Stokes (96CRS2942) (96CRS2943) (96CRS5949)	No Error
STATE v. FITE No. 98-611	Mecklenburg (96CRS25314)	No Error
STATE v. FOSTER No. 98-642	Alamance (97CRS7485) (97CRS7486) (97CRS7487) (97CRS7488)	Affirmed; motion for appropriate relief denied

	(97CRS7489) (97CRS7490) (97CRS7491) (97CRS9883)	
STATE v. GAULDIN No. 98-991	Rockingham (95CRS3375) (95CRS7144) (95CRS8382) (95CRS8383) (95CRS8384) (95CRS8385) (95CRS8386) (95CRS8387) (95CRS8388) (95CRS8391) (95CRS8392) (95CRS8393) (95CRS8394) (95CRS8495) (95CRS8397) (95CRS8398) (95CRS8399) (95CRS8390) (95CRS8215) (95CRS8216) (95CRS8219) (95CRS8220) (95CRS8221) (95CRS11555) (95CRS11556) (95CRS11557) (95CRS11558) (95CRS11559) (95CRS11560) (95CRS11561) (95CRS4806) (95CRS4807)	In sum, the judgment revoking defendant's probation in 95CRS4807 is vacated. As to the remaining judgments, no error. 95CRS4807—vacated. 95CRS3375, 7144, 8382-8388, 8390-8395, 8397-8399, 8215-8216, 8219-8221; and 98CRS4806—no error.
STATE v. HENAGAN No. 97-1187	Cumberland (95CRS32324) (95CRS32325) (95CRS60555) (96CRS8097)	No Error
STATE v. PARKS No. 98-371	Harnett (96CRS13830)	No Error
STATE v. STREET No. 98-1239	Alamance (97CRS23873) (97CRS23874) (97CRS23875)	No Error

STATE v. THOMAS No. 98-632	Onslow (97CRS7611) (97CRS7612)	Vacated and remanded for reinstatement of the jury verdict and sentencing
STATE v. WARREN No. 98-923	Edgecombe (97CRS1724)	No Error
STATE v. WILSON No. 97-914	Cleveland (96CRS10145) (96CRS12519) (96CRS12520) (96CRS12521) (96CRS12522)	No Error
STATE ex rel. EASLEY v. PURVIS FARMS No. 97-1476	Montgomery (95CVS517)	Reversed
STOKES COUNTY DSS v. DUNCAN No. 98-99	Stokes (96CVD60)	Affirmed in part, Vacated and remanded in part
TUTTLE COMMUNITY CENTER, INC. v. COLEMAN No. 98-590	Wake (96CVS11449)	Affirmed
WILLIAMS v. JENKINS No. 98-845	Moore (97CVS479)	Affirmed
WILSON v. FREIGHTLINER CORP. No. 98-1088	Ind. Comm. (405018)	Affirmed
ZIGLAR v. CITY OF WINSTON-SALEM No. 98-437	Ind. Comm. (128709)	Affirmed and remanded with instructions

APPENDIX

ORDER ADOPTING AMENDMENT
TO RULE 26 OF THE RULES
OF APPELLATE PROCEDURE

Order Adopting Amendment to Rule 26 of the Rules of Appellate Procedure

Rule 26 of the Rules of Appellate Procedure is hereby amended to read as follows:

Rule 26

FILING AND SERVICE

(a) ***Filing.*** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. *Filing may be accomplished by mail or by electronic means as set forth in this Rule.*

(1) ***Filing by Mail:*** Filing may be accomplished by mail addressed to the clerk, but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(2) ***Filing by Electronic Means:*** Filing in the appellate courts may be accomplished by electronic means *by the use of the electronic filing site at www.ncappellatecourts.org. All documents may be filed electronically through the use of this site. A document filed by use of the official electronic web site is deemed filed as of the time that the document is received electronically.*

Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. ~~only as hereinafter provided.~~

~~In any case, responses and motions may be filed by electronic means, but only if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court upon a showing of good cause.~~

In all cases where a document has been filed by ~~electronic means~~ *facsimile machine* pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the orig-

inal signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission and neither they nor the electronic transmission fee may be recovered as costs of the appeal. *When a document is filed to the electronic filing site at www.ncappellatecourts.org, counsel may either have their account drafted electronically by following the procedures described at the electronic filing site, or they must forward the applicable filing fee for their document by first class mail, contemporaneously with the transmission.*

~~"Electronic means" means any method of transmission of information between two machines designed for the purpose of sending and receiving such transmissions, and which results in the fixation of the information transmitted in a tangible medium of expression.~~

(b) ***Service of All Papers Required.*** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) ***Manner of Service.*** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper was filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. *When a document is filed electronically to the official web site, service also may be accomplished electronically by use of the other counsel(s)'s correct and current electronic mail address(es) or service may be accomplished in the manner described previously in this subsection.*

(d) ***Proof of Service.*** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of serv-

ice in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) ***Joint Appellants and Appellees.*** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) ***Numerous Parties to Appeal Proceeding Separately.*** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) ***Form of Papers; Copies.*** Papers presented to either appellate court for filing shall be letter size (8-½ x 11") with the exception of wills and exhibits. ~~Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8-½ x 14").~~ All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. *If the document has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.*

Adopted by the Court in Conference this the 4th day of November, 1999. This amendment shall become effective on the 15th of November, 1999, and it shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http:/www.aoc.state.nc.us).

Freeman, J
For the Court

SUBJECT INDEX

WORD AND PHRASE INDEX

SUBJECT INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

specific performance counterclaim in an action arising from a separation agreement and a subsequent postseparation support claim was properly reviewable on appeal even though not referenced in plaintiff's formal notice of appeal where the order was a nonappealable interlocutory order indisputably involving the merits and necessarily affecting the final judgment and which was challenged within an assignment of error. **Wells v. Wells, 401.**

Appealability—interlocutory order—sovereign immunity—An interlocutory order denying defendant's motion for summary judgment was immediately appealable to the extent the appeal is based on the affirmative defense of governmental or sovereign immunity. **Price v. Davis, 556.**

Appealability—pretrial motion—withdrawn—waiver—In an appeal decided upon another issue, the procedural context of plaintiffs' Rule 705 motion at trial was suggestive of waiver of the right to raise the denial of the motion on appeal where plaintiffs had filed a pretrial motion to strike an expert's testimony based upon his refusal to produce materials related to previous cases he had reviewed, defendants had moved for a protective order, counsel subsequently appeared in court and announced a compromise involving withdrawal of both motions, the identical issues were again raised by the parties by motions in limine at the outset of the trial as a result of the earlier consent order having broken down, the trial court suggested that the parties attempt to resolve the disputes, and counsel for plaintiffs announced to the trial court the following morning that his motion would be withdrawn. **Fallis v. Watauga Medical Ctr., Inc., 43.**

Assignments of error—abandoned—Plaintiff abandoned his assignments of error in a workers' compensation appeal by appealing from and assigning error to the opinion and award of the full Industrial Commission, but contending in his brief that the opinion and award of the Deputy Commissioner was erroneous. The opinion and award of the Deputy Commissioner was not properly before the court. **Davis v. Weyerhaeuser Co., 771.**

Briefs—type size—double costs—Double costs were assessed for violation of N.C.R. App. P. 26(f) where both briefs violated type size restrictions. **Barnard v. Rowland, 416.**

Decision by previous Court of Appeals panel—binding—Defendant's contention that the preliminary injunction which he was accused of violating was void because it did not comply with the provisions of N.C.G.S. § 1A-1, Rule 65(d) was overruled because a similar argument by defendant in *Onslow County v. Moore*, 129 N.C. App. 376, was rejected without discussion by another panel of the Court of Appeals. One panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. **State v. Moore, 197.**

Delay in serving record on appeal—appellate rules not suspended—An appeal was dismissed for untimely service of the proposed record on appeal where there were delays of approximately five and six weeks in moving to enlarge the time for service of the proposed record on appeal and actual service thereof. Granting plaintiffs' request for suspension of the rules under Rule 2 would be tantamount to a retroactive grant of an extension of time for service, which would overrule a prior decision of the Court of Appeals in this case. Moreover, plaintiff's request must be denied under the circumstances. **Webb v. McKeel, 816.**

CONSTITUTIONAL LAW—Continued

Clause) arising from the termination of plaintiff's employment. Plaintiff must possess a property interest in the employment before the Law of the Land analysis may be undertaken and plaintiff's assertions that she fell outside the category of an at-will employee are unfounded. **Evans v. Cowan, 1.**

CONTRACTS

Action for breach—jury's verdict—not contrary to evidence—The trial court properly denied plaintiff-Delta's motions for a directed verdict, judgment nov, and a new trial in an action for monies due under a contract for environmental consulting services where Delta's assignment of error was based on the contention that the jury's verdict was contrary to law and the greater weight of the evidence. While plaintiff-Delta's evidence included bills for services rendered and not paid, defendant-Wysong presented evidence that Delta's billing methods were unreliable and inaccurate and the verdict simply reflected the jury's scepticism as to the reliability or credibility of Delta's evidence or witnesses. **Delta Env. Consultants of N.C. v. Wysong & Miles Co., 160.**

Action for breach—nominal damages—instructions—A breach of contract action for monies due under environmental consulting contracts was remanded with an instruction that the trial court enter judgment awarding at least nominal damages where the jury concluded that defendant had breached its promise to pay for services rendered but awarded no damages. Violation of a legal right entitles a party to at least nominal damages; however, in this case, the jury instructions did not include an instruction that a finding in favor of the plaintiff on the first issue required an award of at least nominal damages. **Delta Env. Consultants of N.C. v. Wysong & Miles Co., 160.**

Impossibility of performance and prevention—no instruction—no prejudice—The trial court did not err in an action arising from the cutting of timber by not instructing the jury on the doctrine of impossibility of performance. In assessing and denying the third-party plaintiff's claim that the third-party defendants breached the timber contract, the jury necessarily considered whether it was impossible for the defendant and third-party plaintiff to have performed the contract or whether the third-party defendants prevented him from doing so. **Barnard v. Rowland, 416.**

Language—plain and unambiguous meaning—The trial court did not err in an action arising from contracts for environmental services in granting a directed verdict on defendant's breach of contract counterclaim where defendant contended that plaintiff had been obliged to fully delineate the extent of environmental contamination, but the language of the contract stated that the scope of work was to better delineate the scope of pollution. The trial court interpreted the contract by its plain, unambiguous meaning. **Delta Env. Consultants of N.C. v. Wysong & Miles Co., 160.**

Professional services—evidence of standard of care—common knowledge exception—not applicable—The trial court did not err in an action arising from contracts for environmental services by granting plaintiff's motion for a directed verdict on defendant's counterclaim for breach of contract where the court declared that defendant's failure to offer expert testimony made its evi-

DIVORCE

INSURANCE—Continued

SEXUAL OFFENSES—Continued

that defendant had engaged in either of two acts. The single wrong of engaging in a sexual act with a minor may be established by a finding of various alternatives, which are merely alternative ways of showing the commission of a sexual act. **State v. Petty, 453.**

STATUTE OF LIMITATIONS

Claims by insurance company liquidator—two-year extension—Claims for breach of fiduciary duties and negligent mismanagement arising from the liquidation of an insurance company were not barred by the applicable statute of limitations where the alleged acts of misconduct occurred within three years of the order appointing plaintiff as liquidator and where plaintiff filed these actions within two years of his appointment. N.C.G.S. § 58-30-130(b). **State ex rel. Long v. ILA Corp., 587.**

Environmental consulting services—acts giving rise to causes of action—The trial court did not err by granting plaintiff's motion for a directed verdict under N.C.G.S. § 1-15(c) on negligence counterclaims arising from environmental consulting contracts where the dismissed counterclaims were not preserved within four years from the last act of the defendant giving rise to the cause of action. **Delta Env. consultants of N.C. v. Wysong & Miles Co., 160.**

Environmental consulting services—continuing course of treatment doctrine—not applicable—The trial court did not err by granting a directed verdict on negligence counterclaims in an action arising from contracts for environmental consulting services based upon the four-year statute of repose in N.C.G.S. § 1-15(c). Although defendant-Wysong argued that the continuing course of treatment doctrine pushed back the start of the four-year time limit, the continuing course of treatment doctrine has been adopted with regard to medical malpractice and the Court of Appeals declined to expand the doctrine's breadth to encompass negligence arising from the provision of professional engineering services between sophisticated corporate parties. **Delta Env. Consultants of N.C. v. Wysong & Miles Co., 160.**

Statute of repose—industrial accident—products liability—The trial court did not err by granting summary judgment for defendant Hurco based on the statute of repose in a negligence action arising from plaintiff's fingers being crushed in an industrial accident. Although plaintiff contended that his action was within the statute of limitations of N.C.G.S. § 1-52 because defendant had visited the factory for service on 7 January 1994 and the action was brought on 24 March 1996, an action for the recovery of personal injury for products liability must be brought within six years of the date of purchase under N.C.G.S. § 1-50(6). **Vogl v. LVD Corp., 797.**

Statute of repose—products liability—date of purchase of particular product—evidence insufficient—Summary judgment was properly granted for defendants based on the statute of repose in an action arising from injuries suffered by plaintiff while using a press brake with an allegedly defective flip-finger assembly. The trial court found that the plaintiff's evidence was insufficient to prove that any of the flip fingers purchased within the applicable time period were used in this press brake on the day of the accident. **Vogl v. LVD Corp., 797.**

WORKERS' COMPENSATION—Continued

Rules—dismissal for violation—The Industrial Commission did not err in a workers' compensation action when it vacated the dismissal of plaintiff's case by a Deputy Commissioner based upon plaintiff's violation of an order of the Deputy Commissioner and her failure to appear for her hearing. The Commission, its members, and its deputies may order dismissal of an action or proceeding for violation of the Workers' Compensation Rules, but such an order must specifically enumerate which of the Rules have been violated and what actions constitute the violations. Even assuming that there was a violation and a proper order specifying the violation, dismissing this case was an abuse of discretion when viewed in light of the policy concerns of the Worker's Compensation Act because it effectively terminates plaintiff's exclusive remedy when other less permanent sanctions were available. **Matthews v. Charlotte-Mecklenburg Hosp. Auth., 11.**

Subrogation interest in third-party negligence recovery—prejudgment interest—Defendants were not entitled to prejudgment interest where plaintiff was injured in a motor vehicle collision with a third party, received workers' compensation benefits, was awarded damages and prejudgment interest in a third-party negligence action against the operator of the motor vehicle, and defendants were properly allocated funds from the third-party recovery for their subrogation interest. The language of N.C.G.S. § 97-10.2(f)(1) is clear and unambiguous, needs no interpretation, and does not provide for defendants to collect a pro rata share of the prejudgment interest. **Bartell v. Sawyer, 484.**

Temporary employment service—coverage by manufacturer—not required—A negligence plaintiff was barred from pursuing a civil action against a manufacturer where he was employed by a temporary employment service, Mega Force; he was injured while operating a mechanical die press at the manufacturer's plant; and he settled his workers' compensation claim with Mega Force. Under the contract between the manufacturer and Mega Force, Mega Force was responsible for securing the necessary coverage to protect workers who might suffer loss from an industrial accident and the manufacturer was not required to also provide workers' compensation coverage. Moreover, plaintiff did not satisfy the standard of proof for intentional wrongdoing by the manufacturer because he was unable to explain how the accident occurred. **Poe v. Atlas-Soundelier/American Trading & Prod. Corp., 472.**

Third-party negligence recovery—prejudgment interest—disbursal to plaintiff—Although defendants argued that they were entitled to a pro rata share of a workers' compensation plaintiff's prejudgment interest award on a third-party negligence recovery in order to prevent double recovery by plaintiff, disbursal of prejudgment interest is not specifically addressed in N.C.G.S. § 97-10.2(f)(1) and the plain language of N.C.G.S. § 97-10.2(f)(1)(d) unambiguously directs disbursal to plaintiff of "any amount remaining." **Bartell v. Sawyer, 484.**

WRONGFUL DEATH

Worker in collapsed trench—defendant's knowledge of inherent danger—directed verdict denied—The trial court did not err in a wrongful death action arising from the collapse of the trench in which decedent was working by denying plaintiff's motion for a directed verdict where there was no dispute that the trenching was inherently dangerous, but there was a dispute with respect to

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