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 2. Deceased 3 August 2000.
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 4. Resigned 26 August 2000.

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ARGUED AND DETERMINED IN THE
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AT
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III; EDWIN L. REEL, JR.; THE AMERICAN LEGION AND ITS SUBDIVISIONS;
THE AMERICAN LEGION DEPARTMENT OF NORTH CAROLINA, INCORPORATED;
AND CARY AMERICAN LEGION POST 67, INC., DEFENDANTS

GRAHAM TRENT ELLIS AND HOWARD ELLIS, JR., PLAINTIFFS v. EDWIN L. REEL, III;
EDWIN L. REEL, JR.; THE AMERICAN LEGION AND ITS SUBDIVISIONS; THE
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AND CARY AMERICAN LEGION POST 67, INC., DEFENDANTS

HARRY H. HURLEY AND NANCY C. HURLEY, CO-ADMINISTRATORS OF THE ESTATE OF
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AMERICAN LEGION AND ITS SUBDIVISIONS; THE AMERICAN LEGION
DEPARTMENT OF NORTH CAROLINA, INCORPORATED; AND CARY AMERICAN
LEGION POST 67, INC., DEFENDANTS

No. COA98-238

(Filed 20 April 1999)

1. Associations— youth baseball players—injuries while riding with teammate—national and state organizations—no negligence liability

National and state American Legion organizations could not be held liable for direct negligence in permitting a sixteen-year-old member of a youth baseball team that participates in the American Legion baseball program to transport teammates to and from a game where the evidence shows that the local

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American Legion post that sponsors the team exercised exclusive day-to-day control over the operation of the team; the fact that the national and state American Legion organizations had developed regulations for the baseball program and that the national organization required that local posts purchase liability insurance naming the national organization as an “additional insured” did not show that either the national or the state organization was involved in the operation or control of the youth baseball program.

2. Agency— youth baseball players—injuries while riding with teammate—national and state organizations—vicarious liability

National and state American Legion organizations were not vicariously liable under the doctrine of respondeat superior for the alleged negligence of the manager of a youth baseball team sponsored by a local American Legion post or of a team member who, with the manager’s permission, was driving teammates home after an out-of-town game when a one-car accident killed one teammate and injured others where there was no evidence that either the manager or the driver was authorized by the national or state organization to arrange transportation for or to transport team players to and from games; there was no evidence that the manager or driver was an agent of the national or state organizations by apparent authority; and even if the manager and driver were employees of the national and state organizations, any negligence by the manager or the driver with respect to the transportation of players to and from games occurred outside the scope of their employment.

3. Associations— youth baseball players—injuries while riding with teammate—local organization—no negligence liability

A local American Legion post that sponsors a youth baseball team was not liable on a direct negligence theory for the death of one player and injuries to other players when a vehicle driven by a sixteen-year-old teammate overturned while he was driving them home after an out-of-town game with the manager’s permission where plaintiffs contended that the American Legion post was negligent in allowing the teammate to drive players because of his age and excitability, but there was no forecast of evidence that providing transportation was a duty inherent in operating a youth baseball program with reasonable care; the American

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Legion post had no knowledge of any history or record of unsafe driving by the driver-teammate; and the team manager stated that the driver “had driven before and shown [himself] to be a safe, responsible driver.”

4. Agency— youth baseball players—injuries while riding with teammate—local organization—vicarious liability

Plaintiffs’ forecast of evidence was sufficient for the jury to find vicarious liability by defendant local American Legion post under the doctrine of respondeat superior for the death of one player and injuries to other players on the post’s youth baseball team in a one-car accident while riding in a vehicle driven by a sixteen-year-old teammate with permission of the team’s coaches where the evidence presented material issues of fact as to whether the coaches were agents of the local American Legion post, whether the teammate-driver was also enlisted as an agent of the post by the coaches, and whether transportation of the players was within the scope of any agency.

Appeal by plaintiffs from orders filed by Judge J.B. Allen, Jr., in Wake County Superior Court on 18 September 1997, 24 September 1997, and 25 September 1997, granting summary judgment for defendants The American Legion, Cary American Legion Post 67, and The American Legion Department of North Carolina, Inc., respectively. Heard in the Court of Appeals 17 November 1998.

Edwards & Kirby, L.L.P., by David F. Kirby and William B. Bystrynski, for plaintiff-appellants Dallas E. Daniels, Donald E. Daniels, and Angela M. Daniels.

Law Offices of Walter Lee Horton, by Walter Lee Horton, for plaintiff-appellants Graham Trent Ellis and Howard Ellis, Jr.

DeMent, Askew, Gammon, DeMent & Overby, by Angela L. Dement, for plaintiff-appellants Harry H. Hurley and Nancy C. Hurley.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, William H. Moss, and Deanna L. Davis, for defendant-appellee The American Legion.

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Patterson, Dilthey, Clay & Bryson, L.L.P., by Charles A. Madison and Melissa Ross Matton, for defendant-appellee The American Legion Department of North Carolina, Inc.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare and Kurt F. Hausler, for defendant-appellee Cary American Legion Post 67, Inc.

LEWIS, Judge.

This case is at the summary judgment stage. Therefore, the forecast evidence must be viewed in the light most favorable to the plaintiff when reviewing the grant of summary judgment. *See Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 344, 469 S.E.2d 583, 585 (1996). The evidence tends to show that defendant Cary American Legion Post 67, Inc. (hereinafter "Cary Post 67") sponsors a youth baseball team that participates in the American Legion Baseball Program. On 3 July 1994, the team was scheduled to play in Chapel Hill and later in Cary.

During the 1994 season, the team's coaches and manager Jere Morton (hereinafter "the coaches") directed the players to meet at Cary High School at specified times before all games, home or away. If the game was away, the coaches arranged transportation.

Before the Chapel Hill game, the team's players and some of their parents assembled at Cary High School. The coaches had not rented a van to transport the players, as was their custom for trips exceeding twenty minutes or twenty miles. They solicited volunteers to drive players to Chapel Hill. One volunteer was defendant Edwin L. Reel, III, a team member. At the time, Reel was sixteen years old and a licensed driver. Reel drove several players to the Chapel Hill game in his father's 1982 Chevrolet Blazer.

After the Chapel Hill game, five players joined Reel for a ride back to Cary. These players included plaintiff Graham Trent Ellis, plaintiff Dallas E. Daniels, and Douglas Hurley. Team manager Jere Morton followed four to five car lengths behind Reel.

When Reel reached the exit on Interstate 40, he nearly drove past it. One of the passengers yelled at him to turn. Reel turned the steering wheel hard to the right, and the Blazer hit loose gravel and rolled over several times. Ellis, Daniels, and Hurley were thrown from the vehicle. Ellis and Daniels sustained very severe injuries; Hurley was killed.

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Three complaints were filed by or on behalf of the players injured or killed in the wreck. All of the complaints name as defendants Edwin L. Reel, III, the driver of the Blazer; Edwin L. Reel, Jr., his father and owner of the Blazer; The American Legion; The American Legion Department of North Carolina, Inc. (hereinafter “the North Carolina Department”); and Cary Post 67. The Reels and the national, state, and local American Legion defendants were alleged to be responsible for the plaintiffs’ injuries.

In September 1997, the trial court granted summary judgment in favor of The American Legion, the North Carolina Department, and Cary Post 67 as to all claims against them in all three actions. Plaintiffs appealed; their appeals are consolidated and before us now. Defendants Edwin Reel, III and Edwin Reel, Jr. are not parties to the appeal.

The requirements of summary judgment are well known. *See* N.C.R. Civ. P. 56(c). Before addressing the propriety of summary judgment with respect to each of the defendants, we review the structure of these organizations and their relationship with one another. We will then focus our attention on the structure of the American Legion Baseball Program and the involvement of each of the three defendants in it.

Defendant The American Legion is a non-profit corporation that was created by an act of Congress in 1919. *See* 36 U.S.C. §§ 41 *et. seq.* (1996). The purpose of The American Legion is

[t]o uphold and defend the Constitution of the United States of America; to promote peace and good will among the peoples of the United States and all the nations of the earth; to preserve the memories and incidents of the two World Wars and the other great hostilities fought to uphold democracy; to cement the ties and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country.

36 U.S.C. § 43 (1996). The American Legion has powers enumerated in 36 U.S.C. § 44 (1996). Headquartered in Indianapolis, Indiana, it has almost 3 million members and approximately 275 employees. Membership in The American Legion is restricted to those who were members of the United States Armed Forces assigned to active duty during a time of war or hostilities between the United States and other nations. *See* Constitution of The American Legion, art. IV, § 1.

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The American Legion is “organized in Departments,” of which the North Carolina Department is one; local units of these Departments are called “Posts.” *See* Legion Const. art. III, § 1. Departments must be chartered by The American Legion’s National Executive Committee. *See* Legion Const. art VIII, § 1. “The National Executive Committee, after notice and a hearing before a subcommittee . . . , may cancel, suspend or revoke the charter of a Department for any good and sufficient cause to it appearing.” Legion Const. art XI, § 1.

Those desiring to form a Post must first obtain approval from the Department in which they reside. *See* Legion Const. art IX, §§ 1, 5. Approval is conditioned upon the applicants’ pledge that the Post “shall uphold the declared principles of THE AMERICAN LEGION and shall conform to and abide by the regulations and decisions of the Department and of the National Executive Committee, or other duly constituted national governing body of THE AMERICAN LEGION.” Legion Const. art IX, § 4.2. “Each Department may prescribe the Constitution of its Posts.” Legion Const. art IX, § 7. A Post’s permanent charter may be suspended, cancelled or revoked by its Department. *Id.*

On 1 August 1920, The American Legion issued a permanent charter to The American Legion Department of North Carolina. This charter, a one page document, authorizes the North Carolina Department to “establish and maintain” itself. It subjects the North Carolina Department to “the Constitution of The American Legion and the rules, regulations, orders and laws promulgated in pursuance thereof.” It further states,

By the acceptance of this Charter, . . . the said Department pledges itself, through its Posts and the members thereof, to uphold, protect and defend the Constitution of The United States and the principles of true Americanism, for the common welfare of the living and in solemn commemoration of those who died that liberty might not perish from the Earth.

The North Carolina Department was incorporated as a non-profit corporation in North Carolina in 1955. It has adopted its own Constitution and bylaws. Pursuant to its Constitution, the Department elects its own officers and establishes its own committees. *See* Constitution and Bylaws of The American Legion Department of North Carolina, art. X, XI. It derives its revenues from membership dues and from other sources approved by the Department, but not from the national organization. *See* Department

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Const. art. XII. According to its Constitution, the purpose of the North Carolina Department is

[t]o uphold and defend the Constitution of the United States of America; to maintain law and order; to foster and perpetuate a one hundred percent Americanism; to preserve the memories and incidents of our associations in the Great Wars; to inculcate a sense of individual obligation to the community, state and nation; to combat the autocracy of both the classes and the masses; to make right the master of might; to promote peace and good will on earth; to safeguard and transmit to posterity the principles of justice, freedom and democracy; [and] to consecrate and sanctify our comradeship by our devotion to mutual helpfulness.

Department Const., Preamble. “No person may become or remain a member of the Department except through membership in a Post.” Department Const. art. IV, § 1.

Cary Post 67 received a permanent charter in 1947 and was incorporated as a non-profit corporation in North Carolina in 1991. It has adopted its own constitution and bylaws. It elects its own officers and forms its own committees. Its charter is subject to suspension by the North Carolina Department and revocation by The American Legion. Department Const. art. V, § 5.

In 1994, competition in the American Legion Baseball Program was governed by the “American Legion Baseball 1994 Rule Book” (hereinafter the “National Rule Book”), which was prepared and distributed by The American Legion. The National Rule Book defines the “purpose and scope of American Legion Baseball” as follows:

1. To inculcate in our American youth a better understanding of the American way of life and to promote 100% Americanism.
2. To instill in our Nation’s youth a sincere desire to develop within themselves a feeling of citizenship, sportsmanship, loyalty and team spirit.
3. To aid in the improvement and development of the physical fitness of our country’s youth.
4. To build for the Nation’s future through our youth.

National Rule Book, p. 2. According to the National Rule Book, the four items listed above “are the four permanent [and] unchanging goals of the American Legion Baseball Program.” *Id.* The National

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Rule Book requires that “American Legion Baseball competition . . . be played in accordance with rules set forth and adopted by” The American Legion. *Id.* at 4. The following is a representative list of provisions found in the National Rule Book:

1. Eligibility requirements for players, including age restrictions;
2. Requirement that teams wear “alike” uniforms, bearing American Legion insignia, if they reach state or national championship play;
3. Requirement that batters and catchers wear specified protective equipment;
4. Rules of play;
5. Prohibition against the use of any tobacco product by any player, coach, manager, or umpire “while on the playing field, benches, in bullpens or dugouts”;
6. Requirement that managers, coaches, and players not “conduct themselves in an unsportsmanlike manner that would discredit” the American Legion Baseball Program;
7. Requirement that American Legion Departments of each state “formulate rules, regulations and boundaries that are not in conflict with National rules for all play within that Department.”

The North Carolina Department has indeed developed its own rule book, but the differences between the State Rule Book and the National Rule Book are not substantial and do not materially affect our resolution of the issues before us.

All decisions regarding the establishment of teams, the selection of players and coaches, and the scheduling of games are made by the various Posts. Baseball teams are financed exclusively by their respective Posts without funds from either The American Legion or the North Carolina Department.

I. The American Legion and the North Carolina Department

The American Legion and the North Carolina Department are alleged to be liable based on two theories: (1) direct negligence with respect to the players injured or killed, and (2) vicarious liability for the negligence of defendant Edwin Reel, III and for the negligence of the team’s coaches.

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A. Direct Negligence

[1] Plaintiffs argue in their brief that The American Legion and the North Carolina Department had a “duty to use reasonable care in the operation of their baseball program.” They further contend that The American Legion and the North Carolina Department breached this duty by failing “to develop transportation policies for [the] youth baseball program that would prevent transportation by inexperienced drivers.”

At its most basic level, liability for negligence is premised on the fact that a party is performing a particular undertaking in a negligent fashion.

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of *the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care*, or to so govern his actions as not to endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.

Pinnix v. Toomey, 242 N.C. 358, 362, 87 S.E.2d 893, 897-98 (1955) (citations omitted, emphasis added). In this case, plaintiffs’ claims that they were harmed by the negligence of The American Legion and the North Carolina Department presuppose that these defendants were engaged in the operation of The American Legion Baseball Program.

There is no evidence, however, that the baseball program in which plaintiffs participated was operated by either The American Legion or the North Carolina Department or that they controlled it. To be sure, the play of baseball within the American League Program was *regulated* by The American Legion and the North Carolina Department, but regulating an activity is hardly the same as engaging in it. One could not seriously maintain, for example, that by regulating the taking of oysters from private shellfish bottoms, the North Carolina Department of Environment and Natural Resources is operating those oyster beds. *See* 15A NCAC 3K .0200 *et seq.* (1991).

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Defendants' evidence shows that local Posts, including Cary Post 67, exercised exclusive, day-to-day control over the operation of their respective teams in the American Legion Baseball Program.

Plaintiffs have not cited, nor do we find, any competent evidence to the contrary. Plaintiffs point to the National Rule Book's requirement that local Posts purchase liability insurance naming The American Legion as an "additional insured," but we fail to see the relevance of such a requirement to the issue of whether The American Legion is actually involved in the day-to-day operation or control of the Baseball Program. *Cf. Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 279-80, 357 S.E.2d 394, 398 (rejecting plaintiff's claim that hotel chain which licensed its name to an independently owned hotel "implicitly accepted responsibility and acknowledged liability for injuries on the premises" because chain required owner to maintain liability insurance naming chain as an additional insured), *review on additional issues denied*, 320 N.C. 631, 360 S.E.2d 87 (1987). Thus, because neither The American Legion nor the North Carolina Department was actually engaged in the operation of the baseball program, they cannot be held liable for operating that program negligently.

B. Vicarious Liability

[2] Plaintiffs' second theory is that The American Legion and the North Carolina Department are vicariously liable for the negligence, if any, of defendant Edwin Reel, III, and the coaches. Specifically, plaintiffs argue that The American Legion and the North Carolina Department had the right to control the activities of Reel and Morton; that this control was so extensive as to create an employer-employee relationship between the parties; and that, under the doctrine of *respondeat superior*, The American Legion and the North Carolina Department are responsible for the negligence of their employees, Reel and Morton.

Under the doctrine of *respondeat superior*, a principal is liable for the torts of its agent which are committed within the scope of the agent's authority, when the principal "retains the right 'to control and direct the manner' " in which the agent works. *Vaughn v. N.C. Dept. of Human Resources*, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979), (quoting *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 139 (1944)). Of course, *respondeat superior* does not apply unless an agency relationship of this nature exists. An agency relationship arises when parties manifest agreement that one of them shall act

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subject to and on behalf of the other. *See Hayman*, 86 N.C. App. at 277, 357 S.E.2d at 397.

There is not a scintilla of competent evidence that either Edwin Reel, III, or Manager Jere Morton was authorized or directed by The American Legion or by the North Carolina Department to arrange transportation for, or to transport, team players to and from the baseball field. Furthermore, there is no evidence that Reel or Morton was an agent of these defendants by way of apparent authority. We also have determined that neither the American Legion nor the North Carolina Department was operating the baseball program. Thus, even assuming that Reel and Morton were somehow employees of The American Legion and the North Carolina Department, any negligence by Reel or Morton with respect to the transportation of players to and from the baseball field occurred outside the scope of their employment.

The evidence presented by The American Legion and the North Carolina Department established the lack of any genuine issue of material fact and that these defendants were entitled to judgment as a matter of law. Plaintiffs failed to rebut this evidence, and so summary judgment as to all claims properly was granted for The American Legion and the North Carolina Department. *See Felts v. Hoskins*, 115 N.C. App. 715, 717, 446 S.E.2d 110, 111 (1994).

II. Cary Post 67

Plaintiffs' claims against Cary Post 67 essentially are identical to their claims against The American Legion and the North Carolina Department.

A. Direct Negligence

[3] Plaintiffs urge that defendant Cary Post 67 was negligent in failing to have a transportation policy in place and in failing to provide transportation to and from the games. Direct negligence requires that the plaintiffs prove the following elements: a legal duty, a breach of that duty, and damages proximately caused by the breach. *See Tise v. Yates Constr. Co., Inc.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997). Ordinarily, it is a jury's province to determine issues of breach and causation. *See Griggs v. Morehead Memorial Hosp.*, 82 N.C. App. 131, 132-33, 345 S.E.2d 430, 431 (1986). However, when the evidence viewed in the light most favorable to the non-moving party indicates that only one conclusion of law may reasonably be reached, summary judgment is proper. *See Thompson*, 122 N.C. App. at 344, 469 S.E.2d

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at 585. When a defendant moves for summary judgment, it may meet its burden by showing either (1) that an essential element of the plaintiff's claim is missing as a matter of law, or (2) that the plaintiff "cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982).

We hold that summary judgment as to plaintiffs' claim of direct negligence was properly granted in favor of defendant Cary Post 67. There is no evidence forecast or in the record that tends to show that providing transportation is a duty inherent in operating a baseball program with reasonable care. Moreover, plaintiffs are unable to show as a matter of law that allowing Reel to drive was a proximate cause of the injuries suffered by plaintiffs.

We believe *Johnson v. Skinner*, 99 N.C. App. 1, 392 S.E.2d 634, review on add'l issues denied, 327 N.C. 429, 395 S.E.2d 680 (1990), is instructive. There, an injured motorist sued a car dealership that had allowed its mechanic to drive his uninsured car with its dealer license plates. The mechanic loaned his car to his roommate, who collided with plaintiff. Plaintiff sued the dealership that had illegally supplied the license plates under a theory that "motorists who are unable to register their vehicles are, as a class, a somewhat greater risk of injury to people on the highway than insured motorists." *Johnson*, 99 N.C. App. at 11, 392 S.E.2d at 639-40. This Court said that such a "theory of negligence gives us pause," *id.* at 11, 392 S.E.2d at 640, but found that the case was properly submitted to the jury on the issue of negligence of the dealership. The Court explained that submission was proper because the evidence indicated the dealership had specific knowledge that the roommate was allowed to drive the car and that the roommate "previously had used lack of care in driving the [car]." *Id.* at 12, 392 S.E.2d at 640. As such, the dealership's giving of the license plates to the mechanic was a proximate cause of the injuries because the dealership "should have foreseen a danger to other motorists" when it allowed its mechanic to use the dealer plates. *Id.* at 11, 392 S.E.2d at 640.

In this case, plaintiffs urge that defendant Cary Post 67 was negligent in allowing Reel to drive players because of his age and his excitability. In *Johnson*, although the theory of a general class of more dangerous drivers gave this Court "pause," the case properly went to the jury because the dealership possessed specific knowledge about the danger of the specific driver involved. In contrast,

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Cary Post 67 had no knowledge of any history or record of unsafe driving by Reel; indeed, the team manager said Reel “had driven before and shown [himself] to be a safe, responsible driver.” We are unwilling to say a bare allegation that a driver is young is enough to send the causation issue to the jury. Plaintiffs further allege that the game had been heated and so Cary Post 67 should have known Reel would be excitable. However, all persons present at the game saw the excitement, and many witnessed the altercation with a Chapel Hill parent afterwards. To say that Cary Post 67 should be on notice that all of these individuals were potentially dangerous drivers stretches the limits of foreseeability beyond reason. Because only one inference can be drawn from the facts at hand, we hold that summary judgment for defendant Cary Post 67 on the issue of direct negligence was proper. *See id.* at 7, 392 S.E.2d at 637.

B. Vicarious Liability

[4] When a principal can control and direct his agent, *respondeat superior* imposes liability upon the principal for the torts of his agent. *See Peace River Elec. Coop., Inc. v. Ward Transformer Co., Inc.*, 116 N.C. App. 493, 504, 449 S.E.2d 202, 210 (1994), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995). Most commonly expressed in terms of employer-employee relationships, the theory imposes liability when the agent’s actions within the scope of the employment and in furtherance of the master’s business are expressly authorized or are performed with implied authority. *See Medlin v. Bass*, 327 N.C. 587, 592, 398 S.E.2d 460, 463 (1990). Although there can be an agency relationship only if the principal retains the right to control the manner of performance, *see Vaughn*, 296 N.C. at 686, 252 S.E.2d at 795, driving to or from a work site at the direction of an employer has been considered to be within the scope of employment and sufficient to subject an employer to vicarious liability for an employee’s negligent driving. *See MGM Transport Corp. v. Cain*, 128 N.C. App. 428, 431, 496 S.E.2d 822, 824 (1998).

Viewing the evidence in the light most favorable to the plaintiffs, there is enough evidence forecast to submit the case to a jury on the issue of vicarious liability. Plaintiffs have alleged and presented evidence that the coaches were agents of Cary Post 67, which allegedly was operating the baseball team. As agents, the coaches may have enlisted Reel as an agent as well. Factual discrepancies exist as to the agency relationship(s), and as to whether providing transportation was within the scope of Cary Post 67’s business in operating the team.

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Because the factual questions of whether Reel was an agent of the team, and whether transportation was even within the scope of any agency, are disputed and are material to *respondeat superior* liability, they are matters properly left to a jury. *See Thompson*, 122 N.C. App. at 345-46, 469 S.E.2d at 586. We reverse the grant of summary judgment on the claim of vicarious liability and remand the issue for trial.

Affirmed in part and reversed in part.

Judges GREENE and HORTON concur.

WANDA J. CHOATE, EMPLOYEE, PLAINTIFF v. SARA LEE PRODUCTS, EMPLOYER;
SELF/CONSTITUTION STATE SERVICES, CARRIER; DEFENDANTS

No. COA98-397

(Filed 20 April 1999)

**Workers' Compensation— temporarily leaving work station—
fall in parking lot—injury arising out of and in course of
employment**

Plaintiff employee's injury when she slipped and fell in the employer's parking lot after she temporarily left the production line to check on a co-worker arose out of and in the course of her employment. A finding that plaintiff left her work station without her supervisor's permission in violation of company policy did not prohibit plaintiff from receiving compensation benefits where plaintiff testified that it was routine to leave the work station with the permission of other members of the production team, and she had such permission; the supervisor admitted that she would have allowed plaintiff to leave if she had asked; the plant manager admitted that plaintiff would probably not have been fired for going outside without permission; and plaintiff's statement that the rule was routinely violated was not contradicted.

Judge GREENE dissenting.

Appeal by plaintiff from an Opinion and Award entered 7 February 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 January 1999.

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[133 N.C. App. 14 (1999)]

Donaldson & Black, P.A., by Jay A. Gervasi, Jr., for plaintiff-appellant.

Orbock Bowden Ruark & Dillard, PC, by Barbara E. Ruark, for defendant-appellees.

HUNTER, Judge.

Wanda J. Choate (plaintiff) appeals from the Opinion and Award of the North Carolina Industrial Commission (Commission) which denied plaintiff's claim for benefits under the North Carolina Workers' Compensation Act (Act). The Commission found as a fact that plaintiff fell in the employer's parking lot on 27 January 1994. The issue on appeal is whether that fall arose out of and during the course of plaintiff's employment.

Evidence before the Commission tended to show that at the time of the incident, plaintiff had worked for defendant for twenty-seven and one-half years as a seamstress. Plaintiff worked with several other workers in a production team, and her pay was based on productivity. On 27 January 1994, plaintiff was informed by a distraught co-worker, Shelly Bright (Bright), who is married to plaintiff's nephew, that plaintiff's nephew had just been in an automobile accident and that Bright was leaving work in order to check on him. Bright left the plant, and plaintiff asked her teammate in front of her in the production line if she (plaintiff) could go outside to see if Bright needed assistance. Plaintiff's teammate replied in the affirmative. Plaintiff informed members of her team and went to Bright in the parking lot. While in the parking lot, plaintiff fell due to icy conditions. As she was falling, plaintiff grabbed Bright's car door with her left hand and fell on her back. After her fall, plaintiff offered to accompany Bright and inquired if there was anything she could do to help Bright in her distressed situation. After being informed that Bright did not need plaintiff to do anything else, plaintiff encouraged Bright to be careful due to her condition and inclement weather. Plaintiff then returned to her work station.

Plaintiff did not immediately report her fall; however, sometime before lunch, she informed her supervisor Carol Bottomly (Bottomly) about the fall and reported that her shoulder was hurting. Bottomly completed an accident report while plaintiff worked at her sewing machine. Plaintiff also reported her injury to the plant nurse at 5:30 p.m. Due to continued pain, plaintiff consulted several physicians, including an orthopedist and a neurologist.

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Plaintiff contends that the Commission erred in finding that her injury did not arise out of and in the course of her employment. The Commission made findings of fact, among others, that “[c]ompany policy prohibits personnel in the parking lot except at authorized times unless the employee has the permission of a supervisor” and “[p]laintiff’s presence in the parking lot was not related to her employment, but was a direct result of an automobile accident involving her nephew.” The Commission made specific conclusions that plaintiff’s fall did not arise out of her employment, that her location in the parking lot at the time of her fall was not calculated to further the employer’s business either directly or indirectly, and that plaintiff’s decision to check on her niece did not bear a reasonable relationship to her employment nor was it related to her job duties. For those reasons, the Commission found that plaintiff’s claim is not compensable under the provisions of the Act. We disagree.

The standard of appellate review of an opinion and award of the Commission is limited to a determination of (1) whether the Commission’s findings of fact are supported by any competent evidence in the record; and (2) whether the Commission’s findings justify its legal conclusions. *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997). Even if there is conflicting evidence, the Commission’s findings of fact are conclusive on appeal if there is any competent evidence to support them. *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 509-10, 473 S.E.2d 10, 12 (1996). “[T]his Court is ‘not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached.’ . . . ‘This is so, notwithstanding [that] the evidence upon the entire record might support a contrary finding.’” *Baker v. City of Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996).

An injury is compensable under the Act only if the injury (1) is an “accident” and (2) “aris[es] out of and in the course of the employment.” *Roberts v. Burlington Industries*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988); N.C. Gen. Stat. § 97-2(6) (1991). When an employee is injured while going to or from his place of work, is upon premises owned or controlled by his employer, and the employee’s act involves no unreasonable delay, then the injury is generally deemed to have arisen out of and in the course of the employment. *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E.2d 570 (1962). Plaintiff contends that the rule from *Bass* applies in the present case

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because her act of entering the parking lot was certainly no more personal and no less related to her work than leaving at the end of the day would have been. Plaintiff went to the parking lot to check on her co-worker and contemplated leaving work if her co-worker needed assistance. Plaintiff did not injure herself while leaving work; therefore the rule enunciated in *Bass*, while persuasive, does not control our decision in the present case.

The words “arising out of the employment” refer to the origin or cause of the accidental injury, and the words “in the course of employment” refer to the time, place, and circumstances under which an accidental injury occurs. *Roberts*, 321 N.C. at 354, 364 S.E.2d at 420. There must be some causal relationship between the injury and the employment before the resulting disability or disablement can be said to “arise out of the employment.” *Pittman v. Twin City Laundry*, 61 N.C. App. 468, 472, 300 S.E.2d 899, 902 (1983). An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer’s business. *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964). According to the general rule, “[w]here any *reasonable relationship* to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as ‘arising out of employment.’” *Smallwood v. Eason*, 123 N.C. App. 661, 665-66, 474 S.E.2d 411, 414 (1996) (emphasis in original) (citations omitted) (injuries sustained by employees as result of vehicular collision with forklift driven by co-employee on road adjacent to employer’s facility arose out of and in the course of employees’ employment for workers’ compensation purposes). Where the evidence shows that the injury occurred during the hours of employment, at the place of employment, and while the claimant was actually in the performance of the duties of the employment, the injury is in the course of the employment. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968). In order to be compensable, plaintiff must prove both the “arising out of” requirement and the “in the course of” requirement; however, as stated by former Chief Justice Branch, analysis of those factors sometimes blends:

[T]he two tests, although distinct, are interrelated and cannot be applied entirely independently. Rather, they are to be applied together to determine the issue of whether an accident is sufficiently work-related to come under the Act. Since the terms of the Act should be liberally construed in favor of compensation, defi-

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ciencies in one factor are sometimes allowed to be made up by strength in the other.

Hoyle v. Isenhour Brick and Tile Co., 306 N.C. 248, 252, 293 S.E.2d 196, 199 (1982).

In *Roberts v. Burlington Industries*, 321 N.C. 350, 364 S.E.2d 417, the employee was killed while aiding a motorist on the highway during a business trip. The North Carolina Supreme Court stated that an injury to an employee while he is performing acts for the benefit of third persons does not arise out of the employment unless the acts benefit the employer to an appreciable extent. *Id.* at 355, 364 S.E.2d at 421. The Court stated:

The record here contains no evidence that anyone other than decedent involved in the events surrounding his accidental death had any connection to Burlington. So far as this record reveals, decedent acted solely for the benefit of a third party. We thus hold that his death did not arise out of the employment.

Id. Unlike *Roberts*, the present case involves numerous connections to the employer. The plaintiff fell on the employer's premises after temporarily leaving the production line in order to aid a fellow employee, who also happened to be the wife of plaintiff's nephew. The facts are very similar to those in *Bellamy v. Manufacturing Co.*, 200 N.C. 676, 158 S.E. 246 (1931).

In *Bellamy*, the plaintiff had finished work early but was still "on the clock," when she took a friend to seek employment in the same mill. During that errand, plaintiff was injured in an elevator. The Supreme Court, in affirming the decision of the superior court, stated:

The mission she went on, while she was "on duty" was in the mill, was a temporary purpose, and not such a departure from the employer's business that we could say from a liberal construction of the act that it was not in the course of the employment. In fact, she went with a friend to get her employment in the mill, and in doing so did not leave the mill. Under the facts and circumstances of the case and the conduct of the plaintiff, what she did was too casual to bar a recovery.

Bellamy, 200 N.C. at 680, 158 S.E. at 248. As in *Bellamy*, plaintiff in the present case was on the employer's premises when the accident occurred. Even more convincing, she was temporarily attending to a

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co-worker, whereas the plaintiff in *Bellamy* was helping a friend find employment.

In another similar case, the Court found that the worker was entitled to benefits under the Act when he was temporarily absent from his work station. In *Gordon v. Chair Co.*, 205 N.C. 739, 172 S.E. 485 (1934), plaintiff went to work with a co-worker during icy conditions, and asked his son to follow in case his employer was to be closed due to the weather. Plaintiff got to work, learned that his employer was in operation, then went to the outside platform at the front of the plant to tell his son not to wait on him. While on the platform, he slipped and fell on the ice and was injured. The Court found that the facts of the *Gordon* case came within the decision in *Bellamy*, and the plaintiff was granted workers' compensation benefits. *Gordon*, 205 N.C. at 742, 172 S.E. at 487.

The *Gordon* Court cited an early United States Supreme Court case as authority, where that Court held that a worker was "on duty" when he was struck and killed while on a personal errand, but still within the railroad yard of his employer:

Assuming . . . that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. *It seems to us, clear that the man was still "on duty," and employed in commerce, notwithstanding his temporary absence from the locomotive engine.*

Id. at 742, 172 S.E. at 487 (quoting *N. C. R. R. Co. v. Zachary*, 232 U.S. 248, 260, 58 L. Ed. 591, 596 (1914) (emphasis added)).

In *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E.2d 596 (1955), an employee was on a business trip when he stopped at a filling station to inflate the tires on his vehicle. The filling station operator gave the employee permission to use his air hose to inflate the tires, but before he could finish, another customer was unable to start his car. The filling station operator requested plaintiff to assist in pushing the car off from a standing position so as to get it started and in order to move it away from the gas pumps. Plaintiff complied with this request, and was struck and injured by another car while pushing the

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disabled car on the highway. The Court found that the circumstances of mutual aid being exchanged between the employee and filling station owner were such that “the inbound aid being for the employer’s benefit, the aid received and the aid given are so closely interwoven that an injury to the employee under such circumstances must be held connected with and incidental to his employment.” *Guest*, 241 N.C. at 453, 85 S.E.2d at 600. While not the basis for upholding the award of benefits in *Guest*, the Court noted that “[w]here the deviation is of such nature as to constitute a total departure from the employment, compensation is denied; but where the deviation is of a minor character, compensation is awarded.” *Id.* at 454, 85 S.E.2d at 601 (citing *Parrish v. Armour & Co.*, 200 N.C. 654, 158 S.E. 188 (1931)).

Under *Bellamy*, *Gordon*, and *Guest*, we find, therefore, that a causal connection existed and plaintiff’s accident during a temporary absence from her work station arose out of and during the course of her employment. The Commission erred in its conclusions of law on this issue. Its finding of fact that “[p]laintiff’s presence in the parking lot was not related to her employment, but was a direct result of an automobile accident involving her nephew” can be properly regarded as either a conclusion of law, or mixed finding of fact and law, or finding of jurisdictional fact, and is therefore not binding upon us. *Cody v. Snider Lumber Co.*, 96 N.C. App. 293, 385 S.E.2d 515 (1989).

While company policy may not have permitted plaintiff in the present case to leave the production line without her supervisor’s permission, our Supreme Court has held that habitual disregard for company policy negates a defense in this regard, stating:

[T]he more recent cases have not viewed minor deviations from the confines of a narrow job description as an absolute bar to the recovery of benefits, even when such acts were contrary to stated rules or to specific instructions of the employer where such acts were reasonably related to the accomplishment of the task for which the employee was hired.

Hoyle, 306 N.C. 248, 254, 293 S.E.2d 196, 200. In *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E.2d 577 (1976), a fire fighter was injured while working on a co-employee’s personal automobile. The Court affirmed a finding of workers’ compensation coverage, even though a published rule prohibited repair of personal vehicles on the premises without prior approval of the assistant chief on duty. The

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Court noted that it was customary for fire fighters to make repairs during lunch, that their superiors were aware of these activities, and these repairs to an appreciable extent benefitted the fire department. *Watkins*, 290 N.C. at 285, 225 S.E.2d at 582.

Likewise, plaintiff in the case *sub judice* testified that it was routine to leave the work station with the permission of other members of the production team. Supervisor Bottomly testified that employees were not supposed to leave the plant without permission, but also admitted that she would have allowed plaintiff to leave if she had asked. The plant manager, Todd Dixon, admitted that plaintiff would “probably not” have been fired for going outside without permission. Plaintiff’s statement that the supposed rule was routinely violated was never directly contradicted by the other employees. No evidence was presented that plaintiff, or anyone else, was disciplined for her specific actions. The Commission found that plaintiff left without a supervisor’s permission. The Commission evidently considered that purported fact in determining that plaintiff was outside her employment at the time of her fall; however, the Commission made no conclusion of law based on this fact. This finding, therefore, does not prohibit the plaintiff from receiving an award of workers’ compensation benefits under the laws of this state. *See Spratt v. Duke Power Co.*, 65 N.C. App. 457, 310 S.E.2d 38 (1983) (employee’s disobedience of the prohibition against running was not sufficient to break causal connection between injury and employment when employee slipped and fell en route to canteen to get a pack of chewing gum).

The fact that the defendant did not reprimand plaintiff nor discipline plaintiff for acting on Bright’s behalf is further evidence that plaintiff’s actions appreciably benefitted the defendant. Plaintiff certainly had reasonable grounds to believe her actions would benefit her employer and create a feeling of good will. Our Supreme Court has stated:

[W]here competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment, or such as would prove beneficial to his employer’s interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a causal connection between the employment and the accident may be established.

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Watkins, 290 N.C. at 283, 225 S.E.2d at 582 (quoting *Guest*, 241 N.C. at 452, 85 S.E.2d at 599-600).

For the reasons stated above, we hereby reverse the Opinion and Award filed 7 April 1997 and remand the matter to the Industrial Commission for entry of a revised Opinion and Award in favor of the plaintiff and further determination not inconsistent with this opinion. The order of the Commission is

Reversed and remanded.

Judge JOHN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not believe plaintiff's injuries arose out of her employment, as mandated by N.C. Gen. Stat. § 97-2(6), and therefore would affirm the decision of the Commission.

The tests developed by our courts to determine whether an employee's injury, sustained while acting for the benefit of a third party, arises out of the employment are whether: (1) the act appreciably benefits the employer, *Roberts v. Burlington Industries*, 321 N.C. 350, 355, 364 S.E.2d 417, 421 (1998); *Guest v. Iron & Metal Co.*, 241 N.C. 448, 453, 85 S.E.2d 596, 600 (1955); (2) the employee has reasonable grounds to believe the act is incidental to the employment, *Guest*, 241 N.C. at 452, 85 S.E.2d at 599; or (3) the employment places the employee at a risk of injury greater than that to which the general public is exposed outside of the employment, *Roberts*, 321 N.C. at 358, 364 S.E.2d at 422-23.

In this case, there is no evidence that plaintiff's injury resulted from an act incident to her employment, or as a consequence of an increased risk of her employment. Accordingly, the dispositive issue is whether plaintiff's act appreciably benefitted her employer.

Even assuming plaintiff's injury was sustained *while acting for the benefit of a third party*, there is no evidence of any benefit to her employer. The injury, even though it occurred on the employer's premises, did not reasonably tend to retain the employer's business or to promote the consummation of new business. *Lewis v. Insurance Co.*, 20 N.C. App. 247, 250-51, 201 S.E.2d 228, 230-31 (1973) (injury

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arose out of the employment where an insurance agent was injured while assisting one of his policyholders whose vehicle was stranded on the side of the road). Although the act in this case apparently was prompted by humanitarian concern for a fellow employee, that concern is not sufficient to constitute an appreciable benefit to the employer. *Roberts*, 321 N.C. at 356-57, 364 S.E.2d at 422. Accordingly, plaintiff's injuries did not arise out of her employment and are not compensable.

The *Bellamy*, *Guest*, and *Gordon* cases, relied upon by the majority, are distinguishable and thus do not support the holding that plaintiff's injuries in this case are compensable. Those cases, holding that the employee's injuries did arise out of the employment, reveal some definite benefit to the employer as a result of the actions of the employee.

LINDA C. PORTER, EMPLOYEE, PLAINTIFF v. FIELDCREST CANNON, INCORPORATED,
EMPLOYER; SELF-INSURED, DEFENDANT

No. COA98-85

(Filed 20 April 1999)

1. Workers' Compensation— withdrawal of counsel—pro se representation—decision not arbitrary

The Industrial Commission did not act arbitrarily in permitting plaintiff's counsel to withdraw and plaintiff to proceed pro se in an appeal to the full Commission where plaintiff consented to counsel's withdrawal in writing, and plaintiff made no objection to counsel's withdrawal.

2. Workers' Compensation— record on appeal—settlement—documents not introduced

The Industrial Commission's settlement of the record on appeal was not erroneous in failing to include documents which plaintiff wished to be included but which were not introduced into evidence at the hearing.

3. Workers' Compensation— causation—burden of proof

The Industrial Commission did not err by placing on plaintiff the burden to prove a causal relation between a work-related incident and her medical condition.

4. Workers' Compensation— causation—work-related accident—failure of proof

Plaintiff failed to establish that her cervical disc injury was caused by a work-related accident where she testified that she felt sharp pains radiating down her neck while operating a computer at work and that a ruptured disc was discovered a month later, but no physician in the case testified to a reasonable degree of medical certainty that plaintiff's ruptured disc was caused by her work with defendant employer.

5. Workers' Compensation— grounds for reconsideration of evidence—failure to take additional evidence—same findings and conclusions as hearing officer

The Industrial Commission did not err by denying plaintiff's request to present additional evidence and reaching the same findings and conclusions as the deputy commissioner after finding that plaintiff showed good grounds to reconsider the evidence.

6. Workers' Compensation— ex parte communication—portions of deposition—exclusion

Only those portions of deposition testimony by plaintiff's treating physician which were tainted by defense counsel's ex parte communication with the physician were required to be excluded from evidence in a workers' compensation proceeding.

Appeal by plaintiff from an Opinion and Award entered 20 August 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 January 1999.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Jeri L. Whitfield and Manning A. Connors, for defendant-appellee.

HUNTER, Judge.

Pursuant to Rule 18 of the North Carolina Rules of Appellate Procedure, Linda C. Porter (plaintiff) appeals from the Opinion and Award of the North Carolina Industrial Commission (Commission) which denied plaintiff's claim for worker's compensation. Evidence before the Commission tended to show that plaintiff was hired as a financial assistant on 29 July 1994 by Fieldcrest Cannon (defendant).

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While at work on 9 September 1994, plaintiff was typing at a conference room table and felt a hot sensation with sharp pains radiating down her neck sometime between the hours of 1:00 p.m. and 3:00 p.m. The computer work station plaintiff worked on that particular day had some ergonomic problems. Despite these problems and her pain, plaintiff continued to work at the keyboard in order to complete an assigned project, and worked full days beginning Saturday, 10 September 1994 through Thursday, 15 September 1994. On 15 September 1994, plaintiff reported to Dr. Stephen St. Clair, the occupational physician on duty for defendant, that she was experiencing pain in her left arm, shoulder and elbow and pain on the top of her left hand.

Plaintiff saw Dr. Stephen Robinson on 4 October 1994, complaining of discomfort in her left shoulder and left hand, with discoloration of the fingers after movements of her hands. Dr. Robinson conducted a physical examination, which was normal, and found no evidence of discoloration or a cervical disc problem. Dr. Robinson recommended ergonomic changes in plaintiff's work station and an MRI if the pain did not resolve.

An MRI conducted on 18 October 1994 revealed a herniated disc at the C-5 level of plaintiff's spine and some spondylosis. A cervical diskectomy and fusion at the C5-6 level was performed on plaintiff on 28 October 1994 by Dr. Ernesto Botero.

Plaintiff returned to work with defendant on 9 January 1995. Since her surgery, plaintiff has experienced other medical problems including symptoms consistent with thoracic outlet syndrome and fibromyalgia. An independent medical evaluation by Dr. Scott Spillman assigned a fifteen percent (15%) permanent partial disability rating to plaintiff's back as a result of her herniated disc at C5-6.

The deputy commissioner denied plaintiff's claim for workers' compensation benefits and plaintiff appealed to the full Commission. By an opinion filed 20 August 1997, the Commission affirmed the decision of the deputy commissioner. Plaintiff appeals.

The standard of appellate review of an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions. *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997) (citations omitted).

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“The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings.” *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997) (citing *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989)). This Court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding of the Commission, and it does not have the right to weigh the evidence and then decide the issue on the basis of its weight. *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). Conclusions of law, including whether there has been a change of condition, are reviewable *de novo* by this Court. See *Richards* at 225, 374 S.E.2d at 118; *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996).

[1] Plaintiff contends that the Commission committed reversible error when it allowed plaintiff’s prior counsel to withdraw, allowing her to proceed *pro se*. Plaintiff argues that the Commission erred by not protecting the rights of an injured worker who proceeded *pro se* in a complicated and involved workers’ compensation appeal, who was

not aware that all the medical records were not submitted as evidence, who was unaware that the transcript of the evidence was not complete, who was clearly unable to handle the appeal competently, who was incapable of assigning error appropriately, and who was incapable of addressing the *ex parte* communications between defense counsel and the treating physician.

The determination of counsel’s motion to withdraw is within the discretion of the trial court, whose decision is reversible only for abuse of discretion. *Benton v. Mintz*, 97 N.C. App. 583, 389 S.E.2d 410 (1990). The Industrial Commission possesses the powers of a court. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 257, 426 S.E.2d 424, 427 (1993) (citing *Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 340 S.E.2d 111 (1986)). “An abuse of discretion occurs when the trial court’s ruling ‘is so arbitrary that it could not have been the result of a reasoned decision.’” *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Plaintiff has presented no authority in this state which supports the proposition that the Commission had a duty to intervene *ex mero*

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motu, preventing plaintiff from representing herself. The motion to withdraw by plaintiff's former counsel was made on 26 March 1997 and was consented to at the same time, in writing, by the plaintiff. At the hearing before the Commission, petitioner fully participated and made no objection to her counsel's withdrawal. As no objection was made, this issue is not properly before this Court and we cannot further address plaintiffs' assertion. *See* N.C.R. App. P. 10(b)(1). Nevertheless, it appears that the Commission did not make an arbitrary decision in allowing counsel to withdraw when plaintiff consented in writing, and never once objected when she appeared before the Commission.

[2] Plaintiff's next assignment of error concerns the Commission's settlement of the record on appeal, which did not include documents "which were necessary to further the assignments of error regarding the allowance of counsel to withdraw." The Commission is vested with the authority to settle the record on appeal. *See* N.C.R. App. P. 18. Settlement of the record on appeal is the function of the trial tribunal, and not the subject of appellate review absent manifest abuse of discretion. *State v. Little*, 27 N.C. App. 467, 478, 219 S.E.2d 494, 501, *disc. review denied*, 288 N.C. 732, 220 S.E.2d 621 (1975). Documents which plaintiff wished to be included in the record were not introduced into evidence at the hearing on the matter. When settling the record on appeal, the Commissioner sustained the majority of the defendant's objections, but did allow certain documents proffered by the plaintiff. Plaintiff fails to show any evidence of abuse of discretion, merely arguing that "[t]hese documents were in the file and were clearly allowed to be a part of the record on appeal." Plaintiff fails to substantiate this claim and, absent a showing of abuse of discretion, this Court finds no error.

Plaintiff contends that the Commission committed reversible error when it admitted and considered certain medical records of the plaintiff prior to the incident in question. Plaintiff made no objection to the records being admitted. As shown by the pre-trial agreement executed by counsel for both parties, plaintiff consented to the inclusion of all of the medical records. Because plaintiff did not preserve this issue for appeal, we cannot address it further. *See* N.C.R. App. P. 10(b)(1).

[3] Plaintiff also argues that the Commission held her to an improper burden of proof. Plaintiff first relies on *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), for the proposition that the

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Commission incorrectly placed the burden on plaintiff to prove she sustained a compensable traumatic incident. Plaintiff's reliance on *Parsons* is misplaced. It is axiomatic that plaintiff has the burden of initially establishing a causal relationship between a work-related incident and her medical conditions. See *Snead v. Mills, Inc.*, 8 N.C. App. 447, 451, 174 S.E.2d 699, 702 (1970) (“[a] person claiming benefit of compensation has the burden of showing that the injury complained of resulted from the accident”); *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 384 S.E.2d 549, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989).

Parsons concerned a separate set of facts and circumstances not present in this case: the plaintiff was awarded her medical expenses and future medical treatment by the Commission. Subsequently, the defendants refused to continue to pay for medical treatment beyond one visit to a neurologist. Another hearing was held, and the Commission held that the injured worker did not meet her burden to prove that the medical treatment was causally related. *Parsons*, 126 N.C. App. at 541, 485 S.E.2d at 868. This Court reversed, finding that once the claim is approved the burden shifts to the defendant to prove that the medical treatment is not related. *Id.* at 542, 485 S.E.2d at 869. There is no such burden on the defendant in the present case as the plaintiff's claim has not been approved by the Commission. The Commission did not err in holding the plaintiff to the proper burden of establishing a causal relationship.

[4] Secondly, plaintiff contends that causation in the case at bar is simple and uncontradictory, and no expert testimony is necessary to establish causation. Under workers' compensation law in this state, “[t]here must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question.” *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980); *see also Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965). There will be “many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of.” *Click*, 300 N.C. at 167, 265 S.E.2d at 391 (citation omitted). Plaintiff failed to bring forth credible and convincing testimony that establishes a causal relationship between the alleged incident of pain on 9 September 1994, and the cervical disc injury discovered on 18 October 1994. The North Carolina Supreme Court has held

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where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.

Id. (citations omitted). In *Click*, the Court determined that the causal relationship between a specific trauma and the rupture of an intervertebral disc involved such complex questions that medical expert testimony was required to establish causation. *Id.* at 169, 265 S.E.2d at 392. No physician in the case *sub judice* testified to a reasonable degree of medical certainty that plaintiff's ruptured disc was caused by her work with defendant. While the Court in *Click* did not rule out the possibility that a disc injury case may arise in the future wherein the facts are so simple, uncontradictory, and obvious as to permit a finding of a causal relationship between an accident and the injury absent expert opinion evidence, mere speculation and possible causal relationship does not meet plaintiff's burden of proof. *Id.* at 168-69, 265 S.E.2d at 391-92. Accordingly, we find no error.

[5] Plaintiff argues that the Commission erred by denying her request to present additional evidence and reaching the same findings and conclusions as the deputy commissioner after finding that she showed good grounds to reconsider the evidence. Plaintiff concedes that "the question of whether to reopen a case for the taking of additional evidence rests in the sound discretion of the Industrial Commission, and its decision will not be disturbed on appeal in the absence of an abuse of discretion." *Schofield v. Tea Co.*, 299 N.C. 582, 596, 264 S.E.2d 56, 65 (1980); *see also* N.C. Gen. Stat. § 97-85 (1991). The Commission shall review the award

and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award

N.C. Gen. Stat. § 97-85 (1991). The Commission's ruling on "good ground" will not be reviewed absent a showing of manifest abuse of discretion. *See Thompson v. Burlington Industries*, 59 N.C. App. 539, 297 S.E.2d 122 (1982), *cert. denied*, 307 N.C. 582, 299 S.E.2d 650 (1983); *Lynch v. Construction Co.*, 41 N.C. App. 127, 254 S.E.2d 236, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). "The Commission's power to receive additional evidence is plenary power 'to be exercised in the sound discretion of the Commission.'" *Moore v. Davis Auto Service*, 118 N.C. App. 624, 456 S.E.2d 847 (1995) (*quot-*

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ing *Lynch* at 130, 254 S.E.2d at 238). The ruling of the Commission in the present case states that “[t]he appealing party has shown good grounds to reconsider the evidence. However, upon much detailed reconsideration of the evidence, the undersigned reach the same facts and conclusions as those reached by the Deputy Commissioner.” Although the Commission did reconsider the evidence considered by the deputy commissioner, it determined, in its discretion, that there were no good grounds to receive further evidence or to rehear the parties. Plaintiff presents no precedent for the argument that determining there are good grounds to reconsider the evidence by the Commission requires it take additional evidence and overturn the findings of fact and conclusions of law reached by the deputy commissioner. Plaintiff has shown no abuse of discretion for the Commission’s decision and, therefore, this assignment of error is overruled.

[6] Finally, plaintiff contends on appeal that the Commission erred by failing to exclude “tainted medical evidence.” On 13 June 1995, defense counsel sent a letter *ex parte* to plaintiff’s treating physician inquiring as to his opinion regarding plaintiff’s condition. Dr. Botero responded to the letter, giving brief opinions, in his own handwriting, as to the causation of plaintiff’s condition and continuing problems. Plaintiff argues that early in his deposition, Dr. Botero testified that “something happened recently for her to have the problem in the left arm;” however, once Dr. Botero was questioned regarding the *ex parte* correspondence, his testimony became contradictory and was unfavorable to plaintiff.

Our Supreme Court has held that defense counsel may not interview plaintiff’s treating physician privately without the plaintiff’s express consent in a medical malpractice case. *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990). In *Salaam v. N.C. Dept. of Transportation*, 122 N.C. App. 83, 468 S.E.2d 536, *disc. review improvidently allowed*, 345 N.C. 494, 450 S.E.2d 51 (1997), this Court applied *Crist* in the worker’s compensation context, holding that a doctor’s deposition testimony must be excluded if taken after defense counsel engaged in *ex parte* contact with the doctor without the consent of plaintiff’s counsel. All of the evidence in the present case was considered and the record closed prior to the *Salaam* decision, which was filed 19 March 1996. The exclusion of any of Dr. Botero’s testimony was not mandated under precedent existing at that time. Nevertheless, *Salaam* does apply to the present case. See *Evans v. Young-Hinkle Corp.*, 123 N.C. App. 693, 474 S.E.2d 152 (1996).

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Salaam and *Evans* held that all of the deposition was tainted due to prior *ex parte* communication with defense counsel. To the contrary, plaintiff in the case *sub judice* contends that only portions of Dr. Botero's deposition testimony are tainted, *i.e.*, those responses to questions following mention of, and regarding, the *ex parte* communication. We agree with plaintiff. While we are bound by *Salaam* and *Evans*, neither case dealt with the issue of deposition testimony being partially tainted by *ex parte* communication with defense counsel. Apparently, the plaintiffs in those cases never raised this issue. We hold that only those portions of the deposition related to the *ex parte* communication should be excluded. To hold otherwise could punish the plaintiff for the improper conduct of the defendant, going against the logic of the rule first enunciated in *Crist*—considerations of patient privacy, confidentiality, adequacy of formal discovery, and the “untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery.” *Crist*, 326 N.C. at 336, 389 S.E.2d at 47. Accordingly, we remand the case to the Commission to review the deposition testimony and exclude from consideration only those portions tainted by the *ex parte* communication. The remainder of the deposition is competent evidence and can be properly considered by the Commission.

Affirmed in part; reversed and remanded in part.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. CLIFFORD BLACKWELL, DEFENDANT-APPELLANT

No. COA98-882

(Filed 20 April 1999)

1. Evidence— prior crime or act—similar modus operandi—remoteness

In a prosecution for first-degree statutory rape and first-degree statutory sexual offense against an eleven-year-old female, evidence concerning defendant's sexual assaults on two young females ten and seven years earlier was admissible to establish that defendant was the present victim's assailant by showing a

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similar modus operandi where there was evidence that, on all three occasions, defendant licked his lips, called the victims expletive terms, and attempted to perform cunnilingus upon them. The prior bad acts were not too remote in time to render them inadmissible.

2. Rape; Sexual Offenses— defendant as perpetrator—sufficiency of evidence

The State's evidence was sufficient to support a jury finding that defendant was the perpetrator of a rape and a sexual offense against an eleven-year-old victim where it tended to show that the victim recognized defendant's voice and correctly described his hair, beard, and build, and the victim's neighbor observed defendant running from the direction of the victim's home at approximately the same time the attack on the victim ended.

3. Constitutional Law— effective assistance of counsel—inexperience—subsequent discipline

Defendant was not denied the effective assistance of counsel in a prosecution for burglary, rape and sexual offense because one of his attorneys had only practiced for a few months and his other attorney, who walked out of court, was subsequently suspended from practice for other disciplinary reasons.

Appeal by defendant Clifford Blackwell from judgment entered 12 August 1996 by Smith (Osmond), J., in Superior Court, Person County. Heard in the Court of Appeals 1 April 1999.

Theresa K. Pressley, for defendant-appellant.

Michael F. Easley, Attorney General, by Elizabeth N. Strickland, Assistant Attorney General, for the State.

WYNN, Judge.

In this matter, the State's evidence tends to show the following. On the afternoon of 24 August 1995, the eleven-year-old minor female was approached outside of her home by defendant Clifford Blackwell. Blackwell asked her several questions including her name, where her mother was, and whether he could come inside. The minor refused Blackwell's request to enter her home and walked away.

Subsequent to this incident, the minor went home, took a bath, watched television and fell asleep around 9:30 p.m. Throughout this

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period, the minor was alone because her mother worked the late shift.

At approximately 11:30 p.m., the minor was awakened by a strange man climbing on top of her. The man was naked and proceeded to rip the minor's underwear off. Thereafter, the man raped the minor while screaming expletives. The attack lasted approximately twenty-five minutes.

Approximately five minutes after the attack ended, the minor's mother returned home to find her daughter wrapped in a blood-stained sheet. The mother immediately contacted the authorities. When the police arrived, the minor described the assailant. The minor stated that she knew her attacker was black because of the texture of his hair and from what she could see through the window as he was leaving. The minor also stated that the man was tall and skinny and that she recognized his voice as that of the man who had questioned her earlier in the day. That is, she recognized the voice to be Blackwell's. After providing this information, the minor was taken to the emergency room for treatment.

During the police investigation, it was discovered that a neighbor had observed Blackwell running from the direction of minor's residence at approximately the same time the attack ended. The investigation also revealed the presence of a pubic hair upon the minor's body that likely came from Blackwell's body.

Consequently, Blackwell was arrested and tried for first-degree burglary, first-degree-statutory rape, and first-degree-statutory sexual offense. Following his conviction on all charges, Blackwell appealed to this Court.

Before reaching the pertinent issues on appeal, we note that Blackwell violated rule 26(g) of the North Carolina Rules of Appellate Procedure by failing to use the proper font and line spacing in his brief to this Court. 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." N.C. R. App. P. 34; *Steingress v. Steingress*, 350 N.C. 64, 68, 511 S.E.2d 298, 301 (Frye, J. dissenting) (1999); *State v. Hill*, 132 N.C. App. 209, 211, 510 S.E.2d 413, 414 (1999). Neither

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action is necessary in this case because we choose not to impose sanctions; instead, we utilize our discretion under rule 2 to reach the merits of this appeal.

[1] Proceeding, Blackwell first contends that the trial court committed reversible error by allowing into evidence certain prior bad acts. Specifically, Blackwell objects to the trial court's decision to allow the State to present the testimony of two female witnesses.

One of the witnesses testified that when she was thirteen-years old (approximately ten years prior to the incident at issue here), Blackwell swam up to her in an apartment complex pool, grabbed her between the legs, touched her vaginal area, and licked his lips. For this conduct, Blackwell was convicted of taking indecent liberties with a minor.

The other witness testified that approximately seven years prior to the incident at issue here, Blackwell went to her house and offered her a couple hundred dollars to "let me eat your p---y." According to the witness, although she asked Blackwell to leave after he made this statement, he nonetheless proceeded toward her, pushed her legs apart and put his head between her legs. When she pushed Blackwell away and threatened him with a knife, he called her expletives and assaulted her.

Under rule 404(b) of the North Carolina Rules of Evidence,

[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

The list of permissible purposes set forth in rule 404(b) is not exclusive and "the fact that evidence cannot be brought within a [listed] category does not necessarily mean that it is inadmissible." *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E.2d 350, 356 (1986). Our Supreme Court has characterized rule 404(b) as a general rule of inclusion of relevant evidence of other crimes, wrongs, or acts which is subject to but one exception, evidence should be excluded if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *See State v. Jeter*, 326 N.C. 457, 459-60, 389 S.E.2d 805, 807 (1990) (emphasis added). Accordingly, although "evidence may tend

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to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under rule 404(b) so long as it also is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986).

Significantly, our Supreme Court has been "markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in rule 404(b)." *State v. Cotton*, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987). Indeed, such evidence is relevant and admissible so long as the incidents are sufficiently similar and not too remote. *Bagley*, 321 at 207, 362 S.E.2d at 247-48.

In the case *sub judice*, Blackwell contends that the aforementioned prior acts were inadmissible because they were neither sufficiently similar nor temporally proximate. We disagree.

A prior act or crime is sufficiently similar if there are some unusual facts present indicating that the same person committed both the earlier offense and the present one. *See State v. Sneed*, 108 N.C. App. 506, 509, 424 S.E.2d 449, 451 (1993), *aff'd*, 336 N.C. 482, 444 S.E.2d 218 (1994). The similarities, however, need not be "unique and bizarre," but rather must simply tend to support a reasonable inference that the same person committed both the earlier and later acts. *Id.*; *see also State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991).

In offering the testimony of the two female witnesses, the State contended that this testimony was necessary to show identity, modus operandi, intent, opportunity, and knowledge. Specifically, the State argued that the prior crimes demonstrated Blackwell's "oral fixation" and consistent choice of young females as his victims. The State explicitly denied that their testimony was offered to show Blackwell's actions were part of a common scheme or plan.

Although we find the relationship between Blackwell's prior acts and the case *sub judice* somewhat tenuous, we cannot say that the trial court committed reversible error in admitting them. There is ample precedent to support this conclusion. For example, our Supreme Court in *Bagley* held that licking and performing cunnilingus upon victims is unique enough to constitute a modus operandi and therefore admissible under rule 404(b). Similarly, in *State v. Carter*, 338 N.C. 569, 589, 451 S.E.2d 157, 167 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995), the "unusual" facts demonstrating

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that the same person committed both crimes were that the victims in each were hit with a brick above the right eye. Moreover, our Supreme Court has stated that “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. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 367 (1954).

In the instant case, Blackwell’s prior acts tend to demonstrate that he was the minor victim’s assailant by showing a similar modus operandi. Specifically, on all three occasions Blackwell licked his lips, called his victims expletive terms, and attempted to perform cunilingus upon them. Accordingly, they were sufficiently similar to meet the first requirement of rule 404(b).

Addressing Blackwell’s remoteness argument, remoteness in time is less significant when evidence of the prior-sex offense is offered to show modus operandi as opposed to a common plan or scheme. *See State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986). Further, “remoteness in time generally affects only the weight to be given such evidence, not its admissibility.” *Stager*, at 307, 406 S.E.2d at 893. Indeed, prior cases have held that intervals of seven and ten years are not necessarily too remote to preclude the admission of prior-bad acts. *See State v. Penland*, 343 N.C. 634, 644, 472 S.E.2d 734, 745 (1996), *cert. denied*, *Penland v. North Carolina*, — U.S. —, 136 L. Ed. 2d 725 (1997); *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989).

In the case *sub judice*, Blackwell’s prior acts occurred seven and ten years before the incident at issue here. Blackwell, however, spent some of that time in prison. Excluding that time, there was a six year interval between these prior acts and the conduct relating to the crime charged in the instant case. We cannot say that these prior acts are too remote to consider them irrelevant and therefore inadmissible. Accordingly, we reject this assignment of error.

[2] Blackwell next contends that the trial court erred in not granting his motion to dismiss at the close of all the evidence. When considering a defendant’s motion for dismissal, the trial court must determine only whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser-included offense included therein, and (2) of defendant’s being the perpetrator of such

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offense. See *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is evidence such that a reasonable mind might accept as adequate to support a conclusion. See *State v. Moseley*, 338 N.C. 1, 47, 449 S.E.2d 412, 440 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Accordingly, if the evidence only raises a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. See *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. Further the evidence is to be considered in the light most favorable to the State and it is entitled to every reasonable intendment and inference drawn therefrom. See *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978).

In the instant case, Blackwell contends that the State failed to present substantial evidence that he was the perpetrator of the offense. We disagree.

At trial, the State presented the minor's testimony showing that she recognized Blackwell's voice and correctly described his hair, beard, and build. Moreover, the State presented the testimony of the minor's neighbor who observed Blackwell running from the direction of the minor's home at approximately the same time the attack ended. This evidence, standing alone, constituted substantial evidence that Blackwell was the perpetrator of the offense, and therefore the trial court properly denied Blackwell's motion to dismiss.

[3] Lastly, Blackwell contends that he was denied his constitutional right to effective assistance of counsel. To prevail upon a claim of ineffective counsel, a defendant must show: (1) that the representation was ineffective; and (2) that the error of the attorney was so serious as to deprive the defendant of a fair hearing. See *State v. Thomas*, 329 N.C. 423, 439, 407 S.E.2d 141, 151 (1991), *cert. denied*, — U.S. —, 139 L. Ed. 2d 41 (1997).

In making this argument, Blackwell states that he was denied effective counsel because one of his attorneys had only practiced for a few months and his other attorney—who subsequently was suspended from practice for other disciplinary reasons—walked out of court without reason. Moreover, Blackwell contends that his attorney failed to file proper motions in limine or subpoenas and failed to properly investigate the prior crimes when given notice.

First, we note that the disciplinary proceedings against one of Blackwell's attorneys was of no consequence to our determination on

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this issue. As stated by the United States Supreme Court, “[o]nly rarely will such surrounding circumstances justify a presumption of ineffectiveness independent of counsel’s actual trial performance.” *United States v. Cronin*, 466 U.S. 684, 80 L. Ed. 2d 657 (1984). Moreover, the fact that Blackwell’s other attorney was inexperienced is also of no consequence. Our Supreme Court has stated that “[m]ere inexperience is not sufficient in itself to render the assistance of counsel ineffective, . . . the issue is not how much experience he has had, but how well he acted.” *State v. Poole*, 305 N.C. 308, 312, 289 S.E.2d 335, 338 (1982).

With respect to the attorney’s actual performance, we find that it did not fall below an objective standard of reasonableness and therefore was constitutionally sound. Although it may have been prudent to have filed motions in limine, Blackwell’s attorney nonetheless made the appropriate arguments in court. Moreover, a reading of the transcript demonstrates that he vigorously and competently examined all the witnesses. We therefore find that his conduct was reasonable and reject Blackwell’s final assignment of error.

No prejudicial error.

Judges WALKER and HUNTER concur.

DONNA D. SPENCER, PLAINTIFF v. GEORGE SPENCER, DEFENDANT

No. 98-134

(Filed 20 April 1999)

**1. Divorce— alimony—substantially changed circumstances—
reduced income capacity**

The trial court did not err in finding and concluding that there was a substantial change of circumstances warranting termination of plaintiff’s alimony payments to defendant. The court was particularly aware of plaintiff’s reduced income due to her retirement and specifically found that potential income from a new job was undetermined. The court’s findings were clearly supported by the evidence.

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2. Child Support, Custody, and Visitation— child support—reduced—evidence of income reduction—sufficient

The trial court did not err by decreasing plaintiff's monthly child support obligation based upon its determination of her income and there was sufficient evidence in the record to support the findings concerning her income. An amount alleged by defendant to be rents was described in testimony as a contribution toward household expenses and the court did not abuse its discretion by electing not to view this payment as rental income.

3. Child Support, Custody, and Visitation— attorney fees—child support and alimony—notice—insufficient

The issue of attorney fees was not properly before the trial court in an action involving alimony and child support where defendant moved for attorney fees at the conclusion of trial and submitted an affidavit which revealed his early awareness of his intention to seek attorney fees, but the record reflects no efforts by defendant to notify plaintiff of this intent. Statutory authority providing for attorney fees in modification of child support and alimony actions does not override a party's basic constitutional rights to notice and due process considerations.

4. Child Support, Custody, and Visitation— child support—unilateral reduction—not willful—not contempt

The evidence before the trial court was sufficient to support the conclusion that plaintiff was not in willful contempt of court in her unilateral reduction of child support where she reduced her payments by half when she took full responsibility for supporting one of the couple's two children and filed motions to change the custody of the children and to reduce payments accordingly.

5. Child Support, Custody, and Visitation— child support—modification—authority prior to petition

A child support action was remanded for a determination of the arrearage occurring between the unilateral reduction and the filing of the petition to modify. The trial court lacks authority to modify obligations prior to the filing of the petition.

Appeal by defendant from judgment entered 30 July 1997 by Judge Wayne G. Kimble, Jr., in Onslow County District Court. Heard in the Court of Appeals 5 October 1998.

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*J. Randal Hunter for plaintiff-appellee.**Amy R. Jordan and Laura P. Graham for defendant-appellant.*

HUNTER, Judge.

Briefly, the record reveals that Donna Spencer (plaintiff) and George Spencer (defendant) were married for nineteen years before they obtained a divorce in 1994. Plaintiff was employed by the United States Navy and defendant was the homemaker. Upon their divorce, the couple entered into an agreement whereby defendant received the marital home, primary custody of the two children, monthly child support payments in the amount of \$1,138.00 and monthly alimony payments from plaintiff in the amount of \$800.00. When plaintiff retired from military service in November of 1996, she filed numerous motions seeking to change the custody provisions of the former agreement and to reduce the child support payments accordingly, and to terminate the alimony payments. Defendant responded with a motion to hold plaintiff in contempt of court for unilaterally modifying the amounts of the support payments.

At the hearing on 15 April 1997, the trial court made the following findings of fact concerning plaintiff and defendant's changed circumstances since the original April 1994 order:

7. At the time of the entry of the 21 April 1994, order, the plaintiff was employed as a Lieutenant Commander with the United States Navy, earning \$5,534.00 per month. She had been primarily responsible for the support of the family prior to the separation. The defendant was not employed though the court specifically found that he is able-bodied, capable of working, and is skillful in the use of his hands, including mechanics, carpentry and remodeling.
8. After David [the parties' son] moved in with the plaintiff, she reduced her child support payments from \$1,138.00 per month to \$569.00 per month. She paid \$569.00 per month in child support until February of 1997. For February, March and April of 1997, she paid the sum of \$362.00 per month in child support.
9. The plaintiff retired from the United States Navy on 30 November 1996. When she retired, she was no longer eligible to receive active duty pay. She began to receive her retirement

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pay in December of 1996. The gross amount of the plaintiff's retirement pay is slightly less than \$2,900.00 per month. From that amount, the defendant is entitled to receive approximately \$711.00 pursuant to an equitable distribution order entered in the Onslow County District Court by the Honorable Leonard T. Thagard. Furthermore, approximately \$194.00 is deducted from the plaintiff's retirement each month to pay for a survivor benefit plan that must be maintained for the benefit of the defendant pursuant to Judge Thagard's order. Therefore, the plaintiff's present gross income is approximately \$2,100.00 per month.

10. The plaintiff has recently accepted a job in nursing with Onslow Memorial Hospital. She is able to work at this job "as needed" by the hospital. She is presently going through orientation and is in a probationary status with this employment. As a result, her income is undetermined. If she is able to maintain this employment, she will earn \$15.75 per hour as a nurse with Onslow Memorial Hospital.
11. The plaintiff's income has declined substantially since the entry of the 21 April 1994, court order.
12. The defendant continues to reside in the former marital residence with the younger child of these parties. He spends most of his day, five days a week, at a day care facility known as Children's Castle Day Care. He does "odd jobs" for this facility. Though he testified that he does not keep regular records of the hours that he works for the facility, his hourly rate, or any other method by which he charges for his services, he earns approximately \$400.00 per month from this employment. As set forth above, he receives approximately \$711.00 each month as his share of the plaintiff's military retirement. Therefore, his present, gross monthly income is approximately \$1,100.00 per month.
13. Though the defendant remains able-bodied and capable of full time employment, he has made no serious effort to obtain or keep stable employment. He has investigated the possibility of buying various businesses in Onslow County but he has not followed through with any serious inquiry about any business opportunity. Nevertheless, he is capable of earning an income and supporting himself.

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14. The plaintiff paid alimony to the defendant pursuant to the 21 April 1994, court order, through the month of December, 1996. Beginning in January of 1997, the defendant has received his share of the plaintiff's military retirement either directly from the plaintiff or directly from the government. Therefore, the plaintiff made no alimony payments after December of 1996.
15. Circumstances have changed substantially since the entry of the 21 April 1994, court order. As set forth above, David [the parties' son] moved in with the plaintiff in February of 1995, and has since reached the age of majority. The plaintiff has retired from the United States Navy and has no stable income except for her Navy retirement. The defendant is receiving his share of the plaintiff's military retirement and has otherwise made no serious attempt to generate any income. The circumstances of this case are appropriate for the modification of the 21 April 1994, court order.

Based on these findings, the court made the following conclusions:

2. Circumstances have changed substantially since the entry of the 21 April 1994, court order. This change of circumstances is within the contemplation of North Carolina General Statutes 50-13.7 and 50-16.9 and justifies a reduction in the plaintiff's child support obligation to the defendant and the elimination of her alimony obligation to the defendant.
3. The appropriate amount of child support to be paid by the plaintiff to the defendant, under North Carolina General Statute 50-13.4 and North Carolina Child Support Guidelines, is \$350.00 per month plus one half of the uninsured medical, dental, and orthodontal expenses incurred on behalf of Diana Michelle Spencer [the parties' daughter].
4. The plaintiff has not willfully violated the prior orders of this court and is not in contempt of court. The defendant is not entitled to collect any arrearage of child support or alimony of any kind.

[1] Defendant, in his first assignment of error, contends that the trial court erred in finding and concluding that there was a substantial change of circumstances warranting a termination in plaintiff's alimony payments. Defendant bases his argument on the court's

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alleged failure to consider plaintiff's potential income from her new post-retirement employment. We disagree.

"As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). "The power of the court to modify an alimony order is not power to grant a new trial or to retry the issues of the original hearing, but only to adapt the decree to some distinct and definite change in the financial circumstances of the parties." *Cunningham v. Cunningham*, 345 N.C. 430, 436, 480 S.E.2d 403, 406 (1997).

Here, from the findings listed above, it is apparent that the trial court carefully considered the changed circumstances occurring between the original order (21 April 1994) and the date of the hearing (15 April 1997) and found substantially changed circumstances, especially concerning plaintiff's reduced income capacity. The court was particularly aware of plaintiff's much reduced income from the United States Navy due to her recent retirement and, specifically, found that plaintiff's potential income from the job at Onslow County Memorial Hospital was "undetermined." Plaintiff testified that, should she survive the five-week orientation process, she was only assured of two days of work per month and had no idea of whether or not she would be able to work more often. Based on this testimony, the trial court determined that plaintiff's potential income from Onslow County Memorial Hospital was "undetermined." This finding and conclusion may, of course, be revisited by the court upon proper motion. It is interesting to note that, during the hearing, defendant agreed with this conclusion when he argued:

Obviously it is too early at this time to find out what her income is and what her child support should be. I would just simply argue and would ask the Court to reduce her child support temporarily and maybe set it for review in 90 days for some reasonable period of time so that we could properly calculate what this child is entitled to.

The lower court's conclusions must be supported by specific findings of fact. "If the findings are supported by competent evidence, they are conclusive on appeal even though the evidence would support contrary findings." *Cornelison v. Cornelison*, 47 N.C. App. 91, 93, 266 S.E.2d 707, 709 (1980). Therefore, "[w]hile the sufficiency of the findings to support the award is reviewable on appeal, the weight to

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be accorded the evidence is solely for the trier of the facts.” *Id.* (citations omitted). Here, since the court’s findings are clearly supported by the evidence, defendant’s contentions are without merit.

[2] Likewise, defendant contends the trial court erred in decreasing plaintiff’s monthly child support obligation based on its failure to properly determine plaintiff’s income. Defendant contends that the court excluded from her total income her income from Onslow County Memorial Hospital and \$125.00 she received monthly in alleged rents. Again, we disagree.

We have already stated that plaintiff’s potential income from her new nursing position at Onslow County Memorial Hospital can best be determined once she concluded her orientation process and had worked long enough to determine an average monthly income. Defendant claims plaintiff testified she regularly received \$125.00 in rent from their son’s girlfriend who had moved in with them. However, our review of the record indicates plaintiff actually testified that the payment was a contribution towards household expenses. The lower court elected not to view this payment as rental income and we see no abuse of its discretion in this decision. Again, there is sufficient evidence in the record to support the trial court’s findings concerning plaintiff’s income in paragraph 10 of the 15 April 1997 order. This assignment of error is overruled.

[3] In his third assignment of error, defendant asserts that the trial court erred in failing to address his claim for attorney fees when the evidence clearly supported such an award. Defendant states in his brief that “[a]t the conclusion of the trial in the instant case, defendant moved for attorney fees and submitted an Affidavit showing the expenses he had incurred.”

The affidavit, prepared prior to the hearing on 15 April 1997 and submitted by defendant in support of his oral motion at the end of the hearing, reveals defendant’s early awareness of his intention to seek attorney fees, yet, the record reflects no efforts by defendant to notify plaintiff of these intentions. In response to plaintiff’s motions for change of custody, termination of child support and for a reduction in child support, defendant filed two orders for the plaintiff to appear and show cause for failure to comply with support orders. He did not file a motion seeking attorney fees. While there is statutory authority providing for attorney fees in both modification of child support actions (N.C. Gen. Stat. § 50-13.6 (1995)) and alimony actions (N.C. Gen. Stat. § 50-16.4 (1995)), this authority does not override a party’s

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basic constitutional rights to notice and due process considerations. Defendant failed to file proper pleadings in the cause, therefore, the issue of attorney fees was not properly before the lower court. This assignment of error is without merit.

[4] In his final assignment of error, defendant contends that the trial court erred in not holding plaintiff in contempt of court for unilaterally reducing her child support payments without first obtaining a court order.

Plaintiff acknowledged in her testimony that, beginning in February of 1995, she reduced her court-ordered monthly child support payment from \$1,138.00 to \$569.00. The court had previously determined a monthly payment of \$1,138.00 based on the couple's relative incomes and the fact that both children resided with defendant. When the older child moved in with plaintiff in February 1995, plaintiff elected to reduce her child support payment by half and continued to send payments to defendant for the child still remaining with him. Soon thereafter, on 3 April 1995, plaintiff filed a motion in the district court seeking a court order modifying her child support payment. This motion was not heard until 15 April 1997—over two years later.

N.C. Gen. Stat. § 5A-21(a) (1986) provides, in pertinent part, that: "Failure to comply with an order of a court is a continuing civil contempt as long as: . . . (3) [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order." "Although the language of section 5A-21(a) does not expressly so state, it has nevertheless been held that one may not be held in civil contempt for failure to comply with an order of the court unless his failure be willful." *Powers v. Powers*, 103 N.C. App. 697, 705, 407 S.E.2d 269, 274-75 (1991) (evidence sufficient to support lower court's conclusion that defendant was in contempt of court for failing to comply with consent judgment because he unreasonably withheld his consent to his daughter's choice of colleges); *see also Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981) (evidence sufficient to support lower court's ruling that defendant was not in willful contempt of court by deducting from his child support payments made to plaintiff amounts representing voluntary expenditures for needs of the parties' children while they were visiting him); *Jarrell v. Jarrell*, 241 N.C. 73, 84 S.E.2d 328 (1954) (evidence sufficient to support lower court's determination that defendant was not in contempt of court for his good faith assumption that he was not required to pay support for his oldest child upon her

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marriage and for his youngest child during the times that child resided with him). A finding of willful disobedience requires “an ability to comply with the court order and a deliberate and intentional failure to do so.” *Bennett v. Bennett*, 21 N.C. App. 390, 393, 204 S.E.2d 554, 556 (1974).

In the case *sub judice*, plaintiff reduced her child support payments by half when she took full responsibility for supporting one of the couple’s two children. Plaintiff followed up her actions by filing motions with the court to change the custody of her children and to reduce the child support payments accordingly. During this time, the record reflects no failure on plaintiff’s part to make the monthly payments on behalf of the child still residing with defendant.

Based on the above, we uphold the lower court’s determination that plaintiff’s decision to divide her child support payment by half when her oldest child moved in with her did not constitute a deliberate or intentional attempt by plaintiff to violate the court’s order. We find that the evidence before the lower court was sufficient to support the conclusion that defendant was not in willful contempt of court.

[5] Finally, we look to whether defendant is entitled to any arrearages in child support payments. We have previously held that the “trial court has the discretion to make a modification of a child support order effective from the date a petition to modify is filed as to support obligations that accrue after such date.” *Mackins v. Mackins*, 114 N.C. App. 538, 546-47, 442 S.E.2d 352, 357, *cert. denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). We hold that the *Mackins* ruling applies to reductions as well as increases in support payments. Thus, the trial court had the authority to modify the child support order effective to the date the petition was filed—3 April 1995. We find no precedent granting the trial court the authority to modify support obligations prior to the filing of the petition to modify. Therefore, defendant is entitled to any arrearages accruing between the time plaintiff unilaterally reduced her child support payments in February of 1995 and 3 April 1995, the date the petition was filed. This case is remanded for a determination of the child support arrearages accruing between February 1995 and 3 April 1995.

Affirmed in part; reversed in part and remanded.

Chief Judge EAGLES and Judge LEWIS concur.

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[133 N.C. App. 47 (1999)]

STATE OF NORTH CAROLINA, PLAINTIFF v. ROY ELLIS BAGGETT, DEFENDANT

STATE OF NORTH CAROLINA, PLAINTIFF v. ED PENUEL, DEFENDANT

No. COA98-636

(Filed 20 April 1999)

1. Appeal and Error— assignments of error—legal basis for error required

The State's appeal was subject to dismissal where the assignment of error failed to set forth the legal basis on which the State contended the trial court erred; however, the State included in the notice of appeal the legal basis on which it challenged the ruling and, since the appellees were informed of the issues to be raised and were thereby allowed to protect their interests, the appeal was reviewed under Appellate Rule 2.

2. Zoning— adult business—extraterritorial jurisdiction

The trial court correctly dismissed criminal charges of operating an adult business within 1,000 feet of a residence in violation of a county ordinance where the business was outside the city limits but within the City's extraterritorial jurisdiction and it was not clear whether the county ordinance applied outside Jacksonville's city limits or outside Jacksonville's extraterritorial jurisdiction. Where the language of an ordinance is ambiguous, it must be strictly construed.

Judge LEWIS dissenting.

Appeal by plaintiff from order filed 27 February 1998 by Judge Russell J. Lanier, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 23 February 1999.

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

Lanier & Fountain, by Keith E. Fountain, for defendant-appellees.

GREENE, Judge.

The State appeals from the superior court's order affirming the district court's dismissal of criminal charges against Roy Ellis Baggett and Ed Penuel (collectively, Defendants).

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Defendants own and operate Tobie's Lounge, a topless bar located less than one mile outside the city limits of Jacksonville, North Carolina, in Onslow County. On 26 August 1997, Defendants were each charged with "knowingly and intentionally operat[ing] an adult business known as Tobie's Lounge within 1,000 feet of a building used as a residence" in violation of Onslow County Ordinance § 8-205. Defendants each filed a motion to dismiss the charges on 30 September 1997. The district court allowed Defendants' motions to dismiss on 19 November 1997, and the State gave notice of appeal to the superior court. On 27 February 1998, the superior court affirmed dismissal of the charges against Defendants. The State appeals from the superior court's order.

[1] Before addressing the merits of the State's appeal, we note that our scope of review on appeal is confined to properly presented assignments of error. *Rogers v. Colpitts*, 129 N.C. App. 421, 499 S.E.2d 789 (1998). Rule 10 of the Rules of Appellate Procedure requires that "[e]ach assignment of error shall . . . state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). One purpose of this rule is to "identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position." *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988).

In this case, the State's only assignment of error is: "The trial court acted incorrectly as a matter of law in affirming the District Court's ruling dismissing the above referenced charges." The State failed to set forth in its assignment of error the legal basis on which it contends the trial court erred, and has thereby subjected this appeal to dismissal. *See Rogers*, 129 N.C. App. at 423, 499 S.E.2d at 790 (dismissing appeal for failure to state the legal basis on which error was assigned). The State did include, in its Notice of Appeal to this Court, the legal basis on which it challenged the trial court's ruling, noting its contention that the trial court erred "because the Ordinance in question is a police power ordinance The city of Jacksonville has no jurisdiction to enact police power ordinances in [its extraterritorial jurisdiction]. Therefore, Tobie's Lounge is not located within the [county] 'exclusive of the jurisdiction of any incorporated municipality.'" Although including this information in the notice of appeal does not cure the State's inadequate assignment of error, it did inform the appellees of the issues to be raised and thereby allowed the appellees to protect their interests by assessing

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the sufficiency of the proposed record on appeal. Accordingly, in our discretion, we review the merits of the State's appeal. N.C.R. App. P. 2 (providing that this Court may "suspend or vary the requirements or provisions of any of these rules" in order to "prevent manifest injustice" or "expedite decision in the public interest").

[2] For purposes of this appeal, we assume that Tobie's Lounge violates the Onslow County adult business ordinance. Accordingly, the only issue is whether the Onslow County adult business ordinance applies to businesses, such as Tobie's Lounge, located within the area one mile outside Jacksonville's city limits.

Article 6 ("Delegation of Police Powers") of Chapter 153A ("Counties") provides: "A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances." N.C.G.S. § 153A-121(a) (1991). The county's authority under Article 6 extends "to any part of the county not within a city." N.C.G.S. § 153A-122 (1991). It follows that Onslow County has statutory authority to enact an ordinance regulating all businesses located outside the city limits of Jacksonville.¹ The remaining question is whether Onslow County did so. *See Town of Lake Waccamaw v. Savage*, 86 N.C. App. 211, 356 S.E.2d 810 (holding that town was authorized to exercise extraterritorial jurisdiction but had not done so), *disc. review denied*, 320 N.C. 797, 361 S.E.2d 89 (1987).

The Onslow County adult business ordinance, enacted in 1992, provides:

Sec. 8-201. Authority and jurisdiction.

The provisions of this article are adopted by the county board of commissioners under authority granted by the General Assembly of the State of North Carolina, in Chapter 153A, (45-50)

1. Previous cases of this Court have established that Onslow County enacted its adult business ordinance pursuant to its Chapter 153A, Article 6 police power jurisdiction. *See Maynor v. Onslow County*, 127 N.C. App. 102, 106, 488 S.E.2d 289, 292, *appeal dismissed*, 347 N.C. 268, 493 S.E.2d 458, and *cert. denied*, 347 N.C. 400, 496 S.E.2d 385 (1997); *Onslow County v. Moore*, 129 N.C. App. 376, 382, 499 S.E.2d 780, 785, *disc. review denied*, 349 N.C. 361, — S.E.2d —, — (1998). In addition to this statutory authority to impose its ordinances outside the Jacksonville city limits, the Jacksonville city council specifically adopted a resolution granting Onslow County the authority to "enforc[e] its adult business ordinance" against businesses located within Jacksonville's extraterritorial jurisdiction, the area one mile outside Jacksonville's city limits. Jacksonville, N.C., *Res.* 96-03, Regular Sess. (1996).

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and further Article VI of Chapter 153A, Section 135 of the General Statutes. From and after the effective date hereof, this article shall apply to every building, lot, tract or parcel of land *within the county exclusive of the jurisdiction of any incorporated municipality* (as herein stated)

Onslow County, N.C., *Code* art. VII, § 8-201 (1992) (emphasis added).

In construing ordinances, we adhere to fundamental principles of statutory construction. *Hayes v. Fowler*, 123 N.C. App. 400, 404, 473 S.E.2d 442, 445 (1996). Where the language employed is clear and unambiguous, there is “no room for judicial construction.” *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984). Where the language employed is ambiguous, however, we must strictly construe language creating a criminal offense. *State v. Clemmons*, 111 N.C. App. 569, 572, 433 S.E.2d 748, 750, *cert. denied*, 335 N.C. 240, 439 S.E.2d 153 (1993); *see also Davidson County v. City of High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987) (“Statutorily granted powers are to be strictly construed.”).

In this case, the Onslow County adult business ordinance explicitly applies only to businesses located within Onslow County “exclusive of the *jurisdiction*” of Jacksonville. This phrase is ambiguous because Jacksonville has “extraterritorial jurisdiction” over areas within one mile of its city limits. *See* N.C.G.S. § 160A-360(a) (Supp. 1998) (providing that an incorporated municipality may extend its jurisdiction outside its borders by one to three miles); N.C.G.S. § 160A-193 (1994) (giving municipalities “authority to summarily remove, abate, or remedy everything in the city limits, or within one mile thereof, that is dangerous or prejudicial to the public health or public safety”). It is therefore unclear whether the Onslow County adult business ordinance applies to businesses outside Jacksonville’s city limits, or whether it applies only to those businesses outside Jacksonville’s extraterritorial jurisdiction. Accordingly, strictly construing Onslow County’s adult business ordinance as written, it does not apply to businesses located within Jacksonville’s extraterritorial jurisdiction. Because Tobie’s Lounge is located within Jacksonville’s extraterritorial jurisdiction, it follows that the trial court correctly dismissed the charges against Defendants.

Affirmed.

Judge HORTON concurs.

Judge LEWIS dissents.

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Judge LEWIS dissenting.

The parties have stipulated that Tobie's Lounge is a business of the type regulated by Section 8-205 of the Onslow County Code. The ordinance says it is adopted "under authority granted by . . . Chapter 153A," and that it applies to any "land within the county exclusive of the jurisdiction of any incorporated municipality (*as herein stated*)." Onslow County Code § 8-201 (1992) (emphasis added). The parenthetical indicates that "jurisdiction" refers to jurisdiction under police powers, the "herein stated" Chapter 153A at issue. There is no mention anywhere in the ordinance of any planning or zoning statutes; rather, the ordinance cites only police power statutes. Furthermore, although the City's resolution titled, "A RESOLUTION ALLOWING ONSLOW COUNTY TO ENFORCE ITS ADULT BUSINESS ORDINANCE WITHIN THE CITY'S ONE-MILE EXTRATERRITORIAL JURISDICTION," is not dispositive of the issue, it provides further notice to defendants that the County ordinance applies to their establishment. Finally, section 8-202 clarifies that the ordinance is intended to regulate adult businesses "located in the county." Onslow County Code § 8-202 (1992).

Accordingly, I disagree with the majority's reasoning that the ordinance is vague in its use of the term "jurisdiction" and that defendants might lack notice of the applicability of this ordinance to their business. Courts presume that defendants know the law, *see State v. Rose*, 312 N.C. 441, 446, 323 S.E.2d 339, 342 (1984), and this specific ordinance was adopted pursuant to County police powers according to our prior case law. *See Onslow County v. Moore*, 129 N.C. App. 376, 382, 499 S.E.2d 780, 785, *disc. review denied*, 349 N.C. 361, — S.E.2d — (1998); *Maynor v. Onslow County*, 127 N.C. App. 102, 106, 488 S.E.2d 289, 292, *cert. denied*, 347 N.C. 400, 496 S.E.2d 385 (1997). When the ordinance refers to jurisdiction "as herein stated," and no mention ever is made to planning or zoning statutes, or any statutes other than police power statutes, "jurisdiction" can mean only jurisdiction under the County's police powers. "Jurisdiction" in the ordinance is not a vague term.

The majority insinuates that these defendants might reasonably have believed they were operating their topless bar outside the reach of Onslow County police powers to regulate them *and* outside the City's power to regulate since they were within the City's jurisdiction only for zoning and planning purposes. I cannot believe that these business owners operated under the assumption that they had found a strip club utopia where no municipal force regulated for the health,

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safety, and welfare of the people. This Court had provided defendants notice that *this* County ordinance regulated topless bars such as theirs, and that it was enacted pursuant to the County's police powers. There is no ambiguity in the term "jurisdiction" in the County ordinance, and I vote to reverse and remand for trial.

I respectfully dissent.

CHARLES J. BROWN, M.D., PLAINTIFF v. RANDALL A. ROTH, MARY JO ROTH, LAKE PROPERTIES LIMITED, H.B. PETHEL COMPANY, INCORPORATED AND AMERISPEC, DEFENDANTS

No. COA98-751

(Filed 20 April 1999)

Vendor and Purchaser—realtor—square footage—reliance on appraisal

Summary judgment was improperly granted on claims for breach of fiduciary duty and negligent misrepresentation against a realtor arising from plaintiff's purchase of a house with fewer square feet than represented where the realtor had relied upon the square footage in an appraisal. There was a genuine issue of material fact as to whether defendant exercised reasonable care in obtaining and communicating to plaintiff the heated square footage; a real estate agent's reliance on a reliable appraiser for computation of square footage is evidence of the agent's compliance with her standard of care but is not conclusive. Summary judgment on fraud and unfair and deceptive trade practices claims was proper because there was no evidence that defendant knew it had communicated false square footage information.

Appeal by plaintiff from order filed 23 March 1998 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 February 1999.

Pinto Coates Kyre & Brown, PLLC, by David L. Brown and Martha P. Brown, for plaintiff-appellant.

Waggoner, Hamrick, Hasty, Monteith and Kratt, PLLC, by S. Dean Hamrick and John W. Bowers, for defendant-appellee Lake Properties Limited.

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GREENE, Judge.

Charles J. Brown (Plaintiff) appeals from the trial court's granting of Lake Properties Limited's (Defendant) motion for summary judgment.

In June of 1993, Randall and Mary Roth (the Roths) owned a house and property (collectively, the Property) located in Huntersville, North Carolina, and hired Defendant as their real estate agent to sell the Property. As a result of this decision, Lori Ivester (Ms. Ivester), a licensed real estate agent and employee of Defendant, was responsible for obtaining information from the Roths, and preparing a multiple listing form. On the multiple listing form, Ms. Ivester represented, among other things, that the Roths' house contained 3,484 square feet of heated living area.¹ Ms. Ivester received the information regarding square footage from an appraisal performed, for the Roths, by H.B. Pethel Company, Inc. (Pethel), a well known and highly respected appraiser. Ms. Ivester did not verify the information in the Pethel appraisal independently prior to preparing the multiple listing form.

Also in the summer of 1993, Defendant hosted an open house at the Property to attract potential buyers, which Plaintiff attended. At the open house, Plaintiff met Earl Crosland (Mr. Crosland), another employee of Defendant and a licensed real estate agent, who showed Plaintiff the Property. At the open house, Plaintiff received a copy of the multiple listing form prepared by Ms. Ivester, which represented the Roths' house as having 3,484 heated square feet. Shortly after the open house, Plaintiff contacted and met with Mr. Crosland about his interest in making an offer to purchase the Property. Mr. Crosland informed Plaintiff he could represent Plaintiff in the purchase of the Property as the buyer's agent.

On 25 September 1993, Plaintiff and Defendant entered into a "Dual Agency Agreement," wherein they agreed Defendant would act "as agent for both [the Roths] and [Plaintiff]" with respect to the sale and purchase of the Property. The record reveals that this "Dual Agency Agreement" was signed by Plaintiff and Defendant. The signature line for the seller on this form agreement is blank. There is no indication in this record that the Roths consented, orally or in writing, to permit Defendant to serve as a dual agent.

1. It is not disputed that the Roths' house is complex in design, not a simple rectangular house, and square footage is difficult to ascertain.

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On 1 October 1993, Plaintiff offered to purchase the Property for \$565,000.00, and his offer was accepted by the Roths on 3 October 1993. The closing on the Property was held on 12 November 1993 and Defendant received, from the Roths, a 5 percent commission totaling \$28,250.00.

In December of 1995, in an effort to take advantage of lower interest rates, Plaintiff decided to refinance the Property, and had an appraisal performed by Varnadore & Associates (Varnadore). The Varnadore appraisal indicated the Roths' house contained only 3,108 heated square feet, nearly 400 square feet less than the amount represented on the multiple listing form. It is not disputed that the 3,108 figure represents the correct heated square footage of the Roths' house.

On 14 November 1996, Plaintiff filed a complaint against the Roths, Defendant, Pethel, and Amerispec, but subsequently dismissed all parties except Defendant voluntarily. Plaintiff seeks relief from Defendant under four claims: (1) breach of fiduciary duty; (2) negligent misrepresentation; (3) fraud; and (4) unfair and deceptive trade practices. On 14 January 1997, Defendant filed its answer, which contains a cross-claim for indemnity against Pethel for any erroneous representations of square footage contained in Pethel's appraisal. Defendant moved for summary judgment, and that motion was granted as to all claims in an order filed 23 March 1998.

In its order granting Defendant's motion for summary judgment, the trial court concluded, *inter alia*, that Defendant, as a realtor, "could reasonably rely on the measurements of a house by a trained and professional appraiser who had a good reputation for appraisals in [the] general area in which the house was located."

The dispositive issue is whether genuine issues of material fact exist as to Defendant's breach of duty to accurately report the square footage of the Roths' house.

A real estate agent has the fiduciary duty "to exercise reasonable care, skill, and diligence in the transaction of business [e]ntrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so." 12 C.J.S. *Brokers* § 53, at 160 (1980). "The care and skill required is that generally possessed and exercised by persons engaged in the same business." *Id.*, § 53, at 161. This duty requires the agent to "make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reason-

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able diligence” and likely to affect the principal. *Id.*, § 57, at 172; James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 8-9, at 243 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994) [hereinafter *Webster's Real Estate Law in North Carolina*] (agent has duty to disclose all facts he “knows or should know would reasonably affect the judgment” of the principal). The principal has “the right to rely on his [agent's] statements,” and is not required to make his own investigation. 12 C.J.S. *Brokers* § 57, at 172.

“Generally, a broker must act solely for the benefit of his principal, who first employed him, and may not undertake to represent an interest adverse to the principal.” *Id.*, § 62, at 187. A broker, however, may act as the agent of two parties with adverse interest, “with the full knowledge and consent of both.” *Id.*, § 62, at 189; 12 Am. Jur. 2d *Brokers* § 112 (1997) (absent an agreement between the seller and the purchaser, “a broker may not act as agent for both the seller and purchaser in the same transaction”). A broker acting as a dual agent “may still be liable in damages to one of the parties for a breach of duty to such party by reason of his acts in the course of the transaction.” 12 C.J.S. *Brokers* § 62, at 189. In other words, the dual agent “owes all fiduciary and other agency duties to both principals.” *Webster's Real Estate Law in North Carolina* § 8-9, at 243.

In this case, there is some question as to whether there exists a lawful dual agency, as there is no indication in this record that the Roths agreed that Defendant could serve as both an agent for the seller and for the purchaser. In any event, it is not disputed that Defendant and Plaintiff entered into a contract wherein Defendant agreed to act as Plaintiff's agent in the purchase of the Property. Thus Defendant had a fiduciary obligation to make a full and truthful disclosure to Plaintiff of all material facts, with regard to the Property, known by it or discoverable with reasonable diligence. The heated square footage of the Roths' house was a material fact and was discoverable by Defendant with reasonable diligence² and thus should have been disclosed by Defendant to Plaintiff.

Defendant does not contest its duty to disclose to Plaintiff the square footage of the Roths' house. It nonetheless argues there was no breach of its duty to Plaintiff. In other words, Defendant contends it was reasonable for it to rely on the square footage computation made by the Roths' appraiser and the communication of that number

2. There is no dispute that Defendant had access to the Roths' house, as it was the selling agent for the Roths.

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to Plaintiff discharged Defendant's duty to Plaintiff. We agree that a real estate agent's reliance on a reliable appraiser for the computation of the square footage of a house, when that agent represents the buyer, is some evidence of that agent's compliance with his standard of care. It is not, however, conclusive as a matter of law. Indeed, the North Carolina Real Estate Commission (Commission) suggests that real estate agents "are expected to personally measure all properties they list and accurately calculate their square footage. They must not rely on tax records, information from a previous listing, or representations of the seller or others." N.C. Real Estate Comm'n, *Residential Square Footage Guidelines* 5 (1999). The Commission further suggests that "where a complex, odd-shaped dwelling is involved, agents should advise the seller (or buyer, if appropriate) to seek the assistance of a State-licensed or State-certified appraiser or an experienced engineer or architect in calculating the square footage." *Id.* Thus genuine issues of material fact exist as to whether Defendant exercised reasonable care in obtaining and communicating to Plaintiff the heated square footage of the Roths' house, and summary judgment was not proper on the breach of fiduciary duty and negligent misrepresentation claims. N.C.G.S. § 1A-1, Rule 56(c) (1990) (summary judgment not appropriate if genuine issues of material fact exists); *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 595-96, 394 S.E.2d 643, 648 (1990) (the question of "reasonable care" depends upon the circumstances of each case and is usually a question for the jury), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991); *Helms v. Holland*, 124 N.C. App. 629, 635, 478 S.E.2d 513, 517 (1996) (negligent misrepresentation requires the failure to exercise reasonable care and competence in obtaining and communicating information). Because there is no evidence in this record that Defendant knew it had communicated false square footage information to Plaintiff, summary judgment on the fraud and unfair and deceptive trade practices claims was proper.³ *Forbes*, 99 N.C. App. at 594, 394 S.E.2d at 647 (fraud requires showing that misrepresentation was made with knowledge of its falsity).

In so holding, we reject Defendant's argument that *Marshall v. Keaveny*, 38 N.C. App. 644, 248 S.E.2d 750 (1978), requires we affirm the trial court. In the *Marshall* case, the purchaser's false misrepresentation claim, filed against the seller, was dismissed because the

3. Plaintiff, in support of his unfair and deceptive trade practices claim, only argues that it should survive summary judgment because there is evidence of fraud on the part of Defendant. Because we hold there is no evidence of fraud, it follows the unfair and deceptive trade practices claim also must fail.

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purchaser had access to the house and could have measured its size. There is no indication, in that case, that the house was complex and difficult to measure. Furthermore, the claim in that case was against the seller, not against the purchaser's agent, who was employed for the sole purpose of assisting the purchaser in purchasing a house, and owed a fiduciary duty of reasonable care and competence to the purchaser.

Affirmed in part, reversed in part, and remanded.

Judges LEWIS and HORTON concur.

ANNETTE ALSTON, PLAINTIFF v. DUKE UNIVERSITY, A CORPORATION, D/B/A DUKE UNIVERSITY MEDICAL CENTER AND/OR DUKE UNIVERSITY OB/GYN CLINIC; PRIVATE DIAGNOSTIC CLINIC, L.L.P.; CHAPEL HILL OBSTETRICS & GYNECOLOGY, P.A.; VIVIAN E. CLARK, M.D.; AND KELLY ALEXANDER, M.D., DEFENDANTS

No. COA98-677

(Filed 20 April 1999)

1. Discovery— schedule—modification—discretion of court

The trial court was well within its discretion in a medical malpractice action when it denied amendment of a discovery scheduling order. Plaintiff's contention that her proposed schedule would not result in delay was speculative at best.

2. Trials— voluntary dismissal—summary judgment not submitted—case not rested

A summary judgment order for defendants in a medical malpractice action was vacated where the plaintiff's attorney made every effort to have the court rule on her motion to amend a discovery scheduling order prior to the court hearing defendants' summary judgment motions and attempted to take a voluntary dismissal after the motion for a new schedule was denied. Plaintiff had not submitted the issue of summary judgment to the court for determination and is not deemed to have rested her case at that point.

Appeal by plaintiff from order filed 2 December 1997 by Judge Henry V. Barnette, Jr. in Durham County Superior Court. Heard in the Court of Appeals 16 March 1999.

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[133 N.C. App. 57 (1999)]

Perry, Perry & Perry, P.A., by Robert T. Perry and Matthew M. Cook, for plaintiff-appellant.

Moore & Van Allen, PLLC, by William E. Freeman, for defendant-appellees Duke University Medical Center, Private Diagnostic Clinic, L.L.P., and Kelly Alexander, M.D.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Deanna L. Davis, for defendant-appellees Chapel Hill Obstetrics & Gynecology, P.A., and Vivian E. Clark, M.D.

GREENE, Judge.

Annette Alston (Plaintiff) appeals from the trial court's order denying Plaintiff's motion to amend the discovery scheduling order and granting summary judgment for Duke University, Private Diagnostic Clinic, Chapel Hill Obstetrics & Gynecology, P.A., Vivian E. Clark, M.D., and Kelly Alexander, M.D. (collectively, Defendants).

Plaintiff filed her medical malpractice complaint on 16 January 1997,¹ and Defendants filed answers during February and March of 1997. On 3 July 1997, a consent order was entered by the trial court scheduling discovery. Pursuant to that order, Plaintiff was to designate all expert witnesses she intended to call at trial by 1 August 1997, and to have these expert witnesses available for deposition by 1 October 1997. Defendants were required to designate all expert witnesses they intended to call at trial by 1 November 1997, and to have them available for deposition by 1 January 1998. All discovery was to be completed by 1 March 1998, in order to provide "a period of thirty (30) days prior to trial during which no discovery or depositions will be taken so that the parties can prepare for the trial without being hampered by discovery or depositions." The parties consented to "confer with the Court to schedule this case for trial sometime after April 1, 1998."

Plaintiff named one expert witness, Orlan Vincent Wade Masters, M.D. (Dr. Masters), and he was deposed by Defendants pursuant to the terms of the discovery scheduling order. Following Dr. Masters' deposition, Defendants filed motions for summary judgment, contending Dr. Masters was unqualified to testify at trial as an expert

1. Plaintiff initially named Durham County Hospital Corporation as an additional defendant, but voluntarily dismissed her claims against Durham County Hospital Corporation with prejudice on 13 November 1997.

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witness, and contending Plaintiff had been contributorily negligent as a matter of law. Plaintiff then filed a motion to amend the discovery scheduling order so she could name an additional expert witness.

On 1 December 1997, a hearing was held before the trial court on both Plaintiff's and Defendants' motions. At that hearing, Plaintiff's attorney informed the trial court that "our motion [to amend the discovery scheduling order] has a direct bearing on the defense motion for summary judgment, that's why we wish to be heard first." Plaintiff contended the motion to amend was required under Rule 26 because it would not result in delay of the trial. Defendants contended that amending the discovery scheduling order was within the discretion of the trial court and should not be allowed. Then, with the court's permission, Defendants argued their summary judgment motions. Plaintiff's attorney, instead of arguing in opposition to Defendants' summary judgment motions, stated to the trial court:

I think that the defense is really focusing on the wrong issue. We do want our motion to amend the consent discovery order heard through because it has a direct bearing on, as I think you understand, basically all of their arguments for their summary judgment motion. It is all based on their opinion that Dr. Masters is not qualified under Rule 702 as an expert witness in this case. And we believe that Dr. Masters does qualify as an expert witness and would be qualified in a court of law.

However, that is not the issue that we're trying to decide right now. What we need to decide first, is whether or not plaintiff should be allowed to amend [the] discovery scheduling order and designate an additional expert witness. If the plaintiff is going to be allowed to do that as plaintiff, I believe, is allowed to, under the Rules of Civil Procedure, then all of these arguments that they're making really are premature and should go out the window because plaintiff has and can designate an expert witness who will qualify and will not have the same problems that they have with respect to Dr. Masters in regards to his, you know, not performing the operation personally, you know, in the past twenty-five years. And then their objections related to, you know, the failure to qualify as an expert witness do not arise. And so we really need to have that issue heard first before we really go on to address the other issues that they're raising with regards to their summary judgment motion.

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The trial court then asked Plaintiff's attorney: "What about their argument that your client was contributorily negligent as a matter of law?" Plaintiff's attorney responded: "Well, Your Honor, there again it focuses on the wrong issue." He then proceeded to respond to the trial court's question, and afterwards stated:

Again, Your Honor, I'm resisting responding to these allegations from the defendants before I get the ruling on whether or not we're going to be allowed to amend the discovery order. And I do believe that these are separate, independent motions because if we're going to be allowed to amend, then much of what they're saying, if not all of what they're saying, is going to not be applicable right now.

And so, if you're going to deny [Plaintiff's] motion [to amend the discovery scheduling order], then there is a whole host of responses to be made to their motions, I suppose.

The trial court then orally denied Plaintiff's motion to amend the discovery scheduling order. Plaintiff's attorney immediately stated: "[I]n light of that ruling . . . we feel that the plaintiff has no choice but to enter into a voluntary dismissal of this action without prejudice against defendants in this case." Defendants contended Plaintiff had argued against summary judgment, and had therefore rested her case prior to seeking voluntary dismissal. The trial court agreed, and granted Defendants' motions for summary judgment.

The issues are whether: (I) the trial court erred in denying Plaintiff's motion to amend the discovery scheduling order; and (II) Plaintiff rested her case prior to seeking voluntary dismissal.

I

[1] Rule 26 of our Rules of Civil Procedure sets forth general discovery guidelines. *See* N.C.G.S. § 1A-1, Rule 26 (1990). In medical malpractice actions, the trial court shall:

Establish by order an appropriate discovery schedule designated so that, unless good cause is shown at the conference for a longer time, and subject to further orders of the court, discovery shall be completed within 150 days after the order is issued; nothing herein shall be construed to prevent any party from utilizing any procedures afforded under Rules 26 through 36, so long as trial or any hearing before the court is not thereby delayed

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N.C.G.S. § 1A-1, Rule 26(f1)(3). Orders involving discovery matters are ordinarily within the trial court's discretion. *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480, *disc. review denied*, 293 N.C. 589, 239 S.E.2d 264 (1977).

In this case, Plaintiff contends Rule 26(f1) required the trial court to allow an amendment to the discovery scheduling order because Plaintiff had proposed a schedule with the same ultimate deadline as was contained within the original discovery scheduling order. Plaintiff's contention that no delay would result, however, is speculative at best. Although Plaintiff's proposed schedule is presumably feasible for Plaintiff, it may not be feasible for Defendants, who would need to schedule depositions of any new experts Plaintiff named. Accordingly, the trial court was well within its discretion to deny amendment of the discovery scheduling order in this case.

II

[2] Prior to the adoption of Rule 41, a plaintiff could take a voluntary nonsuit as a matter of right "at any time before the verdict" if the defendant had asserted no counterclaim and had demanded no affirmative relief. *McCarley v. McCarley*, 24 N.C. App. 373, 375, 210 S.E.2d 531, 532 (1975), *rev'd in part on other grounds*, 289 N.C. 109, 221 S.E.2d 490 (1976) (expressly agreeing with the Court of Appeals' Rule 41 holding). Rule 41(a)(1) was initially "patterned closely upon the cognate Federal Rule and provided that an action . . . might be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment." *Id.* at 376, 210 S.E.2d at 533. Rule 41 was amended prior to its effective date, however, to allow voluntary dismissal by a plaintiff "at any time before the plaintiff rests his case." *Id.*; N.C.G.S. § 1A-1, Rule 41(a)(1).

For purposes of summary judgment motions, this Court holds that the record must show that plaintiff has been given the opportunity at the hearing to introduce any evidence relating to the motion and to argue his position. *Having done so and submitted the matter to the [trial court] for determination*, plaintiff will then be deemed to have "rested his case" for the purpose of summary judgment and will be precluded thereafter in dismissing his case pursuant to Rule 41 during the pendency of the summary judgment motion.

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Wesley v. Bland, 92 N.C. App. 513, 515, 374 S.E.2d 475, 477 (1988) (emphasis added) (holding the plaintiffs could take a voluntary dismissal immediately following the defendants' arguments for summary judgment where the plaintiffs had not yet argued in opposition to the summary judgment motion); *Troy v. Tucker*, 126 N.C. App. 213, 484 S.E.2d 98 (1997) (holding the plaintiff had "rested" her case where summary judgment had been argued by the parties three days before the plaintiff attempted to take a voluntary dismissal).

In this case, Plaintiff's attorney made every effort to have the trial court rule on Plaintiff's motion to amend the discovery scheduling order prior to hearing Defendants' summary judgment motions. Plaintiff's attorney made it clear that he had not made his arguments against summary judgment, and did not want to do so until after the trial court's ruling on Plaintiff's motion. As soon as the trial court ruled on Plaintiff's motion to amend the discovery scheduling order, Plaintiff took a voluntary dismissal of the action without arguing against summary judgment. Indeed, the comments made by Plaintiff's attorney which may be construed as an argument against summary judgment were only in response to the trial court's direct question on that subject. Plaintiff specifically had not submitted the issue of summary judgment to the trial court for determination. Accordingly, Plaintiff is not deemed to have rested her case at that point, and was free to take a voluntary dismissal of the action. Following Plaintiff's voluntary dismissal, this action was not pending before the trial court. It follows that the trial court's summary judgment order must be vacated.

Affirmed in part and vacated in part.

Judges LEWIS and HORTON concur.

SWEAT v. BRUNSWICK ELECTRIC MEMBERSHIP CORP.

[133 N.C. App. 63 (1999)]

BOBBY LEE SWEAT, PLAINTIFF v. BRUNSWICK ELECTRIC MEMBERSHIP
CORPORATION, DEFENDANTLINDA MCGOVERN BRASWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES
FRANCUM BRASWELL, JR., PLAINTIFF v. BRUNSWICK ELECTRIC MEMBERSHIP
CORPORATION, DEFENDANT

No. COA98-492

(Filed 20 April 1999)

Utilities—electricity—uninsulated power line—not negligent

The trial court properly granted defendant's motion for summary judgment in an action arising from the electrocution and injury of plaintiff and decedent while working on a ladder which came into contact with an uninsulated power line at a construction site. The power lines were plainly visible, conformed to the National Electrical Safety Code, were 21.9 feet away from the house and 25.6 feet above the ground, and plaintiffs did not allege that in the ordinary course of their work they were required to maneuver the ladder in close contact with the power lines, so that defendant was not required to foresee that plaintiffs would permit the ladder to come into contact with the power lines. Mere notice of construction is not enough to warrant additional measures by defendant.

Appeal by plaintiffs from judgments entered 2 March 1998 by Judge D. Jack Hooks, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 18 February 1999.

Hedrick & Blackwell, L.L.P., by P. Scott Hedrick; and Hearn, Brittain & Martin, P.A., by L. Morgan Martin and George M. Hearn, Jr., for plaintiffs-appellants.

Johnson & Lambeth, by Robert White Johnson, for defendant-appellee.

WALKER, Judge.

On 9 November 1994, Bobby Lee Sweat ("plaintiff") and James Francum Braswell ("decedent") were installing vinyl siding on a house under construction located on East Second Street in Ocean Isle Beach, North Carolina. The house being constructed was over 30 feet

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in height and had been under construction since July of 1994. Plaintiff and decedent were using a forty-foot aluminum extension ladder to work on a window located approximately 30 feet above the ground facing East Second Street.

Defendant's electrical distribution lines were on poles and ran along the street. The lines were 21.9 feet north of the house horizontally and 25.6 feet above the ground. The base of the ladder was between the building and the distribution lines and approximately 13 feet from directly below the lines.

Plaintiff and decedent were found electrocuted at the base of the ladder. There were no witnesses to this accident. The plaintiff testified that the last thing he remembered was being in the process of climbing down the ladder after he finished his work. The power line, which the ladder struck, was not insulated and as a result of the contact, decedent was killed and plaintiff was seriously injured. The power line conformed to the National Electrical Safety Code (NESC) in all respects.

In his deposition, plaintiff admits that he was aware of the power lines, but that he was not concerned since he believed the lines were insulated. During the construction of the house and on the day of the accident, defendant's employees drove by the construction site at least twice a day in order to get to a job installing street lights.

On 29 August 1996, plaintiff filed a complaint for personal injuries. On 23 October 1995, the decedent's wife, acting as the personal representative of his estate, filed a wrongful death action.

Defendant moved for summary judgment in both cases and the trial court, with the agreement of the parties, consolidated the cases. On 2 March 1998, the trial court entered orders granting summary judgment for defendant finding "that there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law." On appeal, plaintiffs contend the trial court erred in granting summary judgment.

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 Guy Furniture Co.*, 122 N.C. App. 340,

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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).

Plaintiffs argue that defendant breached its duty of care owed to them by its installation, operation, and maintenance of an uninsulated 7,200 volt power line and that, as a result, defendant proximately caused plaintiffs' injuries and death. More specifically, based on their expert's opinion, plaintiffs contend that defendant failed to insulate or de-energize the power line or failed to post appropriate warnings.

Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in the same circumstances. *Bogle v. Power Co.*, 27 N.C. App. 318, 321, 219 S.E.2d 308, 310 (1975), *disc. review denied*, 289 N.C. 296, 222 S.E.2d 695 (1976). In order to sustain a claim for negligence, a plaintiff must prove (1) the defendant owed a duty to the plaintiff; (2) the defendant failed to exercise proper care in the performance of the duty; and (3) the breach of the duty was a proximate cause of the injury suffered by the plaintiff. *Westbrook v. Cobb*, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992). The absence of any one of these elements will defeat a negligence claim. *Id.*

A supplier of electricity owes the highest degree of care to the public because of the dangerous nature of electricity. *Hale v. Power Co.*, 40 N.C. App. 202, 204, 252 S.E.2d 265, 267, *disc. review denied*, 297 N.C. 452, 256 S.E.2d 805 (1979). An electric company is required "to exercise reasonable care in the construction and maintenance of their lines when positioned where they are likely to come in contact with the public." *Bogle*, 27 N.C. App. at 321, 219 S.E.2d at 310. However, "the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires. . . ." *Mintz v. Murphy*, 235 N.C. 304, 314, 69 S.E.2d 849, 857 (1952). Also, this Court has held that an electrical utility has exercised reasonable care when it has insulated its power lines "by height and isolation in accordance with existing regulations." *Bogle*, 27 N.C. App. at 321, 219 S.E.2d at 310. In *Bogle*, the

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plaintiff was killed when he attempted to move an extension ladder after it struck a power line. *Id.* at 320, 219 S.E.2d at 310. The defendant was found to have exercised reasonable care where the power line was located 21 feet from the building in which the plaintiff was working with an extension ladder and suspended from a pole at a height of 22 feet. *Id.* at 320-22, 219 S.E.2d at 310. Similarly, in *Brown v. Power Co.*, 45 N.C. App. 384, 386-88, 263 S.E.2d 366, 368-69, *disc. review denied*, 300 N.C. 194, 269 S.E.2d 615 (1980), the plaintiff was killed when the antenna he was installing struck power lines. This Court held that the defendant exercised reasonable care and did not breach any duty in its operation of the power lines which were located 12 to 14 feet away from the house and the closest distance from the ground to the lines was 22 feet, 2 inches. *Id.*

Plaintiffs argue that their case is analogous to the situation in *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979). In *Williams*, the plaintiff was hired to repair a piece of guttering that had come loose from the roof of a house. *Id.* at 401, 250 S.E.2d at 256. The plaintiff noticed two electrical wires running near the roof of the house. *Id.* at 401, 250 S.E.2d at 257. After the plaintiff finished repairing the gutter, but before he and his helper started taking down an extension ladder they used in the repair, the plaintiff was knocked unconscious evidently as a result of the ladder hitting electrical wires. *Id.* The Supreme Court reversed the granting of summary judgment for defendant because it found there was a genuine issue of material fact relating to the defendant's duty to insulate the wires since there was a discrepancy in the parties' evidence as to the actual distance between the wires and the roof. *Id.* at 402-03, 250 S.E.2d at 257.

The plaintiffs also allege that even if defendant complied with the NESC, the NESC does not control whether defendant violated its standard of care. Plaintiffs cite *Willis v. Power Co.*, 42 N.C. App. 582, 592, 257 S.E.2d 471 (1979) where this Court held that even though defendant met the NESC requirements as to line insulation and clearance, the defendant may still have breached its duty of care to the plaintiff. In *Willis* and in *Hale*, 40 N.C. App. at 203, 252 S.E.2d at 266, both plaintiffs were electrocuted at the same location when their ladder came in contact with power lines. In both cases, this Court reversed summary judgment for the defendant, finding there was an issue of fact as to the defendant's negligence where the two high voltage, uninsulated power lines were only 3 feet 10 inches from the side of the house and 22.7 feet above the ground. *Willis*, 42 N.C. App. at

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592-96, 257 S.E.2d at 478-80; *Hale*, 40 N.C. App. at 203-04, 252 S.E.2d at 267. Further, plaintiff alleged these power lines were obscured by trees and shrubbery. *Willis*, 42 N.C. App. at 594, 257 S.E.2d at 479; *Hale*, 40 N.C. App. at 205, 252 S.E.2d at 268.

Here, the power lines were plainly visible, conformed to the NESC, and were 21.9 feet away from the house and 25.6 feet above the ground. There was no evidence that the plaintiffs in navigating, positioning, and utilizing the ladder were required to come in close contact with the power line as was the situation in *Hale* and *Willis*. In *Brown*, 45 N.C. App. at 389, 263 S.E.2d at 370, this Court held that the defendant was not required "to foresee that some person may hold a metal antenna in the air in such a way as to come in contact with the high voltage wires." Also, we held in *Bogle*, 27 N.C. App. at 322, 219 S.E.2d at 310, that the defendant was required to exercise reasonable care "to provide for those eventualities which a reasonably prudent person would have foreseen under the circumstances" and that it was "unreasonable to call on the defendant to foresee that plaintiff's intestate would ignore the warnings of his supervisors and cause a metal ladder to fall against the line."

The plaintiffs in this case do not allege that in the ordinary course of their work, they were required to maneuver the ladder in close contact with the power lines. Thus, defendant was not required to foresee that plaintiffs, for unexplained reasons, would permit the ladder to come in contact with the power lines located at a distance of 21.9 feet away from the house and 25.6 feet above the ground.

In addition, plaintiffs argue that since the defendant had notice that there was construction in progress at the site, they had a duty to warn plaintiffs of a potential danger and/or temporarily insulate the power lines. Further, plaintiffs contend that defendant's employees were trained to spot dangerous situations around power lines and to take measures, which might include warnings or temporary insulation, to protect the public. However, plaintiffs have presented no evidence to show that mere notice of construction is enough to warrant that these additional measures be required by the defendant. Since this Court has held that an electrical utility did not breach any duty of care where its power lines were at similar distances away from the structure and above the ground, we likewise conclude that defendant's lines were properly insulated by height and isolation such that no additional duty to the plaintiffs existed on the part of defendant. *See Mintz*, 235 N.C. at 314, 69 S.E.2d at 857.

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[133 N.C. App. 68 (1999)]

Therefore, we find the defendant exercised reasonable care in the operation of its power lines and did not breach any duty of care owed to the plaintiffs. 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.

DELORES D. ROBINSON, PLAINTIFF-APPELLEE v. STATE OF NORTH CAROLINA, EAST
CAROLINA UNIVERSITY, DEFENDANT-APPELLANT

No. COA98-610

(Filed 20 April 1999)

Tort Claims Act— Industrial Commission finding of negligence—evidence sufficient

It could not be said that the Industrial Commission erred by finding defendant negligent where plaintiff was injured by a falling light fixture, defendant stipulated that the University owned the building and was responsible for electrical repairs, one of defendant's electricians had worked on the light near the time of the accident, that electrician testified that the light could not fall without someone working on it or messing with it and that he would be the one to work on it, and the light was accessible only by a ladder. The Court of Appeals may not substitute its judgment for that of the Commission if there was competent evidence to support the Commission's findings.

Chief Judge EAGLES dissenting.

Appeal by defendant from decision and order entered 10 March 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 February 1999.

Gray, Newell & Johnson, L.L.P., by S. Camille Payton, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Don Wright, Assistant Attorney General, for the State.

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[133 N.C. App. 68 (1999)]

EDMUNDS, Judge.

Plaintiff was employed by the Pitt County Department of Social Services as an Income Maintenance Case worker. As part of her job, she used various satellite offices to interview clients for Medicaid eligibility. On 5 April 1994, while working at the Pitt County Mental Health Center in Bethel, a light fixture fell from the ceiling onto her head, causing injury. The building housing the Center is owned and maintained by East Carolina University School of Medicine, which is responsible for electrical repairs and services of the building.

Plaintiff filed a tort claim and a workers' compensation claim against the State of North Carolina (East Carolina University). The claims were consolidated for hearing before a Deputy Commissioner, who issued a decision and order in defendant's favor. Plaintiff appealed to the Full Commission, which reversed the findings of the Deputy Commissioner (one Commissioner dissenting) and awarded plaintiff damages. Defendant appeals. We affirm.

The only issue before this Court is whether the Commission erred in finding defendant negligent. In order to prevail on a negligence claim, a plaintiff must prove that (1) defendant owed a duty to plaintiff, (2) defendant breached that duty, (3) the breach was the proximate cause of injury, and (4) damages resulted from the breach. See *Lamm v. Bissette Realty*, 327 N.C. 412, 395 S.E.2d 112 (1990).

"The Commission's fact findings will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986) (quoting *Jones v. Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965)). Additionally, if a finding is a mixed question of law and fact, "it is also conclusive if supported by competent evidence." *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 95, 398 S.E.2d 921, 924 (1990), *disc. review denied*, 328 N.C. 576, 403 S.E.2d 522 (1991). This Court may not substitute its judgment for that of the Commission if there was competent evidence to support its findings and if those findings support its legal conclusions. See *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992). Here we find there was competent evidence to support the Commission's findings. Defendant owed a duty of reasonable care to plaintiff. See *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). Defendant stipulated that the University owned the building and was responsible for electrical repairs. One of defendant's electricians had worked on the light that fell near the time of the accident.

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That electrician testified that the light could not fall without “somebody working on it or messing with it.” He further admitted that he would be the one to work on the light, and that the light was accessible only by means of a ladder. As a result of improper work done to the fixture, it fell, injuring plaintiff. While defendant presented conflicting evidence, in light of deferential standard of review, we cannot say that the Commission erred in its findings of fact or conclusions of law.

Affirmed.

Judge WYNN concurs.

Chief Judge EAGLES dissents.

Chief Judge EAGLES dissenting.

I respectfully dissent. I agree with the dissenting opinion in the Industrial Commission that plaintiff has presented no evidence that Mr. Smith breached a duty to plaintiff or that any alleged breach of duty was the proximate cause of plaintiff’s injury. A plaintiff asserting a negligence claim has the burden to prove that defendant breached a duty of care owed to plaintiff and that the breach was the proximate cause of plaintiff’s injury. *Swann v. Len-Care Rest Home*, 127 N.C. App. 471, 475, 490 S.E.2d 572, 575 (1997), *rev’d on other grounds*, 348 N.C. 68, 497 S.E.2d 282 (1998). The evidence must be sufficient to raise more than speculation, guess, or mere possibility. *Id.* Here, plaintiff’s evidence raised no more than the mere possibility that Mr. Smith replaced a light bulb in the light fixture that fell on plaintiff’s head. The electrician testified that he replaced light bulbs *somewhere* in the building around the time of the accident, but that “I don’t know whose office it was” and “I can’t remember working on that one particular fixture.” Furthermore, even if Smith did replace a bulb in the light fixture that injured plaintiff, plaintiff offered no evidence whatsoever that Smith acted negligently in doing so. Smith testified that even if he had replaced a bulb on the light fixture in question he would have reported anything “out of the ordinary” to his supervisor. I cannot agree with the majority that plaintiff produced sufficient evidence that Mr. Smith breached a duty to plaintiff.

Even if plaintiff had produced sufficient evidence of breach, plaintiff did not meet her burden of proving that any alleged negligence was the proximate cause of plaintiff’s injuries. Our Supreme

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Court has defined proximate cause as “a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred” *Adams v. Mills*, 312 N.C. 181, 192, 322 S.E.2d 164, 172 (1984). Here, there is no evidence of record to establish how long a time passed between the electrician’s *alleged* repairs to the light fixture and plaintiff’s injury. As the dissenting opinion in the Industrial Commission noted, “a number of people were coming and going into the Mental Health Center in Bethel [between the alleged repairs and plaintiff’s injury] and may have had access to the office in question.” Accordingly, plaintiff produced no evidence of an unbroken connection between any alleged negligent action by Mr. Smith and plaintiff’s injury.

In summary, plaintiff’s evidence showed only that 1) as the owner of the building, defendant university had a duty to plaintiff to act with reasonable care in conducting maintenance and repairs of the light fixture in question; 2) that defendant’s electrician replaced a light bulb *somewhere* in the building *sometime* before the injury; 3) and that plaintiff was injured when a light fixture in the building fell on her head. Accordingly, plaintiff failed to meet her burden in presenting sufficient evidence of two requisite elements of negligence—breach and proximate cause. See *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 468 S.E.2d 260, *review denied*, 344 N.C. 444, 476 S.E.2d 134 (1996). For these reasons I respectfully dissent and vote to reverse.

LUCY B. STRICKLAND, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, DEFENDANT

No. 98-816

(Filed 20 April 1999)

**Insurance— automobile—liability—owned-vehicle exclusion—
rental car**

An owned-vehicle exclusion in an automobile liability insurance policy which did not provide coverage for any vehicle other than the covered auto which was owned by the policy holder or furnished for his regular use did not apply to a rental auto. Although defendant contended that the rental car was a substi-

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tute for an owned vehicle, it was neither a vehicle owned by the policyholder nor furnished for his regular use.

Appeal by defendant from summary judgment order filed 1 June 1998 by Judge James E. Ragan, III, in Craven County Superior Court. Heard in the Court of Appeals 16 March 1999.

Ward and Smith, P.A., by A. Charles Ellis and Teresa DeLoatch Bryant, and Kennedy W. Ward, P.A., by Kennedy W. Ward, for plaintiff-appellee.

Dunn, Dunn, Stoller & Pittman, L.L.P., by Raymond E. Dunn, Jr., for defendant-appellant.

LEWIS, Judge.

On 29 July 1993, plaintiff was involved in an automobile accident with one of defendant's insureds, John Brandt. Brandt held two separate policies issued by defendant: an Auto Policy which listed his 1988 Hyundai as the covered auto, and a Motorcycle Policy which listed his 1985 Yamaha motorcycle as the covered auto. Brandt was driving a rental vehicle at the time of the collision because his 1988 Hyundai was being repaired. Each policy contained identical language and liability limits of \$100,000. Plaintiff sustained damages in excess of \$225,000, and sought a determination of whether she may combine the liability coverages from Brandt's two policies. On 27 May 1998, the trial judge signed an order granting summary judgment for plaintiff. We affirm.

The rules of construction of insurance contracts are well established. Language must be given its ordinary, plain meaning unless a word is ambiguous; ambiguous words are those "reasonably capable of more than one meaning." *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 201, 415 S.E.2d 764, 765, *disc. review denied*, 331 N.C. 557, 417 S.E.2d 803 (1992). "Where the policy language is clear and unambiguous, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written." *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 687, 443 S.E.2d 357, 359 (1994), *disc. review improvidently allowed*, 340 N.C. 353, 457 S.E.2d 300 (1995). A court may not operate "under the guise of interpreting [an] ambiguous provision[]" to avoid enforcing the contract as written. *Id.* Furthermore, exclusionary clauses must be construed in favor of coverage. See *N.C. Farm Bureau Mut. Ins. Co. v. Walton*, 107 N.C. App. 207, 209, 418 S.E.2d 837, 839 (1992).

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Brandt's policies, which are his insurance contracts with defendant, contain identical language. The policies provide, in pertinent part and with original emphasis:

AGREEMENT

In return for payment of the premium and subject to all the terms of this policy, we agree with you as follows:

DEFINITIONS

. . . .

Your covered auto means:

1. Any vehicle shown in the Declarations.

. . . .

4. Any auto or *trailer* not owned by you while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:

- a. breakdown;
- b. repair;
- c. servicing;
- d. loss; or
- e. destruction.

. . . .

PART A—LIABILITY COVERAGE—COVERAGE A

INSURING AGREEMENT

We will pay damages for *bodily injury* or *property damage* for which any *insured* becomes legally responsible because of an auto accident.

. . . .

Insured as used in this Part means:

1. You or any *family member* for the ownership, maintenance or use of any auto or *trailer*.

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2. Any person using *your covered auto*.
3. For *your covered auto*, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.
4. For any auto or *trailer*, other than *your covered auto*, any person or organization but only with respect to legal responsibility for acts or omissions of you or any *family member* for whom coverage is afforded under this Part.

....

EXCLUSIONS

....

B. We do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle, other than *your covered auto*, which is:
 - a. owned by you; or
 - b. furnished for your regular use.

....

The Automobile Policy lists Brandt as the named insured and the 1988 Hyundai as the covered vehicle. Defendant tendered its policy limits of \$100,000 under the Automobile Policy to plaintiff because the rental car was a covered auto under section 4(b) of the definition of covered auto. Accordingly, the Motorcycle Policy alone is the subject of this appeal.

Under the Motorcycle Policy, Brandt is the named insured. Under the Insuring Agreement section of the policy, "insured" refers to Brandt for the use of "any auto." Defendant thus agreed to pay for bodily injury for which Brandt, using "any auto," became responsible because of an automobile accident. Plaintiff has met her burden of proving coverage under defendant's Motorcycle Policy. *See Kruger v. State Farm Mut. Auto. Ins. Co.*, 102 N.C. App. 788, 790, 403 S.E.2d 571, 572 (1991).

Defendant contends, however, that Exclusion B negates coverage under Brandt's Motorcycle policy. Defendant would have this Court

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say as a matter of law that since the rental car was a substitute for an owned vehicle, it must be considered owned by Brandt or furnished for Brandt's regular use. Here, the rental car was neither a vehicle owned by Brandt nor a vehicle furnished for his regular use. *See N.C. Farm Bureau Mut. Ins. Co. v. Warren*, 326 N.C. 444, 446-47, 390 S.E.2d 138, 140 (1990) (holding that determination of "furnished for regular use" is fact specific inquiry and two general classes have emerged: where employer has furnished vehicle for employee and where vehicle has been purchased but title not yet transferred). We are without authority to rewrite defendant's contract for insurance, and we cannot say that a rental car, agreed by the parties to be a temporary substitute and for which Brandt paid, is a vehicle furnished for his regular use. We note that defendant is free to explicitly prevent this situation in the future with precise contractual language. *See, e.g., American Standard Ins. Co. of Wis. v. Ekeroth*, 791 P.2d 1220, 1221 (Colo. Ct. App.) (approving an auto insurer's limitation of liability clause that read "[t]he total limit of our liability under all policies issued to you by us shall not exceed the highest limit of liability under any one policy"), *cert. denied*, 797 P.2d 1299 (1990); *Butler v. Robinette*, 614 S.W.2d 944, 946-47 (Ky. 1981) (approving an auto insurer's limitation of liability clause which provided that if more than one policy was issued to an insured, the total liability of the company would not exceed the greater of the limits of the several policies).

Defendant has not met its burden of showing coverage is excluded under Brandt's Motorcycle Policy. *See Kruger*, 102 N.C. App. at 790, 403 S.E.2d at 572. Accordingly, we affirm the trial court's order of summary judgment for plaintiff.

Affirmed.

Judges GREENE and HORTON concur.

IODICE v. JONES

[133 N.C. App. 76 (1999)]

ALINE JOAN IODICE, JAMES V. IODICE AND MARY J. IODICE, PLAINTIFFS v.
THOMAS RICHARD JONES, DEFENDANT

No. COA98-770

(Filed 20 April 1999)

Insurance— automobile—UIM—allocation of liability settlement—primary and excess carriers

The trial court erred in a declaratory judgment action to determine the allocation of a set-off between UIM carriers where plaintiff was injured while riding in a vehicle owned by Robert Penny; the other vehicle was at fault and the liability carrier settled for \$62,500; plaintiff's damages exceeded the settlement; the carriers of the Penny vehicle (Nationwide) and a family member policy which covered plaintiff (Geico) each sought UIM credit for the settlement; and the trial court ordered that the set-off be shared pro rata to their respective UIM limits (\$31,250 each). The "other insurance" clauses in each policy are identically worded, but do not have identical meanings. Because the vehicle in which the accident occurred is owned by Penny, it follows from the wording of the clause that Nationwide's UIM coverage is primary and Geico's coverage is excess. Nationwide is entitled to set-off the entire \$62,500 settlement because the primary provider is entitled to the credit for the liability coverage; however, the excess UIM coverage does not apply until the liability coverage and the primary UIM coverage are exhausted.

Appeal by unnamed defendant, Nationwide Mutual Insurance Company, from judgment filed 20 April 1998 by Judge Melzer A. Morgan, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 16 March 1999.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Ian J. Drake, for unnamed defendant-appellant Nationwide Mutual Insurance Company.

Womble Carlyle Sandridge & Rice, PLLC, by Allen R. Gitter and Jack M. Strauch, for unnamed defendant-appellee Government Employees Insurance Company.

No brief filed for plaintiffs or for named defendant.

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[133 N.C. App. 76 (1999)]

GREENE, Judge.

Nationwide Insurance Company (Nationwide) appeals from the trial court's declaratory judgment ordering Nationwide and Government Employees Insurance Company (GEICO)¹ to "share the \$62,500 set off credit . . . *pro rata* in proportion to their respective limits of underinsured motorist [(UIM)] coverage."

The facts of this case are not in dispute. Aline Joan Iodice (Iodice) was injured in an automobile accident while riding as a passenger in a vehicle driven by Fiona Margaret Penney (Fiona) and owned by Robert A. Penney (Penney). All parties agree that Thomas Richard Jones (Jones), the driver of the other vehicle involved in the accident, was at fault. Liability insurance for Jones's vehicle was provided by Integon Insurance Company (Integon). Iodice settled her claim against Jones for \$62,500.00, which amount was paid by Integon pursuant to Jones's policy. Iodice's damages exceed the \$62,500.00 received from Integon.

At the time of the accident, the Penney vehicle was insured by Nationwide under a policy issued to Penney and listing Fiona as an authorized driver. Nationwide's policy provided UIM coverage up to \$100,000.00 per person and \$300,000.00 per accident for Iodice, as a "person occupying" the Penney vehicle. Iodice was also covered under her mother's GEICO insurance policy, as a "family member" of the named insured. The GEICO policy likewise provided UIM coverage up to \$100,000.00 per person and \$300,000.00 per accident. Both the GEICO policy and the Nationwide policy contain the following "other insurance" paragraph:

[I]f there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

"You" is defined, in both policies, as the named insured and spouse.

GEICO filed a motion for declaratory judgment seeking a judicial determination of the proper allocation of the \$62,500.00 set-off credit (arising from Integon's payment to Iodice) against the UIM amounts owed to Iodice by GEICO and Nationwide.² The trial court ordered

1. Both Nationwide and GEICO are unnamed defendants in this action.

2. UIM carriers are entitled to set off the amount received by a claimant from the tortfeasor's liability carrier against any UIM amounts owed. *Onley v. Nationwide*

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GEICO and Nationwide to share the \$62,500.00 set-off credit *pro rata* in proportion to their respective limits of UIM coverage, entitling GEICO and Nationwide to set off any UIM amounts respectively owed by \$31,250.00 each. Nationwide appeals, contending it is entitled to set off the entire \$62,500.00 against any UIM amount it owes.

The only question presented for our review is whether Nationwide is entitled to the entire \$62,500.00 set-off credit.

Where it is impossible to determine which policy provides primary coverage due to identical “excess” clauses, “the clauses are deemed mutually repugnant and neither . . . will be given effect.” *N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 511, 369 S.E.2d 386, 388 (1988); *Onley v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 686, 690, 456 S.E.2d 882, 884 (“[W]e read the policies as if [mutually repugnant excess] clauses were not present.”), *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995).

In this case, the “excess” clause of the “other insurance” paragraph in each policy provides: “[A]ny insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.” If we deem these clauses mutually repugnant and read the policies as if neither “excess” clause is present, the remaining language of the “other insurance” paragraph in each policy provides that Nationwide and GEICO must each “pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits.” Accordingly, if the identically worded “excess” clauses in the Nationwide and GEICO policies prevent a determination of which policy provides primary UIM coverage, a *pro rata* allocation of UIM coverage and credit from the Integon payment is appropriate.

Nationwide contends, however, that the “other insurance” clauses in this case, although identically worded, do not have identical meanings and are therefore not mutually repugnant. We agree. Because “you” is expressly defined as the named insured and spouse, the Nationwide “excess” clause reads: “[A]ny insurance we provide with respect to a vehicle [Penney] do[es] not own shall be excess over any other collectible insurance.” It follows that Nationwide’s UIM coverage is *not* “excess” over other collectible insurance (and is, therefore, primary), because the vehicle in which the accident

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occurred is owned by Penney. The GEICO “excess” clause reads: “[A]ny insurance we provide with respect to a vehicle [Iodice’s mother] do[es] not own shall be excess over any other collectible insurance.” It follows that GEICO’s UIM coverage is “excess” (and is, therefore, secondary), because the vehicle in which the accident occurred is not owned by Iodice’s mother. Accordingly, Nationwide provides primary UIM coverage in this case. As such, Nationwide is entitled to set off the entire \$62,500.00 against any UIM amounts it owes Iodice, because “the primary provider of UIM coverage . . . is entitled to the credit for the liability coverage. The excess UIM coverage providers still get the benefit of the credit for the coverage because their UIM coverage does not apply until the liability coverage and the primary UIM coverage are exhausted.” *Falls v. N.C. Farm Bureau Mut. Ins. Co.*, 114 N.C. App. 203, 208, 441 S.E.2d 583, 586, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).³ We have stated that “to share the liability in proportion to the coverage but not the credit in a like manner is irrational.” *Onley*, 118 N.C. App. at 691, 456 S.E.2d at 885. It would likewise be irrational to impose primary liability for UIM coverage on an insurer without applying the set-off credit “in a like manner.” Accordingly, Nationwide, the primary UIM provider, is entitled to set off the full \$62,500.00 paid by Integon against any UIM amounts it owes Iodice.

Reversed and remanded.

Judges LEWIS and HORTON concur.

3. The holding in *N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 51-52, 483 S.E.2d 452, 458-59, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 25 (1997), is distinguishable and thus is not determinative of this case. *Bost* required a *pro rata* division of the set-off credit where the “other insurance” clauses were identically worded, in part because the plaintiff therein was a Class I insured under both policies. *Bost*, 126 N.C. App. at 52, 483 S.E.2d at 458 (“All persons in the first class are treated the same for insurance purposes.”). In this case, Iodice is a Class II insured under the Nationwide policy (as a guest of the named insured) and a Class I insured under the GEICO policy (as a relative of the named insured). A Class II insured may be treated differently than a Class I insured. *See, e.g., Nationwide Mutual Ins. Co. v. Silverman*, 332 N.C. 633, 638, 423 S.E.2d 68, 71 (1992).

STREETER v. COTTON

[133 N.C. App. 80 (1999)]

GLORIA JEAN STREETER, PLAINTIFF v. AUGUSTA COTTON, DEFENDANT

No. COA97-1302

(Filed 20 April 1999)

Trials— motion for JNOV—motion for new trial—granting both inconsistent

An order in a negligence action was remanded where the court granted both plaintiff's motion for JNOV, thereby determining defendant negligent as a matter of law, and plaintiff's motion for a new trial as to the issue of negligence, thus reinstating that issue for the jury.

Appeal by defendant from judgment entered 4 June 1997 by Judge Elaine M. O'Neal in Durham County District Court. Heard in the Court of Appeals 18 August 1998.

Teague, Rotenstreich and Stanaland, by Ian J. Drake and Kenneth B. Rotenstreich, for defendant-appellant.

Roberti, Wittenberg, Holtkamp and Lauffer, PA, by R. David Wicker, Jr., for plaintiff-appellee.

JOHN, Judge.

In this motor vehicle negligence action, defendant Augusta Cotton appeals the trial court's grant of judgment notwithstanding the verdict (JNOV) and new trial in favor of plaintiff Gloria Jean Streeter. Specifically, defendant argues the evidence presented by both parties regarding his alleged negligence was sufficient to submit the case to the jury, and that the new trial award was contrary to law and constituted an abuse of discretion. For the reasons set forth herein, we vacate the judgment of the trial court and remand with instructions.

At trial, plaintiff's evidence tended to show the following: On 20 June 1995 in Durham, North Carolina, plaintiff stopped her vehicle in the left lane of Fayetteville Street in order to negotiate a left turn onto Cook Road. As traffic was heavy, she was unable to turn during two full cycles of the traffic light governing the intersection. After plaintiff had been waiting for at least two minutes, her automobile was struck from behind by defendant's vehicle. Plaintiff did not see defendant prior to the collision as her attention was focused upon oncoming traffic.

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Plaintiff did not seek medical treatment immediately after the accident, but was treated later for injuries to her neck and back. Plaintiff missed three days of work and incurred approximately \$1,300.00 in property damage to her vehicle.

Defendant testified he was traveling in the left lane of Fayetteville Street behind several other automobiles. These automobiles suddenly swerved into the right lane, whereupon defendant was confronted with plaintiff's vehicle stopped at the intersection. Being too close to stop without colliding with plaintiff's automobile, defendant "slid onto her car and touched it." Defendant did not see brake lights or blinker lights engaged on plaintiff's vehicle.

On 28 March 1996, plaintiff filed suit alleging the collision between

plaintiff's automobile and the defendant's automobile was a direct and proximate result of the negligent acts and omissions of the defendant.

Plaintiff sought, *inter alia*, to "have and recover of the defendant, damages in an amount not in excess of Ten Thousand Dollars (\$10,000)." Defendant thereafter counterclaimed alleging contributory negligence on the part of plaintiff.

Defendant moved for directed verdict at the close of plaintiff's evidence and at the conclusion of all evidence. Plaintiff likewise moved for directed verdict on the issues of negligence and contributory negligence. The trial court granted directed verdict in favor of plaintiff on the issue of contributory negligence, but denied all other motions. The jury returned a verdict in favor of defendant, determining plaintiff had not been injured by the negligence of defendant.

On 20 December 1996, plaintiff moved for JNOV pursuant to N.C.G.S. § 1A-1, Rule 50 (1990) (Rule 50), and for new trial pursuant to N.C.G.S. § 1A-1, Rule 59 (1990) (Rule 59). The court allowed both motions 29 May 1997, declaring "good cause exists for allowing the motions of the [p]laintiff" and that "the issues of negligence of the defendant and damages, if any, sustained by plaintiff [be placed] on this Court's next jury calendar." Defendant filed timely appeal to this Court 27 June 1997.

Defendant argues the trial court erred in granting plaintiff's motions for JNOV and new trial. Because the court's allowance of

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both motions was legally inconsistent, however, we vacate the order and remand for further proceedings without reaching the merits of defendant's assignments of error.

A JNOV motion pursuant to Rule 50 seeks entry of judgment in accordance with the movant's earlier motion for directed verdict, notwithstanding the contrary verdict actually returned by the jury. *See* G.S. § 1A-1, Rule 50(b); *Northern Nat'l Life Ins. v. Miller Machine*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). A ruling on such motion is a question of law, *see Penley v. Penley*, 314 N.C. 1, 9 n.1, 332 S.E.2d 51, 56 n.1 (1985), and presents the same issue for appellate review as a motion for directed verdict, *see Mobley v. Hill*, 80 N.C. App. 79, 83, 341 S.E.2d 46, 49 (1986), *i.e.*, whether the evidence, taken as true and considered in the light most favorable to non-movant, is sufficient to take the case to the jury and to support a verdict for the non-movant. *See Henderson v. Traditional Log Homes, Inc.*, 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). "It is proper to direct a verdict for a moving party with the burden of proof only if the credibility of the movant's evidence is manifest as a matter of law." *Miller Machine*, 311 N.C. at 69, 316 S.E.2d at 261.

Concomitant with a JNOV motion, a party may move for new trial as provided in Rule 50 and Rule 59. *See, e.g.*, G.S. § 1A-1, Rule 50(b)(1) ("motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative"); *see also* G.S. § 1A-1, Rule 59; *Barnett v. Security Ins. Co. of Hartford*, 84 N.C. App. 376, 380, 352 S.E.2d 855, 858 (1987) (new trial motion joined with motion for JNOV is equivalent to motion for new trial motion under Rule 59(a)(8)). A motion for new trial is addressed to the discretion of the trial court, *see Anderson v. Smith*, 29 N.C. App. 72, 78, 223 S.E.2d 402, 406 (1976), and is "strictly limited to whether the record affirmatively shows a manifest abuse of discretion by the trial judge." *Thomas v. Dixon*, 88 N.C. App. 337, 342, 363 S.E.2d 209, 212 (1988).

In the case *sub judice*, plaintiff's JNOV motion alleged the verdict of the jury was "contrary to the evidence." She consequently requested that the court "set aside the verdict . . . and enter judgment on behalf of the [p]laintiff in accordance with the [p]laintiff's motion for directed verdict," wherein she asserted defendant was negligent as a matter of law. Plaintiff also moved for new trial on the basis that "the verdict of the jury was contrary to the evidence and the instructions of law given by the [trial c]ourt."

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In addressing plaintiff's motions, the trial court stated "good cause exists for allowing the *motions* of the [p]laintiff" (emphasis added) and that "the issues of negligence of the defendant and damages, if any, sustained by plaintiff [are to be placed] on this Court's next jury calendar." The trial court thus granted both plaintiff's motion for JNOV, thereby determining defendant negligent as a matter of law, and plaintiff's motion for new trial "as to the issue[] of negligence of the [d]efendant . . .," thus reinstating that issue for the jury. Accordingly, the trial court's order is legally inconsistent and erroneous in that the question of defendant's negligence may not be determined by the court as a matter of law and thereafter submitted to the jury for determination. See *Graham v. Mid-State Oil Co.*, 79 N.C. App. 716, 720, 340 S.E.2d 521, 524 (1986) ("[i]nconsistent judgments are erroneous"); see also *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 183 (1986) ("[a]n irregular order, one issued contrary to the method of practice and procedure established by law, is voidable").

As we cannot ascertain the trial court's disposition of plaintiff's motions from its order, that order must be vacated and this matter remanded for rehearing of plaintiff's motions for JNOV and new trial. See *Barnett*, 84 N.C. App. at 380, 352 S.E.2d at 858 ("[w]hen the trial court fails to comply with Rule 59 and Rule 50 in ordering a new trial, the general course is to reverse and remand for reinstatement of the verdict"); cf. *Edwards v. Edwards*, 110 N.C. App. 1, 15, 428 S.E.2d 834, 841, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993) (unclear order of the trial court remanded with instructions).

On remand, the trial court may either: 1) grant plaintiff's JNOV motion, set the issue of damages for trial, and conditionally grant or deny plaintiff's motion for new trial in the event that the trial court's JNOV judgment is thereafter vacated or reversed on appeal, see G.S. § 1A-1, 50(c)(1) ("[i]f the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial"), or 2) deny plaintiff's motion for JNOV, and grant or deny plaintiff's motion for new trial.

Vacated and remanded with instructions.

Judges GREENE and TIMMONS-GOODSON concur.

IN RE EVERETTE

[133 N.C. App. 84 (1999)]

IN THE MATTER OF NATASHA EVERETTE

No. COA98-748

(Filed 20 April 1999)

Juvenile— neglected—findings—insufficient

A trial court order concluding that a juvenile was neglected was remanded where the conclusion was not supported by adequate findings of fact and did not support the adjudicatory and disposition orders. The finding of fact that the juvenile was not provided proper care, supervision, or discipline by her mother was more properly a conclusion of law; even assuming that the court's determination may be characterized as a finding a fact, the matter must be remanded for findings regarding the effect on the juvenile of the failure of her mother to provide proper care, supervision, and discipline. More than one inference can be drawn from the evidence as to whether the juvenile was at a substantial risk of impairment or had suffered impairment.

Appeal by respondent mother from judgment entered 19 February 1998 by Judge Joseph M. Buckner in Chatham County District Court. Heard in the Court of Appeals 16 March 1998.

Paul G. Ennis for respondent-appellant mother.

Lunday A. Riggsbee for petitioner-appellee Department of Social Services.

HORTON, Judge.

Chatham County Department of Social Services (petitioner) filed a petition on 21 August 1997, alleging that the juvenile, N.E., was an abused and neglected juvenile due to certain actions of her mother, the appellant herein. The juvenile's father is a resident of another state and is not involved in this appeal. The mother contests the allegations of the petition. An evidentiary hearing was held before the trial court on 22 January 1998. At the conclusion of the hearing, the trial court dismissed the abuse allegations, but found that the juvenile was neglected. In support of its determination, the trial court made the following findings of fact by clear, cogent, and convincing evidence:

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1. [Sets out persons present in court.]
2. That the juvenile is neglected in that she is not provided proper care, supervision or discipline by her mother.
3. That since the Chatham County Department of Social Services assumed temporary custody, the mother has improved the condition of the house and has completed parenting classes.

Based on those three findings of fact, the trial court concluded that “the juvenile is a neglected juvenile as defined in N.C.G.S. 7A-517(21).” The trial court then ordered that legal custody of the juvenile remain with the petitioner. Respondent mother appealed.

At the close of all the evidence in a bench trial, the trial court must make findings of fact and state separate conclusions of law in order to assist us in understanding the basis for the trial court’s decision. *In re Hughes*, 74 N.C. App. 751, 756, 330 S.E.2d 213, 217 (1985). *See also* N.C. Gen. Stat. § 1A-1, Rule 52 (1990). A “conclusion of law” is a statement of the law arising on the specific facts of a case which determines the issues between the parties. *Id.* at 759-60, 330 S.E.2d at 219. If the trial court’s conclusions of law are supported by findings of fact based on clear, cogent and convincing evidence, and the conclusions of law support the order or judgment of the trial court, then the decision from which appeal was taken should be affirmed. *Id.* at 758-59, 330 S.E.2d at 218.

Here, the determinative issue between the parties was whether the juvenile was “neglected” within the meaning of the Juvenile Code. There were sharply contested issues of fact raised by the evidence in this case. The trial court’s conclusion that the juvenile was “neglected,” however, is not supported by adequate findings of fact and does not support the adjudicatory and dispositional orders entered by it.

It appears, therefore, that this matter must be remanded to the trial court for two reasons. First, the “finding of fact” by the trial court that “[the juvenile] is not provided proper care, supervision or discipline by her mother” is more properly denominated a conclusion of law. We acknowledge that “[t]he classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law.” *In re Helms*, 127 N.C. App. 505,

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510, 491 S.E.2d 672, 675 (1997) (citations omitted). Determination that a child is not receiving proper care, supervision, or discipline, requires the exercise of judgment by the trial court, and is more properly a conclusion of law. No other findings of fact support the conclusion by the trial court that Natasha is a neglected juvenile. Even assuming that the trial court's determination may be characterized as a finding of fact, the matter must be remanded for findings with regard to the effect on the juvenile of the failure of her mother to provide proper care, supervision, and discipline.

We have consistently held that "there [must] be some physical, mental, or emotional impairment of a juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline' " in order to support a neglect adjudication. *Id.* at 511, 491 S.E.2d at 676 (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)). Although the trial court found that the respondent did not provide Natasha with proper care, supervision or discipline, the trial court did not make any findings that Natasha was impaired or at substantial risk of impairment as the result of respondent's actions. In *Helms*,

the findings of fact reveal[ed] that [the juvenile] was substantially at risk due to the instability of her living arrangements, and Respondent and [the juvenile] moved at least six times during the four months Respondent retained custody. Respondent also placed [the juvenile] at substantial risk through repeated exposure to violent individuals, one of whom uses cocaine. Furthermore, the environment in which Respondent and [the juvenile] lived was injurious in that it involved drugs, violence, and attempted sexual assault. The trial court's findings of fact therefore support the conclusion of law that [the juvenile] is a neglected juvenile.

Id. at 512, 491 S.E.2d at 676.

Here, more than one inference can be drawn from the evidence as to whether Natasha was at a substantial risk of impairment or had suffered impairment. The matter must therefore be remanded so that the trial court can make appropriate findings of fact from the credible evidence and enter conclusions of law based thereon. *See Safriet*, 112 N.C. App. at 753, 436 S.E.2d at 902 (affirming the trial court even though there were no findings of impairment or substantial risk of impairment because that was the only inference which could be drawn from the facts of that case).

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The trial court need not take any additional evidence unless it chooses in its discretion to do so. Due to the passage of time since appeal was taken in this case, the trial court shall consider evidence of any changes in the circumstances and needs of the juvenile in entering an appropriate dispositional order.

Vacated and remanded.

Judges GREENE and LEWIS concur.

PATSY W. TALLEY, PLAINTIFF v. DANIEL ALLEN TALLEY, DEFENDANT

No. COA98-924

(Filed 20 April 1999)

Appeal and Error— assignments of error—argument—inadequate—appeal dismissed

An appeal was dismissed where one assignment of error failed to state the legal basis on which error was assigned while the other assignment of error was not supported by argument.

Appeal by defendant from order filed 27 February 1998 by Judge Wendy M. Enochs in Guilford County District Court. Heard in the Court of Appeals 30 March 1999.

Diane Q. Hamrick, and Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiff-appellee.

Stephen E. Lawing for defendant-appellant.

GREENE, Judge.

Daniel A. Talley (Defendant) appeals from the trial court's order commanding him to pay alimony and provide medical coverage for Patsy W. Talley (Plaintiff).

The hearing of Plaintiff's alimony claim commenced on 28 July 1997, and was recessed on 30 July 1997. At that time, the trial court: (1) mentioned Defendant's knowledge of its time availability before the hearing began; (2) noted its own efforts to expedite the hearing; and (3) invited both parties to meet with it to reschedule the conclu-

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sion of the hearing. Neither party met with the trial court during the recess of the case.

The case reconvened on 13 October 1997, and Defendant, in open court, moved for a mistrial due to the trial delay. The trial court denied this motion, noting Defendant's failure to request an earlier trial date. The hearing was completed on 15 October 1997, and the trial court entered its alimony order on 27 February 1998.

The record on appeal contains forty-three different assignments of error. Defendant's brief to this Court presents two "Questions": (1) "DID THE COURT COMMIT PREJUDICIAL ERROR IN SIGNING AND ENTERING JUDGMENT AWARDING TO PLAINTIFF ALIMONY, MEDICAL COVERAGE AND ATTORNEYS FEES?"; and (2) "DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR BY DENYING DEFENDANT'S MOTION OF MISTRIAL, THEREBY DENYING DEFENDANT DUE PROCESS?"

Question number one is followed by reference to assignment of error number thirty-eight, which reads, "The signing and entry of judgment awarding to Plaintiff alimony, medical coverage, and reserving the issue of attorney fees."

Question number two is followed by reference to assignment of error number forty-one, which reads, "The denial of Defendant's motion for mistrial on the grounds of delay of proceeding resulting in denial of due process to Defendant." The full content of Defendant's brief, with regard to Question number two, provides:

There was a 75 day delay between the initial trial date, July 30, 1997, when this case was recessed, and the recessed date, October 13, 1997.

In *U.S. v. HALL*, US Court of Appeals, 9th Circuit, No. 95-50609 (1997), where a judge recessed a jury trial for 48 days, it was held that this violated the Due Process Clause of the U.S. Constitution, and the judgment must be reversed regardless of whether the defendant can show that he was prejudiced as a result.

The dispositive issue is whether this appeal must be dismissed for failure to comply with the North Carolina Rules of Appellate Procedure (Rules).

The Rules provide that the scope of appellate review is "confined to a consideration of those assignments of error set out in the record

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on appeal in accordance with [Rule 10].” N.C.R. App. P. 10(a). Rule 10 requires that “[e]ach assignment of error shall . . . state plainly, concisely and without argumentation the legal basis upon which error is assigned.” N.C.R. App. P. 10(c)(1);¹ *Rogers v. Colpitts*, 129 N.C. App. 421, 499 S.E.2d 789 (1998). The function of the brief, as provided in Rule 28, is to provide an argument setting out the contentions of the parties with respect to each question presented. N.C.R. App. P. 28(b)(5). “Immediately following each question [presented] shall be a reference to the assignments of error pertinent to the question.” *Id.* Assignments of error which are not supported by “reason or argument” in the brief “will be taken as abandoned.” *Id.* These Rules are mandatory, and their violation subjects an appeal to dismissal. *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984).

In this case, assignment of error number thirty-eight fails to state the legal basis, or ground, on which error is assigned. Thus the argument asserted in Defendant’s brief in response to Question number one and in support of assignment of error number thirty-eight is outside our scope of review and will not be considered.

Assignment of error number forty-one contains an adequate legal basis to support the error assigned. The statements made in Defendant’s brief in response to Question number two and in support of assignment of error number forty-one, however, do not contain any argument.² Accordingly, this assignment of error also is abandoned. Defendant’s remaining forty-one assignments of error are abandoned because they are neither set out nor referenced in his brief.

Appeal dismissed.

Judges MARTIN and McGEE concur.

1. Former Rule 10 required appellate review, “notwithstanding the absence of . . . assignments of error in the record on appeal,” of whether the “judgment is supported by the verdict or by the findings of fact and conclusions of law,” if those issues were presented in the appellant’s brief. N.C.R. App. P. 10(a) (1984); see *Electric Co. v. Carras*, 29 N.C. App. 105, 107, 223 S.E.2d 536, 538 (1976). The current version of Rule 10, however, is specific in requiring proper assignments of error as a prerequisite to the review of any issue, including whether “the judgment is supported by the verdict or by findings of fact and conclusions of law.” N.C.R. App. P. 10(a).

2. Even Defendant’s implied argument has no merit because he caused the very error of which he now complains. Defendant cannot build error into a trial and then assert the same error on appeal. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983).

CITY OF ASHEVILLE v. MORRIS

[133 N.C. App. 90 (1999)]

CITY OF ASHEVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF-APPELLEE v. FRANK W. MORRIS, RODNEY S. METCALF, THOMAS R. FRECK, JR., JAMES H. HALL, MICHAEL R. CLONTZ, GUY H. SHUFORD, RICK C. EMORY AND THE CITY OF ASHEVILLE CIVIL SERVICE BOARD, DEFENDANTS-APPELLANTS

No. COA98-1003

(Filed 20 April 1999)

Administrative law— conflict of interest—recusal required

The trial court correctly concluded that two members of a Civil Service Board should recuse themselves from a proceeding involving a pay plan for firefighters where one board member was married to a firefighter, the other had a son who was a firefighter and both faced the possibility of a pay loss.

Appeal by defendants from judgment entered 29 April 1998 by Sitton, J., in Superior Court, Buncombe County. Heard in the Court of Appeals 1 April 1999.

Martha Walker-McGlohon, Assistant City Attorney, for plaintiff-appellee.

Cynthia C. Harbin, for defendants-respondents.

WYNN, Judge.

Respondent firefighters are employed by the City of Asheville. Prior to 1996, these firefighters were provided, *inter alia*, two incentive pay programs: (1) they could receive a two-percent pay increase if they received certification as a Level I Fire Inspector, and (2) they could receive a three-percent pay increase if they received certification as an Emergency Medical Technician-D (“EMT-D”). Thus, collectively these programs provided firefighters with the opportunity to obtain a five-percent increase in their pay. All of the respondent firefighters have earned only one of these two pay incentives.

In 1995, a re-classification study recommended that Asheville make Level I Fire Inspector and EMT-D certifications mandatory, thereby abolishing the aforementioned incentive-pay programs. This study, however, also recommended that a five-percent pay increase accompany this change so that it would not adversely affect those firefighters who had already received both certifications. To protect those firefighters who had not already received both certifications, Asheville provided them with two options—obtain the certificates on

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the next testing date or relinquish the five-percent increase in base pay. Essentially, any firefighter who had completed only one of the two certification programs was informed that unless he obtained the second certification, he would lose his pertinent two- or three-percent pay increase.

Consequently, respondents, who faced losing their pertinent two- or three-percent incentive pay, appealed to the Civil Service Board. After the appeal was filed, it was discovered that two of the five Board members may have conflicts of interest. Specifically, Board member Jane Knisley was married to an Asheville firefighter. Moreover, Board member Ken Edwards' son was not only a City of Asheville firefighter, but was also at one time a member of the grieving class. Asheville requested these two members recuse themselves from this matter, but both declined. Thereafter, the Board found that Asheville's plan to eliminate the incentive pay programs was not justified and directed the City to re-examine it. Asheville appealed to the Superior Court.

In granting Asheville's writ, the trial court instructed the parties to submit affidavits regarding the conflict of interest issue. Both parties obliged. Subsequently, Asheville moved to have some of the respondents' affidavits stricken on the basis that they were not based upon personal knowledge. This motion was set to be heard by Superior Court Judge Downs.

Prior to Superior Court Judge Downs' decision, a hearing regarding the substantive matters at issue was held by Superior Court Judge Sitton. At this hearing, no party asked for a continuance or objected to the matter proceeding at that point. Moreover, no party mentioned Judge Downs' pending hearing. After reviewing the pertinent evidence, Judge Sitton concluded that both Knisley and Edwards had a conflict of interest and remanded the matter to the Board for a new hearing. In so ruling, Judge Sitton specifically stated that because the conflict of interest issue was determinative, he did not need to resolve the issue of jurisdiction. It wasn't until after this ruling that Judge Downs decided to strike some of respondents' affidavits. This appeal ensued.

"A fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge." *Crumpp v. Board of Ed. of Hickory Admin. School Unit*, 326 N.C. 603, 622, 392 S.E.2d 579,

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589 (1990) (quoting *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943)). Accordingly, an individual with pecuniary interest in an administrative proceeding should not adjudicate that dispute. See *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927). Further, the pecuniary interest need not be direct for the very “appearance of evil” must be avoided. See *Venable v. School Comm. of Pilot Mount.*, 149 N.C. 120, 121, 62 S.E. 902, 903 (1908). Therefore, whenever an individual has an interest in the outcome of a proceeding or there is a reasonable apprehension thereof, the individual should not adjudicate that proceeding.

In the case *sub judice*, the composition of the Board would make a reasonable person suspect that the Board was not wholly disinterested. Specifically, two of the Board members had apparent interests in the matter. Board member Knisely was married to a firefighter who would suffer a pay loss if he lost one of his two certifications. Further, Board member Edwards has a son who is a firefighter and faces the same possibility. Accordingly, we hold that the trial court correctly concluded that these members had a conflict with respect to this matter and should recuse themselves.

Additionally, we note that this ruling does not leave respondents without remedy. Specifically, three of the five members can still vote on this matter, and therefore a quorum can be convened.

Lastly, we note that the respondents contend that Judge Downs erred in striking their affidavits regarding the conflict of interest issue. Because we hold that a conflict of interest did exist, this argument is moot and therefore we need not address it.

Affirmed.

Judges WALKER and HUNTER concur.

COUCH v. PRIVATE DIAGNOSTIC CLINIC

[133 N.C. App. 93 (1999)]

FINESSE G. COUCH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CARNELL SIMMONS COUCH, PLAINTIFF V. PRIVATE DIAGNOSTIC CLINIC AND DUKE UNIVERSITY, DEFENDANTS

No. COA97-1540

(Filed 4 May 1999)

1. Trials— argument of counsel—veracity of witnesses—no prejudicial error

There was no prejudicial error in a medical malpractice action where plaintiff's counsel argued that defense witnesses were lying. The only objection was to a reference which was not alone sufficiently prejudicial to entitle defendants to a new trial and, although the statements may have been improper and the court should have given a cautionary instruction, the statements were not of such gross impropriety as to entitle defendants to a new trial. Given the convincing evidence presented at trial supporting defendants' negligence, any effect on the jury's verdict was harmless.

2. Agency— hospital and doctors—substantial evidence

The trial court did not err in a medical malpractice action by denying defendant-Duke University's motion for JNOV on the issue of whether any of the treating physicians was an agent of Duke. Considering the evidence in the light most favorable to the nonmoving party, there was substantial evidence of the existence of an agency relationship.

3. Trials— Rule 60 motion—excusable neglect—voluntary dismissal—willful act

The trial court erred in a medical malpractice action by allowing plaintiff's counsel to reinstate the Private Diagnostic Clinic as a defendant on a Rule 60 motion following a voluntary dismissal based upon plaintiff's counsel's mistaken belief that an employer-employee relationship existed between all treating physicians and defendant-Duke. The voluntary dismissal was a carefully considered decision, a trial strategy, and thus constitutes a deliberate willful act precluding relief under Rule 60. The fact that the legal consequences of the action were misunderstood by plaintiff's attorney is not material.

Judge WALKER concurring.

Judge GREENE concurring in part and dissenting in part.

COUCH v. PRIVATE DIAGNOSTIC CLINIC

[133 N.C. App. 93 (1999)]

Appeal by defendants from judgment entered 3 March 1997 by Tillery, J., in Superior Court, Durham County. Heard in the Court of Appeals 22 September 1998.

Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, by Maria P. Sperando and Keith A. Bishop, for plaintiff-appellee.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, and Robinson Bradshaw & Hinson, P.A., by Everett J. Bowman, Lawrence C. Moore, III, and John M. Conley, for defendants-appellants.

WYNN, Judge.

Defendants Duke University and the Private Diagnostic Clinic appeal from a jury determination that their medical practice negligence caused the death of ten-year-old Carnell Simmons Couch—son of plaintiff Finesse G. Couch.

Individually and as administratrix of Carnell's estate, Ms. Couch initiated this action against Duke, the Private Diagnostic Clinic, and Dr. Delbert R. Wigfall—an Assistant Professor of Pediatric and Acting Chief of the Division of Nephrology at Duke. She alleged that those medical providers negligently: (1) failed to examine, assess, and treat Carnell in an appropriate and timely manner and, (2) failed to appropriately diagnose the extent and urgency of Carnell's condition.

In her complaint, Ms. Couch characterized Duke as a private university operating a private hospital for the treatment of persons in need of medical care and attention and the Private Diagnostic Clinic as a professional organization of physicians who practice medicine at Duke. The complaint further alleged:

At all times relevant to this action Dr. Wigfall, the attending physician and all other physicians under his control, supervision and guidance who rendered treatment, were agents of Duke [and the Private Diagnostic Clinic] and that all acts and omissions of Dr. Wigfall and all other physicians rendering treatment . . . were performed within the scope of their agency as agents and representatives of Duke [and the Private Diagnostic Clinic].

Although defendants denied in their answer that Dr. Wigfall and all other physicians were acting within the course and scope of an agency relationship with Duke at the time they rendered treatment to

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Carnell, they admitted that the Private Diagnostic Clinic is a professional organization of physicians who practice medicine at Duke. Moreover, defendants admitted that Dr. Wigfall is a member of the Private Diagnostic Clinic practicing at Duke “and as such is employed by [Duke] to carry out those duties.”

The day following the commencement of trial on 6 January 1997, Ms. Couch “by and through her . . . attorney of record” filed a written “Notice of Voluntary Dismissal with Prejudice” against Dr. Wigfall and the Private Diagnostic Clinic. Five days into the trial after six witnesses had testified, Ms. Couch’s counsel attempted to have it stipulated “that the doctors who read the x-rays, and who treated Carnell on the 4th through the 15th [of December], and before, were employees of . . . [Duke].”

Defendants’ counsel responded that these physicians “were . . . partners in the Private Diagnostic Clinic, at Duke practicing medicine at the medical center.” Further, he stated that the physicians were employed as professors or faculty members in the Department of Pediatrics at Duke. However, he would not stipulate that the physicians were employed by Duke “as treating physicians.”

Concerned that she had prematurely dismissed the Private Diagnostic Clinic as a defendant, Ms. Couch’s counsel orally moved under Rule 60(b) for relief from the judgment in order to reinstate the Private Diagnostic Clinic. In support of this motion, counsel explained that she thought that only Dr. Wigfall was an employee of Duke at the time they rendered treatment to Carnell. Ms. Couch’s counsel admitted that “it was a mistake, it was an honest mistake that we made,” based on the statements of defendants’ counsel and the allegation in the answer, that these physicians were employees of Duke. At another point in the record, Ms. Couch’s counsel told the trial court that she entered the dismissal “because I wanted to just have everything real clean and have one defendant.”

Despite defendants’ objection to Ms. Couch’s motion, the trial court reinstated the Private Diagnostic Clinic as a defendant. In its written order allowing the reinstatement of the Private Diagnostic Clinic, the trial court found that in dismissing the Private Diagnostic Clinic, Ms. Couch’s counsel “acted in the good faith belief that an employer-employee relationship between all treating physicians and [Duke]” existed. Additionally, it found that: (1) Duke and the Private Diagnostic Clinic had not been prejudiced and (2) “the plaintiff was not at fault . . . and played no role in her counsel’s decision to remove

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[the] Private Diagnostic Clinic as a named defendant.” Therefore, the trial court concluded that “the belief of counsel relative to the admissions of [Duke] was an inadvertent mistake and the actions taken . . . were excusable neglect.”

At trial, the evidence showed that on 4 December 1991, Ms. Couch brought Carnell, who previously had been diagnosed with nephrotic syndrome¹ with minimal change disease, to Duke’s emergency room after he began experiencing symptoms including swelling, decreased urine output, and shortness of breath. After performing a number of tests on Carnell, including a chest x-ray, the medical personnel diagnosed his condition as a relapse of his nephrotic syndrome, treated him with several drugs, and discharged him to the care of his parents.

On 10 December 1991, Carnell was again brought to Duke’s emergency room complaining of a shortness of breath, coughing, and vomiting. This time, however, he was admitted to the hospital and given numerous tests including chest x-rays and two electrocardiograms (“EKGs”). An initial x-ray on 10 December 1991 led to a diagnosis of pneumonia, but the second x-ray on 14 December 1991 was reported to reveal that his lung anomaly had begun to resolve.

Further, the first EKG on 13 December 1991 was characterized as “a very strange looking EKG” suggesting that this test be repeated. The second, however, was interpreted as normal. Thereafter, on 15 December 1991, Carnell was discharged from Duke.

While at home on 13 February 1992, Carnell died. An autopsy established the cause of death as *in situ* pulmonary artery thrombosis, meaning that one or more blood clots had developed and blocked the main artery leading from the heart to the lungs. Some of the blood clots were determined to be months old, while others were years old.

At the close of all of the evidence, Duke moved for a directed verdict on the grounds that there was insufficient evidence of negligence on its part. The Private Diagnostic Clinic’s motion was based in part on the trial court reinstating it as a defendant. The trial court denied both motions.

1. Generally characterized, nephrotic syndrome is a condition in which the kidneys leak protein that would normally stay in the blood stream and as a result there is a tendency for fluid to accumulate abnormally within the body. The condition is further characterized by intervals of remission punctuated by flare-ups or swelling of the abdominal and genital areas, and associated discomfort.

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Subsequently, the jury determined that the medical doctors who treated Carnell were agents of Duke and that Carnell's death was caused by the negligence of both the Private Diagnostic Clinic and Duke. Damages were assessed at \$2,501,150.00. Defendants moved for judgment notwithstanding the verdict (JNOV) which the trial court denied.

On appeal, defendants contend that the trial court committed reversible error by: (1) permitting Ms. Couch's counsel to engage in a grossly improper jury argument during trial, (2) denying Duke's Motion for Judgment Notwithstanding the Verdict, and (3) allowing Ms. Couch's counsel to reinstate the Private Diagnostic Clinic as a defendant. We address each of these seriatim.

I.

[1] First, defendants assert that the trial court abused its discretion in allowing the jury argument of Ms. Couch's counsel which contained various references to the veracity of defense witnesses. Specifically, defendants point to counsel's comments that: (1) "There is nothing worse than a liar because you can't protect yourself from a liar. . . . [T]hese people, and all the doctors that they paraded in here who told you lie, after lie, after lie"; (2) "They lied to your face, blatantly. They didn't care. They tried to make fools of everybody in the courtroom"; (3) "In your face lies"; (4) ". . . they knew before they put their hands on the Bible that they were going to tell those lies and [Defendants' attorney] put them up anyway. That's heavy. That's a heavy accusation"; (5) "Well, I don't know what you call it but that's a lie. That's not even—that's not shading the truth . . . How is that not a lie? How is that not a lie?"; (6) "So you see, when I say a lie, okay, I want the record to reflect that I mean a lie"; (7) "Now let me ask you this, how do you think that they intend to get out from under all these lies?"; (8) "This is another blatant lie"; (9) "When they parade these witnesses in one after another and lied to your face. I mean, they were not even smooth about it."

It is well established in North Carolina that "[c]ounsel have wide latitude in making their arguments to the jury." *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967). Further, the control of counsel's arguments "must be left largely to the discretion of the trial judge," *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979), because the trial judge

'sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of the lati-

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tude that ought to be allowed to counsel in the argument of any particular case.’

State v. Thompson, 278 N.C. 277, 283, 179 S.E.2d 315, 319 (1971) (quoting *State v. Barefoot*, 241 N.C. 650, 657, 86 S.E.2d 424, 429 (1955)). Therefore, “the appellate courts ordinarily will not review the exercise of the trial judge’s discretion [regarding jury arguments] unless the impropriety of counsel’s remarks is extreme and is clearly calculated to prejudice the jury in its deliberations.” *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761; see also *Thompson*, 278 N.C. at 283, 179 S.E.2d at 319 (stating “[i]t is only in extreme cases of the abuse of privilege by counsel, and when this is not checked by the court, and the jury is not properly cautioned, [the appellate courts] can intervene and grant a new trial.”).

“Jury argument, however, is not without limitations.” *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994). “The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury.” *Id.* (quoting *State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1975)). Moreover, “[i]f the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu.*” *Id.* (quoting *Britt*, *supra*).

Defendants in the case *sub judice* objected only to the first of these arguments which was: “There is nothing worse than a liar because you can’t protect yourself from a liar. . . . [T]hese people, and all the doctors that they paraded in here who told you lie, after lie, after lie.” This comment alone is not sufficiently prejudicial to entitle the defendants to a new trial. Therefore, we must determine whether counsel’s other references to defense witnesses’ veracity constituted gross improprieties entitling defendants to a new trial because of the court’s failure to correct them *ex mero motu.*

In North Carolina, “[i]t is improper for a lawyer to assert his opinion that a witness is lying.” *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978). However, the mere fact that counsel makes such an argument does not automatically establish that the argument is grossly improper so as to require a new trial when the trial court does not intervene *ex mero motu.* See *State v. Solomon*, 340 N.C. 212, 218-20, 456 S.E.2d 778, 782-84 (1995) (holding that the trial court did not abuse its discretion by failing to intervene *ex mero motu* to prevent closing argument by the prosecutor that the defendant lied during his testimony); *State v. Noell*, 284 N.C. 670, 696, 202 S.E.2d 750.

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767 (1974) (holding that solicitor's statement during closing that defense witnesses have lied was merely a question which was submitted to the jury for its determination when it made its findings and returned its verdict), *vacated in part on other grounds*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed.2d 1205 (1976); *State v. Jordan*, 49 N.C. App. 561, 569, 272 S.E.2d 405, 410 (1980) (holding that prosecutor's statements regarding his opinion as to the truthfulness of a defense witness, considering the evidence against the defendant, did not reach the level of the grossly improper statements which would require the trial court to correct them *ex mero motu*).

In fact, the existence of overwhelming evidence supporting the jury's verdict notwithstanding improper characterizations regarding the veracity of witnesses' statements has been sufficient in some cases to prevent the imposition of a new trial. *See e.g. State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879 (1994) (holding that statements to the jury made by the prosecutor asserting that a defense witness was lying was improper, but considering all the facts and circumstances revealed in the record which showed overwhelming evidence against the defendant, such statements did not constitute a prejudicial error); *Thompson*, 278 N.C. at 277, 179 S.E.2d at 315 (holding that solicitor's statements to the jury that the defense witnesses were lying were not sufficient to warrant a new trial in view of the overwhelming evidence of guilt against the defendant). Therefore, to determine whether counsel's argument in this case was grossly improper, we must examine the argument in the context in which it was given and in light of the factual circumstances to which it refers. *See State v. Ocasio*, 344 N.C. 568, 580, 476 S.E.2d 281, 288 (1996).

Here, several trial witnesses (including some of Duke's witnesses) testified that the x-rays on December 11th and 14th revealed an enlarged pulmonary trunk and pulmonary arteries. Nonetheless, Duke neither reported nor evaluated this diagnosis.

Further, one month prior to the filing of this suit, Dr. Chen, a Duke cardiopulmonary radiologist, along with three other Duke physicians wrote a published article concluding that at the time of the x-rays, Carnell more likely suffered from a blood clot rather than pneumonia. Additionally, there was other evidence presented that Carnell's lung difficulties were not related to pneumonia, but instead due to a blood clot.

Given the convincing evidence presented at trial supporting the defendants' negligence, we find that the jury argument had a harmless

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effect, if any on the jury's verdict. Although these statements may have been improper to the extent that the trial court should have given a cautionary instruction, we are unable to conclude that they were of such gross impropriety to entitle the defendants to a new trial. *See State v. Vines*, 105 N.C. App. 147, 412 S.E.2d 156 (1992) (holding that the prosecutor's argument attacking the integrity of defense counsel was of such gross impropriety as to justify *ex mero motu* correction; however, in light of the strong and convincing case against the defendant we could not hold that the prosecutrix's improper comments were sufficiently prejudicial as to require a new trial). Thus, we reject defendants' first assignment of error.

II.

[2] Next, Duke argues that the trial court erred in denying its motion for JNOV because there was no competent evidence that "any of the treating physicians alleged to have been negligent was an agent of Duke."

A motion for JNOV is treated as a renewal of the motion for directed verdict. *See Maintenance Equip. Co. v. Godley Builders*, 107 N.C. App. 343, 353, 420 S.E.2d 199, 204 (1992); N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (1990). Thus, a movant cannot assert grounds on a motion for JNOV that were not previously raised in the directed verdict motion. *See Lassiter v. English*, 126 N.C. App. 489, 492-93, 485 S.E.2d 840, 842 (1997) (holding that a party must have made a directed verdict motion at trial on the specific issue which is the basis of the JNOV).

Because Duke never asserted this agency argument as a grounds for its motion for directed verdict, it has no standing to raise this issue in its motion for JNOV. *See id.* However, we will address the merits of its argument on this point.

Preliminarily, it is noted that we do not read the Supreme Court's holding in the *Smith* case to mean that all physicians who practice medicine at the Duke Medical Center do so as agents of the Private Diagnostic Clinic. *See Smith v. Duke Univ.*, 219 N.C. 628, 14 S.E.2d 643 (1941) (physicians employed by Duke University, as professors, are not necessarily employees of Duke University at the time they render treatment to a patient at the university hospital). Instead, the relationship between the Private Diagnostic Clinic, Duke, and the physicians at the Medical Center is subject to change and must necessarily be determined based on the evidence presented in each case.

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The trial court in deciding a JNOV motion must determine whether the evidence in the light most favorable to the non-moving party is sufficient to take the case to the jury. *See Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 506 S.E.2d 267, 270 (1998). “The motion should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim.” *Id.* (citing *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C.App. 237, 242, 446 S.E.2d 100, 103 (1994)). In other words, the motion should be denied if there exists substantial evidence or “‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

Admittedly, the testimony in the subject case is somewhat conflicting as to the exact relationship between Duke and those persons employed as professors, who also treat patients (including the reading of x-rays) at the Medical Center. There is some testimony that would support the conclusion that all such persons are rendering treatment as agents of the Private Diagnostic Clinic, not Duke, but that conclusion is not mandated on this record.

As previously stated, Duke admitted in its answer that the Private Diagnostic Clinic is a professional organization of physicians who practice medicine at the Medical Center and that Dr. Wigfall is a member of the Private Diagnostic Clinic practicing at Duke “and as such is employed by [Duke] to carry out those duties.”

Moreover, witness testimony at trial supports the existence of an agency relationship between Duke and some of the persons rendering treatment to Carnell, including those who evaluated his x-rays. For instance, Dr. Cindy Miller, who interpreted the 14 December 1991 x-ray, testified she was employed by Duke as an Assistant Professor of Pediatric Radiology and in that capacity, she assisted “the clinicians and residents in the interpretation of [x-rays].” Dr. Mark Kliever testified that he was employed by Duke as an Associate Professor of Radiology in its Department of Pediatric Radiology and in that capacity, “read and interpret[ed] some x-rays” of Carnell which had been taken on 14 December 1991.

Dr. Catherine Wilfert-Katz testified that she was “employed by [the] Medical Center” and “associated with” the Private Diagnostic Clinic at the Medical Center. Dr. Wilfert further testified that “within the framework of the Medical Center,” she serves “as a consult for

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infectious disease problems,” and in this capacity, she received a consultation request from Dr. Wigfall regarding Carnell.

Considering this evidence in the light most favorable to the Ms. Couch, the nonmoving party, we conclude that there was substantial evidence of the existence of an agency relationship between Duke and Carnell’s treating physicians. Accordingly, the trial court did not err in denying Duke’s motion for JNOV.

III.

[3] Finally, the Private Diagnostic Clinic contends that the trial court erred in allowing Ms. Couch to reinstate Private Diagnostic Clinic as a defendant, when her counsel, as a trial strategy, deliberately dismissed the Private Diagnostic Clinic as a defendant. We agree.

Rule 60(b)(1) of the North Carolina Rules of Civil Procedure provides that upon a proper showing, “a court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . [because of a] [m]istake, inadvertence, surprise, or excusable neglect.” N.C. Gen. Stat. § 1A-1, Rule 60 (b)(1) (1990). A voluntary dismissal with prejudice constitutes a final judgment within the meaning of this Rule. *See Carter v. Clowers*, 102 N.C. App. 247, 252-53, 401 S.E.2d 662, 665 (1991); *but see Wright, Miller and Kane, Federal Practice and Procedure: Civil 2d § 2858* (voluntary dismissal does not give rise to relief under Rule 60(b)).

Whether conduct constitutes “excusable neglect” presents a conclusion of law, fully reviewable on appeal. *See Jones-Onslow Land Co. v. Wooten*, 177 N.C. 248, 98 S.E. 706 (1919); *Thomas M. McLinnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986). If “excusable neglect” exists, it is within the discretion of the trial court to allow or deny the Rule 60(b)(1) motion and that decision will not be disturbed on appeal unless the trial court has abused its discretion. *See id.*

Although negligence and carelessness can support Rule 60(b)(1) relief, it is only when such neglect or carelessness is excusable. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489 123 L. Ed.2d 74 (1993) (construing a federal statute using the term “excusable neglect”). The determination of whether a particular act of negligence or carelessness is “excusable” requires consideration of any relevant circumstance, including: (1) “the danger of prejudice to the adverse party”; (2) “the length of any delay caused by the neglect and its effect on the proceedings”; (3)

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“the reason for the neglect, including whether it was within the reasonable control of the moving party”; and (4) “whether the moving party acted in good faith.” 12 *Moore’s Federal Practice*, 3rd, § 60.41[1][a]; see *McInnis*, 318 N.C. at 425, 349 S.E.2d at 555.

Deliberate or willful conduct cannot constitute excusable neglect, 12 *Moore’s Federal Practice*, 3rd, § 60.41[1][c][ii], at 60-88, 60-89 (3d ed. 1998), nor does inadvertent conduct that does not demonstrate diligence, *Id.* at § 60.41[1][c][ii], at 60-89. Thus, mistakes of legal advice or mistakes of law are not within the contemplation of Rule 60(b)(1). See *Phifer v. Travellers’ Ins. Co.*, 123 N.C. 405, 31 S.E. 715 (1898); *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038 (9th Cir. 1992); *Federal Practice and Procedure* § 2858 (“ignorance of law” is not grounds for Rule 60(b) relief).

In this case, the trial court granted Rule 60(b)(1) relief on the basis that Ms. Couch’s counsel’s “inadvertent mistake” in dismissing the claim against the Private Diagnostic Clinic, constituted “excusable neglect.”² Our review of the record reveals that the voluntary dismissal of the Private Diagnostic Clinic and Dr. Wigfall was a carefully considered decision, a trial strategy, and thus constitutes a deliberate willful act precluding relief under Rule 60 (b)(1). The fact that the legal consequences of the action were misunderstood by Ms. Couch’s attorney is not material. See *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 575 (10th Cir. 1996). In any event, if the dismissal were held to constitute neglect, it would not be “excusable” because (1) Duke never admitted (in its answer or otherwise) that Carnell’s treating physicians were its agents for the purpose of rendering treatment; and (2) Ms. Couch had signed a hospital form wherein she acknowledged that the treating physicians were not acting as employees of Duke, but as independent contractors.

Furthermore, Ms. Couch’s attorney should have been on notice of the pitfalls of proceeding against Duke based on a claim that its professors were Duke’s agents at the time they were treating patients at the hospital. See *Smith*, *supra*, 219 N.C. at 628, 14 S.E.2d at 643. Therefore, the voluntary dismissal of the Private Diagnostic Clinic,

2. Historically, it has been the excusable neglect of the party, not the attorney, which justifies relief under Rule 60(b)(1). See *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 131, 180 S.E.2d 407, 409 (1971). Nonetheless, attorney neglect can also constitute grounds for relief under Rule 60 (b)(1), if the client has been diligent in communicating with his attorney and is not otherwise at fault. See *Norton v. Sawyer*, 30 N.C. App. 420, 424, 227 S.E.2d 148, 152 (1976); *Pioneer*, *supra*, 507 U.S. at 396, 123 L. Ed.2d at 90 (attorney negligence can constitute excusable neglect).

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was not subject to being set aside under Rule 60(b)(1) and the trial court erred, as a matter of law, in reinstating the Private Diagnostic Clinic into the lawsuit.³

In summary, the granting of Ms. Couch's Rule 60 motion is reversed and judgment entered, against the Private Diagnostic Clinic pursuant to the jury verdict, is vacated. Because there was substantial evidence that Carnell's treating physicians were agents of Duke and these physicians were in fact negligent, the trial court's denial of Duke's motion for JNOV is affirmed.

Private Diagnostic Clinic—Reversed.

Duke—Affirmed.

Judge WALKER concurs in a separate opinion.

Judge GREENE concurs in part and dissents in a separate opinion.

Judge WALKER concurring.

My research indicates that the majority of cases to reach our appellate courts regarding arguments of counsel which referred to the veracity of witnesses were criminal cases. In most of these cases, our courts have held that counsel's arguments regarding a witness lying was not sufficiently prejudicial to warrant a new trial. I would decline to impose a standard more restrictive in civil cases than in criminal cases. While I express my concern that counsel's argument may have violated our Rules of Professional Conduct, our Supreme Court has stated that ethical transgressions by counsel do not always constitute "legal error" and "legal error" does not entitle a defendant to a new trial unless it is prejudicial. *State v. Sanders*, 303 N.C. 608,

3. This Court's holding in *Carter*, *supra*, 102 N.C. App. at 247, 401 S.E.2d at 662 does not require a different result. In that case, the attorney dismissed, with prejudice, his complaint against Clowers and Deeney. *Id.* The attorney had intended to dismiss Clowers with prejudice and Deeney without prejudice. In effect, the attorney never intended to dismiss the action against Deeney with prejudice. *Id.* The trial court found that the attorney had entered the Deeney dismissal by "mistake and inadvertence" and allowed an amendment of the notice of dismissal. *Id.*

By contrast, in the *case sub judice*, Ms. Couch's attorney intended to dismiss the claim against the Private Diagnostic Clinic and made that decision after some deliberation.

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281 S.E.2d 7, *cert. denied*, 454 U.S. 973, 70 L. Ed. 2d 392 (1981). I agree the trial judge did not commit prejudicial error in overruling defendant's lone objection and in not intervening *ex mero motu* in the remainder of the argument.

Judge GREENE concurring in part and dissenting in part.

I believe Plaintiff's closing jury argument contained grossly improper comments, and therefore would grant Duke a new trial.

In jury argument, a lawyer is not to determine matters of credibility and announce that opinion to the jury, as that is the prerogative of the jury. *State v. Locklear*, 294 N.C. 210, 218, 241 S.E.2d 65, 70 (1978). Thus a lawyer's expression of her opinion to a jury that a witness is lying is a "step out of bounds" and the trial court is obliged to act *ex mero motu* and immediately "correct the transgression." *Id.*; *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967) (improper for lawyer to assert his opinion that a witness is lying); *cf. State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974) (district attorney's argument that "I submit to you, that they have lied to you" was proper), *vacated on other grounds*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976); *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976) (argument that "The State would argue and contend to you that [defendant's] testimony was nothing but the testimony of a pathological liar," was proper); *State v. Solomon*, 340 N.C. 212, 456 S.E.2d 778 (statement that defendant was "lying his head off" was not improper because witness had admitted on the stand that he had lied), *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995); *State v. Tyler*, 346 N.C. 187, 485 S.E.2d 599 (statement that defendant put his "hand on the Bible and told about 35,000 whoppers" did not require trial court to intervene *ex mero motu* because comment does not "equate to the type of specific, objectionable language referring to defendant as a liar"), *cert. denied*, — U.S. —, 139 L. Ed. 2d 411 (1997).

In this case, Plaintiff's counsel repeatedly expressed her unequivocal opinion that various witnesses for defendants had lied on the witness stand. She even suggested that defendants' counsel knew they were going to lie before they were placed on the witness stand and "they put them up anyway. That's heavy. That's a heavy accusation." Indeed it is! These comments were grossly improper and the trial court erred in overruling defendants' objection to them. To the extent there was no objection, the trial court erred in not intervening to immediately and *ex mero motu* stop the argument. The magnitude

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of this error entitles Duke to a new trial. *See Locklear*, 294 N.C. at 218, 241 S.E.2d at 70 (granting defendant a new trial).

I fully concur with the remainder of the majority's opinion.



SWAN QUARTER FARMS, INC., PLAINTIFF v. ROGER A. SPENCER AND WIFE, DOROTHY C. SPENCER; BENJAMIN CAHOON AND WIFE, MELANIE S. CAHOON; AND JEFFREY D. GIBBS AND WIFE, JENNIFER S. GIBBS

No. COA98-740

(Filed 4 May 1999)

1. Estoppel— piercing corporate veil—clean hands

The trial court did not err by refusing to pierce the corporate veil in an action to determine possession of a tract of land where defendant contended that the trial court should have disregarded plaintiff's corporate form to determine the true nature of the parties and their interests and should not have granted summary judgment for plaintiff. Defendants were aware of the defects in the title when they purchased the property, used the defects in the title as leverage in negotiations, and may not resort to equitable principles. Equity is for the protection of innocent persons and is a tool used by the court to intervene where injustice would otherwise result.

2. Deeds— real property—bona fide purchaser for value

The trial court did not err in an action concerning possession of land by determining that one of defendants' predecessors in title was not a bona fide purchaser for value without notice of any defects in the chain of title where a 1969 deed was presumptively invalid on its face and an inquiry by the purchaser would have disclosed that the conveyance was not open and above board.

3. Adverse Possession— ejectment claim—determined in prior action

An ejectment action was not barred by an adverse possession claim where the issue of adverse possession had been raised, argued, and determined by the Court of Appeals in a prior action.

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4. Appeal and Error— preservation of issues—cross-assignment of error

A cross-assignment of error concerning an N.C.G.S. § 1-111 bond was proper where defendants argued that the trial court's order did not deprive plaintiff of an alternative ground for summary judgment, but the decision may have deprived plaintiff of an alternative basis in law for supporting the judgment.

5. Ejectment— defense bond—not a condition precedent to filing an answer

The trial court did not err in an ejectment action by granting defendants' motion for leave to file a defense bond. The trial court has discretion to extend the time for filing an N.C.G.S. § 1-111 bond and to allow filing of the bond after the answer has been filed. Posting a defense bond is not a condition precedent to filing an answer; the requirement of a defense bond was never intended to be used to require forfeiture on technical grounds by a party having merit to its argument.

Appeal by defendants from order entered 18 February 1998 by Judge Howard E. Manning, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 29 March 1999.

This action concerns the possession of a tract of land in Hyde County, North Carolina. In March 1969, the plaintiff, Swan Quarter Farms, Inc. ("SQF") was the owner of the property. At that time, SQF was owned in equal $\frac{1}{3}$ shares by shareholders A.H. Van Dorp, Mary Van Dorp and Fred Poore. On 31 March 1969 SQF, by and through its President, Mr. Van Dorp, and its Secretary, Mrs. Van Dorp, executed a deed dated 25 March 1969 purporting to convey the property to Mrs. Van Dorp individually.

On 18 October 1972, the Van Dorps signed a note and deed of trust to Federal Land Bank ("Federal") to secure a \$100,000 loan to the Van Dorps. On 5 September 1975 the Van Dorps signed another note and deed of trust to Federal, this time to secure a \$208,000 loan. On 18 January 1983 Federal made an advancement on the 1975 deed of trust in the amount of \$247,000. On 25 July 1988, Federal began foreclosure proceedings on the 1975 deed of trust. The foreclosure sale was held on 2 December 1988 and Federal bid the sum of \$470,000. No upset bids were filed and a deed was executed to Federal for the property on 14 December 1988.

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Meanwhile, in 1983, Mr. Poore had filed suit against SQF and the Van Dorps seeking to invalidate the 1969 transfer from SQF to the Van Dorps. In 1989, this Court determined that the 1969 transfer of the deed from SQF to the Van Dorps was presumptively invalid. *Poore v. Swan Quarter Farms, Inc.*, 95 N.C. App. 449, 450, 382 S.E.2d 835, 836 (1989), *disc. review denied*, 326 N.C. 50, 389 S.E.2d 93 (1990). This Court also determined that “the plaintiffs were entitled to rely on the presumption of invalidity of the corporate deed, and the defendants’ failure to offer any evidence to rebut the presumption mandates *voiding* of the 25 March 1969 deed.” *Id.* at 451, 382 S.E.2d at 836 (emphasis added).

At the time of this Court’s 1989 decision, Poore still owned a $\frac{1}{2}$ share in SQF, and the remaining $\frac{1}{2}$ shares were owned by the Van Dorps. Mrs. Van Dorp passed away on 28 September 1991. In consideration of legal services, Mr. Van Dorp, acting as executor of Mrs. Van Dorp’s estate and individually, transferred to Lee E. Knott the Van Dorps’ shares in SQF in April of 1992.

On 7 May 1992, defendants Roger A. Spencer and family purchased both Poore’s share in SQF as well as Poore’s interest in the land by way of quitclaim deed. The Spencers also purchased Federal’s interest in the land by special warranty deed in which Federal warranted that it had done nothing to impair title in the property since it received it. Lawyers’ Title Insurance Corporation provided an owner’s title insurance policy to the Spencers for the \$460,000 purchase price without exceptions to the claims of SQF, the Van Dorps or the Poores.

On 27 October 1995 SQF instituted this action to eject the Spencers from the property. On 22 December 1995 the Spencers answered denying SQF’s right to possession. SQF then filed a Motion to Strike the Answer for failure of defendants to post the bond required by G.S. 1-111. Pursuant to a consent order entered without prejudice to SQF’s Motion to Strike the [Spencer’s] Answer, the Spencers filed an amended answer on 12 July 1996. On 2 December 1996 the Spencers moved for summary judgment. On 15 April 1997 the Spencers filed a motion for leave to file defense bond or alternatively for relief from failure to file the G.S. 1-111 defense bond. On 15 May 1997 SQF moved for summary judgment.

On 18 February 1998, the trial court denied defendants’ motion for summary judgment and granted summary judgment to SQF, determining that SQF was “the owner in fee simple of the property which

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is the subject of this action and entitled to immediate possession of the property.” The trial court also granted defendants’ motion to file a defense bond. Upon posting the defense bond required by G.S. 1-111, defendants appealed. In addition, SQF cross-assigned as error the trial court’s determination allowing defendants to file the defense bond.

Hornthal, Riley, Ellis and Maland, by L. P. Hornthal, Jr. and M. H. Hood Ellis, for plaintiff-appellee.

Moore & Van Allen, PLLC, by David E. Fox and Christopher J. Blake, for defendant-appellants.

EAGLES, Chief Judge.

[1] We first consider whether the trial court erred in granting plaintiff’s motion for summary judgment because the trial court should have disregarded the plaintiff’s corporate form to determine the true nature of the real parties and their interests. Defendants contend that if the trial court had examined the plaintiff rather than relying on plaintiff’s corporate identity, “the trial court would have found Mr. Knott seeking to reap an economic windfall as a result of the Van Dorps’ prior self-dealing and breaches of fiduciary duty.” Accordingly, defendants argue that “Mr. Knott should be estopped from suing in SQF’s name and using the Van Dorp’s self-dealing and the accompanying statutory presumption to defeat the Spencers’ claims to possession of the Property.” Defendants argue that the Van Dorps would have been estopped from relying on their own improper conduct to maintain this action. Defendants argue that it follows that Mr. Knott, as the Van Dorps’ successor, should not possess any greater right to sue in SQF’s name. Defendants rely on *Bangor Punta Operations v. Bangor & A. R. Co.*, 417 U.S. 703, 41 L.Ed.2d 418 (1974) and *Park Terrace, Inc. v. Burge*, 249 N.C. 308, 106 S.E.2d 478 (1959) in seeking that the corporate form be disregarded based on equitable principles.

Plaintiff argues that the Spencers cannot claim the benefit of equitable defenses because of their “unclean hands.” Plaintiff asserts that the Spencers bought the property with their “eyes wide open” and used the “legal problems” related to the property’s title to obtain concessions on purchase price and title insurance. Plaintiff argues that estoppel is for the benefit of innocent persons and that defendants could not create an estoppel by their own actions. Plaintiff also distinguishes the cases relied upon by defendants, arguing that the equitable rules proclaimed in those cases have no application where

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the corporation is proceeding at law to recover title to its property wrongfully acquired through fraud and overreaching by an officer and shareholder. Plaintiff argues that “[a]ny other rule would countenance the fraudulent acquisition of corporate property.” Plaintiff finally argues that the Spencers’ pleadings procedurally bar the Spencers’ attempts to disregard the corporate entity because the Spencers did not specifically plead an estoppel or alter ego defense in their Answer.

We hold that defendants cannot claim the benefit of equitable defenses. “The corporate veil may be pierced to prevent fraud or to achieve equity.” *Harrelson v. Soles*, 94 N.C. App. 557, 561, 380 S.E.2d 528, 531 (1989) (quoting *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985)). Equity is for the protection of innocent persons and is a tool used by the court to intervene where injustice would otherwise result. See *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964) (only innocent persons may claim the benefit of equitable estoppel). Here, defendants were aware of the defects in the title when they purchased the property. In fact, the defendants used the defects in the title as leverage in negotiations with Federal to obtain concessions on price and title insurance. The defendants protected themselves in the transaction and they may not resort to equitable principles to protect themselves from any fraud. Accordingly, we hold that the trial court did not err by refusing to pierce the corporate veil. The assignment of error is overruled.

[2] We next consider whether defendants’ predecessors in title were bona fide purchasers for value without notice of any defects in the chain of title. Defendants argue that the trial court erred when it determined that Federal was not a bona fide purchaser without notice of the invalidity of Mrs. Van Dorp’s title to the property. Defendants contend that the trial court incorrectly held that the 1969 deed conveying the property to Mrs. Van Dorp charged Federal with actual and constructive notice of a fatal defect in its chain of title. In doing so, defendants argue that the trial court failed to make a critical distinction between a deed that is void on its face and one that is voidable. Defendants contend that a voidable deed is sufficient to pass title to a bona fide purchaser for value, but a void deed is not. *Beam v. Almond*, 271 N.C. 509, 520, 157 S.E.2d 215, 224 (1967). Defendants assert that Federal had no actual or constructive notice of any imposition, undue advantage or actual or constructive fraud in connection with the 1969 deed. Defendants contend that although this Court correctly held that conveyances of corporate property to corporate offi-

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cers are subject to a judicial presumption of invalidity, the trial court erred when it determined that the presumption rendered the 1969 deed void rather than merely voidable. Defendants argue that “unless or until an action was commenced challenging the 1969 deed, it was merely voidable, not void, and the judicial presumption against validity had no meaning or application.” Defendants note that no action to void the 1969 deed was taken until 1983, while Federal loaned substantial sums to the Van Dorps in 1972 and 1975. Defendants additionally argue that had Federal conducted a reasonable inquiry, it would not have disclosed any fatal defect in the 1969 deed because “the corporate records revealed complete shareholder and director approval.” Accordingly, defendants assert that Federal was a bona fide purchaser for value with no notice of any defect in the chain of title, and defendants are entitled to be protected as a grantee to Federal’s innocent purchaser status.

Plaintiff first argues that as a matter of law, the 1969 deed by which defendants claim title is invalid as a matter of law because “the undisputed facts and evidence completely and conclusively establish the very basis for the presumptive invalidity of the 1969 deed and the fact that the presumption could not be rebutted under the circumstances surrounding the deed.” Plaintiff asserts that the trial court properly determined that based on the undisputed facts of record, the 1969 deed was invalid as a matter of law and was null and void. Accordingly, plaintiff asserts that defendants have no title to the property unless defendants or their predecessors in interest acquired the property as an innocent or bona fide purchaser for value without notice of the infirmity. Plaintiff next argues that both the Spencers and their predecessor in interest, Federal, had actual and constructive notice of the defect in the deed and neither qualify for protection as bona fide purchasers for value without notice. Plaintiff argues that the “vitiating or corrupting fact appears on the face of the record and the 1969 deed which Mrs. Van Dorp signed to herself as an officer of SQF.” Plaintiff argues that the 1969 deed was presumptively invalid and defendants were charged with notice of the defect appearing on the face of the deed. At the very least, plaintiff argues that the “vitiating fact” appearing on the face of the deed was sufficient to put Federal “on notice of all matters which a reasonable inquiry would have disclosed.” Plaintiff asserts that Federal did not undertake a reasonable inquiry. Accordingly, plaintiff argues that the trial court correctly held that Federal was not a bona fide purchaser for value without actual or constructive notice of the defect, and Spencer did not take title free of the defect.

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After careful consideration of the record, briefs and contentions of both parties, we affirm. Where “an innocent purchaser conveys to one who has notice, the latter is protected by the former’s want of notice and takes free of the equities.” *Morehead v. Harris*, 262 N.C. 330, 342, 137 S.E.2d 174, 185 (1964) (citing *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894)). Here, it is not disputed that defendants had notice of the defects in title when it purchased the subject property. The issue is whether their predecessor in title, Federal, was a bona fide purchaser for value without notice of the defect in the title. We find that defendants are not entitled to protection as a bona fide purchaser for value without notice because Federal cannot claim protection as a bona fide purchaser for value without notice.

Defendants are correct in their contention that the 1969 deed was merely voidable and not void on its face. “The purchase or lease of the property of a corporation by an officer or director of a corporation renders the transaction voidable, not void, and such transaction will be upheld only when open, fair, and for sufficient consideration.” *Youth Camp v. Lyon*, 20 N.C. App. 694, 697, 202 S.E.2d 498, 500 (1974) (citing 19 C.J.S. Corporations § 775, p. 137). This Court has already recognized the “presumption of invalidity of the deed” in this case. *Swan Quarter Farms*, 95 N.C. App. at 450, 382 S.E.2d at 836. This Court also determined that “the plaintiffs were entitled to rely on the presumption of invalidity of the corporate deed, and the defendants’ failure to offer any evidence to rebut the presumption mandates voiding of the 25 March 1969 deed.” *Id.* at 451, 382 S.E.2d at 836. However, this Court did not void the deed until 1989, and when the deed was conveyed to Federal in 1972, it was still merely voidable. The issue then becomes whether Federal was a bona fide purchaser for value without notice when it acquired the voidable deed in 1972. The key to determining this issue is Federal’s notice. The 1969 deed was presumptively invalid on its face. By law, Federal was charged with “notice of every fact affecting [its] title which an accurate examination of the title would disclose.” *Waters v. Phosphate Corp.*, 310 N.C. 438, 442, 312 S.E.2d 428, 432 (1984) (citing *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E.2d 1 (1973)). Here, an inquiry by Federal would have disclosed that the 1969 conveyance was not “open and above board.” First, based on undisputed facts in the record, the conveyance of the 1969 deed was for far less than adequate consideration. The recorded deed showed that “[t]he sum of \$5.00 in excise tax or stamps was affixed to the deed as recorded. In 1969, this represented consideration of between \$4,500 and \$5,000 (\$0.50 per \$500).” However, a bal-

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ance sheet dated in 1967 in Federal's loan file for SQF showed the property was worth at least \$135,000, and evidence indicates the property may have been worth as much as \$282,750 in 1969. Additionally, there was evidence in the record that Mr. Poore was not aware of the 1969 transfer and did not consent to it. The trial court found that the transaction "was not fairly and openly authorized, was not free from oppression, and lacked full disclosure and fair dealing because of the Van Dorps' fiduciary relationship as officers of SQF." Accordingly, we hold that Federal could not claim status as a bona fide purchaser for value without notice and defendants are not protected by any bona fide purchaser without notice status. The assignment of error is overruled.

[3] We next consider whether plaintiff's ejectment claim is barred because the Van Dorps acquired title to the disputed property by adverse possession pursuant to G.S. 1-38. Defendants contend that Mrs. Van Dorp satisfied all the requirements for adverse possession. First, defendants argue that Mrs. Van Dorp entered the property under color of title because she took possession of the property in the good faith belief that she held good title to the property. Defendants assert that Mrs. Van Dorp did not have a fraudulent intent at the time she executed the 1969 deed. Second, defendants contend that Mrs. Van Dorp satisfied all of the other requirements for adverse possession. She took possession on 1 April 1969, and her possession was continuous, adverse, hostile and exclusive. Defendants note that the Van Dorps exclusively determined who would farm the property and collected the rents and profits. Defendants additionally note that Mrs. Van Dorp's adverse possession was never tolled since no action was filed or pending prior to 31 March 1976. Defendants argue that defendants' claim of adverse possession was erroneously precluded by the trial court because the issue of adverse possession was never raised in any prior litigation. Additionally, defendants contend that Mrs. Van Dorp's fiduciary relationship with SQF does not preclude title by adverse possession. Defendants argue that "even if some quasi-trust relationship existed, it was repudiated by clear and unequivocal acts" by Mrs. Van Dorp, and all shareholders of SQF had actual notice of the adverse claim no later than 1 August 1973.

Plaintiff argues that the issue of Mrs. Van Dorp's adverse possession was adjudicated adversely to Mrs. Van Dorp in *Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 291, 338 S.E.2d 817, 820 (1986), *disc. review denied*, 326 N.C. 50, 389 S.E.2d 94 (1990)). In that case, plaintiff contends that Mrs. Van Dorp asserted a claim of supe-

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rior title to the property by adverse possession. In reversing an order for summary judgment and remanding the case for trial, this Court noted that “the pleadings also fail to disclose sufficient facts and circumstances to permit judgment on the pleadings based on either estoppel or adverse possession.” *Id.* Upon remand and after trial on the merits, plaintiff asserts that this Court found that title to the property remained in SQF. The Court stated that its “previous opinions clearly establish that defendant Swan Quarter Farms, Inc. is the owner in fee simple of the property in dispute. . . .” *Poore v. Swan Quarter Farms, Inc.*, 119 N.C. App. 546, 550, 459 S.E.2d 52, 54 (1995) (citing *Poore v. Swan Quarter Farms, Inc.*, 111 N.C. App. 546, 434 S.E.2d 251 (1993) (unpublished)). Plaintiff argues that pursuant to the opinions of this Court, final judgment was entered therein adjudicating SQF as the sole owner in fee simple. Plaintiff argues that even if this were not so, defendants’ claim would still fail as a matter of law. Plaintiff contends that the Van Dorps could not claim color of title because Mrs. Van Dorp could not enter into possession of the land in good faith. Plaintiff cites the presumption of fraud arising from the relationship of Mrs. Van Dorp and SQF, and asserts that good faith demands undivided loyalty to the corporation and prohibits self-dealing to the detriment of the corporation and its shareholders. Plaintiff argues that given the relationship, any possession by Mrs. Van Dorp is deemed the possession by SQF in the absence of an unqualified and unequivocal disavowal. Plaintiff asserts that recording of the 1969 deed is not sufficient to constitute disavowal. Additionally, plaintiff argues that the knowledge of Mrs. Van Dorp, as an officer of SQF, is not imputed to SQF where she was acting for herself and adversely to the interests of SQF. Accordingly, plaintiff argues that the claim of adverse possession fails as a matter of law. We find plaintiff’s arguments persuasive.

The issue of adverse possession was raised as an affirmative defense by SQF in its answer to Mr. Poore’s complaint in *Swan Quarter Farms*, 79 N.C. App. at 287, 338 S.E.2d at 818. A final judgment in that action was rendered in *Poore v. Swan Quarter Farms, Inc.*, 94 N.C. App. 530, 380 S.E.2d 577 (1989) in which SQF prevailed. This Court reiterated its determination that SQF held title to the property in fee simple in *Swan Quarter Farms*, 119 N.C. App. at 550, 459 S.E.2d at 54 (citing *Swan Quarter Farms*, 111 N.C. App. at 546, 434 S.E.2d at 251 (unpublished)). Accordingly, the trial court did not err in determining that the issue of adverse possession had been “raised and argued” and had been determined by this Court. The assignment of error is overruled.

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[4] We last consider whether the trial court's order settling the record on appeal incorrectly allowed plaintiff to include cross-assignments of error. Defendants argue that plaintiff's purported cross-assignments of error did not properly preserve for appeal the question of whether the trial court erred in denying plaintiff's Motion to Strike and granting defendants' Motion for Leave to File Defense Bond. Defendants argue that at most "the trial court's rulings . . . deprived SQF of a basis for obtaining a default judgment against Appellants, not an alternative basis for supporting summary judgment." Defendants assert that the proper procedure would have been for plaintiff to file a cross-appeal, not cross-assignments of error.

On the merits of plaintiff's cross-assignment of error, defendants argue that the trial court properly exercised its discretion in allowing defendants to file a G.S. 1-111 defense bond. Defendants contend that North Carolina courts have held that the bond requirement may be waived, and that the statute requiring it has been treated with considerable leniency. Defendants additionally argue that in cases where an answer has been filed without bond and has remained on file without objection, it would be improper for the trial judge to strike the answer and render judgment for the plaintiff without notice or without giving defendant the opportunity to file a defense bond. Defendants assert that the trial court's decision here "avoided exactly the type of forfeiture on technical grounds which the North Carolina Supreme Court" has criticized.

Plaintiff contends that the cross-assignment of error was proper pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure. Plaintiff cites *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978). In *Barbour*, on an appeal from a grant of summary judgment in favor of defendants, this Court held that the trial court's denial of defendants' motion to dismiss pursuant to Rule 12(b)(6) was properly preserved for appeal by defendants' cross-assignment of error. Plaintiff argues that *Barbour* is indistinguishable from the case here. On the merits, plaintiff argues that "no basis for exercise of the Court's discretion has been shown" and that defendants' answer should have been stricken and judgment entered for plaintiff. Plaintiff asserts that posting a G.S. 1-111 defense bond is required as a condition precedent to filing answer and defending the action.

We affirm. Plaintiff's argument that it has properly preserved this issue for appeal by cross-assignment of error is persuasive. Defend-

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ants argue that the trial court's order did not deprive plaintiff of an alternative ground for summary judgment. However, the trial court's decision may have deprived plaintiff of an alternative basis in law for supporting the judgment. Accordingly, pursuant to *Barbour*, cross-assignment of error pursuant to Rule 10(c) was sufficient to properly preserve this question for appellate review.

[5] On its merits, however, the assignment of error is overruled. A number of cases indicate that the trial court has discretion to extend the time for filing a G.S. 1-111 defense bond and to allow filing of the bond after the answer has been filed. *Dunn v. Marks*, 141 N.C. 232, 53 S.E.2d 845 (1906). Additionally, "our Supreme Court has held that the requirement [of posting bond] may be waived and has treated the statute with considerable leniency." *Gates v. McDonald*, 1 N.C. App. 587, 588, 162 S.E.2d 143, 144 (1968). Accordingly, posting a defense bond is not a condition precedent to filing an answer. Additionally, our research indicates that the requirement of a defense bond was never intended to be used to require forfeiture on technical grounds by a party having merit to its argument. Accordingly, the cross-assignment of error is overruled.

Affirmed.

Judges JOHN and EDMUNDS concur.

PAMELA A. MARTIN, PLAINTIFF v. JEFFREY M. VANCE, RONALD BEAUVAIS, AND
DUKE UNIVERSITY, DEFENDANTS

No. COA98-649

(Filed 4 May 1999)

1. Appeal and Error— appealability—order denying arbitration

An order denying arbitration is immediately appealable because it involves a substantial right (the right to arbitrate claims) which might be lost if the appeal is delayed.

2. Arbitration— agreement to arbitrate—employment contract

A trial court order denying defendant's' motions to dismiss and to stay proceedings pending final arbitration was reversed

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and remanded where plaintiff's employment contract included an agreement to arbitrate the claims plaintiff asserts. The grievance procedure as set out in the Personnel Policy Manual became a part of plaintiff's employment contract because it had been included in the Manual and it is apparent that plaintiff signed a transfer/upgrade request knowing that any claim arising out of her employment would be subject to resolution pursuant to the grievance procedure. Moreover, she took advantage of the grievance procedure by initiating internal review of her termination and seeking reinstatement.

Appeal by defendants from an order entered 31 March 1998 by Judge David Q. LaBarre and filed 14 April 1998 in Orange County Superior Court. Heard in the Court of Appeals 27 January 1999.

Baddour & Milner, PLLC, by Robert Terrell Milner, for plaintiff-appellee.

Fulbright & Jaworski, L.L.P., by John M. Simpson and Karen M. Moran, for defendants-appellants.

WALKER, Judge.

On 30 December 1997, plaintiff filed this action against her former employer, Duke University (Duke), and her former supervisors Jeffrey Vance (Vance) and Ronald Beauvais (Beauvais) alleging battery, intentional infliction of emotional distress, tortious interference with contract, and negligent retention. Plaintiff had been employed at Duke since 1990 as a nonexempt biweekly employee who was not covered by a collective bargaining agreement. This meant she was paid every two weeks and was subject to federal overtime restrictions. She was not employed for a fixed period of time and did not have a written employment contract. Since 5 February 1996, plaintiff had worked as Staff Assistant to Vance, an Associate Professor in Neurology at Duke University Medical Center. Beauvais was the Administrator of the Department of Neurology. Vance and Beauvais accused plaintiff of falsifying her time cards which led to her termination by Duke on 28 February 1997. As plaintiff gathered her belongings to leave, she alleges that Vance committed a battery upon her by standing in close proximity to her and then shoving her away from her computer. Plaintiff also alleges that during her employment with Vance she was subjected to a pattern of verbal abuse, insults, and humiliation that led to her diagnosis of clinical depression. Further,

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she alleges that Vance and Beauvais interfered with her “employment contract . . . with Duke” by representing to her that Duke did not pay overtime but approved her use of “comp time” to make up for the extra hours that she had worked.

On 29 January 1997, prior to her termination, plaintiff requested a transfer to another department at Duke. The transfer/upgrade request form that plaintiff filed contained a certification which she signed. That certification read in part:

6. I hereby agree that any dispute or controversy arising out of or related to my employment or termination by Duke University shall be subject to final and binding resolution through the applicable grievance or dispute resolution procedure, as may be periodically amended and which is available upon request from the department of Human Resources.

The grievance procedure referred to in the certification was entitled the “Nonexempt (Biweekly) Employee Grievance Procedure” and was contained in the Duke University Personnel Policy Manual. The grievance procedure had been in place at Duke since 1994, and it called for an outside arbitrator to hear all grievances involving the involuntary termination of an employee such as plaintiff. Prior to the filing of her complaint, plaintiff availed herself of the grievance procedure and sought reinstatement through the internal portion of the process, proceeding to the “Second Step.”

In response to plaintiff’s complaint, defendants filed a motion to dismiss and a motion to stay these proceedings pending completion of arbitration. After a hearing on motions, the trial court made the following findings and conclusions:

FINDINGS OF FACT

1. Plaintiff was employed by Defendant Duke University during all times relevant to this action.
2. At no time did Plaintiff sign a written contract of employment with Duke University.
3. Plaintiff signed the document entitled Duke University Transfer/Upgrade Request which contained a clause referring to binding arbitration. Plaintiff never received the transfer she requested.

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4. Duke University's Personnel Policy Manual is a unilaterally promulgated employment policy manual which outlines grievance procedures purporting to provide for the arbitration of certain disputes between Duke University and its employees.

CONCLUSIONS OF LAW

1. This Court has personal jurisdiction over the parties to this action, and subject matter jurisdiction over the claims asserted in this action.
2. Plaintiff was employed by Defendant Duke University as an employee-at-will during all times relevant to this action.
3. Pursuant to Walker v. Westinghouse Electric Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), Duke University's unilaterally promulgated Personnel Policy Manual, submitted by Defendants as evidence of a contract between Duke University and Plaintiff to submit disputes such as those at issue in this action to binding arbitration, is not a part of Plaintiff's employment contract and is therefore not a contract as a matter of law.
4. The document entitled "Duke University Transfer/Upgrade Request" is not a contractual agreement in any sense, is not a part of Plaintiff's employment contract and is therefore not a contract as a matter of law.

The trial court denied defendants' motions to dismiss and to stay proceedings pending arbitration.

[1] Ordinarily, this appeal would be interlocutory because it does not determine all of the issues between the parties and directs some further proceeding preliminary to a final judgment. *Futrelle v. Duke University*, 127 N.C. App. 244, 247, 488 S.E.2d 635, 638, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 412 (1997). However, an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed. *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998).

[2] On appeal, defendants contend that the grievance procedure was a part of plaintiff's employment contract and that this was evidenced by her signing of the transfer/upgrade request. Plaintiff argues that

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the grievance procedure and policy manual were not part of her employment contract and that the transfer/upgrade request did not constitute a supplement to her employment contract because there was no mutuality of assent to the agreement and there was no voluntary waiver of plaintiff's rights to judicial process.

At the outset, we note that "North Carolina has a strong public policy favoring the settlement of disputes by arbitration." *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). Our review confirms this position is consistent with other jurisdictions including "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765 (1983); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26 (1991). Our Supreme Court has held that where there is any doubt concerning the existence of an arbitration agreement, it should be resolved in favor of arbitration. *R.N. Rouse & Co.*, 331 N.C. at 92, 414 S.E.2d at 32. The validity of an arbitration agreement is determined by the application of basic contract law principles. *Futrelle*, 127 N.C. App. 244, 488 S.E.2d 635; *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 134 L. Ed. 2d 902 (1996).

The dispositive issue here is whether the plaintiff, in her contract of employment with Duke, agreed to arbitration of her claims in accordance with the procedure set forth in the Personnel Policy Manual.

The trial court in its denial of defendants' motion, cited *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986) where the plaintiff employee alleged he was wrongfully discharged by his employer and claimed that an employee handbook was part of his employment contract which the employer had violated. Under the facts of that case, this Court held that the handbook was not part of the plaintiff's at-will employment contract. *Id.* There was no issue regarding how the dispute would be resolved. This Court quoted extensively from the employee handbook and concluded that the handbook "did not become an understanding binding on the employer." *Id.* at 260, 335 S.E.2d at 84. However, *Walker* is inapposite here as there is evidence beyond the promulgation of the policy manual that indicates the grievance procedure was made part of plaintiff's employment contract.

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In this case, we examine a number of factors to determine if plaintiff's contract of employment included an agreement to arbitrate her claims. First, plaintiff had worked for Duke since 1990 and the Personnel Policy Manual containing the grievance procedure had existed since 1994. Also, in her complaint, plaintiff asserted she had a contract of employment with Duke although she denied in her affidavit the grievance procedure was ever explained to her. However, she does not claim that she was unaware of the grievance procedure, and, in fact, plaintiff availed herself of the grievance procedure and began proceedings prior to the initiation of this action. Further, plaintiff sought a transfer to another department and signed the transfer/upgrade request which contained an explicit certification that any dispute or controversy arising out of or related to her employment or termination by Duke would be subject to resolution through the applicable grievance or dispute resolution procedure.

An employment-at-will contract may be supplemented by additional agreements which are enforceable. *Walker*, 77 N.C. App. at 261, 335 S.E.2d at 84. Before a valid contract can exist, there must be a mutual agreement between the parties as to the terms of the contract. *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 326 S.E.2d 11 (1985). "If a question arises concerning a party's assent to a written instrument, the court must first examine the written instrument to ascertain the intention of the parties." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 273, 423 S.E.2d 791, 795 (1992). If the language of the contract is "clear and unambiguous," the court must interpret the contract as written. *Robbins v. Trading Post*, 253 N.C. 474, 117 S.E.2d 438 (1960).

The transfer/upgrade request, which plaintiff signed, is a "clear and unambiguous" certification of her willingness to submit disputes arising from her employment with Duke to the grievance procedure. As the language in the agreement is unambiguous, we need not look beyond the writing itself to determine whether there was mutual assent to the agreement. Furthermore, plaintiff's execution of this document charges her with knowledge and assent to the contents of the agreement. *Biesecker v. Biesecker*, 62 N.C. App. 282, 302 S.E.2d 826 (1983).

In this State it is held that one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was wilfully misled or misinformed by the defendant as to these contents . . . he is held to have signed with full knowledge and assent as to what is therein contained.

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Gas House, Inc. v. Southern Bell Telephone Co., 289 N.C. 175, 180, 221 S.E.2d 499, 503 (1976) (quoting *Harris v. Bingham*, 246 N.C. 77, 97 S.E.2d 453 (1957) and *Williams v. Williams*, 220 N.C. 806, 18 S.E.2d 364 (1941)), overruled on other grounds, *State ex rel. Utilities Comm. v. Southern Bell*, 307 N.C. 541, 299 S.E.2d 763 (1983).

Moreover, the agreement to arbitrate does not fail for lack of consideration. Mutual binding promises provide adequate consideration to support a contract. *Casualty Co. v. Funderburg*, 264 N.C. 131, 140 S.E.2d 750 (1965); *Kirby v. Board of Education*, 230 N.C. 619, 55 S.E.2d 322 (1949). Where each party agrees to be bound by an arbitration agreement, there is sufficient consideration to uphold the agreement. See *Johnson v. Circuit City Stores*, 148 F.3d 373 (4th Cir. 1998).

Other jurisdictions have held that arbitration agreements evidenced by similar circumstances as here are enforceable. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26 (1991), the plaintiff was required by his employer to register as a securities representative with several securities exchanges including the New York Stock Exchange. Included in the registration materials was a requirement that the plaintiff agree to arbitrate any disputes that arose between him and his employer and which were required to be arbitrated by the rules of the stock exchange. *Id.* After the plaintiff was terminated by his employer at the age of 62, he sued under the Age Discrimination in Employment Act and the employer moved to compel arbitration. *Id.* The Supreme Court affirmed the Fourth Circuit Court of Appeals and held that the claim was arbitrable under the agreement signed by the plaintiff with the stock exchange. *Id.*

In *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997), the plaintiff, while on leave from work, signed an acknowledgment form when she received an employee handbook from the new owners of the defendant hospital. *Id.* at 273. The acknowledgment form contained an agreement to arbitrate all claims arising out of plaintiff's employment. *Id.* The plaintiff argued that the arbitration agreement failed for lack of mutual assent claiming that the hospital had not agreed to be bound. The Fourth Circuit Court of Appeals disagreed and held that by submitting the arbitration policy to plaintiff, the defendant hospital had implicitly agreed to be bound by the policy. *Id.* at 275. Noting the strong federal policy supporting arbitration of

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disputes, the trial court reversed and remanded the case for a stay pending arbitration. *Id.* at 276.

Similarly, in *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997), plaintiff was employed at a hospital owned by defendant, and, when she received a copy of Tenet's employee handbook, she signed an arbitration clause set out on the last page of the handbook. *Id.* at 834. The trial court found that the signed arbitration clause constituted a contract and dismissed the plaintiff's complaint. *Id.* On appeal, Patterson argued that Missouri law ordinarily did not consider an employee handbook part of an employment contract because it lacks the usual prerequisites to a contract. *Id.* at 835. However, the Eighth Circuit Court of Appeals found that although the employee handbook was not a contract, the arbitration clause formed a separate contract because it was separate and distinct from the remainder of the handbook. *Id.* Thus, the arbitration agreement was enforceable for all claims that the plaintiff brought against the hospital.

In *Johnson v. Circuit City Stores*, 148 F.3d 373 (4th Cir. 1998), the plaintiff applied for a job with defendant and signed her job application which contained an arbitration agreement whereby any claims arising out of her application or her employment with defendant would be submitted to arbitration. The district court held that the agreement was not enforceable for lack of consideration and denied defendant's motion for summary judgment. *Id.* at 377. Pursuant to their earlier decision in *O'Neil*, the Fourth Circuit Court of Appeals reversed the trial court holding that where both parties agree to be bound by the arbitration, there was sufficient consideration to enforce the contract. *Id.* at 379.

In each of the above cases, the court held the plaintiff was bound by an arbitration agreement which was proffered by an employer, prospective employer, or a regulating body and which was not part of a formal employment contract. Here, plaintiff alleged in her complaint that she had an employment contract with Duke during her seven years of employment. The grievance procedure had been included in the Personnel Policy Manual since 1994. With this additional background, it is apparent that plaintiff signed the transfer/upgrade request document knowing that any claim arising out of her employment would be subject to resolution pursuant to the grievance procedure. Moreover, plaintiff took advantage of the grievance procedure by initiating the internal review of her termination and seeking reinstatement. Thus, the grievance procedure as set out

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in the Personnel Policy Manual became a part of plaintiff's employment contract.

The plaintiff cites *Routh*, 108 N.C. App. 268, 423 S.E.2d 791, in support of her contention that there was no agreement. In *Routh*, the plaintiff signed an agreement which terminated the business relationship between the parties and which also included an arbitration agreement. *Id.* However, an additional term to the agreement had been placed at the end of the standard form and plaintiff only signed on the line after the added term, not on the original line designated for his signature. *Id.* This Court, in affirming the trial court's holding that the arbitration agreement was invalid, held that there was no meeting of the minds by the parties with regard to the agreement to arbitrate. *Id.* at 274, 423 S.E.2d at 795. We reasoned that an ambiguity existed in the agreement because of the added term and the signature after the added term and that extrinsic evidence was properly admitted to interpret the contract. *Id.* at 273, 423 S.E.2d at 795. The extrinsic evidence indicated that the parties had not agreed on the term requiring arbitration. *Id.* There is no such ambiguity in the agreement signed by the plaintiff and she makes no such contention.

Plaintiff also contends that the agreement was not enforceable because she did not make a voluntary waiver of her rights to judicial process and cites *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812, 133 L. Ed. 2d 24 (1995) as authority. In *Lai*, the Ninth Circuit Court of Appeals held that a plaintiff must make a knowing and voluntary waiver of her right to litigate a claim brought under Title VII for sexual discrimination. *Id.* *Lai* is distinguishable, however, because it deals specifically with federal statutory claims arising out of the employment. Further, the agreement only required those claims selected by the employer to be arbitrated. In this case, plaintiff's claims are not statutorily based nor were they selected by the employer to be arbitrated. The parties' agreement to abide by the grievance procedure includes all claims arising out of the employment relationship. Moreover, as noted above, plaintiff is charged with knowledge of and assent to the agreement which she signed. *See Biesecker*, 62 N.C. App. 282, 302 S.E.2d 826.

We conclude that plaintiff's employment contract included an agreement to arbitrate plaintiff's claims which she now asserts. For the reasons stated herein, we reverse the order of the trial court denying defendants' motions to dismiss and to stay the proceedings pend-

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ing final arbitration and remand for entry of an order staying proceedings pending final arbitration.

Reversed and remanded.

Judges LEWIS and TIMMONS-GOODSON concur.

BETH M. SHARP, PLAINTIFF v. THADDEUS PENDER SHARP, III, THADDEUS PENDER SHARP, JR., ALAN D. SHARP, SHARP FARMS, A NORTH CAROLINA PARTNERSHIP, COMPOSED OF THADDEUS PENDER SHARP, JR. AND ALAN D. SHARP, PARTNERS; AND SHARP FARMS, INC. A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA98-639

(Filed 4 May 1999)

Trusts—constructive—equitable distribution—jury trial

The trial court erred by denying defendants' demand for a jury trial as to a constructive trust claim arising from equitable distribution. A third party to an equitable distribution action has a state constitutional right to a trial by jury on a claim for constructive trust.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendants Thaddeus Pender Sharp, Jr., Alan D. Sharp, Sharp Farms (a North Carolina partnership composed of Thaddeus Pender Sharp, Jr., and Alan D. Sharp), and Sharp Farms, Inc., from order entered 16 March 1998 by Judge Sarah F. Patterson in Wilson County District Court. Heard in the Court of Appeals 13 January 1999.

Daughtry, Woodard, Lawrence & Starling, L.L.P., by Stephen C. Woodard, Jr., for plaintiff-appellee.

Walter L. Hinson, P.A., by Walter L. Hinson and Meredith P. Ezzell, for defendant-appellants.

LEWIS, Judge.

Plaintiff Beth Sharp and her husband, Thaddeus Pender Sharp, III ("Pender"), married on 24 January 1970 and separated on 18 November 1996. Plaintiff alleges that in 1981 she and Pender purchased an interest in a farming partnership, Sharp Farms, for

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\$120,000. She alleges that the partnership held title to real and personal property acquired during the marriage and that she and Pender worked for the benefit of the partnership throughout their marriage. Pender; his brother, defendant Alan D. Sharp ("Alan"); and their father, Thaddeus P. Sharp, Jr. ("Thad"), were the three original members of the partnership. Plaintiff further alleges that on 31 October 1996, Pender withdrew from the partnership at a price substantially less than the fair market value of his interest and divested himself of his interest in partnership-owned real estate. Pender became an employee of the newly formed Sharp Farms, Inc., a corporation comprised of Thad and Alan.

On 19 December 1996, plaintiff filed an action for divorce from Pender, and Pender counterclaimed seeking equitable distribution. Although these pleadings are not included in the record, both parties apparently agree that such action was Wilson County File No. 96 CVD 2031. Plaintiff voluntarily dismissed her 1996 claim.

Plaintiff filed the complaint that is the subject of this appeal in early June of 1997. She named Pender, Thad, Alan, the partnership ("Sharp Farms"), and the corporation ("SF Inc.") as defendants. The 1997 complaint sought an unequal division of marital property, an interim distribution of marital property, imposition of a constructive trust, the nullification of certain transfers of property by Pender, the reconveyance of property, and consolidation of the 1997 action with Pender's 1996 counterclaim for equitable distribution.

Defendant Pender answered separately from defendants Thad, Alan, Sharp Farms, and SF Inc. Defendants Thad, Alan, Sharp Farms, and SF Inc. objected to plaintiff's motion to consolidate and demanded a trial by jury of all allowable issues. Plaintiff entered a voluntary dismissal of all claims except her actions for equitable distribution and constructive trust and her motion for consolidation. On 22 January 1998, Judge Sarah F. Patterson heard plaintiff's motion to consolidate, Pender's motions to dismiss and to compel discovery, and the other defendants' motion to sever. The trial court allowed plaintiff's motion to consolidate, noting that the legal issues of equitable distribution were the same. The trial court denied the defendants' motion to sever the constructive trust issue from the equitable distribution actions, saying, "The issue of constructive trust is not a cause of action which is to be severed from other actions, but rather is a request for equitable relief within the equitable distribution action itself." The trial court continued, explaining that since the

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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,*

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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

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an equitable distribution action may impose a constructive trust on property titled to a third party so long as that third party is made a party to the equitable distribution proceeding and does not ask for a jury.

Honoring a third party's state constitutional right to a jury trial is sound public policy. A third party should not lose any rights by virtue of doing business with a person who seeks or may later seek equitable distribution. Bifurcation of the claims, with a jury determining the facts surrounding a constructive trust claim, is necessary to protect the rights of civil litigants who demand, and are constitutionally guaranteed by *Kiser*, a jury. Here, the same judge who presides over the equitable distribution and other non-jury issues may convene a jury to determine the constructive trust issue.

We reverse the trial court's denial of defendants' demand for a jury trial as to the constructive trust claim. We do not reach the issue of severance of the claims, as the trial court has discretion to determine the most efficient and effective structure for the claims in light of our holding here. See *In re Dunn*, 129 N.C. App. 321, 326, 500 S.E.2d 99, 102, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 645 (1998). We believe, however, that the risk of inconsistent verdicts is least if the constructive trust issue is resolved before the equitable distribution case. Moreover, first settling the constructive trust claim reduces the impact of the doctrine of election of remedies. See *Lamb*, 92 N.C. App. at 686-87, 375 S.E.2d at 688.

Reversed.

Judge WALKER concurs.

Judge TIMMONS-GOODSON dissents.

Judge TIMMONS-GOODSON dissenting.

The majority concludes that a third party to an equitable distribution action has the right under North Carolina's constitution to trial by jury on a claim seeking imposition of a constructive trust on property to which the third party holds legal title. I disagree with the majority's conclusion and, therefore, respectfully dissent.

In arriving at its conclusion, the majority distinguishes the present set of facts from those in *Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61 (1996) ("*Upchurch I*") and *Upchurch v.*

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Upchurch, 128 N.C. App. 461, 495 S.E.2d 738 (“*Upchurch II*”), *disc. review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998). The majority notes that, unlike here, “the [third party] in *Upchurch I* and *Upchurch II* did not request a jury trial on the issue of property to which they held title.” On the basis of this distinction, the majority has construed the *Upchurch* decisions to “hold that a judge in an equitable distribution action may impose a constructive trust on property titled to a third party so long as that third party . . . does not ask for a jury.” I must disagree with this construction, as it is too broad. Quite simply, this Court in *Upchurch I* and *II* was not confronted with the single issue of whether a third party to an equitable distribution action may request a jury trial on the question of whether a constructive trust should be imposed on property to which the party holds title. Thus, the *Upchurch* cases in no way bear on the issue currently presented. Rather, I believe that our Supreme Court’s decision in *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989), conclusively resolves the question now before us.

In *Kiser*, the Court examined the issue of whether a constitutional right to trial by jury exists in an action for equitable distribution. Answering this question in the negative, the Court stated that under its long-held interpretation of article I, section 25 of our constitution, the right to a jury trial is “found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted.” *Id.* at 507, 385 S.E.2d at 490. Having articulated the dispositive rule, the Court held as follows:

The right to bring an action for equitable distribution of marital property did not exist prior to 1868, but was newly created by the General Assembly in 1981 with the passage of 1981 N.C. Sess. Laws ch. 815. Prior to the passage of this act the distribution of assets upon divorce depended on the application of other rules of law. Hence, there is no constitutional right to trial by jury on questions of fact arising in a proceeding for equitable distribution of marital assets under our longstanding interpretation of article I, section 25 and its predecessors, but rather any right to jury trial would have to be created by the express language of the act itself. No such right is contained in the equitable distribution statutes. Rather, the only reference to jury trial rights in the statutes says merely, “[n]othing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina.” N.C.G.S. § 50-21(c) (1987).

Id. at 508-09, 385 S.E.2d at 490.

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It is the majority's position that, in the case before us, the claim for constructive trust is separate and distinct from the action for equitable distribution, such that the party who holds title to the alleged trust property is entitled to have a jury decide the issue of whether such a trust exists. Contrary to the majority, I agree with the trial court that "[t]he issue of constructive trust is not a cause of action which is to be severed from other actions, but rather is a request for equitable relief within the equitable distribution action itself." As such, all issues pertaining to the constructive trust are "questions of fact arising in a proceeding for equitable distribution of marital assets," and thus, "there is no constitutional right to trial by jury." *Id.* at 508, 385 S.E.2d at 490.

As for defendants' contention that the trial court erred in denying their motion to sever the constructive trust issue from the equitable distribution action, I discern no error, since the trial judge is vested with broad discretion in determining whether severance is appropriate. *In re Dunn*, 129 N.C. App. 321, 326, 500 S.E.2d 99, 102, *disc. review denied and review dismissed*, 348 N.C. 693, 511 S.E.2d 645 (1998).

For the foregoing reasons, I vote to affirm the order of the District Court of Wilson County.

NANCY MARIE MEHOVIC, PLAINTIFF v. MEHMET MEHOVIC AND VEZIC MEHOVIC,
DEFENDANTS

No. COA97-1025

(Filed 4 May 1999)

**1. Damages— punitive—fraud and undue influence—
rescission**

The trial court did not err by submitting to the jury the issue of punitive damages on plaintiff's claims for fraud, undue influence, and duress even though plaintiff had elected rescission on those claims. North Carolina public policy supports an award of punitive damages upon a jury verdict establishing fraud and consequent entitlement, at plaintiff's election, either to rescission or to compensatory damages.

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2. Trials— punitive damages—submitted after all the substantive issues—no error

The trial court did not err in an action for fraud, unjust enrichment, and constructive trust by placing the punitive damages issue at the conclusion of all of the substantive issues. Although defendants contended that it was impossible to determine the issue on which the jury based its award of punitive damages, the evidence was sufficient to sustain the jury's affirmative findings on each of the substantive issues and to support plaintiff's entitlement to punitive damages on each.

Appeal by defendants from order entered 13 May 1997 by Judge J. Marlene Hyatt in McDowell County Superior Court. Heard in the Court of Appeals 21 April 1998.

C. Gary Triggs, P.A., by C. Gary Triggs and Susan Janney, for defendants-appellants.

Hunter & Evans, P.A., by W. Hill Evans, for plaintiff-appellee.

JOHN, Judge.

Defendants appeal the trial court's order denying their motions to set aside a 19 March 1997 jury verdict, for new trial, and for judgment notwithstanding the verdict (JNOV) or new trial. We conclude the trial court did not err.

Pertinent facts and procedural history include the following: Plaintiff Nancy Marie Mehovic and defendant Mehmet Mehovic (Mehmet) were married 16 December 1981. In 1986, plaintiff and Mehmet (the couple) purchased a home and 15.75 acres of land (the property) in McDowell County for approximately \$52,000.00. The couple advanced \$26,000.00 at closing and paid the balance due over a period of years thereafter. Improvements were made to the residence during that time and a mobile home was added to the property. Mehmet's younger brother, defendant Vezic Mehovic (Vezic), came to live with the couple as a junior high school student and was thereafter raised by them. On 19 May 1995, the couple executed a gift deed vesting full title to the property in Vezic, and subsequently separated in the summer of 1995.

On 29 August 1995 in McDowell County Superior Court, plaintiff filed the instant complaint setting forth counts of assault and battery, intentional infliction of emotional distress, fraud, duress, and undue

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influence against Mehmet. Plaintiff further asserted claims of fraud, unjust enrichment and constructive trust against Vezic. Plaintiff alleged, *inter alia*, that Mehmet had subjected her to physical and mental abuse on several occasions, and that he had fraudulently “represented to [her] that the property needed to be conveyed to [Vezic] in order to protect it from [the couple’s] debts,” but that it would still belong to the couple following transfer to Vezic.

On 18 September 1995, defendants filed answer, including motions, counterclaims and a third-party complaint against McDowell County resident Jake Stockton. Plaintiff filed her reply, containing motions, 4 October 1995; the third-party defendant filed answer 20 October 1995. Plaintiff’s motions to dismiss the third-party complaint and to dismiss defendants’ first counterclaim were allowed 17 March 1997, and defendants voluntarily dismissed their remaining counterclaims that same date.

Jury trial commenced 17 March 1997 in McDowell County Superior Court. At the charge conference following presentation of evidence, the parties agreed, *inter alia*, that the trial court would instruct the jury on “Rescission of Written Instrument” in reference to plaintiff’s allegations of fraud, undue influence and duress. It was further agreed that,

if the jury should answer Issue 4, Issue 5, or Issue 6 in favor of the Plaintiff, finding that there was either undue influence, duress, or fraud, then [plaintiff’s] remedy [would be] rescission of the written instrument.

Over defendants’ objection, the jury was also subsequently instructed, *inter alia*, as follows:

Issue 7 reads: what amount of punitive damages, if any, does the jury in its discretion award to the Plaintiff . . . ? You will answer this issue only if you have answered Issue 1 or Issue 2 and Issue 3 in favor of the Plaintiff or if you have answered Issue 4 or Issue 5 or Issue 6 in favor of Plaintiff. If you have answered any one of those issues in favor of the Plaintiff, then you will consider Issue Number 7.

The jury answered the issues submitted in the following manner:

Issue One: Did the defendant, Mehmet . . . assault the plaintiff . . . ?

Answer: YES

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Issue Two: Did the defendant, Mehmet . . . commit a battery upon the plaintiff . . . ?

Answer: NO

Issue Three: What amount is the plaintiff . . . entitled to recover for personal injury?

Answer: \$1.00

Issue Four: Was the plaintiff . . . induced to execute the deed dated May 19, 1995, from Mehmet . . . and [plaintiff] to Vezic . . . , a single man, by the fraudulent representations of the defendant, Mehmet . . . ?

Answer: YES

Issue Five: Was the plaintiff . . . induced to execute the deed dated May 19, 1995, from Mehmet . . . and [plaintiff] to Vezic . . . , a single man, by the undue influence of the defendant, Mehmet . . . ?

Answer: YES

Issue Six: Was the plaintiff . . . induced to execute the deed dated May 19, 1995, from Mehmet . . . and [plaintiff] to Vezic . . . , a single man, under duress exerted by Mehmet . . . ?

Answer: YES

Issue Seven: What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff . . . ?

Answer: \$24,500.00

Judgment was entered 19 March 1997 ordering rescission of the gift deed to Vezic, and ordering Mehmet to pay plaintiff \$1.00 in compensatory damages and \$24,500.00 in punitive damages. Defendants filed motions that same date to set aside the verdict, for new trial, and for *JNOV* or new trial. The trial court denied these motions 13 May 1997, and defendants thereafter filed timely notice of appeal.

[1] Defendants contend the trial court erroneously denied their motions attacking the jury verdict. According to defendants, punitive damages were recoverable by plaintiff only as to the assault count, and not as to those counts upon which plaintiff had foregone an

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award of compensatory damages and elected the remedy of rescission, *i.e.*, fraud, undue influence and duress. In light of plaintiff's election of rescission with regard to those claims, defendants continue, the trial court erred in submitting a punitive damages issue thereon. Defendants note they objected to the trial court's listing of the punitive damages issue following all the substantive issues rather than immediately following the assault charge.

It is well-established that a party alleging fraud must elect either the remedy of rescission or that of damages, but may not seek both, as these remedies are inconsistent. *See Parker v. White*, 235 N.C. 680, 688, 71 S.E.2d 122, 128 (1952). One who elects rescission "may recover back what he has parted with under [the contract], but cannot recover damages for the fraud." *Id.* The purpose of the "election of remedies" doctrine "is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954).

Pointing to plaintiff's election of the remedy of rescission and forbearance of compensatory damages in reference to her fraud, undue influence and duress claims, defendants assert the principle that punitive damages "cannot be awarded in the absence of compensatory damages." *Lynch v. N.C. Dept. of Justice*, 93 N.C. App. 57, 60, 376 S.E.2d 247, 249 (1989) (citing *Worthy v. Knight*, 210 N.C. 498, 499, 187 S.E. 771, 772 (1936)); *see also Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984) ("[b]efore punitive damages may be awarded to the plaintiff, the jury must find that the defendant committed an actionable legal wrong . . . and it must award the plaintiff either compensatory or nominal damages") (citations omitted).

Cases supporting this proposition rely upon the seminal case of *Worthy v. Knight*, wherein our Supreme Court stated:

[p]unitive damages may not be awarded unless otherwise a cause of action exists and at least nominal damages are recoverable by the plaintiff.

Worthy, 210 N.C. at 499, 187 S.E. at 772. However, our Supreme Court subsequently interpreted *Worthy* as holding that nominal damages must be *recoverable* in order to justify an award of punitive damages, but that there is no requirement that nominal damages "*actually be recovered*." *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992) (emphasis added). Thus, "[o]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal dam-

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ages, which in turn support an award of punitive damages.” *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991), *aff’d*, 331 N.C. 743, 417 S.E.2d 447 (1992).

Therefore,

the failure of the plaintiff to actually receive an *award* of either nominal or compensatory damages is immaterial [to the entitlement of punitive damages]. The question . . . [is] one of whether [the] plaintiff . . . has established her cause of action[.]

Id. However, “[e]ven where sufficient facts are alleged to make out an identifiable tort . . . the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed.” *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976) (citations omitted). Such aggravated conduct

may be established by allegations sufficient to allege a tort where that tort, *by its very nature*, encompasses any of the elements of aggravation. Such a tort is fraud, since fraud is, itself, one of the elements of aggravation which will permit punitive damages to be awarded.

Id.

North Carolina public policy does not support awarding punitive damages “to *compensate* the plaintiff for nonquantifiable compensatory damages.” *Id.* at 113, 229 S.E.2d at 302 (citation omitted) (emphasis added). Rather, punitive damages have been “consistently allowed . . . *solely* on the basis of [our] policy to punish intentional wrongdoing and to deter others from similar behavior.” *Id.* (citations omitted) (emphasis added).

We note that

[i]n North Carolina, actionable fraud *by its very nature* involves intentional wrongdoing . . . [and] [t]he punishment of such intentional wrongdoing is well within North Carolina’s policy underlying its concept of punitive damages.

Id. (citations omitted).

While our courts have not specifically addressed the propriety of awarding punitive damages based upon the remedy of rescission, the modern trend contemplates

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no logical reason for permitting punitive damages for the tort of fraud and deceit in a law action, and foreclosing such damages for fraud and deceit in an equitable action.

Black v. Gardner, 320 N.W.2d 153, 161 (S.D. 1982); *see also Village of Peck v. Denison*, 450 P.2d 310, 314-15 (Idaho 1969) (“[t]he absence of a showing of actual damages need not bar an award of punitive damages, for such a showing is not a talismanic necessity. The reason for such a requirement is that it first insures that some legally protected interest has been invaded. . . . There is no reason why an award of equitable relief may not fulfill this same function, for in either case it is necessary first to show an invasion of some legally protected interest.”); *Kennedy v. Thomsen*, 320 N.W.2d 657, 659 (Iowa Ct. App. 1982) (plaintiff’s rescission claim sufficient to support punitive damages where “there was ample evidence [plaintiff] had sustained actual damage,” the crucial question for justifying punitive damages award being “whether actual damages were sustained rather than whether such damages are reduced to a money judgment”); *Mid-State Homes, Inc. v. Johnson*, 311 So.2d 312, 318 (Ala. 1975) (exemplary damages are “appropriate in cases . . . where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained. . . . To allow [punitive damages] when a contract is affirmed, and not when there is a rescission, is illogical when the purposes of punitive damages are [for punishment and prevention]”). We concur with the thrust of current thought and hold North Carolina public policy supports an award of punitive damages upon a jury verdict establishing fraud and consequent entitlement, at the plaintiff’s election, either to rescission or compensatory damages.

Turning to the case *sub judice*, we note preliminarily that appellate review of an allegedly erroneous jury instruction involves examination of the contested instruction in context, and

“if the charge when considered as a whole presents the law of the case to the jury in such manner as to leave no reasonable cause to believe that the jury was misled or misinformed [,]”

then the charge “‘will not be held prejudicial.’” *Blow v. Shaughnessy*, 88 N.C. App. 484, 491, 364 S.E.2d 444, 448 (1988) (quoting Strong’s N.C. Index 3d, *Appeal and Error*, § 50). Having determined punitive damages may properly be awarded upon a jury verdict sustaining a claim for rescission, we further hold the trial court did

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not err in submitting to the jury the issue of punitive damages on plaintiff's claims of fraud, undue influence and duress.

[2] Defendants also complain that the trial court's placement of the punitive damages issue at the conclusion of all the substantive issues was misleading and rendered "it impossible to determine upon which [issue] the jury ultimately based" its award of such damages. We do not agree.

The number, form, and phraseology of issues is in the court's discretion; and there is no abuse of discretion where the issues are "sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause."

Pinner v. Southern Bell, 60 N.C. App. 257, 263, 298 S.E.2d 749, 753, *disc. review denied*, 308 N.C. 387, 302 S.E.2d 253 (1983) (quoting *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E.2d 505, 507 (1967)). Considering the trial court's charge in its entirety and not in detached fragments, *see McPherson v. Haire*, 262 N.C. 71, 75, 136 S.E.2d 224, 226-27 (1964), we conclude there was no abuse of discretion in the court's listing of the issues.

After instructing on Issues One (assault) and Two (battery), the trial court directed the jury to answer Issue Three (personal injury compensation for the assault and/or battery claims) only if it had answered either Issue One or Two, or both, affirmatively. Then, after charging on Issues Four (fraud), Five (undue influence) and Six (duress), the trial court instructed that Issue Seven (punitive damages) was only to be considered and answered if the jury had "answered Issue One or Two and Issue Three in favor of the plaintiff or . . . answered Issue Four or Issue Five or Issue Six in favor of the plaintiff."

Contrary to defendants' assertions, the foregoing format was not inherently or erroneously misleading because evidence offered by the plaintiff and admitted by the court was sufficient to sustain the jury's affirmative findings on each of the substantive issues and to support plaintiff's entitlement to punitive damages on each. *See Trimed, Inc. v. Sherwood Medical Co.*, 977 F.2d 885, 894 (4th Cir. 1992) (claim of error in punitive damages award rejected although jury failed to "specify whether the award was for both . . . counts . . . or only one," where verdicts on both counts upheld on appeal); *see also Walker v. L.B. Price Mercantile Co.*, 203 N.C. 511, 512, 166 S.E. 391, 392 (1932)

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(failure of jury to distinguish between compensatory and punitive damages in verdict did not deprive plaintiff from recovering amount awarded).

In short, defendants' arguments in support of its post-trial motions being unfounded, the trial court did not err in denying those motions.

No error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

REPLACEMENTS, LTD., PLAINTIFF v. MIDWESTERLING, A GENERAL PARTNERSHIP,
DEFENDANT

No. COA98-1013

(Filed 4 May 1999)

1. Jurisdiction— long-arm—specific

The trial court erred in an action for misappropriation of trade secrets by granting defendant's motion to dismiss for lack of personal jurisdiction where the controversy arose out of defendant's contacts with this state and specific jurisdiction was sought. Defendant admitted sending the mail in question to at least 50 North Carolina suppliers soliciting their business and the misappropriation therefore concluded in North Carolina. Moreover, defendant engaged in other acts which may have originated in Missouri but were directed to and concluded in North Carolina. Defendant therefore availed itself of the privilege of conducting business in North Carolina on numerous occasions.

2. Jurisdiction— long-arm—general

The trial court erred in an action for misappropriation of trade secrets by granting defendant's motion to dismiss for lack of personal jurisdiction where, assuming that general jurisdiction analysis applied, defendant maintained systematic and continuous contacts with North Carolina through its business relationship with plaintiff and availed itself of the privilege of doing business here through direct mail to at least 50 residents,

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advertisements in journals circulated in North Carolina, and advertisement on an Internet website available to North Carolina citizens.

Appeal by plaintiff from an order entered 25 March 1998 by Judge Michael E. Beale in Guilford County Superior Court. Heard in the Court of Appeals 1 April 1999.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr. and Natasha Rath Marcus, for plaintiff-appellant.

Anderson & Associates, P.C., by Joseph L. Anderson, for defendant-appellee.

HUNTER, Judge.

The dispositive issue in this case is whether the trial court erred in granting the defendant MidweSterling's motion to dismiss for lack of personal jurisdiction.

Plaintiff Replacements, Inc. (Replacements) is a North Carolina corporation which buys and sells discontinued and active china, crystal, flatware, and collectibles. Defendant MidweSterling (MidweSterling) is a general partnership headquartered in Missouri which deals in sterling flatware, holloware, and other silverware. Replacements filed the complaint in this matter alleging causes of action against defendant MidweSterling for misappropriation of trade secrets under the North Carolina Trade Secrets Protection Act. Specifically, Replacements contends that in August 1997, MidweSterling came into possession of its suppliers list and used it to contact potential customers in North Carolina without the consent of Replacements. MidweSterling did not answer, but instead filed a motion to dismiss for lack of personal jurisdiction. The trial court granted MidweSterling's motion to dismiss on 25 March 1998. Replacements appeals.

The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact. *See Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974); *Parris v. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29, *disc. review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evi-

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dence in the record; if so, this Court must affirm the order of the trial court. *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 462 S.E.2d 832 (1995). A claim should be dismissed under Rule 12(b)(6) where it appears that plaintiff is not entitled to relief under any set of facts which could be proven. *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994). Therefore, “[t]he question for the [appellate] court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory, whether properly labeled or not.” *Id.* at 300, 435 S.E.2d. at 541.

The evidence presented to the trial court indicates that MidweSterling, by its own admission, mailed an advertisement to at least fifty North Carolina residents in August 1997. While MidweSterling denies appropriating Replacements’ trade secrets with the mass mailing, it does not deny that it directly solicited business in this state by mailing advertisement to residents of North Carolina. Additionally, Replacements submitted evidence that MidweSterling has had continual business and contractual business with Replacements prior to the August 1997 mass mailing, including (1) selling and shipping merchandise to Replacements in the amount of approximately \$65,000.00; (2) purchasing merchandise from Replacements on at least ten occasions; (3) telephoning Replacements’ office in North Carolina on several occasions; (4) contracting with Replacements to participate in Replacements’ Star Supplier program, for which MidweSterling has paid \$100.00 per year; and (5) maintaining with Replacements a supplier list of various patterns of silverware it is interested in purchasing. MidweSterling admits soliciting “virtually all” of its business through advertisements in nationally-distributed antique, home, interior and similar trade journals and magazines. Those journals and magazines are distributed in North Carolina and are available to North Carolina residents. MidweSterling also maintains a website, which allows residents throughout all the United States, including North Carolina, to place orders via internet access.

Following its examination of the evidence and oral arguments of counsel, the trial court made the following findings of fact:

[T]he plaintiff has offered no evidence to support that the alleged misconduct complained about in the Complaint occurred within the state of North Carolina, but that instead all of the evidence is

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that the alleged conduct occurred outside the state of North Carolina, in the state of Missouri, the Court so finds as a fact, and therefore applies the heightened analysis required by the “general jurisdiction” cases[.]

[P]laintiff has not produced evidence of systematic and continuous contacts between the defendant and the forum state of North Carolina sufficient to support this Court’s exercise of personal jurisdiction over the defendant.

Based on these findings, the case was dismissed for lack of personal jurisdiction over the defendant.

In order for MidweSterling to be subject to personal jurisdiction in the case *sub judice*, North Carolina’s long-arm statute and the Due Process Clause of the United States Constitution must be satisfied. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977). Our long-arm statute provides for personal jurisdiction in any action claiming injury to person or property within this state arising out of an act or omission in this state, N.C. Gen. Stat. § 1-75.4(3) (1996); an act or omission outside this state by the defendant, provided in addition that at or about the time of the injury either:

- a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or
- b. Products, materials, or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.

N.C. Gen. Stat. § 1-75.4(4)a, b (1996). Personal jurisdiction is also property in any action which:

- a. Arises out of a promise . . . by the defendant to perform services . . . or to pay for services . . . in this State . . . ; or
- b. Arises out of services . . . performed for the plaintiff by the defendant within this State . . . ; or
- c. Arises out of a promise, made anywhere . . . by the defendant to deliver or receive within this State . . . things of value; or
- d. Relates to goods . . . shipped from this State by the plaintiff to the defendant on his order or direction; or

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- e. Relates to goods, documents of title, or other things of value actually received by plaintiff in this State from the defendant

N.C. Gen. Stat. § 1-75.4(5)a-e (1996).

When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry—whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process. *Murphy v. Glafenhein*, 110 N.C. App. 830, 431 S.E.2d 241, *disc. review denied*, 335 N.C. 176, 436 S.E.2d 382 (1993). In order to satisfy the requirements of the Due Process Clause, the pivotal inquiry is whether the defendant has established “certain minimum contacts with [the forum state] such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Id.* at 835, 431 S.E.2d at 244 (*quoting International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)). The factors used in determining the existence of minimum contacts include “(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.” *Murphy*, 110 N.C. App. at 835, 431 S.E.2d at 244 (*quoting Cherry Bekaert & Holland v. Brown*, 99 N.C. App. at 632, 394 S.E.2d at 655-56 (1990)).

[1] The United States Supreme Court has noted two types of long-arm jurisdiction: “specific jurisdiction,” where the controversy arises out of the defendant’s contacts with the forum state, and “general jurisdiction,” where the controversy is unrelated to the defendant’s activities within the forum, but there are “sufficient contacts” between the forum and the defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 (1984). The controversy in this case arises out of the alleged misappropriation of trade secrets of the plaintiff by the defendant. The misappropriation occurred when the defendant obtained the list and used it to send advertisement literature to North Carolina residents. Because the controversy arises out of defendant’s contacts with this state, specific jurisdiction is sought. *See Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986).

With specific jurisdiction, the court must analyze the relationship among the defendant, the forum state, and the cause of action. *Buck*

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v. Heavner, 93 N.C. App. 142, 145, 377 S.E.2d 75, 77 (1989). In a case similar to the present one, our Supreme Court held that by making an offer to a North Carolina plaintiff to enter into a contract made in this state and having substantial connection with it, a defendant purposefully availed itself of the protection and benefits of our law and sufficient minimum contacts justified the exercise of specific jurisdiction. *Tom Togs, Inc.*, 318 N.C. at 367-68, 348 S.E.2d at 787. In that case, the Court found that a single contract had substantial connection to North Carolina when (1) defendant contacted plaintiff, whom plaintiff knew to be located in North Carolina, thus the contract for the manufacture of shirts was made in North Carolina; (2) defendant was told the shirts would be cut in North Carolina, and defendant agreed to send its personal labels to plaintiff in North Carolina to be attached, thus defendant was aware that the contract would be performed in this state; (3) shirts were manufactured and shipped from this state; and (4) after defendant became dissatisfied with the shirts, it returned them to this state. *Id.* at 367, 348 S.E.2d at 786-87.

In the present case, the controversy concerns MidweSterling's alleged misappropriation of trade secrets under the North Carolina Trade Secrets Protection Act (Act). "Misappropriation" is defined in the act as "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. § 66-152(1) (1992). The alleged misappropriation in the present case includes use of the trade secret information to address mail to at least fifty North Carolina suppliers soliciting their business. By its own admission, MidweSterling sent the mail in question, which was received in this state in August 1997. Therefore, the misappropriation, or use, concluded in North Carolina. If a defendant has "purposefully directed" activities towards the state's residents, it has "fair warning" that it may be sued in this forum, and the assertion of specific jurisdiction is proper. *See Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786 (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 85 L. Ed. 2d 528, 540-41 (1985)). Beyond the contact from which the controversy in this case arises, MidweSterling has, throughout the past several years, entered into numerous sales contracts with Replacements, a North Carolina corporation doing business in this state. The contracts were substantially performed and the goods were shipped from this state. MidweSterling also contracted to participate in an ongoing Star

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Supplier program with Replacements, has maintained a supplier list with Replacements, and has contacted Replacements by telephone calls to North Carolina on several occasions. At the same time, MidweSterling has regularly advertised in magazines and journals which are distributed in North Carolina. While all of these acts may have originated in Missouri, most were directed to, and all concluded in, the state of North Carolina. Most required or solicited performance in North Carolina. Therefore, MidweSterling has availed itself of the privilege of conducting business in this state on numerous occasions, and personal jurisdiction is proper.

Here, the trial court determined that the alleged conduct occurred outside the state of North Carolina, in the state of Missouri, and therefore applied the “heightened analysis required by the ‘general jurisdiction’ cases.” Based on the meaning of misappropriation in the Act and evidence presented to the trial court, we disagree with this finding and the court’s ultimate conclusion. However, assuming *arguendo* that the controversy in this case did not arise from the contacts with this forum because the misappropriation of trade secrets occurred outside of North Carolina, we find that the exercise of general jurisdiction would be proper.

[2] “General jurisdiction” may be asserted over the defendant even if the cause of action is unrelated to defendant’s activities in the forum as long as there are sufficient “continuous and systematic” contacts between defendant and the forum state. *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989) (*citing Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411). The United States Supreme Court recognized that the threshold for satisfying minimum contacts for general jurisdiction is higher than in specific jurisdiction cases. In order to assert general jurisdiction there must be “substantial” forum-related minimum contacts on the part of the defendant. *Id.*

In the present case, there are substantial forum-related minimum contacts on the part of the defendant. As discussed previously, MidweSterling has maintained systematic and continuous contacts with North Carolina since 1994 through its business relationship with Replacements, including purchases of approximately \$65,000.00, participation in Replacements’ Star Supplier program, and maintenance of a supplier list with Replacements of patterns of silverware. MidweSterling is interested in purchasing. MidweSterling has placed several phone calls to Replacements’ North Carolina headquarters

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regarding business transactions. It has purposely availed itself of the privilege of doing business here through direct mail to at least fifty residents and advertisements in journals which are circulated in North Carolina. It advertises on an internet website which is available to North Carolina citizens. If a defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," it has "thus invok[ed] the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958); see *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977) (exercise of personal jurisdiction proper over non-resident defendant corporation where it had purposely availed itself of the privilege of doing business here by actively soliciting orders by mailing twenty-seven advertisements to North Carolinians). Therefore, a finding of general jurisdiction in this case would also be proper.

Based on the foregoing, we find controversy at issue arises from the contacts by MidweSterling in the state of North Carolina, which are sufficient to satisfy the requirements of our long-arm statute and the Due Process Clause. Therefore, the exercise of personal jurisdiction is proper. Competent evidence does not support the trial court's findings of fact. Where a trial court's finding of fact is not supported by competent evidence, "the corresponding conclusions of law are likewise erroneous." *Ronald G. Hinson Electric, Inc. v. Union County Bd. of Educ.*, 125 N.C. App. 373, 379, 481 S.E.2d 326, 330 (1997). Accordingly, we find that the trial court erred in the order of 25 March 1998.

Reversed and remanded.

Judges WYNN and WALKER concur.

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JUDITH COLEMAN, ADMINISTRATOR OF THE ESTATE OF KATHY ANN MUSSO, PLAINTIFF v.
WILLIAM WIRT HINES AND HUBERT PALMER HINES, DEFENDANTS

No. COA98-938

(Filed 4 May 1999)

1. Negligence— contributory—riding with intoxicated driver—willful and wanton

The trial court erred in action by the estate of an intoxicated passenger against an intoxicated driver and the owner of the vehicle arising from an automobile accident by finding that there were material issues of fact about whether the passenger contributed to her death by willful and wanton conduct. Under the facts of this case, the driver was willfully and wantonly negligent in operating a motor vehicle while under the influence of intoxicating liquor; to the extent that the evidence establishes willful and wanton negligence on the part of the driver, it also establishes a similarly high degree of contributory negligence on the part of the passenger.

2. Negligence— last clear chance—riding with intoxicated driver

The doctrine of last clear chance did not apply to an intoxicated passenger riding with an intoxicated driver where the evidence tended to show that the passenger had opportunities to avoid riding with the driver but declined and chose to ride with him. Furthermore, there is nothing in the complaint to put defendants on notice that plaintiff planned to use the last clear chance doctrine.

Appeal by plaintiff and defendant Hubert Palmer Hines from judgment entered 27 April 1998 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 31 March 1999.

Plaintiff Judith Coleman is the administratrix of the estate of Kathy Ann Musso (Ms. Musso). On 23 April 1994, Ms. Musso was riding as a passenger in a 1980 Jeep vehicle operated by defendant William Wirt Hines (Wirt). Ms. Musso and Wirt were returning from a party in northern Wake County and driving along I-440 when they were involved in an automobile accident. As a result of the accident, Ms. Musso was killed. Plaintiff brings this action to recover damages from Wirt and from his father, Hubert Palmer Hines (Mr. Hines), the owner of the Jeep vehicle, for the death of Ms. Musso.

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Both Ms. Musso and Wirt had been drinking alcoholic beverages at the time of the accident. Chemical tests following the accident revealed Ms. Musso's blood-alcohol content to be .16 and Wirt's to be .169. There was evidence that Wirt's blood-alcohol content would have been .184 at the time of the accident. There was also evidence that Wirt had a driving record which included two prior convictions of driving while impaired and another charge of reckless driving, and that his driving privilege had been suspended prior to the date of the accident in question.

Wirt was living with his father, Mr. Hines, and his mother in Wendell at the time of the accident. Mr. Hines denied that Wirt was driving the Jeep automobile with his permission at the time of the accident, and averred that when he learned that Wirt's driving privilege was revoked, he had specifically forbidden his son to operate the Jeep vehicle.

In the criminal trial, Wirt pleaded guilty to manslaughter as a result of the death of Ms. Musso. In the civil trial, the trial court granted Mr. Hines' motion for summary judgment in all respects. Wirt also moved for summary judgment on the grounds that Ms. Musso was contributorily negligent as a matter of law. The trial court granted partial summary judgment in favor of Wirt, finding that there were no material issues about whether Wirt was negligent and Ms. Musso was contributorily negligent, but finding there were material issues about whether Wirt caused the death of Ms. Musso by willful and wanton conduct, and whether Ms. Musso contributed to her death by willful and wanton conduct.

Charles R. Hassell, Jr., for plaintiff appellant-appellee.

Bailey & Dixon, by Gary S. Parsons, for Hubert Palmer Hines, defendant appellant-appellee.

Smith Law Offices, P.C., by Robert E. Smith for William Wirt Hines, defendant appellee.

HORTON, Judge.

[1] Although plaintiff and Mr. Hines raise a variety of issues in their briefs, the central question before this Court is whether Ms. Musso contributed by her own actions to her own death so that plaintiff's claim for wrongful death is barred.

In cases involving the issue of the contributory negligence of a passenger for agreeing to ride in an automobile operated by an

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intoxicated person, the elements to be proved are: “(1) the driver was under the influence of an intoxicating beverage; (2) the passenger knew or should have known that the driver was under the influence . . . ; and (3) the passenger voluntarily rode with the driver even though the passenger knew or should have known that the driver was under the influence.”

Goodman v. Connor, 117 N.C. App. 113, 115-16, 450 S.E.2d 5, 7 (quoting *Watkins v. Hellings*, 321 N.C. 78, 80, 361 S.E.2d 568, 569 (1987)), *disc. review denied*, 338 N.C. 668, 453 S.E.2d 177 (1994). Thus, where a passenger “enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him, he is guilty of contributory negligence *per se*.” *Davis v. Rigsby*, 261 N.C. 684, 686-87, 136 S.E.2d 33, 35 (1964). Plaintiff contends that there were material questions of fact as to Ms. Musso’s knowledge of Wirt’s being under the influence of intoxicating liquor, so that the trial court erred in granting summary judgment on the issue of contributory negligence. We disagree.

Evidence forecast by defendants included the following undisputed facts: (1) defendant Wirt Hines was drinking early on the afternoon of the accident when he stopped by to see Ms. Musso at her place of employment at Domino’s Pizza; (2) according to Ms. Hansma, Ms. Musso’s employer, Ms. Musso knew Wirt was drinking when he stopped by Domino’s, and Ms. Musso also stated that they planned to drink that evening on their way to an engagement party, during the party, and following the party; (3) Ms. Hansma begged Ms. Musso not to ride with Wirt that night, and repeatedly offered to pick them up at the party and drive them home, no matter how late they stayed at the party; (4) when Wirt picked up Ms. Musso later that evening, they went to a convenience store and purchased a 12-pack of beer, which they drank in each other’s presence over the evening; (5) the only alcohol Wirt drank that evening was consumed in Ms. Musso’s presence; (6) at the time of the accident, Wirt’s blood-alcohol content was at least .184, more than twice the legal limit, according to the treating physician, Dr. Anderson; and (7) it was obvious to the officer investigating the accident, Officer Melee, who arrived about three minutes after the accident, that Wirt was under the influence of alcohol at the time of the accident.

Although plaintiff argues that there is a question of material fact as to whether Ms. Musso knew or should have known that Wirt was under the influence, that argument does not refute the clear evidence

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of Ms. Hansma, Officer Melee, and Dr. Anderson. As a result, we conclude that there is no question of material fact about either Wirt's condition at the time of the accident, nor Ms. Musso's knowledge of his condition. The trial court properly entered summary judgment on the issues of Wirt's negligence and Ms. Musso's contributory negligence.

Plaintiff further contends, however, that even if Ms. Musso was found to be contributorily negligent, Wirt was willfully and wantonly negligent as evidenced by his plea to manslaughter in the death of Ms. Musso, so that contributory negligence on the part of Ms. Musso would not bar plaintiff's claim.

"It is well settled that contributory negligence, even if admitted by the plaintiff, is no defense to willful and wanton injury." *Pearce v. Barham*, 271 N.C. 285, 289, 156 S.E.2d 290, 294 (1967) (quoting *Brendle v. R.R.*, 125 N.C. 474, 478, 34 S.E. 634, 635 (1899)). We agree with plaintiff that under the facts of this case Wirt was willfully and wantonly negligent in operating a motor vehicle while under the influence of intoxicating liquor. Defendants contend, however, that Ms. Musso's own negligence in riding with a person whom she knew to be under the influence of intoxicating liquor rose at least to the same level as that of Wirt, so that a claim for her death is barred as a result. See *Coble v. Knight*, 130 N.C. App. 652, 503 S.E.2d 703, 706 (1998); *Meachum v. Faw*, 112 N.C. App. 489, 494, 436 S.E.2d 141, 144 (1993); and *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 74 (1992).

In *Sorrells*, our Supreme Court reinstated the trial court's dismissal of a Rule 12(b)(6) claim in an action against a dram shop and stated that while they recognized

the viability of the rule [that the defendant's willful or wanton negligence would avoid the bar of ordinary contributory negligence], we do not find it applicable in this case. Instead, we hold that plaintiff's claim is barred as a result of decedent's own actions, as alleged in the complaint, which rise to the same level of negligence as that of defendant. . . . In fact, to the extent the allegations in the complaint establish more than ordinary negligence on the part of defendant, they also establish a similarly high degree of contributory negligence on the part of the decedent. Thus, we conclude that plaintiff cannot prevail.

Sorrells, 332 N.C. at 648, 423 S.E.2d at 74.

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Likewise, in the present case (heard in the context of a motion for summary judgment), to the extent that the evidence establishes willful and wanton negligence on the part of Wirt, it also establishes a “similarly high degree of contributory negligence on the part of” Ms. Musso. The same point is made in *Coble*, where the decedent and the driver of an automobile had been drinking together for several hours. At one point, the driver locked the keys inside the car and called his father to bring an extra set of keys. The father did so and the young men unlocked the car and drove off, and a tragic accident followed, resulting in the passenger’s death. The estate of the passenger sought to recover from the driver’s father for negligently entrusting the car keys to the driver. In affirming summary judgment for the father, we held in part:

Indeed, if, as [decedent’s] estate argues, the intoxicated condition of the son was, or at least should have been apparent to his father when he handed the spare keys to his son, then under the facts of this case, the only conclusion to be drawn is that the son’s intoxicated state was equally obvious to [decedent] when he got into the vehicle with the son. The record shows that [decedent] and the [son] drank alcoholic beverages for hours prior to stopping at the gas station. Thereafter, they waited together until [the son’s] father arrived. These facts show conclusively that [decedent’s] negligence in riding with the intoxicated son rose at least to the level of the father’s alleged negligence in entrusting the automobile to his son. Such negligence on [decedent’s] part, of course, acts as a bar to any claim his estate has against the father’s negligence.

Coble, 130 N.C. App. at 656, 503 S.E.2d at 706.

We also affirmed this doctrine in *Canady v. McLeod*, 116 N.C. App. 82, 446 S.E.2d 879, *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994). In that case, a homeowner gave alcohol to the decedent, who was one of a crew working on the homeowner’s roof on a cold and windy day in December. Thereafter, decedent fell to his death. A suit for wrongful death was instituted against the homeowner. We held that even if the homeowner’s negligence rose to the level of willful and wanton (or, gross) negligence, “the deceased’s own negligence in consuming the alcohol while working on a roof rose to the same level of negligence as that of defendant [homeowner] and thus bars plaintiff’s claim.” *Id.* at 87, 446 S.E.2d at 882.

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Applying the logic of the cases cited above, we hold as a matter of law that under the facts of this case, the actions of the decedent, Ms. Musso, rose to the same level of negligence as that of Wirt. Tragically, Ms. Musso consciously assumed the risk of entering a vehicle, and riding as a passenger in that vehicle while it was being driven by a person under the influence of alcohol. She was with the driver, Wirt, when they purchased alcohol and she consumed alcohol along with him at a party. She knew in advance that they planned to consume alcohol and that Wirt intended to drive the vehicle home after drinking alcohol, and yet did not accept her employer's offer to drive them home regardless of the hour of the morning. We know of no principle of logic nor any overriding social policy which would militate in favor of allowing a recovery of damages under these facts.

[2] Finally, we have carefully considered plaintiff's argument that the doctrine of last clear chance would operate to preserve her claim, but find that the doctrine would not apply under the facts of this case. In order to show last clear chance a plaintiff must allege and prove that

(1) [p]laintiff, by [her] own negligence, placed [herself] in a position of peril from which [she] could not escape; (2) defendant saw, or by the exercise of reasonable care should have seen and understood, the perilous position of plaintiff; (3) defendant had the time and the means to avoid the accident if defendant had seen or discovered plaintiff's perilous position; (4) . . . defendant failed or refused to use every reasonable means at his command to avoid impending injury to plaintiff; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid impending injury.

Williams v. Lee Brick and Tile, 88 N.C. App. 725, 728, 364 S.E.2d 720, 721 (1988). In reviewing the complaint, plaintiff presented no allegations that Ms. Musso had placed herself in a position of peril from which she could not escape. Indeed, evidence from the depositions tends to show that Ms. Musso had opportunities to avoid riding with Wirt, but declined to follow through with them and, instead, chose to ride with him. Furthermore, although pleadings are to be read liberally, see *Anderson v. Town of Andrews*, 127 N.C. App. 599, 604, 492 S.E.2d 385, 388 (1997), there is no indication in the complaint which would put defendants on notice that plaintiff planned to use the last clear chance doctrine.

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We reverse the action of the trial court and find that no issues of material fact exist as to whether Wirt was grossly negligent and whether Ms. Musso was grossly contributorily negligent. In all other respects, we affirm the order of the trial court.

Affirmed in part and reversed in part.

Judges LEWIS and TIMMONS-GOODSON concur.

FIRST-CITIZENS BANK & TRUST COMPANY, PLAINTIFF-APPELLEE v. 4325 PARK ROAD ASSOCIATES, LTD., LAT W. PURSER, III, THOMAS E. NORMAN, AND E. JUDSON MCADAMS, DEFENDANTS-APPELLANTS

No. COA98-977

(Filed 4 May 1999)

1. Guaranty— contract—liability of individual guarantors limited—total liability not limited

The trial court correctly entered judgment against defendants on a note individually rather than jointly and severally and correctly declined to amend or modify its judgment where defendants (the maker and guarantors of the \$600,000 note) argued that language in the note limited their maximum total liability to \$300,000. The plain language of an amendment to the note allowed plaintiff to pursue collection individually in an amount not in excess of \$300,000.

2. Attorneys— fees—guaranty agreement and note—one instrument

Defendant-guarantors were liable for attorney fees in an action on a note where there was but one instrument signed by both maker and guarantors and that instrument provided for reasonable attorney fees.

Appeal by defendants from judgment entered 22 January 1998 and order entered 15 April 1998 by Judge Ronald E. Bogle in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 March 1999.

On 3 September 1985, defendant 4325 Park Road Associates, Ltd. (maker), executed and delivered an installment note in the principal

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sum of \$600,000.00 to Mutual Savings & Loan Association, Inc. Lat W. Purser, III, Thomas E. Norman, and E. Judson McAdams (collectively, guarantors) executed guaranties of payment. First-Citizens Bank & Trust Company (plaintiff) is the successor-in-interest to Mutual Savings & Loan Association, Inc.

The installment note was secured by a deed of trust. Collateral was a restaurant facility in the Park Road Shopping Center in Charlotte. No collateral other than a leasehold interest was pledged to secure the indebtedness. The maker failed to make all payments due under the installment note held by plaintiff, and on 2 May 1996 plaintiff instituted this action against the maker and the guarantors (collectively, defendants) claiming a balance due on the note of \$504,354.48 with interest accruing at the rate of \$136.88 each day. As amended, the complaint sought judgment against each of the individual guarantors in the sum of \$300,000.00, with the total recovery not to exceed \$504,354.48 plus interest.

Defendants admitted execution of the installment note, admitted plaintiff's demand, but alleged that they were only liable for a total of \$300,000.00 pursuant to the terms of the note, that more than \$700,000.00 had been paid in interest and principal on the note since its execution, and that they were therefore discharged of all obligation under the note. They further moved that plaintiff be required to foreclose upon the security described in the deed of trust which secured the obligation, and moved that if plaintiff declined to do so that they then be discharged of their obligation under the installment note to the extent plaintiff's failure prejudiced them.

Plaintiff moved for summary judgment against defendants and the motion was granted. The trial court entered judgment against each in the sum of \$300,000.00, with plaintiff's total recovery not to exceed \$468,587.69, the amount due on the installment note on 16 October 1997, and interest on that amount until paid in full. The trial court also awarded plaintiff its costs and assessed attorney fees in the amount of fifteen percent (15%) against defendants. Within apt time, defendants moved pursuant to Rules 59(a)(7) and (9) of the North Carolina Rules of Civil Procedure that the trial court alter, amend or modify its judgment to provide for a recovery against all defendants, jointly and severally, in the total sum of \$300,000.00 and costs. This motion was denied. Defendants appealed from entry of summary judgment, and from the denial of their motion to modify that judgment.

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Ward and Smith, P.A., by Louise W. Flanagan and Michael P. Flanagan, for plaintiff appellee.

James H. Wade for defendant appellants.

HORTON, Judge.

The issues for determination by this Court are (I) whether defendants are individually liable for the entire balance due on the installment note to a maximum of \$300,000.00 each, or whether they are jointly and severally liable for a maximum amount of \$300,000.00; and (II) whether defendant guarantors are liable for reasonable attorney fees pursuant to N.C. Gen. Stat. § 6-21.2.

I.

[1] All parties agree that they executed the installment note which is the subject of this litigation. The installment note is a form, described as FHLMC Uniform Instrument, Form 3301, and is designed for use in various states. The original obligation under the installment note was \$600,000.00, with interest at 12.50% and initial monthly payments of \$6,683.37. The note contains the following provision:

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

Prior to the execution of the note, the following paragraph was added at the end of the form installment note, following the signature lines:

The parties to this Note, being the Maker, Guarantors and Payee hereby acknowledge and agree that by acceptance of this Note the Payee, its successors and assigns, shall have full recourse rights to the security described in the Deed of Trust which secures this Note but shall not have any personal recourse

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or right to pursue collection of the Guarantors or the maker individually for an amount in excess of \$300,000.00. Execution, delivery and acceptance of this Promissory Note shall be conclusive proof of the agreement of the parties hereto to the provision herein set forth.

Defendant E. Judson McAdams then signed the note for 4325 Park Road Associates as maker, and the individual defendants Purser, Norman, and McAdams then signed as guarantors. Immediately before the signatures of defendants is the following statement: "The undersigned hereby personally guarantee payment of the indebtedness evidenced by this Note."

Defendants argue that the above language of the note limits their maximum total liability to \$300,000.00, and that their liability is joint and several. We disagree.

It is well-established law that, when a contract is plain and unambiguous on its face, it will be interpreted by the courts as a matter of law. *Cleland v. Children's Home*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). Parol evidence as to the parties' intent and other extrinsic matters will not be considered if the language of the contract is not susceptible to differing interpretations. *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 552-53, 478 S.E.2d 518, 521 (1996), *disc. review denied*, 346 N.C. 275, 487 S.E.2d 538 (1997). In this case, the plain language of the amendment to the note allows plaintiff to "pursue collection of the Guarantors or the maker individually for an amount [not] in excess of \$300,000.00." Moreover, not only is the language of the note unequivocal, it would make little business sense for the holder of the note to advance the sum of \$600,000.00 to the maker, but agree to limit the liability of the maker and its guarantors to a total of \$300,000.00. The trial court correctly entered judgment for plaintiff and against defendants individually, rather than jointly and severally. It therefore follows that the trial court correctly declined to amend or modify its judgment. These assignments of error are overruled.

II. Liability for Attorney Fees

[2] Paragraph 7 of the Note sets out the rights of plaintiff to demand payment of overdue payments and, in the event of default, to demand payment "immediately [of] the full amount of principal . . . and all the interest . . ." Section (E) of Paragraph 7 then provides that:

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If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all its costs and expenses to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

It is clear here that the maker defaulted in payments under the Note, and that plaintiff made demand for the full amount of principal due with interest. Under the above provision, plaintiff was entitled to "costs and expenses," including reasonable attorneys' fees. Pursuant to that provision and our applicable statute, N.C. Gen. Stat. § 6-21.2(2) (1997), the trial court awarded plaintiff "attorneys' fees in the amount of Fifteen Percent (15%) of the outstanding indebtedness"

Defendants complain that the guaranty agreement did not contain a provision requiring the guarantors to pay reasonable attorney fees in the event of a default by the maker, and cite *Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E.2d 752 (1972), in support of their position. In *Wilson* the maker signed a promissory note to plaintiff on 4 March 1966; the note included a provision for reasonable attorney fees in the event of a default. *Id.* at 141, 187 S.E.2d at 752. On 14 June 1966 the *Wilson* defendants signed a *separate* guaranty agreement which did not contain an agreement for attorney fees. *Id.* at 141, 187 S.E.2d at 753. As the guaranty agreement did not provide for attorney fees, our Supreme Court held that the guarantors were not liable for such fees under N.C. Gen. Stat. § 6-21.2(2). *Id.* at 146, 187 S.E.2d at 756. Here, however, there was but one instrument signed by both maker and guarantors. That instrument provided, as set out in detail above, for reasonable attorney fees upon default and the liability of all parties to the Note for those attorney fees.

As we discussed above, the paragraph which was added to the Note merely limits the individual liability of the guarantors and the maker to \$300,000.00 *each*—it does not release the guarantors from their contractual liability for interest, costs, and reasonable attorney fees. This assignment of error is overruled.

Defendants also argue that, since the notice of acceleration of the Note, they paid the sum of \$113,749.95 to plaintiff from the rentals they received on the restaurant which was collateral for the Note. They contend that full amount ought to be credited to their obligation under the Note. The record reflects that the amounts paid by defendants were correctly credited by plaintiff as interest and principal on

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the Note, and substantially reduced the liability of defendants. No error in this regard appears in the judgment entered by the trial court, as it correctly reflected the balance due on the Note after giving defendants credit for all payments made by them.

We have carefully considered all other arguments and contentions made by defendants, but find them to be without merit. The trial court correctly concluded that there are no issues of material fact which require a jury trial and entered summary judgment for plaintiff. We note, however, that the judgment entered by the trial court could be read to say that each defendant is liable for a maximum of \$300,000.00, *plus* a reasonable attorney fee. In order to avoid any uncertainty which might arise from such a reading of the judgment, we hold that the maximum liability of each defendant is \$300,000.00, which amount *includes* any liability for interest, costs, and attorney fees. We note that counsel for plaintiff agreed with that interpretation during oral argument of this case. As clarified, the judgment of the trial court is affirmed.

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

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NORTH CAROLINA LIMITED PARTNERSHIP AND LUTHERAN FAMILY SERVICES IN THE
CAROLINAS, DEFENDANTS

No. COA97-1532

(Filed 4 May 1999)

1. Deeds— restrictive covenants—group home

The trial court erred by entering summary judgment for defendants in an action to determine whether a group home for emergency care for undisciplined, delinquent or at risk youth violated subdivision restrictive covenants. The framers of the restrictive covenants sought to establish a harmonious and attractive single family residential development where the health and safety of residents were secured and the only purposes permitted, other than residential use, were day nurseries, kindergarten schools, and fraternal or social clubs or meeting places.

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Houses of detention, reform schools, and institutions of kindred character were excluded; houses of detention and reform schools are institutions devoted to the custody and reformation of juvenile delinquents and this home is an institution of kindred character.

2. Deeds— restrictive covenants—housing not limited based on handicapping condition

A restrictive covenant which prohibited a group home for undisciplined, delinquent or at risk youth did not limit housing based on a handicapping condition.

Appeal by plaintiff from judgment entered 16 October 1997 by Judge Leon Stanback in Durham County Superior Court. Heard in the Court of Appeals 25 August 1998.

Eagen, Eagen & Adkins, by Philip S. Adkins, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by William C. Smith, Jr., for defendants-appellees.

TIMMONS-GOODSON, Judge.

This is an action to enforce subdivision restrictive covenants. The following facts are stipulated or admitted in the pleadings. Defendant Capital Health Care Investors ("Capital") purchased a residence at 5323 Revere Road, located in the Parkwood area in Durham, North Carolina. The Parkwood subdivision is subject to restrictive covenants. The pertinent portions prohibit nuisances, any use except residential use, any houses of detention, reform schools, asylums, institutions of kindred character or multi family use. Capital then leased the residence to defendant Lutheran Family Services in the Carolinas ("Lutheran"). Lutheran moved its "Dencontee House" ("Dencontee") to the residence.

Dencontee is a temporary emergency shelter group home for children between the ages of eleven and seventeen years. The program was developed to provide 15 to 30 days of emergency care for up to 5 children at a time. The target population are the undisciplined, delinquent, or at risk youth who are in need of emergency placement to determine needed services, or children entering the program through a voluntary placement agreement between parents and the program. Most of the children are referred to Dencontee by the Durham County

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Department of Social Services or the county court system. The children in the house are monitored 24 hours a day by at least two supervisors, who act as surrogate parents. Dencontee receives funding from state agencies, and the surrogate parents are paid for their services out of a common operating fund.

Plaintiff, Parkwood Association ("Parkwood"), filed a declaratory judgment action against Capital and Lutheran (collectively "defendants") seeking a determination of whether the house for children in the Parkwood Subdivision area violated the governing restrictive covenant of the area. Both parties moved for summary judgment based on the pleadings and certain attached stipulations. On 16 October 1997, the trial court entered summary judgment in favor of defendants, thus permitting the house to remain in the subdivision. Parkwood appeals the ruling.

[1] The issue presented by this appeal is whether the existence of the Dencontee House in the Parkwood subdivision violates the governing restrictive covenant. Parkwood asserts that the trial court erred by granting summary judgment for defendants, because Dencontee violates the plain and obvious purpose of the restrictive covenant. We agree with Parkwood and reverse the judgment of the trial court.

In *Hobby & Son v. Family Homes*, our Supreme Court stated the fundamental rules that apply to restrictive covenants:

While the intentions of the parties to restrictive covenants ordinarily control the construction of covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of the land. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interest of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent. Even so, we pause to recognize that clearly and narrowly drawn restrictive covenants may be employed in such a way that the legitimate objectives of a development scheme may be achieved. Provided that a restrictive covenant does not offend articulated considerations of public policy or concepts of substantive law, such provisions are legitimate tools which may be utilized by developers and other interested parties to guide the subsequent usage of property.

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The intent of the parties may be obtained from “study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions.” *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967). Any restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described in the covenant. *Id.* Doubt must favor the unrestricted use of property. *Id.* If a restrictive covenant is ambiguous it will be given its “natural meaning” at the time the covenant was created. *Forest Oaks Homeowners Assn. v. Isenhour*, 102 N.C. App. 322, 324, 401 S.E.2d 860, 862 (1991). Therefore, the ambiguous term will be given its customary definition as it existed at the time of the restrictive covenant’s creation. *Angel v. Truitt*, 108 N.C. App. 679, 682, 424 S.E.2d 660, 662 (1993).

The record reflects that the framers of the restrictive covenant wanted Parkwood to be a harmonious and attractive single family residential development where the health and safety of the residents were secured. The framers sought to establish such an environment by limiting the land use to residential purposes and by excluding cemeteries, crematories, houses of detention, reform schools, asylums, institutions of kindred character, buildings for the manufacture or storage of gun powder or explosives, and slaughterhouses. The only purposes permitted, other than residential use, were day nurseries, kindergarten schools, and fraternal or social clubs or meeting places.

Parkwood argues that Dencontee falls within one of the exclusions contained in the restrictive covenant pertaining to institutions for children. We are compelled to agree.

Article Six of Parkwood’s restrictive covenant entered in 1960 provides as follows:

ARTICLE SIX, Section 5: There shall never at any time be erected, permitted, or maintained upon any part of The Property any cemetery or crematory; any house of detention, reform school, asylum, or institution of kindred character; any building for the manufacture or storage of gun powder or explosives; nor any slaughter house.

Both “houses of detention” and “reform school” are institutions devoted to the custody and/or reformation of juvenile delinquents. *See Webster’s New International Dictionary* 616, 1909 (3d ed. 1966)

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(defining “detention home” as “a house of detention for juvenile delinquents” and defining “detention” as “a period of temporary custody prior to disposition”; defining “reform school” as “a reformatory for boys and girls” and defining “reformatory” as “a penal institution to which young or first offenders or women are committed and in which repressive and punitive measures are held to be subordinated to training in industry and exercise of the physical, mental, and moral faculties”).

The meaning of the catch-all phrase “institutions of a kindred character” must be examined. The word institution is defined as an “establishment.” *Id.* at 1171. Kindred is defined as “a group of related individuals” or “a natural grouping.” *Id.* at 1243. Thus, the term refers to establishments of a similar character or related nature.

In the instant case, the parties stipulate that the criteria for admission include juveniles who have been “adjudicated undisciplined or delinquent in Juvenile Court or [who are] at risk of being adjudicated undisciplined or delinquent.” The North Carolina Juvenile Code defines an undisciplined juvenile as a juvenile “who is unlawfully absent from school; or who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home.” N.C. Gen. Stat. § 7A-517(28) (1995). A delinquent is a juvenile “less than 16 years of age who has committed a crime or infraction under State law or under an ordinance of local government[.]” N.C. Gen. Stat. § 7A-517(12) (1995). Using the aforementioned definitions, it follows that Dencontee is an “institution of kindred character” to the enumerated institutions in the restrictive covenant. Thus, the presence of Dencontee in the Parkwood subdivision is an impermissible use of the land. Based on the stipulations of the parties that define the criteria for admission and the intent of the framers of the restrictive covenant, Dencontee violates the plain and obvious purpose of the restrictive covenant.

[2] Parkwood next argues that the restrictive covenant does not violate any federal or state fair housing laws. Although there are several restrictions in the state and federal fair housing laws, the handicapping condition is the only one argued in the briefs. Thus, we will specifically address that issue. N.C.R. App. P. 28(a). In the instant case, we find that the violated restriction does not limit housing on the basis of a handicapping condition.

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The order granting summary judgment in favor of defendants is reversed and remanded to the trial court for entry of summary judgment in favor of Parkwood.

Reversed.

Judges GREENE and SMITH concur.

KATHARINE H. STAFFORD, PLAINTIFF v. RENE CHARLES STAFFORD, DEFENDANT

No. COA98-1306

(Filed 4 May 1999)

Appeal and Error— appealability—divorce judgment—remaining issues reserved—appeal premature

An appeal from a divorce judgment was dismissed where plaintiff sought an absolute divorce and equitable distribution, the trial court determined the date of separation, granted an absolute divorce, and reserved the remaining issues for later hearing, and defendant appealed. While the trial court's determination of the date of separation may have an impact on the unresolved issue of equitable distribution, the same factual issues are not involved, the threat of inconsistent verdicts is not present, and no substantial right of defendant would be prejudiced absent immediate appellate review.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 23 April 1998 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 19 April 1999.

Pitts, Hay, Hugenschmidt & Devereux, P.A., by James J. Hugenschmidt, for plaintiff-appellee.

Jackson & Jackson, by Phillip T. Jackson, for defendant-appellant.

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WALKER, Judge.

The parties were married on 11 October 1980. Plaintiff filed a complaint on 14 May 1996 in which she sought an absolute divorce. She subsequently filed an amended complaint in which she also sought equitable distribution of marital property. Defendant filed a motion to dismiss, which the trial court denied, and later filed his answer and counterclaim. Plaintiff then filed a reply to defendant's counterclaim.

On 3 March 1998, the matter came on for hearing on the issue of absolute divorce, which was severed from the remaining issues in this cause with the parties' consent. The trial court determined the parties' date of separation to be the first week of October, 1992. After granting plaintiff an absolute divorce from defendant, the trial court reserved the remaining issues in this cause for later hearing. From the trial court's judgment, defendant appeals.

The initial issue presented by this appeal is whether it is premature. Although defendant asserts that the trial court's judgment is a final judgment within the meaning of N.C. Gen. Stat. § 7A-27(c) (1995), we disagree. The trial court's judgment "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Additional issues raised by the amended complaint, including equitable distribution, have not been resolved. The judgment is therefore not final but rather interlocutory in nature. *Id.*

Generally, no right of appeal lies from an interlocutory judgment. *State ex rel. Employment Security Comm. v. IATSE Local 574*, 114 N.C. App. 662, 442 S.E.2d 339 (1994). If there is no right of appeal, it is the duty of an appellate court to dismiss the appeal on its own motion. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985).

Defendant argues in the alternative that the judgment affects a substantial right and that he is entitled to pursue this appeal pursuant to N.C. Gen. Stat. § 7A-27(d)(1). To be immediately appealable on that

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basis, defendant has the burden of showing that: (1) the judgment affects a right that is substantial; and (2) the deprivation of that substantial right will potentially work injury to him if not corrected before appeal from final judgment. *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990). Whether a substantial right will be prejudiced by delaying appeal must be determined on a case by case basis. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

In this matter, defendant asserts the trial court's "determination of the date of separation is so fundamental to an equitable distribution trial that it affects a substantial right . . ." Defendant claims immediate review of the issues of this case are warranted for this reason and also in "the interest of judicial economy." Generally, the right to avoid a trial is not a substantial right, while avoidance of two trials on the same issues may be. *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982). A party must show that the same factual issues would be present in both trials and that the possibility of inconsistent verdicts on those issues exists. *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 444 S.E.2d 694 (1994). Defendant has not made such a showing in this matter. While the trial court's determination of the parties' date of separation may have an impact on the unresolved issue of equitable distribution, the same factual issues are not involved. No threat of inconsistent verdicts is present. Thus, no substantial right of defendant would be prejudiced absent immediate appellate review of the trial court's judgment. This appeal is

Dismissed.

Judge SMITH concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I believe the trial court's "Partial Judgment" setting the date of separation for the parties and granting absolute divorce is immediately appealable; therefore, I would address the merits of Defendant's appeal. Accordingly, I must respectfully dissent.

As a general rule, "final judgments are always appealable." *Tinch v. Video Industrial Services*, 347 N.C. 380, 381, 493 S.E.2d 426, 427 (1997) (per curiam); N.C.G.S. § 7A-27(c) (1995) ("From any final judgment of a district court in a civil action appeal lies of right directly to

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the Court of Appeals.”); N.C.G.S. § 1-277(a) (1996). A “‘decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation’ is final in nature *and is immediately appealable.*” *Highway Commission v. Nuckles*, 271 N.C. 1, 13, 155 S.E.2d 772, 783 (1967) (quoting 4 Am. Jur. 2d *Appeal and Error* § 53 (1962) (emphasis added)). Our Supreme Court “interpret[s] G.S. 1-277 so as to give any party to a lawsuit a right to an *immediate appeal* from every judicial determination . . . which constitutes a final adjudication, *even when that determination disposes of only a part of the lawsuit.*” *Oestreicher v. Stores*, 290 N.C. 118, 124, 225 S.E.2d 797, 802 (1976) (emphases added);¹ *Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 701-02, 375 S.E.2d 161, 162 (1989) (per curiam) (holding that the trial court’s dismissal of the plaintiffs’ claim for compensatory damages “was a final judgment and plaintiffs were entitled to appellate review of the grant of summary judgment against them on [that] issue” even though other issues were still pending in the trial court).

In this case, the “Partial Judgment” is, despite its caption, a final judgment because it disposes of the parties’ action for divorce, leaving nothing to be judicially determined in the trial court on that action. The divorce action was expressly “severed from the remaining issues in this cause” with the consent of the parties and is a “separate and distinct branch” of the parties’ litigation which is final in nature. Accordingly, the trial court’s judgment as to divorce is a final judgment and is immediately appealable.

In any event, even assuming the “Partial Judgment” entered in this case is interlocutory, it affects a substantial right which would be prejudiced absent immediate appeal. “[A]n order which completely disposes of one of several issues in a lawsuit affects a substantial

1. The language in *Oestreicher* as to what constitutes a substantial right may have been implicitly limited by subsequent Supreme Court cases. See *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 696 (1994) (noting that “two lines of cases” have emerged regarding whether a substantial right has been affected); *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6-7, 362 S.E.2d 812, 816 (1987) (noting “two occasionally incompatible lines of authority governing the appealability of partial summary judgments,” referring to the Supreme Court’s apparent rejection of part of the *Oestreicher* opinion in *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593, (1982)). Regardless of whether that portion of *Oestreicher* has been implicitly overruled, the remaining aspects of the *Oestreicher* opinion (including the statement cited above) remain unchallenged, and in fact, have been relied on in recent Supreme Court opinions. See, e.g., *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998); *Crossman v. Moore*, 341 N.C. 185, 186, 459 S.E.2d 715, 717 (1995); *Pelican Watch*, 323 N.C. at 702, 375 S.E.2d at 162.

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right.” *Case v. Case*, 73 N.C. App. 76, 78, 325 S.E.2d 661, 663 (1985) (allowing immediate appeal of the trial court’s entry of summary judgment on the defendant’s counterclaim for equitable distribution, even though claims for absolute divorce and child custody and support were still pending in the trial court, because it affected a substantial right), *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). In addition, the trial court’s determination of the date of separation in the divorce action precludes relitigation of that issue for purposes of equitable distribution, *see, e.g., Garner v. Garner*, 268 N.C. 664, 665, 151 S.E.2d 553, 554 (1966) (noting that *res judicata* is applicable to divorce proceedings), and it cannot be modified by another district court judge upon a showing of changed conditions because it is not a discretionary ruling, but rather is a ruling on a matter of law which can only be reversed on appeal, *see, e.g., Calloway v. Motor Co.*, 281 N.C. 496, 501-03, 189 S.E.2d 484, 488-89 (1972). As such, the trial court’s determination in this case affects a substantial right and is immediately appealable.



LEE JETER DAVIES, GUARDIAN AD LITEM FOR ELIZABETH H. HARDY, A MINOR, AND LEE JETER DAVIES, INDIVIDUALLY, PLAINTIFFS v. FORREST RAY LEWIS, JAN LEWIS, AND LUCY LEWIS, DEFENDANTS

No. COA98-701

(Filed 4 May 1999)

Negligence— contributory—diving into shallow water

The trial court correctly granted summary judgment for defendants in a negligence action arising from an injury suffered when the minor plaintiff (Elizabeth) dove from defendants’ dock into shallow water to join defendants’ daughter on a personal water craft. Elizabeth knew from her experience as a trained diver that diving into water of an unknown depth was dangerous, but did so by her own choosing and at her own risk. Her decision to dive without attempting to measure the water’s depth constitutes contributory negligence.

Appeal by plaintiffs from order entered 3 March 1998 by Judge James G. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 27 January 1999.

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Anderson, Daniel & Coxe, by Henry L. Anderson, Jr., for plaintiff-appellants.

Marshall, Williams & Gorham, L.L.P., by William Robert Cherry, Jr., and John L. Coble, for defendant-appellees.

LEWIS, Judge.

On the afternoon of 19 August 1994 and at the invitation of defendant Lucy Lewis ("Lucy"), age thirteen, plaintiff Elizabeth H. Hardy ("Elizabeth"), age fourteen, traveled on the Intracoastal Waterway via her personal watercraft (referred to in both parties' briefs as a "wave runner") to visit Lucy. Lucy was waiting for Elizabeth on defendants' floating dock, which was part of the pier extending from defendants' property into the Waterway. After Elizabeth arrived and docked her wave runner, Lucy boarded the wave runner and started it while Elizabeth laid down on the dock to sunbathe.

Within seconds, Lucy was approximately 10 or 15 feet into the Intracoastal Waterway when she called for Elizabeth to "come on." Elizabeth, fearing that her mother would take the wave runner from her if she found out another person was on it alone, got up from the dock and dove in the water. The water was approximately 12 inches deep, and Elizabeth struck her head and broke her neck upon diving. When Lucy asked her what happened, Elizabeth told her, "I dove in." When Lucy asked why Elizabeth did so, Elizabeth stated, "I did a shallow water dive. I thought I could do it."

Prior to that date, Elizabeth had been swimming and diving from the defendants' dock approximately six times, during which she was never able to see more than one or two inches into the water; she had not, however, previously dove in the direction she did that day. All of these dives were what Elizabeth considered "shallow dives," and she had learned how to dive in this manner under instruction at a camp. She also was instructed at camp not to dive into water when she did not know its depth, and had been told by her mother not to dive off the floating dock behind their own home, where the water was two or three feet deep. Based on her experience as a diver, though, Elizabeth considered it safe to perform a shallow dive into two feet of water. Elizabeth knew that the water depth changed with the tide, but assumed the tidal conditions at defendants' floating dock would remain constant.

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From this unfortunate occurrence has come a prolonged attempt by plaintiffs to place the blame for Elizabeth's accident on defendants. Plaintiffs initially filed suit against defendants Forrest Ray Lewis and Jan Lewis in federal district court on 27 March 1995, asserting admiralty jurisdiction. Lucy was added as a defendant on 23 May 1995 in an amended complaint which stated, among other things, that at the time of the accident, Elizabeth "was in the process of boarding a boat/vessel pursuant to the commands and directions of the captain of said boat, [Lucy]. . . ." That court granted defendants' motion to dismiss the case for lack of subject matter jurisdiction, noting that it could "perceive of no serious argument and analysis which would support a maritime nexus with the events resulting in Elizabeth's injury." *Brock v. Lewis*, No. 7:95-CV-44-F (E.D.N.C. 1995), slip op. at 15-16.

Plaintiffs appealed this decision to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's decision in an unpublished opinion. In so doing, the Court noted the following:

Perhaps Elizabeth and her mother wanted the case in federal court because, under North Carolina law, contributory negligence provides a complete defense to a suit claiming negligence. The shallowness of the water at the spot where Elizabeth dove presented a real likelihood of a finding of contributory negligence on her part. In admiralty, however, comparative negligence rather than contributory negligence applies.

Brock v. Lewis, No. 95-2302, 86 F.3d 1148, 1996 WL 276980 (4th Cir. 1996) (unpublished), slip op. at 2, footnote 1 (citations omitted), *cert. denied*, — U.S. —, 136 L. Ed. 2d 377 (1996).

Having exhausted their attempts to be heard in the federal courts, plaintiffs then turned their attention homeward and filed a complaint in New Hanover County Superior Court on 29 January 1997, alleging negligence by Lucy and her parents. That court's order granting defendants' motion for summary judgment was filed 3 March 1998, and plaintiffs appeal to this Court from that order. We affirm.

To establish a valid claim of negligence, plaintiffs must show that defendants owed them a duty, that defendants breached this duty, and that damages were proximately caused by the breach. *See Tise v. Yates Construction Co., Inc.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680

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(1997). If defendants, as the party moving for summary judgment, "prov[e] that an essential element of the opposing party's claim is nonexistent, or . . . show[] through discovery that the opposing party cannot produce evidence to support an essential element of his claim," summary judgment is appropriate. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). "While issues of negligence and contributory negligence are rarely appropriate for summary judgment, the trial court will grant summary judgment in such matters where the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of the injury." *Diorio v. Penny*, 103 N.C. App. 407, 408, 405 S.E.2d 789, 790 (1991) (citations omitted), *aff'd*, 331 N.C. 726, 417 S.E.2d 457 (1992).

We need not engage in an extensive analysis of defendants' duty to Elizabeth or any potential breach of that duty, even in light of our Supreme Court's recent decision in *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), to retroactively abolish the common law distinctions between invitees and licensees, because even if defendants were negligent, Elizabeth was contributorily negligent as a matter of law. "[T]he law imposes upon a person the duty to exercise *ordinary care* to protect himself from injury and to avoid a known danger; and . . . where there is such knowledge and there is an opportunity to avoid such a known danger, failure to take such opportunity is contributory negligence." *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 122, 284 S.E.2d 702, 706-07 (1981), *disc. review denied*, 305 N.C. 300, 290 S.E.2d 702 (1982). Because she was nearly fifteen years old, Elizabeth was capable of contributory negligence. *See, e.g., Welch v. Jenkins*, 271 N.C. 138, 144, 155 S.E.2d 763, 768 (1967) ("At . . . age [fourteen], there is a rebuttable presumption that [a minor] possessed the capacity of an adult to protect himself and he is, therefore, presumptively chargeable with the same standard of care for his own safety as if he were an adult."); *Bell v. Page*, 271 N.C. 396, 400, 156 S.E.2d 711, 715 (1967) ("[A] person *between* the ages of seven and fourteen may not be held guilty of contributory negligence as a matter of law.") (emphasis added).

Elizabeth failed to use ordinary care before diving into the water on the date in question. She knew from her experience as a trained diver that diving into water of an unknown depth was dangerous, but did so by her own choosing and at her own risk. There was a reasonable opportunity for her to avoid this danger by jumping instead of diving into the water, and her decision to dive without attempting to

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measure the water's depth constitutes contributory negligence. *See Lenz* at 122-23, 284 S.E.2d at 707 (“[C]ontributory negligence per se may arise where a plaintiff knowingly exposes himself to a known danger when he had a *reasonable* choice or option to avoid that danger, or when a plaintiff heedlessly or carelessly exposes himself to a danger or risk of which he knew or should have known.”) (citations omitted). Lucy's call to “come on” did not force Elizabeth to dive, and the argument in plaintiffs' briefs that Elizabeth did so “pursuant to [Lucy's] command” insults Elizabeth's considerable intelligence. Here, just as was the case with an eighteen-year-old we deemed contributorily negligent as a matter of law when he was injured after making a shallow dive from a sliding board into a lake, “[t]he danger of striking the bottom of the swimming area when diving head first into shallow water was obvious to plaintiff.” *Jenkins v. Lake Montonia Club*, 125 N.C. App. 102, 107-08, 479 S.E.2d 259, 263 (1997).

Plaintiffs' own aquatics and diving expert, Dr. M. Alexander Gabrielsen, testified in a deposition that the ultimate decision to dive was made by Elizabeth. He went on to state, “If you want the thing—what caused this accident, it was the depth of the water and nothing else.” Although Dr. Gabrielsen later attempted to qualify his remarks by claiming that Lucy's presence was “important,” it is clear that Elizabeth's “want of ordinary care was at least one of the proximate causes of the injury.” *Diorio* at 408, 405 S.E.2d at 790. As noted above, Elizabeth explained her decision to Lucy after the dive by stating, “I thought I could do it.” Regretfully, she could not, but that is through no fault of defendants.

The demonstration of Elizabeth's contributory negligence defeated the essential proximate cause element of plaintiffs' claim. As such, defendants were entitled to a grant of summary judgment. *See Collingwood* at 66, 376 S.E.2d at 427.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

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[133 N.C. App. 172 (1999)]

HAROLD P. LAING, PLAINTIFF v. G. C. LEWIS, DEFENDANT

No. COA98-865

(Filed 4 May 1999)

1. Real Estate— action for possession—surety bond

The trial court did not err by denying plaintiff's motion for a default judgment based upon defendant's failure to file the surety bond required by N.C.G.S. § 1-111. The trial court conducted a hearing and determined that the action should proceed on its merit upon defendant filing an undertaking of \$1,000; this was a proper exercise of the trial court's discretion.

2. Statute of Frauds— order enforcing unsigned settlement— statute of frauds not properly raised

Defendant could not raise the statute of frauds for the first time on appeal where a memorandum of settlement involving a breach of a lease was clearly an agreement for the conveyance of an interest in property and within the statute of frauds, but defendant admitted the existence and terms of the agreement and did not plead the statute as a defense to its enforcement. However, the trial court's order enforcing the agreement did not accurately reflect its terms and the order was remanded.

Appeal by plaintiff from judgment entered 13 May 1998 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 17 March 1999.

J. L. Rhinehart for plaintiff-appellant.

Stephen E. Culbreth for defendant-appellee.

MARTIN, Judge.

Plaintiff filed this action alleging defendant's breach of a lease agreement by non-payment of rent; plaintiff sought a judgment for past-due rent and possession of real property located at 120 North College Road, Wilmington, N.C. Defendant filed an answer containing affirmative defenses and asserted a counterclaim alleging that plaintiff had obtained title to the property from defendant fraudulently; defendant sought to set aside two deeds by which plaintiff had obtained title thereto. Plaintiff moved to strike defendant's answer and counterclaim and for a default judgment on the ground that

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defendant had failed to execute and file the undertaking required by G.S. § 1-111 for actions seeking recovery of possession of real property. Judge James E. Ragan, III, denied plaintiff's motion and ordered defendant to execute and file a defense bond in the amount of \$1,000. Defendant complied with the order.

By agreement of the parties, the matter was submitted to non-binding mediation. A settlement was reached during the mediation conference, though neither a memorandum of the settlement nor a settlement agreement was prepared or signed at that time. A document, entitled "Memorandum of Settlement Agreement," was subsequently drafted by defendant's counsel and submitted to plaintiff's counsel for approval. The memorandum provided for settlement upon the following terms:

1. Plaintiff shall pay Defendant the sum of One Hundred Thousand (\$100,000.00) Dollars, payable Fifty Thousand (\$50,000.00) Dollars on or before July 11, 1997 and Fifty Thousand (\$50,000.00) Dollars on or before December 27, 1997.
2. Upon receipt of the sums set forth in 1 above, Defendant shall quit claim (sic) his entire interest in the "Good Earth" and "McCloap" tracts of land on North College Road, Wilmington, North Carolina to Plaintiff.
3. Defendant shall vacate the "Good Earth tract on or before July 1, 1998; provided however that commencing on February 1, 1998 Defendant shall pay Plaintiff rent in the amount of Seven Hundred Fifty (\$750.00) per month until he vacates.
4. Defendant shall vacate the "McCloap" tract upon sale thereof by Plaintiff or on or before July 1, 1998, whichever shall first occur.
5. Plaintiff shall cancel and mark paid in full and satisfied all Defendant's Promissory Notes, and in particular the one dated January 13, 1982, and shall cancel of record and mark paid in full and satisfied all Defendant's Deeds of Trust, and in particular the one recorded in Book 1197 at Page 10 and/or Book 1269 at Page 545.
6. The parties shall enter into a Stipulation of Dismissal with prejudice of all claims and counterclaims in New Hanover County Superior Court Case No. 95 CvS 3063, and Defendant shall be

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entitled to a refund of the \$1,000.00 cash bond posted by him herein.

7. Any and all claims which the parties may have against one another will be settled and discharged completely and the parties shall execute any and all documents necessary or required to accomplish that purpose and to carry into effect the provisions of this agreement.

Plaintiff and his counsel signed the memorandum agreement and returned it to defendant's counsel for execution by defendant. Defendant, however, declined to sign the memorandum agreement. Defendant's counsel withdrew from the matter.

Plaintiff filed a motion in the cause in which he requested the trial court to enter judgment in accordance with the terms of the memorandum of settlement. The trial court found facts as recited above and, based upon defendant's responses to requests for admissions served upon him by plaintiff, found defendant had admitted the existence of the settlement agreement. The trial court concluded "plaintiff is entitled to specific performance of the terms and conditions of the settlement agreement" and entered an order containing terms identical to the Memorandum of Settlement Agreement with the exception of paragraphs 1 and 3, which provided as follows:

1. That plaintiff shall pay to the defendant the sum of \$100,000.00 payable as follows: The sum of \$50,000.00 on or before the 27th day of May, 1998, and the sum of \$50,000.00 on or before October 29, 1998.

3. That the defendant shall vacate the "Good Earth" tract on or before July 1, 1999, provided, however, that commencing on February 1, 1999, the defendant shall pay to the plaintiff rent in the amount of \$750.00 per month until such time as the defendant vacates the premises.

Plaintiff appeals.

I.

[1] Plaintiff first assigns error to the denial of his motion to strike defendant's answer and counterclaim and for a default judgment. He contends defendant's failure to file the undertaking required by G.S. § 1-111 entitled him to a default judgment.

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Plaintiff correctly asserts that G.S. § 1-111 requires, in actions for the recovery or possession of real property, that a defendant execute and file a surety bond of not less than \$200 before pleading. The purpose of the statute is “to protect the plaintiff from damages he may suffer by reason of defendant’s wrongful possession between the commencement of the action and the entry of final judgment.” *Morris v. Wilkins*, 241 N.C. 507, 511, 85 S.E.2d 892, 895 (1955). However, in such actions, where a defendant answers without filing the necessary bond, judgment by default is irregular unless entered after notice and a hearing permitting defendant to show cause why judgment should not be entered. *See Rich v. Norfolk Southern Ry. Co.*, 244 N.C. 175, 92 S.E.2d 768 (1956).

In the present case, the trial court conducted a hearing and determined the action should proceed on its merit upon defendant’s filing an undertaking in the amount of \$1,000, and so ordered. The order was a proper exercise of the trial court’s discretion. *See Henning v. Warner*, 109 N.C. 406, 14 S.E. 317 (1891) (statute not intended as “engine of oppression”; proper to permit extension of time to file bond); *Narron v. Union Camp Corp.*, 81 N.C. App. 263, 344 S.E.2d 64 (1986) (trial court has discretion to require a defendant to post more than the \$200 minimum). Considering the purpose of G.S. § 1-111, we conclude plaintiff could not have been prejudiced by the court’s order requiring defendant to file a bond well in excess of the statutory minimum. This assignment of error is overruled.

II.

[2] Plaintiff next assigns error to the trial court’s order specifically enforcing the terms of the memorandum of settlement. Plaintiff argues that the trial court’s order is materially different from the parties’ settlement agreement and requests that we vacate the order and remand for entry of an order in conformity with the original memorandum of settlement. Defendant argues that the trial court had no authority to order specific performance because there was no written contract signed by him and, therefore, enforcement of the agreement is prohibited by G.S. § 22-2, the statute of frauds.

It is well established in North Carolina that an agreement to convey an interest in land must satisfy all requirements of the statute of frauds, specifically, that the agreement must be in writing and signed by the party to be charged therewith. N.C. Gen. Stat. § 22-2; *River Birch Assoc. v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990).

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However, it is also well-established that there are three ways in which a party may avail himself of a statute of frauds defense:

(1) The contract may be admitted and the statute pleaded as a bar to its enforcement; (2) the contract, as alleged, may be denied and the statute pleaded, and in such case if it “develops on the trial that the contract is in parol, it must be declared invalid”; or (3) the party to be charged may enter a general denial without pleading the statute, and on the trial object to the admission of parol testimony to prove the contract.

Weant v. McCanness, 235 N.C. 384, 386, 70 S.E.2d 196, 198 (1952) (citations omitted); see also *Jamerson v. Logan*, 228 N.C. 540, 46 S.E.2d 561 (1948).

The memorandum of settlement in this case is clearly an agreement for the conveyance of an interest in property, and is within the statute of frauds. However, defendant admitted the existence and terms of the memorandum agreement and did not plead the statute as a defense to its enforcement, thereby precluding him from the benefit of the statute. See *Weant*, *supra*. Since defendant did not plead the statute of frauds in the trial court, he may not raise it for the first time on appeal. See *Allison v. Steele*, 220 N.C. 318, 17 S.E.2d 339 (1941).

In *Few v. Hammack Enter., Inc.*, 132 N.C. App. 291, 511 S.E.2d 665 (1999) this Court held that parties to a mediated settlement conference may enter into a binding oral agreement to settle a case, and their failure to reduce the agreement to a signed writing does not automatically preclude the finding of a binding agreement. As in *Hammack*, the record before us reflects that the parties orally entered into a valid mediated settlement agreement, the terms of which are not in dispute, and defendant’s failure to sign the agreement does not preclude its enforcement where defendant failed to properly avail himself of the statute of frauds. However, the trial court’s order enforcing the agreement does not accurately reflect the terms to which the parties agreed, and the court was without authority to alter those terms. “In rendering a decree of specific performance, the court has no power to decree performance in any other manner than according to the agreement of the parties.” *Lawing v. Jaynes*, 20 N.C. App. 528, 538, 202 S.E.2d 334, 341, *modified on other grounds*, 285 N.C. 418, 206 S.E.2d 162 (1974) (quoting 71 AmJur. 2d § 211). Therefore, we must vacate the order and remand this case for entry of judgment in accordance with the terms agreed upon by the parties and set forth in the memorandum of settlement.

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Vacated and remanded.

Judges TIMMONS-GOODSON and HUNTER concur.

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FLORENCE, INC., D/B/A PETERBILT OF DUNN, DEFENDANT-APPELLEE

No. COA98-917

(Filed 4 May 1999)

Motor Vehicles— sale—title not transferred—subsequent sale

The trial court properly granted summary judgment for defendant where plaintiff sold an automobile to a third party, who paid with a personal check; plaintiff gave the third party possession of the vehicle, along with a bill of sale, an odometer statement, a temporary tag, and a DMV Temporary Marker Receipt, but did not execute a certificate of title; the third party traded the vehicle to defendant as partial payment for a truck; the third party's check to plaintiff was returned for insufficient funds; and plaintiff sought a declaratory judgment that it is the owner of the vehicle. Neither party demonstrated exemplary professional conduct, but plaintiff was in the better position to have avoided the problem and defendant came the closest in observing reasonable commercial standards of fair dealing in the trade. Plaintiff effectively put the automobile into the stream of commerce and its recourse is against the third party. N.C.G.S. § 25-2-103(1)(b).

Appeal by plaintiff from order entered 26 May 1998 by Judge G.K. Butterfield in Lenoir County Superior Court. Heard in the Court of Appeals 30 March 1999.

White & Allen, P.A., by John P. Marshall and Matthew S. Sullivan, for plaintiff-appellant.

Law Office of James M. Johnson, by James M. Johnson, and Law Office of Dewey R. Butler, by Dewey R. Butler, for defendant-appellee.

McGEE, Judge.

The record in this case shows that plaintiff sold a Ford Mustang automobile to Joyce Elizabeth Rice on 23 August 1997. On that date,

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Rice gave plaintiff a personal check for \$13,331.00 to pay for the automobile. Plaintiff gave Rice possession of the Mustang, along with a bill of sale, an odometer statement, a thirty day temporary tag and a N.C. Department of Motor Vehicles Form 38 30-Day Temporary Marker Receipt. Plaintiff did not execute a certificate of title to Rice.

On 29 August 1997, Rice traded the Mustang to defendant as partial payment for a truck. Rice showed defendant the bill of sale from plaintiff, an odometer statement signed by plaintiff and a thirty day tag signed by plaintiff. She delivered possession of the Mustang to defendant and took possession of the truck. Meanwhile, also on 29 August 1997, Rice's check for purchase of the Mustang was returned to plaintiff for insufficient funds.

Since this series of events, plaintiff has remained in possession of the title to the Mustang, and defendant has remained in possession of the Mustang.

In its complaint, plaintiff sought: (1) a declaratory judgment, pursuant to N.C. Gen. Stat. § 1-253, that it is the owner of the Mustang; (2) a judgment that it is entitled to possession of the automobile; and (3) in the alternative, the value of the Mustang. The trial court entered summary judgment in favor of defendant. Plaintiff appeals.

The question before us is whether, on these facts, plaintiff effectively placed the Mustang into the stream of commerce to the extent that defendant should be construed as a good-faith purchaser of the Mustang. We examine this question under N.C. Gen. Stat. § 20-72 (1993), the portion of the North Carolina Motor Vehicle Act that addresses transfer of ownership, and also under N.C. Gen. Stat. §§ 25-2-103(1)(b), 25-2-104(1) and 25-2-403 (1995), the pertinent sections of North Carolina's adaptation of the Uniform Commercial Code.

The North Carolina Motor Vehicle Act says in pertinent part,

[T]o assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Division, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. . . .

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Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle[.]

N.C. Gen. Stat. § 20-72(b).

North Carolina's adaptation of the Uniform Commercial Code (UCC) says, "A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though . . . the delivery was in exchange for a check which is later dishonored[.]" N.C. Gen. Stat. § 25-2-403.

The parties direct us to two cases in which the potential for conflict between the Motor Vehicle Act and the UCC is addressed. In *Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970), an insurer sought to avoid liability for automobile accident costs where the vehicle in question was delivered more than thirty days before the accident but the certificate of title was signed and delivered less than thirty days before the accident. Our Supreme Court held that the insured acquired ownership of the automobile less than thirty days prior to the accident; therefore, coverage was afforded under the non-owner's policy, which provided that coverage would apply to an owned vehicle for a period of thirty days following date of acquisition of such vehicle. *Id.* The *Hayes* court, citing the Motor Vehicle Act, stated that "for purposes of tort law and liability insurance coverage," ownership of a vehicle passes when:

(1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee, (2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee.

Hayes at 640, 174 S.E.2d at 524.

N.C. National Bank v. Robinson, 78 N.C. App. 1, 336 S.E.2d 666 (1985), involved a dispute among a lender who provided financing to a used-car dealer, the used-car dealer, a couple who purchased a car from the dealer, and the bank that financed the couple's purchase. The used-car dealer sold the car to the couple and absconded with the payment money rather than paying it to his lender. When the lender discovered what had happened, it repossessed the car from the cou-

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ple. The lender asserted that title had not passed to the couple because, while the used-car dealer had delivered possession of the car to the couple, he had not assigned the certificate of title to them. *Robinson* at 5, 336 S.E.2d at 669. Our Court acknowledged that the lender would prevail under the Motor Vehicle Act but held that the UCC controls over the Motor Vehicle Act when automobiles are used as collateral and are held in inventory for sale. *Robinson* at 11, 336 S.E.2d at 672 (citation omitted).

Thus, *Hayes* applies the Motor Vehicle Act on its facts, and *Robinson* applies the UCC on its facts. But neither *Hayes* nor *Robinson* are sufficiently on point to be applied to the facts before us. On these facts, we apply the following analysis.

Both parties before us are “merchants.” See N.C. Gen. Stat. § 25-2-104(1). Both are charged with “having knowledge or skill peculiar to the practices” of their business transactions. *Id.* As merchants, both “are held to more businesslike standards than non-businessmen” and “are held to a higher standard of sophistication than are non-merchants because they are ‘professionals.’” N.C. Gen. Stat. ch. 25, art. 2 (“Historical Notes, North Carolina Comment”). “‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” N.C. Gen. Stat. § 25-2-103(1)(b).

The facts before us suggest that neither party demonstrated exemplary professional conduct. The facts further suggest, however, that of the two parties, plaintiff was in the better position to have avoided the problem and that defendant came the closest of the two in observing “reasonable commercial standards of fair dealing in the trade.” *Id.*

The affidavit of defendant’s agent states that Rice gave him a bill of sale from plaintiff, an odometer statement signed by plaintiff and a thirty day temporary tag signed by plaintiff. It further states that defendant’s agent attempted to determine the status of the automobile title before engaging in a transaction with Rice. Plaintiff, on the other hand, gave Rice possession of a vehicle in exchange for a non-certified personal check. Plaintiff effectively put the automobile into the stream of commerce, and plaintiff’s recourse is against Rice.

We affirm the trial court’s entry of summary judgment for defendant.

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[133 N.C. App. 181 (1999)]

Affirmed.

Judges GREENE and MARTIN concur.

THOMAS PROCTER, PETITIONER v. CITY OF RALEIGH BOARD OF ADJUSTMENT,
RESPONDENT

No. COA98-854

(Filed 4 May 1999)

Parties— intervention—zoning action

The trial court erred by denying the proposed intervenors' motion to intervene where petitioner sought permission to combine five lots into four for the purpose of building duplexes; the Zoning Enforcement Officer interpreted a setback ordinance to prohibit building; petitioner applied to the Board of Adjustment for a different interpretation or for a special use permit; the proposed intervenors were among those signing an opposing petition filed with the Board; the Board upheld the prior interpretation and denied a special use permit; petitioner filed a writ of certiorari in the trial court, which conducted a hearing and announced its intention to reverse the Board; and the proposed intervenors filed their motion to intervene after learning that the Board did not intend to pursue an appeal. Extraordinary and unusual circumstances exist in this case to allow the proposed intervenors' motion to intervene and they satisfied the prerequisites of being interested parties subject to practical impairment of the protection of that interest and inadequate representation of that interest by existing parties.

Appeal by prospective intervenors Anthony and Kathy Johnson from an order entered 28 May 1998 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 25 February 1999.

John F. Oates, Jr. for petitioner-appellee.

Hatch, Little & Bunn, L.L.P., by David H. Permar and Tina L. Frazier, for intervenors-appellants.

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WALKER, Judge.

Petitioner owns property between Wade Avenue and Cole Street near the intersection of Wade Avenue and Glenwood Avenue in Raleigh. The property was previously divided into five parcels and petitioner sought permission from the Raleigh Planning Department to recombine the five lots into four for the purpose of building four duplexes on the property. The Zoning Enforcement Officer in the Planning Department denied petitioner's request based on his interpretation of a city ordinance that applies to the Special R-30 zoning district in which the property is located. Section 10-2024(d)(2) of the Raleigh Zoning Ordinance provides in part:

The minimum district yard setbacks, unless otherwise required by this Code, are:

front yard The greater of either 15 feet or within ten (10) per cent of the median front yard setback established by buildings on the same side of the block face of the proposed building.

Petitioner's plan called for the duplexes to be built facing Wade Avenue. No other homes on nearby properties face Wade Avenue. The Zoning Enforcement Officer interpreted the section as both a minimum and maximum setback distance because the special zoning district had been created to maintain the "block face" such that the buildings along the block were built similar distances from the street. Because of the peculiar terrain of the petitioner's property, if the setback of fifteen feet were interpreted as both a minimum and maximum, the petitioner would be unable to build as planned.

Petitioner applied to the Raleigh Board of Adjustment for an interpretation of section 10-2024(d)(2) and requested that it be interpreted only as a minimum setback. In the alternative, he sought a special use permit to disregard the setback requirement. At the hearing, the Board of Adjustment heard from both the petitioner and residents of the area who opposed the project. In addition, petitions were filed with the Board of Adjustment with the signatures of fifty-three neighbors who opposed the interpretation and the special use permit. Proposed intervenors, Anthony and Kathy Johnson, signed the petition. The Board upheld the prior interpretation and denied the special use permit on multiple grounds.

Petitioner then filed a petition for writ of certiorari in the trial court. On 24 April 1998, the trial court conducted a hearing after

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which it announced its intention to reverse the Board of Adjustment. After learning that the Board of Adjustment did not intend to pursue an appeal of the trial court's order, the proposed intervenors filed their motion to intervene on 29 April 1998. The trial court's order reversing the Board of Adjustment was entered 30 April 1998. At a hearing on 28 May 1998, the trial court denied the motion to intervene, finding that it was not timely.

The proposed intervenors assign as error the trial court's denial of their motion to intervene. They argue that their motion was timely because they had monitored the progress of the case throughout its course and felt that the Board of Adjustment was adequately representing their interest. Further, that only after learning the Board of Adjustment did not plan to appeal the ruling of the trial court did the interest of the proposed intervenors and the Board diverge.

Rule 24 of the North Carolina Rules of Civil Procedure governs intervention in civil actions:

(a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:

...

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (1990). The question of whether an application to intervene is timely is left to the discretion of the trial court who will consider the following factors: (1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985). In situations where a judgment has been entered, motions to intervene are granted only upon a finding of "extraordinary and unusual circumstances" or a "strong showing of entitlement and justification." *Id.* at 264, 330 S.E.2d at 648.

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In light of the factors listed above in *Gentry*, we conclude that extraordinary and unusual circumstances exist in this case to allow proposed intervenors' motion to intervene as timely. *See, e.g., Watson v. Ben Griffin Realty and Auction*, 128 N.C. App. 61, 493 S.E.2d 331 (1997) (Walker, J., concurring); *State v. Smith*, 130 N.C. App. 600, 503 S.E.2d 674 (1998); *Black v. Central Motor Lines, Inc.*, 500 F.2d 407 (4th Cir. 1974); *Wolpe v. Poretzky*, 144 F.2d 505 (D.C. Cir. 1944). From the beginning of this matter, proposed intervenors have been involved in the ongoing proceedings. They appeared at the hearing before the Board of Adjustment and acknowledged their opposition to the proposed plans and in support of the Planning Department's interpretation of the zoning ordinance by their signing of the petition. When petitioner sought review by certiorari in the trial court, the proposed intervenors learned that the Board of Adjustment would defend its decision thereby also representing their interests in the matter. However, only after the trial court reversed the Board of Adjustment did the Board decide not to pursue an appeal. The proposed intervenors then acted timely by filing their motion to intervene in order to have standing to appeal.

Once a motion is deemed timely, three prerequisites must be met for a party to establish its right to intervene: (1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties. *State ex rel. Long v. Interstate Casualty Ins. Co.*, 106 N.C. App. 470, 473, 417 S.E.2d 296, 299 (1992). In this case, proposed intervenors meet all three requirements. The proposed intervenors are interested parties as this proposed development would impact the special character of their neighborhood. Further, as the proposed intervenors reside at 510 Cole Street and the subject property is located at 514 Cole Street, the proposed building plan could affect the proposed intervenors' use and enjoyment of their property. The protection of that interest is impaired by the Board of Adjustment's decision not to proceed with the action, and proposed intervenors' interest is no longer adequately represented by the Board.

For all the reasons stated, we reverse the order of the trial court denying the proposed intervenors' motion to intervene and remand for entry of an order allowing proposed intervenors' motion to intervene for the purpose of appealing the trial court's order of 30 April 1998.

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[133 N.C. App. 185 (1999)]

Reversed and remanded.

Judges JOHN and MCGEE concur.



JESSICA SIERRA HOPE ANDERSON BY AND THROUGH GUARDIAN AD LITEM JERRY H. JEROME, TAMMY ANDERSON AND HUSBAND, DALE ANDERSON, PLAINTIFFS v. TOWN OF ANDREWS AND COUNTY OF CHEROKEE, DEFENDANTS

No. COA98-1367

(Filed 4 May 1999)

Appeal and Error— appealability—summary judgment—partial sovereign immunity

An appeal from the denial of partial and total summary judgment for defendant-Town in an action arising from injuries suffered in a park was dismissed where defendant admitted the purchase of liability insurance in an amount less than that sought by plaintiffs, thereby establishing the Town's entitlement to only partial immunity. The rationale for allowing immediate appeal of the denial of summary judgment based upon sovereign immunity is the entitlement not to have to answer for conduct in a civil damages action, but partial immunity serves only to limit the damage award and does not operate as a bar to the claim.

Appeal by defendant Town of Andrews from order entered 20 August 1998 by Judge Forrest A. Ferrell in Cherokee County Superior Court. Heard in the Court of Appeals 26 April 1999.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Larry McDevitt and Michelle Rippon, for plaintiffs-appellees.

Roberts & Stevens, P.A., by Frank P. Graham and Sarah M. Washburn, for defendant-appellant Town of Andrews.

SMITH, Judge.

This is defendant Town of Andrew's (hereinafter "defendant town") second interlocutory appeal in this matter. Those facts necessary for adjudication of the present appeal are as follows: Plaintiffs filed this action against defendants seeking damages from injuries suffered by plaintiff Jessica Sierra Hope Anderson while visiting a

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park maintained by defendant Town of Andrews. Defendant town answered and moved to dismiss various paragraphs of the complaint under N.C.R. Civ. P. 12(b)(6). Defendant town also moved to dismiss the entire action under N.C.R. Civ. P. 19(b)(2) and (6) based upon sovereign immunity. When these motions were denied, defendant town appealed. This Court held that the trial court had properly denied defendant town's motion to dismiss the action since the complaint sufficiently alleged that the town had waived its sovereign immunity. *Anderson v. Town of Andrews*, 127 N.C. App. 599, 492 S.E.2d 385 (1997).

Subsequently, defendant town filed a "Request for Statement of Monetary Relief Sought by Plaintiff." Plaintiffs responded that plaintiff Jessica Anderson sought compensatory damages in the amount of five million dollars for lifetime care, and ten million dollars for pain, suffering, and disfigurement. Her parents, plaintiffs Tammy and Dale Anderson, sought compensatory damages in the amount of one million dollars for medical expenses, five hundred thousand dollars each for emotional distress, and approximately nine thousand dollars in lost wages to Mrs. Anderson, and approximately twenty-five thousand dollars in lost wages to Mr. Anderson. Thereafter, defendant town moved for partial summary judgment as to the issue of sovereign immunity based upon plaintiffs' statements regarding the monetary relief sought. Defendant town attached the affidavit of the Mayor of the Town of Andrews, Jim Dailey, wherein he admitted that the town "carried a \$1 million insurance policy with the Hartford Insurance carrier[.]" Also attached was an affidavit of Town Consultant Robert Gardner, which indicated that the pool area was not open to the public and that no non-governmental activities were being conducted during the summer of 1994. At the hearing on the motion, defendant town also moved for total summary judgment on the ground that plaintiffs have failed to prove an essential element of their negligence claims. By order entered 20 August 1998, defendant town's motion for partial and total summary judgment was denied. Defendant purports to appeal from this order.

It is well settled that an order denying a motion for summary judgment is interlocutory, and therefore, is not generally immediately appealable. *Wallace v. Jarvis*, 119 N.C. App. 582, 584, 459 S.E.2d 44, 46, *disc. review denied*, 341 N.C. 657, 462 S.E.2d 527 (1995). The purpose of this rule is " 'to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.' " *Jeffreys v.*

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Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985)). A party may, however, be entitled to immediate appellate review, even in instances where the trial court has not provided certification under N.C.R. Civ. P. 54, where the order potentially works injury to a substantial right. *Troy v. Tucker*, 126 N.C. App. 213, 215, 484 S.E.2d 98, 99 (1997) (citing N.C. Gen. Stat. § 7A-27(d)(1)). This Court has previously held that “the denial of a summary judgment motion on the grounds of sovereign and qualified immunity is an exception to the rule and is immediately appealable.” *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 674, 449 S.E.2d 240, 247 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). In *Epps v. Duke University*, the Court explained its rationale for allowing immediate appellate review in such cases: “We allow interlocutory appeals in these situation because ‘the essence of absolute immunity is its possessor’s entitlement not to have to answer for his conduct in a civil damages action.’” 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (citations omitted), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). The presence of such entitlement is noticeably absent in cases involving partial immunity. Notably, partial immunity “does not operate to bar [a] plaintiff’s claim,” it serves only to limit the damage award recoverable from a defendant. *Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 90, 464 S.E.2d 299, 301 (1995).

In the instant case, this Court has previously held that plaintiffs had sufficiently pled waiver of sovereign immunity by the purchase of liability insurance. *Anderson*, 127 N.C. App. 599, 492 S.E.2d 385. Moreover, defendant town has admitted to the purchase of liability insurance in the amount of one million dollars, thereby establishing defendant town’s entitlement to only partial immunity. As this Court has previously held that partial immunity only limits the possible award recoverable from defendant town, and does not bar plaintiffs’ claims entirely, *Wilhelm*, 121 N.C. App. at 90, 464 S.E.2d at 301, the necessity for immediate appellate review is lacking in this case.

In sum, since defendant town cannot show the affectation of a substantial right, this appeal is dismissed.

Dismissed.

Judges GREENE and WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 APRIL 1999

DIXON v. PARKER No. 98-212	Beaufort (97CVD539)	Affirmed
GOLDSTON v. JOHNSON No. 98-716	Carteret (96CVS1383)	Reversed
GREENE v. LOWE'S FOOD STORES No. 98-1028	Ind. Comm. (804119)	Affirmed
LYNCH v. N.C. CENTRAL UNIV. No. 98-697	Wake (97CVS08824)	Affirmed
SLAGLE v. SLAGLE No. 98-581	Catawba (96CVD179)	Affirmed
STATE v. HOWIE No. 97-1552	Cabarrus (96CRS9180)	No Error
STATE v. JACKSON No. 98-671	Guilford (96CRS81347) (96CRS81348)	No Error
STATE v. LONG No. 98-343	Randolph (95CRS12897) (96CRS13598) (96CRS13599)	No Error
STATE v. MILLER No. 98-375	Rowan (96CRS8853)	No Error
STATE v. MOURNING No. 98-851	Beaufort (96CRS2549)	No Error
STATE v. THOMPSON No. 98-667	Mecklenburg (96CRS52581) (96CRS51352) (96CRS51353) (97CRS116356) (97CRS116357) (97CRS116360)	No error in the trial; sentence vacated and remanded

FILED 4 MAY 1999

BALDWIN v. McMILLIAN No. 98-801	Orange (92CVD676)	Reversed
BULLARD v. McCALL No. 98-1296	Caldwell (97CVS1078)	Affirmed

CAP CARE GRP, INC. v. McDONALD No. 98-1008	Guilford (97CVS10824)	Reversed in part and Dismissed in part
CHILDERS v. WALLACE No. 98-1134	Gaston (97CVS3267)	Affirmed
COLLINS v. DEAN No. 98-1308	Mecklenburg (98CVD4967)	Dismissed
CONRAD v. ADAMS No. 98-1467	Gaston (98CVD3294)	Appeal Dismissed
CUFF v. PELICAN BUILDING CTR. No. 98-914	Ind. Comm. (493002)	Affirmed in part Remanded in part
CUMMINGS COVE COMMUNITY ASS'N v. LIEBERT No. 98-1217	Henderson (93CVD980)	Affirmed
DEP'T OF TRANSP. v. WHITEHEART No. 97-1584	Forsyth (95CVS4198)	Affirmed
EDWARDS v. BD. OF GOVERNORS OF UNC No. 98-122	Durham (91CVS01866)	Affirmed in part, Reversed in part, and Remanded
EDWARDS v. GUILFORD COUNTY SCHOOL DIST. No. 98-901	Guilford (98CVS4885)	Affirmed
FLOYD v. CAPE FEAR FARM CREDIT No. 96-708-2	Robeson (92CVS02625)	New Trial
HALSTENBERG v. HALSTENBERG No. 98-1213	Cabarrus (98CVD359)	Appeal dismissed and petition for writ certiorari denied
HAMBY v. SHERWIN WILLIAMS CO. No. 98-878	Ind. Comm. (500721)	Affirmed
HARDIN v. GILBERT-BROWN No. 98-640	Rutherford (97CVD811)	Vacated and Remanded
HUGHES v. CHAPPELL No. 98-675	Wake (97CVS07314)	Reversed and Remanded
IN RE JACOBS No. 98-1077	Buncombe (98J84)	Vacated and Remanded

IN RE MITCHELL No. 98-980	Buncombe (97J233)	Affirmed
IN RE MYERS No. 98-1209	Wilkes (95J44) (95J45)	Affirmed
IN RE SMITH No. 98-1490	Cumberland (92J633) (92J689)	Affirmed
IN RE TOUSIGNANT No. 98-1493	Cumberland (97CVD2096)	Affirmed
JAKOB v. CULPEPPER No. 98-681	Dare (96CVS336)	Affirmed
MARTIN v. E&R FARMS No. 98-1207	Wake (97CVS11588)	Affirmed
MARTINEZ v. RAMADA INN No. 98-839	Ind. Comm. (418054)	Affirmed
MEEKER v. U.S. AIR, INC. No. 98-1057	Ind. Comm. (865023)	Affirmed
MEMORIAL MISSION HOSP, INC. v. GUDGER No. 98-1250	Buncombe (97CVD1973)	Affirmed
ORANGE COUNTY EX REL. McMILLIAN v. McMILLIAN No. 98-802	Orange (90CVD1431)	Reversed
PERRITT v. ST. PIERRE No. 95-698-2	Guilford (94CVS3989)	Affirmed in part and Reversed in part
PITTS v. PITTS No. 98-821	Alamance (94CVD256) (95CVD1394)	Affirmed
ROBERTS v. SARA LEE HOSIERY No. 98-1055	Ind. Comm. (24358) (589226)	Affirmed
SCRONCE v. TOWN OF LONG BEACH No. 98-756	Brunswick (96CVS1203)	Affirmed
SMITH v. CAROLINA DAIRIES No. 98-950	Ind. Comm. (961626)	Affirmed

STATE v. BAXTER No. 98-1076	Lincoln (97CRS5572)	No Error
STATE v. BORDERS No. 98-1129	Forsyth (98CRS22217)	Affirmed
STATE v. BREVARD No. 98-1206	Mecklenburg (94CRS1141)	No Error
STATE v. BRONSON No. 98-1292	Wake (98CRS6871)	Affirmed
STATE v. BROWN No. 98-806	New Hanover (97CRS004)	No Error
STATE v. BULLOCK No. 98-1127	New Hanover (96CRS17005)	No Error
STATE v. CORBETT No. 98-1228	Alamance (97CRS21924)	No Error
STATE v. CREECH No. 98-1214	Pender (97CRS1213) (97CRS1214) (97CRS1215)	No Error
STATE v. DAVIS No. 98-847	Forsyth (97CRS38282) (97CRS36280)	No Error
STATE v. DYAR No. 98-1219	Gaston (97CRS12017) (97CRS12018) (97CRS12019) (97CRS12020) (97CRS11671)	No Error
STATE v. ELLIOTT No. 98-1323	Mecklenburg (97CRS42689)	No Error
STATE v. GARNER No. 97-1384	Guilford (94CRS20636) (94CRS20637)	Affirmed
STATE v. GLOVER No. 98-1125	Iredell (96CRS20427)	No Error
STATE v. HEATH No. 98-1447	Lenoir (95CRS5259)	Dismissed
STATE v. HILL No. 98-1111	Brunswick (97CRS2618)	No error in the trial; Remanded for correction of the judgment

STATE v. HOLMAN No. 98-1168	Durham (93CRS2133) (93CRS2349)	Affirmed
STATE v. HOOVER No. 98-1254	Randolph (96CRS87)	Affirmed
STATE v. JONES No. 98-1287	Northampton (96CRS2199)	No Error
STATE v. KEITH No. 98-1365	Durham (97CRS29400)	Affirmed
STATE v. KIMBLE No. 98-837	New Hanover (97CRS8050) (97CRS8051)	No Error
STATE v. KING No. 98-986	Guilford (96CRS074921)	No Error
STATE v. KIRK No. 98-1401	Mecklenburg (97CRS17007) (97CRS17008)	No Error
STATE v. LEWIS No. 98-735	Guilford (97CRS23511) (97CRS54265)	No Error
STATE v. LYONS No. 98-1316	Wake (96CRS20769) (96CRS20770)	Affirmed
STATE v. MAXWELL No. 98-1059	Craven (97CRS0009)	No Error
STATE v. MAYFIELD No. 98-1137	Rowan (98CRS206)	Affirmed
STATE v. McPHATTER No. 98-1154	Robeson (97CRS4397)	No Error
STATE v. MOORE No. 98-1073	Forsyth (98CRS10483) (98CRS27708) (98CRS17706)	No Error
STATE v. O'NEAL No. 98-1263	Mecklenburg (96CRS78837) (96CRS78839) (96CRS78841)	No Error
STATE v. PERKINS No. 98-1103	Guilford (97CRS081483)	Affirmed
STATE v. QUICK No. 98-1288	Richmond (95CRS4769)	No Error

	(95CRS4770) (95CRS4771)	
STATE v. RANKINS No. 98-473	Chowan (97CRS93)	No Error
STATE v. ROPER No. 98-1359	Wake (97CRS25104) (97CRS25105) (97CRS27988) (97CRS30200)	No Error
STATE v. SCAFF No. 98-702	Currituck (96CRS1906)	Remanded
STATE v. SIHARATH No. 98-1327	Guilford (98CRS2611)	No Error
STATE v. SIMPSON No. 98-1212	Edgecombe (95CRS4234)	No Error
STATE v. SMITH No. 98-978	Cumberland (97CRS10802) (97CRS10803)	No Error
STATE v. SMITH No. 98-1181	Wayne (96CRS9045)	No Error
STATE v. STINSON No. 98-1191	Mecklenburg (94CRS75375) (94CRS75378) (94CRS75379)	No Error
STATE v. TOLSON No. 98-1162	Craven (98CRS2242) (97CRS15606)	No Error
STATE v. VAUGHN No. 98-1280	Forsyth (97CRS42908)	No Error
STATE v. WHITE No. 98-1064	Guilford (93CRS33228)	No Error
STATE v. WHITEHEAD No. 98-1282	Pitt (96CRS18326) (96CRS18327) (96CRS18328) (96CRS18329) (96CRS18330) (96CRS18331) (96CRS18332)	Affirmed
STATE v. WILLIAMS No. 98-930	Guilford (97CRS50722)	No error in the trial; Remanded for resentencing

STATE v. WRENN No. 98-730	Guilford (97CRS38447)	No prejudicial error
STATE v. WYNN No. 98-1107	Mecklenburg (97CRS137720) (97CRS133721)	No Error
THOMAS v. BULLOCK No. 98-1115	Martin (95CVS365)	Affirmed
THOMPSON v. WATERS No. 98-985	Lee (98CVS371)	Affirmed
VANSIPE v. SERVICE AMERICA CORP. No. 98-1261	Ind. Comm. (474935)	Affirmed
WILLIAMS v. CITY OF FAYETTEVILLE No. 98-1130	Ind. Comm. (619840)	Affirmed
WILLIAMS v. MITCHELL No. 98-875	Vance (95CVS481)	Defendant Mitchell's appeal— affirmed Plaintiffs' appeal— affirmed
WOOD v. SOUTHSIDE OIL CO. No. 97-1313	Surry (95CVS12)	No Error
YUAN v. CIRCLE COMPUTER CORP. No. 97-1561	Wake (96CVD11073)	Vacated and Remanded

STATE v. WILDS

[133 N.C. App. 195 (1999)]

STATE OF NORTH CAROLINA v. CURTIS EUGENE WILDS

No. COA98-797

(Filed 18 May 1999)

1. Sentencing— capital—aggravating circumstances—pre-trial hearing denied

The trial court did not abuse its discretion in a capital first-degree murder prosecution which resulted in a life sentence by denying defendant's request for a pretrial hearing to determine whether the evidence was sufficient for the case to proceed capitally. It is clearly within the broad discretion of the trial court to hold a pretrial hearing and the court did not abuse its discretion here; moreover, the jury found that the mitigating circumstances outweighed the aggravating circumstances and recommended a life sentence, so that defendant failed to show that he was prejudiced.

2. Homicide— first-degree murder—premeditation and deliberation—sufficiency of evidence

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution.

3. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel

There was no error and no prejudice in a capital prosecution for a first-degree murder in the submission of the especially heinous, atrocious, or cruel aggravating circumstance because the evidence of multiple stabbings of the victim in the presence of her children was sufficient to support this circumstance and the jury found that the mitigating circumstances outweighed the aggravating circumstances and recommended life imprisonment.

4. Evidence— prior crime or act—assault on victim—admissible

The trial court did not err in a prosecution for first-degree murder by admitting evidence of defendant's prior convictions, including assaulting the victim. Evidence of a defendant's prior assaults on the victim for whose murder the defendant is being tried is admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim. The ten-year time span between the conviction and the victim's death affected the weight rather than the admissibility.

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[133 N.C. App. 195 (1999)]

5. Evidence— hearsay—state of mind exception—incidents of abuse against victim—factual events

The trial court did not err in a first-degree murder prosecution by admitting hearsay statements of the victim where her state of mind during each of the conversations was relevant because they related to her relationship with defendant preceding her death and rebutted defendant's self-defense inferences. Statements relating factual events which tend to show the victim's state of mind, emotion, sensation, or physical condition when the victim made the statements are not excluded if the facts related by the victim serve to demonstrate the basis for the victim's state of mind, emotions, sensations, or physical conditions. Moreover, the State offered substantial independent testimony that defendant acted with malice, premeditation, and deliberation.

6. Evidence— photograph of defendant—shackles and blood

There was no plain error in a first-degree murder prosecution where the court allowed the State to publish to the jury a photograph of defendant taken on the morning of the killing in which his legs were in shackles and there was blood on his hands and clothes and small knife wounds on his hands. The State offered overwhelming evidence of malice, premeditation, and deliberation and the jury would not have reached a different verdict if the photograph had been excluded.

7. Evidence— homicide—photographs of victim's body

The trial court did not abuse its discretion in a first-degree murder prosecution by allowing the State to publish to the jury photographs of the victim's wounds at the crime scene and autopsy photographs taken at the same angles and showing the same wounds where the autopsy photos revealed wounds that could not be seen in the crime scene photos because of the blood covering the body. The photographs were neither cumulative nor excessive in number and their probative value was not substantially outweighed by the danger of unfair prejudice.

8. Evidence— homicide—911 tape from victim's daughter— not unduly prejudicial

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting a tape of the 911 conversation between the victim's eight-year-old daughter and the Sheriff's Office. Although defendant argued that the prejudicial effect of

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the tape outweighed its probative value, the tape had probative value in corroborating the testimony of the daughter and defendant did not show that admitting the tape was not the result of a reasoned choice.

9. Witnesses— motion to sequester witnesses—denied

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion to sequester witnesses. Defendant did not show that the court's ruling was so arbitrary that it could not have been the result of a reasoned decision.

Judge EDMUNDS concurring.

Appeal by defendant from judgment entered 10 November 1997 by Judge Howard R. Greenson, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 29 March 1999.

Defendant appeals his first-degree murder conviction. Evidence presented at defendant's trial tended to show the following:

On the morning of 14 November 1996, defendant Curtis Eugene Wilds was sitting at a table in the kitchen of his home. His wife Tonya Wilds and their three minor children, ages six, eight, and nine, were also in the kitchen and Tonya was ironing clothes. Tonya told the children that the police would want to ask them questions at school that day because defendant had told the police that Tonya had abused the children. As Tonya was talking to the children, defendant got up from the table, picked up a knife, walked over to Tonya, and threw her on the floor. A struggle ensued and continued into the living room, where defendant stabbed Tonya repeatedly in the neck and body, leaving over a dozen wounds in her body. The children tried to pull defendant away from Tonya. The middle child, China Wilds, called 911 and told emergency dispatchers that "Curtis Wilds [was] trying to kill Tonya Wilds." After defendant stabbed Tonya, he dropped the knife and walked out the back door of the house. Defendant testified that when he saw a police car turning into his driveway, he walked back to the house and told the police officers, "I'm the one who did it." Tonya died as a result of the numerous stab wounds.

On 13 January 1997, defendant was charged with first-degree murder. On 20 February 1997, the trial court determined that probable cause existed to believe an aggravating factor existed, i.e., that the killing was "especially heinous, atrocious, or cruel," and declared

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the case a capital murder case. On 3 September 1997, defendant filed a motion for a pre-trial hearing to determine whether there was sufficient evidence to support the submission to the jury of an aggravating circumstance. The trial court denied defendant's motion. On 27 October 1997, defendant was capitally tried on the charge of first-degree murder. The jury returned a verdict of guilty. At the sentencing hearing, the jury found that the mitigating circumstances outweighed the aggravating circumstances and recommended a life sentence. On 10 November 1997, the judge sentenced defendant to life imprisonment.

Attorney General Michael F. Easley, by Assistant Attorney General Dennis P. Myers, for the State.

White & Crumpler, by David B. Freedman, Dudley A. Witt, and Laurie A. Schlossberg, and Causey & Nixon, L.L.P., by William G. Causey, Jr. and Alec Carpenter, for defendant-appellant.

EAGLES, Chief Judge.

[1] We first determine whether the trial court abused its discretion when it denied defendant's request for a pre-trial, so-called *Watson* hearing to determine whether the evidence was sufficient for the case to proceed to trial as a capital case. *See State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984). The trial court refused to hold a pre-trial hearing on the basis that "premature evidence might come out during the case itself to support an aggravating factor that was not brought out at the *Watson* hearing." Defendant contends that the trial court abused its discretion by failing to offer a "sustainable reason for denying the defendant's motion." Defendant further contends that the trial court's failure to conduct a *Watson* hearing resulted in a trial of defendant before a death-qualified jury in violation of his constitutional right to be tried by a fair and impartial jury.

Defendant's argument fails. Defendant bases his argument for a pre-trial hearing on *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984). In *Watson*, the trial court held a pre-trial hearing to determine whether there was sufficient evidence to support the submission of an aggravating factor to the jury. *Id.* at 388, 312 S.E.2d at 452. The *Watson* Court "commend[ed]" the procedure for "its judicial economy and administrative efficiency." *Id.* However, it is clearly within the broad discretion of the trial court to hold a pre-trial hearing, and the trial court did not abuse its discretion here. Furthermore, our courts have uniformly rejected the argument that "death-qualifying" a jury

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deprives a defendant of his constitutional right to a free trial. *See, e.g., State v. Young*, 312 N.C. 669, 686, 325 S.E.2d 181, 191 (1985). Finally, we note that, although the trial was held before a “death-qualified” jury, the jury found that mitigating circumstances outweighed the aggravating circumstances and recommended a life sentence rather than death. Accordingly, defendant has failed to show that he was prejudiced in any way by the trial court’s refusal to hold a *Watson* hearing. Defendant’s assignment of error is overruled.

[2] Defendant next contends that the evidence was insufficient to support a first-degree murder conviction. Defendant contends that “other than unreliable and inadmissible hearsay, no evidence was presented to indicate that the defendant had at any time formed the specific intent to kill his wife or that he did so in a cool state of mind in furtherance of any plan or design. The defendant’s evidence . . . tended to show that the victim initiated the violent conduct . . . by being the first to pick up a knife.” We disagree. “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 (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.* at 451, 451 S.E.2d at 271-72.

In order for the trial court to submit a charge of first degree murder to the jury, there must have been substantial evidence presented from which a jury could determine that the defendant intentionally [] killed the victim with malice, premeditation and deliberation. “Substantial evidence” is that amount of relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. In ruling upon defendant’s motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State’s favor.

State v. Corn, 303 N.C. 293, 296-97, 278 S.E.2d 221, 223 (1981) (citations omitted). Because premeditation and deliberation ordinarily are

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not susceptible of proof by direct evidence, the State generally must establish them by circumstantial evidence. *Weathers*, 339 N.C. at 451, 451 S.E.2d at 271. Examples of circumstances that may raise an inference of premeditation and deliberation include (1) "conduct and statements of the defendant before and after the killing," (2) "threats made against the victim by the defendant, ill will or previous difficulty between the parties," and (3) "evidence that the killing was done in a brutal manner." *State v. Bullard*, 312 N.C. 129, 161, 322 S.E.2d 370, 388 (1984).

Here, the State presented testimony by defendant's daughter China Wilds that on the morning of the killing defendant seemed "pretty angry" and "got up and went over there and got the knife while [Tonya] was looking down ironing her clothes and that was when he put [the knife] behind his back." China further testified that defendant then "put [the knife] around [Tonya's] neck and then pushed her down on the floor." China testified that the struggle moved to the living room, where [defendant] "was over there stabbing her." China further testified that Tonya did not pick up a knife or otherwise attack defendant before he began stabbing her. Furthermore, the State also introduced into evidence the 911 call that China Wilds made, in which she told dispatchers that "Curtis Wilds is trying to kill Tonya Wilds."

At trial, forensic pathologist John D. Butts, M.D., testified that when he performed an autopsy on Tonya's body, he found "a number of stab cutting injuries present on her body" that were "centered mostly around the face and neck region, [and] she had cuts on her hands, both hands, as well as a few minor cuts and scratches on her right upper arm." Dr. Butts described the wounds on Tonya's hands as "defensive wounds."

The State also introduced testimony by witnesses stating that defendant had threatened to kill Tonya in the weeks before he killed her. Tonya's sister Candi Crawford testified that in the two weeks before Tonya's death, defendant told Candi twice that "[s]omebody has to die." Furthermore, Tonya's mother, Joan Crawford, testified that defendant told her the week before Tonya died that Tonya would end up like another woman who had been murdered by her spouse two months earlier.

After careful review of the record and viewing the evidence in the light most favorable to the State and allowing the State every reasonable inference, we conclude that the State offered substantial evidence from which the jury could determine that the defendant inten-

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tionally killed Tonya with malice, premeditation, and deliberation. This assignment of error is overruled.

[3] Defendant next contends that the trial court erred when it submitted to the jury the aggravating factor that the killing was especially “heinous, atrocious, or cruel.” Defendant contends that the killing did not rise to the level of “heinous, atrocious, or cruel.” We conclude that the evidence was sufficient to support the trial court’s finding that the multiple stabbings of Tonya, while in the presence of defendant’s and Tonya’s children, were especially “heinous, atrocious, or cruel.” See *State v. Evans*, 120 N.C. App. 752, 463 S.E.2d 830 (1995), *cert. denied*, 343 N.C. 310, 471 S.E.2d 78 (1996). Even if the evidence had not been sufficient, defendant was not prejudiced by the submission because the jury answered that the mitigating circumstances outweighed the aggravating circumstances and recommended life imprisonment. *State v. Green*, 321 N.C. 594, 612, 365 S.E.2d 587, 598, *cert. denied*, 488 U.S. 900, 109 S. Ct. 247 (1988). This assignment of error is overruled.

[4] We next determine whether the trial court erred when it introduced evidence of defendant’s 1986 conviction for assault on a female and injury to personal property pursuant to Rule 404(b) to show intent, ill will, and malice. At trial, a security officer from Community General Hospital testified that on 11 January 1986, he was summoned to one of the hospital’s locker rooms, where defendant “had one hand around [Tonya’s] throat and he was propped up with the other one against her.” The security officer testified that after he persuaded defendant to turn Tonya loose, defendant then became angry and “he and I got into it after that” and “we knocked a few pictures off the wall” The security officer further testified that police officers arrived and arrested defendant. Defendant was convicted of assault on a female and injury to personal property. The trial court admitted the conviction under Rule 404(b) on the theory that “it goes to show intent, ill will, and malice” and stated that the “probative value outweighs prejudicial effect.”

G.S. 8C-1, Rule 404(b) provides:

(b) Other crimes, wrongs, or acts.—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.

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G.S. 8C-1, Rule 404(b) (1992). Rule 404(b) is “a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Evidence of a defendant’s prior assaults on the victim for whose murder the defendant is being tried is admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim under G.S. 8C-1, Rule 404(b). *State v. Gary*, 348 N.C. 510, 520, 501 S.E.2d 57, 64 (1998). Defendant argues nevertheless that the testimony regarding the assault conviction is too remote in time to be admissible under Rule 404(b). Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered. *State v. Higgs*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998), *cert. denied*, — U.S. —, 119 S. Ct. 1119 (1999). Remoteness in time may be significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan. *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991). However, remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident. *Id.* at 307, 406 S.E.2d at 893. Moreover, remoteness in time generally goes to the weight of the evidence rather than to its admissibility. *Id.*

Here, the assault conviction arose out of an incident in which defendant went to the victim’s workplace and physically abused her. We conclude that the conviction was admissible under Rule 404(b) to show “intent, ill will, and malice.” Because the ten-year time span between the conviction and Tonya’s death affected the weight rather than the admissibility of the evidence, we conclude that the trial court did not err in admitting the conviction. This assignment of error is overruled.

[5] In his next assignment of error, defendant contends that statements made by Tonya to several witnesses constituted inadmissible hearsay. Defendant contends that the witnesses’ statements regarding the incidents of physical and emotional abuse were inadmissible hearsay under *State v. Hardy* because they were “mere recital[s] of facts” and should not have been admitted under the “state of mind” exception to the hearsay rule. See *State v. Hardy*, 339 N.C. 207, 451 S.E.2d 600 (1994). We first note that several statements that defend-

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ant refers to in his brief are statements made on voir dire rather than in the presence of the jury. We address only those statements made in the presence of the jury.

**DAVIDSON COUNTY SHERIFF'S OFFICE EMPLOYEES
WENDY PERRELL AND KELLY SMITH**

At trial, Davidson County Sheriff's Office employees Wendy Perrell and Kelly Smith testified that the day before defendant killed Tonya, Tonya came into the Davidson County Sheriff's Office to inquire about accusations of child abuse that defendant made against her. Perrell and Smith testified that Tonya told them defendant had attempted to change Tonya's life insurance policy to designate himself as the named beneficiary. Perrell and Smith also testified that Tonya told them about an incident in which she woke up in her bed one night to discover that defendant was pouring gasoline on her nightgown. Smith testified that Tonya's "voice was shaking" when she spoke to them and that she was "tearful." Smith testified that Tonya told her that she had a "primarily unhappy" marriage "filled with physical and emotional abuse." Perrell testified that "[Tonya] did not tell me directly that she was scared of him or afraid of [defendant], but her mannerism and the way she conducted herself, I just assumed on my part." When asked on direct examination whether Tonya told Smith that she was afraid of defendant, Smith answered, "Yes, she did" and that "she was afraid he was going to try [to kill her] again."

CANDI CRAWFORD

Tonya's sister, Candi Crawford, testified that about two or three weeks before defendant killed Tonya, Tonya called Crawford and asked her "to call Domestic Violence to see what she could do to get a restraining order against [defendant] to leave the house." Crawford testified that Tonya was too scared to call the office of Domestic Violence herself. Crawford testified that when she spoke to Tonya several weeks before Tonya's death, she could tell that Tonya was "upset" because of her "tears and then the trembling in her voice," and that during her conversations Tonya had stated that she was afraid of defendant. According to Crawford, Tonya told her that she often slept on the couch of her home with a knife underneath the cushion because she was afraid that "defendant would come out of the [bed]room one night and try to kill her one night while she was lying there."

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BEN ROBINSON

Tonya's close friend, Ben Robinson, Jr., testified that during the last two months of her life, Tonya had expressed her fear of defendant to Robinson and that she told Robinson about incidents of emotional and physical abuse. Robinson testified that Tonya had told him that defendant had threatened to kill her and that Tonya told him about the incident involving defendant putting gasoline on her nightgown.

CHARO WASHINGTON

Tonya's sister, Charo Washington, testified that Tonya told Washington one week before she died that she was afraid defendant was going to kill her. Washington further testified that Tonya told her about the gasoline incident as well as a similar incident in which defendant poured lighter fluid or gasoline in a bathtub when Tonya was in it taking a bath. Washington further testified that Tonya had told her "about the time when she was on her knees begging for her life with a gun to her head, she said, 'I begged for my life from that man.' She was sick of it."

JOAN CRAWFORD

Tonya's mother, Joan Crawford, testified that during the last four months of her life, Tonya would often come over to Crawford's house to sleep "because she was afraid to close her eyes around [defendant]." Crawford testified that Tonya was afraid that defendant "would kill her." Crawford also testified that Tonya had told her about past incidents of physical and emotional abuse during Tonya's marriage to defendant.

G.S. 8C-1, Rule 803(3)

G.S. 8C-1, Rule 803(3) of the North Carolina Rules of Evidence allows hearsay testimony into evidence if it tends to show the victim's then existing state of mind or "emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . ." G.S. 8C-1, Rule 803(3) (1992). Although statements that relate only factual events do not fall within the Rule 803(3) exception, *State v. Hardy*, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994), statements relating factual events which tend to show the victim's state of mind, emotion, sensation, or physical condition when the victim made the statements are not excluded

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if the facts related by the victim serve to demonstrate the basis for the victim's state of mind, emotions, sensations, or physical condition, *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *cert. denied*, 523 U.S. 1031, 118 S. Ct. 1323 (1998). *See also State v. Marecek*, 130 N.C. App. 303, 306, 502 S.E.2d 634, 636, *review denied*, No. 362P98 (N.C. Supreme Court Dec. 30, 1998) (“[W]itness testimony that recounts ‘mere recitation of fact’ should be excluded, while testimony that includes both statements of fact and emotion may be admitted.”). “The determination that fact-laden statements are not excluded from the coverage of Rule 803(3) where they tend to show the speaker’s then-existing state of mind is further supported by the federal courts’ interpretation of federal rule 803(3).” *State v. Exum*, 128 N.C. App. 647, 654, 497 S.E.2d 98, 103 (1998).

In the first place, it is in the nature of things that statements shedding light on the speaker’s state of mind usually allude to acts, events, or conditions in the world, in the sense of making some kind of direct or indirect claim about them. . . . In the second place, fact-laden statements are usually deliberate expressions of some state of mind. . . . [I]t does not take a rocket scientist . . . to understand that fact-laden statements are usually purposeful expressions of some state of mind, or to figure out that ordinary statements in ordinary settings usually carry ordinary meaning. In the end, most fact-laden statements intentionally convey something about state of mind, and if a statement conveys the mental state that the proponent seeks to prove, it fits the [federal rule 803(3)] exception.

Id. at 655, 497 S.E.2d at 103 (quoting 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 438, at 417-18 (2d ed. 1994) (explaining the federal courts’ broad reading of federal rule 803(3))).

Here, the witnesses’ testimony regarding Tonya’s prior statements is admissible to show Tonya’s state of mind, despite the fact that the statements also contained descriptions of factual events. This case is distinguishable from *Hardy* in that the statements in *Hardy* were taken from the victim’s diary and contained descriptions of assaults and threats against the victim before she died but did not reveal the victim’s state of mind or contain statements of the victim’s fear of defendant. Tonya’s explanatory comments about the prior incidents of physical and emotional abuse “‘were made contemporaneously with and in explanation of the victim’s statements’ and crying, thus showing her state of mind.” *State v. Murillo*, 349 N.C. 573, 588, 509

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S.E.2d 752, 761 (1998) (quoting *State v. Westbrooks*, 345 N.C. 43, 60, 478 S.E.2d 483, 493 (1996)). “The factual circumstances surrounding her statements of emotion serve only to demonstrate the basis for the emotions.” *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *cert. denied*, 513 U.S. 1031, 118 S. Ct. 1323 (1998). Accordingly, we conclude that the evidence was admissible under the state-of-mind exception of Rule 803(3). Furthermore, it was not necessary for Tonya to state explicitly to each witness that she was afraid, as long as the “scope of the conversation . . . related directly to [her] existing state of mind and emotional condition.” *State v. Mixion*, 110 N.C. App. 138, 148, 429 S.E.2d 363, 368, *review denied*, 334 N.C. 437, 433 S.E.2d 183 (1993).

For admission under Rule 803(3), the state of mind testimony must also be relevant to the issues in the case. *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997). Here, Tonya’s state of mind during each of the conversations at issue is relevant because it relates to her relationship with defendant preceding her death. Tonya’s state of mind is relevant to rebut the defendant’s self-defense inferences in his testimony that Tonya attacked defendant with a knife before defendant killed her. *State v. Faucette*, 326 N.C. 676, 683, 392 S.E.2d 71, 74 (1990). “The jury could infer from the evidence regarding [Tonya’s] state of mind that it was unlikely that [she] would do anything to provoke defendant” *Id.* at 683, 392 S.E.2d at 74-75. Moreover, we conclude that the trial court did not abuse its discretion when it determined that the probative value of the witnesses’ testimony was not outweighed by undue prejudice. Likewise, we conclude that the trial court did not err in admitting Tonya’s statements to these witnesses pursuant to Rule 803(3).

Finally, we note that even if some of the statements did not fall under the “state-of-mind” exception, we conclude that the admission of the statements was not prejudicial error. Defendant confessed to killing Tonya. Independent of the testimony regarding Tonya’s statements to witnesses before she died, the State offered substantial evidence, through the testimony of China Wilds, the autopsy pathologist, and emergency paramedics that defendant acted with malice, premeditation, and deliberation when he killed Tonya. In light of this evidence, defendant cannot show that there is a reasonable possibility that the outcome of the trial would have been different if the trial court had excluded the statements. *State v. Higgs*, 348 N.C. 377, 395, 501 S.E.2d 625, 636 (1998), *cert. denied*, — U.S. —, 119 S. Ct. 1119 (1999); G.S. 15A-1443(a) (1988).

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[6] We next determine whether the trial court erred when it allowed the State to publish to the jury a photograph of defendant taken the morning of the killing in which defendant's legs were in shackles. The photograph revealed blood on defendant's hands and clothes and small knife wounds on defendant's hands. Because defendant stated "no objection" when the State moved to introduce the photograph, we review for plain error. Defendant contends that the photographs were "highly prejudicial to defendant in the same way that his appearance in shackles would have been." As a general rule, a defendant in a criminal case is entitled to appear at trial free from shackles to protect the presumption of innocence. *State v. Thomas*, 344 N.C. 639, 651, 477 S.E.2d 450, 456 (1996), *cert. denied*, — U.S. —, 118 S. Ct. 84 (1997). "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Gardner*, 315 N.C. 444, 450, 340 S.E.2d 701, 706 (1986). Here, the State offered overwhelming evidence of malice, premeditation, and deliberation to support the first-degree murder conviction. Based on the record, we have concluded that the jury would not have reached a different verdict if the photograph had been excluded and that the submission of the photograph did not constitute plain error. This assignment of error is overruled.

[7] We next consider whether the trial court abused its discretion when it denied defendant's motion to exclude photographs of the victim's body, including Exhibits 12, 14, 16, 64, 65, and 67, after she was killed. The trial court allowed the State to publish to the jury photographs of the victim's wounds taken at the crime scene and autopsy photographs taken at the same angles and showing the same wounds as the photographs taken at the crime scene. Defendant contends that the photographs are unduly repetitive and their probative value is outweighed by their prejudicial effect. *See* G.S. 8C-1, Rule 403 (1992). "Photographs of homicide victims are admissible at trial even if they are 'gory, gruesome, horrible, or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used solely to arouse the passions of the jury.'" *State v. Thompson*, 328 N.C. 477, 491, 402 S.E.2d 386, 394 (1991) (quoting *State v. Murphy*, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988)). The State may introduce photographs in a murder trial to illustrate testimony regarding the manner of killing to prove circumstantially the elements of first-degree murder. *State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 528, *cert. denied*, 512 U.S. 1246, 114 S. Ct.

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2770 (1994). What represents “an excessive number of photographs” and whether the “photographic evidence is more probative than prejudicial” are matters within the trial court’s sound discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Factors a court may consider include what the photographs depict, the level of detail, the manner of presentation, and the scope of accompanying testimony. *Id.* at 285, 372 S.E.2d at 527.

Here, the photographs were neither cumulative nor excessive in number and their probative value was not substantially outweighed by the danger of unfair prejudice. In fact, the trial court excluded several pictures because it deemed them repetitive. The photographs revealed the numerous wounds on Tonya and were relevant as circumstantial evidence to illustrate the testimony of China Wilds that defendant killed Tonya with malice, premeditation, and deliberation. *State v. Smith*, 320 N.C. 404, 416, 358 S.E.2d 329, 336 (1987). The photographs were also relevant to help the jury determine whether to find as an aggravating circumstance that the murder was especially, heinous, atrocious, or cruel. Furthermore, the trial court did not err in admitting photographs from both the crime scene and the autopsy because the autopsy photographs revealed wounds that could not be seen in the crime scene photographs because of the blood covering Tonya’s body. *State v. Kandies*, 342 N.C. 419, 443, 467 S.E.2d 67, 80, *cert. denied*, 519 U.S. 894, 117 S. Ct. 237 (1996). This assignment of error is overruled.

[8] We next address whether the trial court abused its discretion when it admitted a tape of the “911” conversation between Tonya’s eight-year-old daughter China Wilds and the Davidson County Sheriff’s Office. Defendant argues that the introduction of the tape into evidence “added nothing to the State’s case by way of evidence” and that the prejudicial effect of the tape in arousing the passions of the jury outweighed its probative value. We disagree.

Under G.S. 8C-1, Rule 403, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” G.S. 8C-1, Rule 403 (1992). The decision to exclude evidence under Rule 403 is left to the broad discretion of the trial court, and will only be reversed on appeal upon a showing that the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision. *State v. Womble*, 343 N.C. 667, 690, 473 S.E.2d 291, 304 (1996), *cert. denied*, 519 U.S. 1095, 117 S. Ct. 775, *reh’g denied*, 520 U.S. 1111, 117 S. Ct. 1122 (1997). Here, the 911 tape had probative value because it was offered to cor-

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roborate the testimony of eight-year-old China Wilds regarding the events leading to her mother's death. *State v. Jordan*, 128 N.C. App. 469, 475-76, 495 S.E.2d 732, 736-37, *review denied*, 348 N.C. 287, 501 S.E.2d 914 (1998). Defendant here has not shown that the decision of the trial court to admit the 911 tape was not the result of a reasoned choice. Accordingly, this assignment of error is overruled.

[9] Defendant next contends that the trial court abused its discretion when it denied defendant's motion to sequester witnesses. Defendant contends that "it becomes apparent upon a review of the transcript that the witnesses offering hearsay testimony used the voir dire and trial testimony of those who came before them to educate themselves and 'strengthen' their testimony." A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998). Here, we conclude that defendant has not shown that the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision. This assignment of error is overruled.

After a careful review of the record, we conclude that defendant received a fair trial free of prejudicial error.

No error.

Judge EDMUNDS concurs with separate opinion.

Judge SMITH concurs.

Judge EDMUNDS concurring.

Although I concur in the majority's analysis and holding, I write separately to address defendant's motion to exclude witnesses from the trial. Both North Carolina Rule of Evidence 615 and N.C. Gen. Stat. § 15A-1255 (1997) are permissive, allowing the trial court discretion to exclude witnesses. *See State v. Ball*, 344 N.C. 290, 474 S.E.2d 345 (1996), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997). I agree that no abuse of discretion has been shown under the facts of this case. In comparison with the North Carolina rule, Federal Rule of Evidence 615 *requires* exclusion of witnesses upon motion of a party. Those with experience in state and federal trials cannot fail

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to have observed the impact of these different rules. Testimony provided by witnesses who hear each other testify often converges. This effect, while not necessarily sinister, appears to be a reflection of human nature; it can lead irresolute witnesses, consciously or not, to conform their testimony to what they have heard before, undermining a jury's ability to evaluate the evidence provided by each witness. Particularly in cases as consequential as the capital murder case at bar, trial courts should be mindful of the words of the Commentary to North Carolina Rule of Evidence 615: "[T]he practice should be to sequester witnesses on request of either party unless some reason exists not to."



ANDREW H. AUSLEY, D/B/A AUSLEY APPRAISAL SERVICES, PLAINTIFF-APPELLEE v.
BRYAN M. BISHOP, DEFENDANT-APPELLANT

No. COA98-922

(Filed 18 May 1999)

1. Libel and Slander— statements adversely affecting business or personal reputation—summary judgment

The trial court erred by granting summary judgment for plaintiff on defendant's counterclaim for slander where defendant was launching his own business as an appraiser and plaintiff's statements to defendant's clients and potential clients involving police reports of stolen client files and loan fraud undoubtedly had the capacity to harm defendant in his trade or profession.

2. Unfair Trade Practices— slander per se—summary judgment

The trial court erred by granting summary judgment for plaintiff on a counterclaim for unfair trade practices which alleged events both before and after the employment relationship between plaintiff and defendant ended. Any portion of the claim relating to events before the termination was properly dismissed, but the parties became competitors upon the termination of the employer-employee relationship and slander per se may constitute a violation of N.C.G.S. § 75-1.1.

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3. Damages— slander and unfair trade practice—after employment termination

Damages were sufficiently pleaded in a counterclaim for unfair or deceptive trade practices based upon slander although other damages related to claims properly dismissed. On remand, the court should limit evidence of damages to those related to plaintiff's alleged slander and unfair and deceptive trade practices that took place after defendant left plaintiff's employment.

4. Fraud— fraudulent misrepresentation—evidence of intent—summary judgment

Summary judgment was properly granted for plaintiff on a counterclaim for fraudulent misrepresentation where there was no evidence of plaintiff's intent at the time the misrepresentations were made.

5. Fraud— negligent misrepresentation—no evidence of failure to exercise reasonable care—summary judgment

Summary judgment was properly granted for plaintiff on a counterclaim for negligent misrepresentation arising from plaintiff's actions in supervising defendant as an apprentice appraiser. There is no evidence to support defendant's contention that plaintiff failed to exercise reasonable care in communicating to defendant that he would sign defendant's log sheets or in communicating his intent regarding compensation.

6. Contracts— breach—no evidence of damages—summary judgment

Summary judgment was correctly granted on a breach of contract counterclaim where defendant was unable to establish or even estimate damages caused by the alleged breach. In order to prevail, defendant must show that the alleged breach caused him injury.

7. Contracts— breach—at will employment

Summary judgment was correctly granted for plaintiff on a counterclaim for breach of an employment contract where defendant did not meet his burden of establishing a specific duration of the contract. An employment contract without a specified duration but with the compensation specified at a rate per year, month, week or day is for an indefinite period.

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8. Contracts— employment compensation—breach—summary judgment

Summary judgment was incorrectly granted for plaintiff on a counterclaim for breach of a written employment contract involving an apprentice appraiser by failing to pay commissions.

9. Emotional Distress— intentional infliction—extreme and outrageous conduct—summary judgment

Summary judgment was correctly granted for plaintiff on a counterclaim for intentional infliction of emotional distress arising from plaintiff's employment of defendant where plaintiff refused to follow through on his obligation to certify defendant's reports unless defendant entered into an agreement not to compete, contacted the police and caused embezzlement charges to be filed against defendant, and relayed negative and accusatory comments to defendant's creditors and potential clients.

Appeal by defendant from order entered 11 May 1998 by Judge Julius A. Rousseau, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 19 April 1999.

Haywood, Denny & Miller, L.L.P., by John R. Kincaid and Thomas H. Moore, for plaintiff-appellee.

Randolph M. James, P.C., by Randolph M. James and David E. Shives, for defendant-appellant.

EDMUNDS, Judge.

Plaintiff is a state-certified appraiser of real estate. Defendant, seeking to become a certified appraiser, was employed by plaintiff in November 1994 as an apprentice, a requisite step in defendant's training and certification process. Between November 1994 and April 1997, defendant prepared and signed appraisal reports, as required by the North Carolina Appraisal Board (the Board). For each report, defendant also prepared and retained a log sheet. The Board required that these log sheets be signed and stamped by a supervising appraiser to certify that each apprentice's report was completed under his or her general supervision.

In November 1994, plaintiff signed and stamped the first report and log sheet prepared by defendant. Plaintiff instructed defendant to let subsequent reports accumulate, however, and plaintiff would sign them simultaneously. In June 1996, defendant passed the State regis-

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tered trainee examination. In April 1997, defendant was qualified to receive a license, subject only to plaintiff forwarding the supervising appraiser's certification. However, on 12 April 1997, at a meeting of the parties, plaintiff conditioned his certification of defendant's reports upon defendant's signing a newly-drafted employment contract, which included a provision relating to compensation and a non-compete clause. After examining the contract and having an attorney review it, defendant, claiming to have "no other choice," signed on 14 April 1997. Plaintiff then signed and stamped defendant's log sheets, and on 30 April 1997, the State issued defendant his official license.

On 1 June 1997, plaintiff opened a new branch office, which was to be run by defendant, and placed a new trainee there to work under defendant's supervision. It was only at this point that defendant began receiving the compensation guaranteed him pursuant to the April 14 contract. On 22 September 1997, plaintiff called for another meeting with defendant. During this meeting, after expressing concerns about misspellings and outdated data in some of defendant's reports, plaintiff proposed renegotiating their contract under terms that would result in decreased income to defendant. Defendant declined to agree to the new terms, and the employment relationship between the parties ended. On 24 September 1997, defendant began to operate his own appraisal business.

On 13 October 1997, plaintiff filed a complaint against defendant alleging breach of contract and unfair and deceptive trade practices. On 17 November 1997, defendant filed an answer and counterclaim, asserting nine claims against plaintiff: (1) breach of oral contract, (2) breach of written contract, (3) fraudulent misrepresentation, (4) negligent misrepresentation, (5) unfair and deceptive trade practices, (6) intentional infliction of emotional distress, (7) malicious prosecution, (8) libel, and (9) slander. On 5 December 1997, defendant filed a motion for partial summary judgment against plaintiff, which was granted on 11 February 1998. This summary judgment order has not been appealed. On 23 April 1998, plaintiff filed a motion for summary judgment as to defendant's counterclaim, which was granted on 11 May 1998. From the judgment dismissing his counterclaim, defendant appeals.

A trial court's grant of summary judgment is fully reviewable by this Court. *See Va. Electric and 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). "The standard of review for whether summary judgment is

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proper is whether the trial court properly concluded that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law." *Phelps v. Spivey*, 126 N.C. App. 693, 696, 486 S.E.2d 226, 228 (1997) (citation omitted). The record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences reasonably arising therefrom. *See Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995). After reviewing each claim in accordance with this standard, we conclude that the trial court correctly granted summary judgment as to most of defendant's claims; however, we also conclude that summary judgment was improper as to one claim and as to parts of two others, and reverse in part and remand for further proceedings.

I. SLANDER

[1] Defendant contended at oral argument that his strongest claim was slander. We agree. Defendant alleged in his counterclaim that plaintiff committed slander by communicating to defendant's personal mortgage lender statements to the effect that defendant had committed loan fraud. This Court has held that "[a]mong statements which are slanderous *per se* are accusations of crimes or offenses involving moral turpitude, defamatory statements about a person with respect to his trade or profession, and imputation that a person has a loathesome [sic] disease." *Gibby v. Murphy*, 73 N.C. App. 128, 131, 325 S.E.2d 673, 675 (1985). When a statement falls into one of these categories, a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage arise; allegation and proof of special damages are not required. *See Donovan v. Fiumara*, 114 N.C. App. 524, 528, 442 S.E.2d 572, 575 (1994).

Defendant avers that the statements allegedly made by plaintiff adversely affected defendant's business and personal reputation. Plaintiff admitted in his deposition that he made statements that impeached defendant in his trade. During a line of questions pertaining to a form signed by plaintiff and submitted by defendant to mortgage broker Southern Fidelity to finance defendant's own home, plaintiff was asked, "Did you suggest, infer, or imply to Robert [Phillips] at Southern Fidelity that your signature was procured by fraud or some other unlawful means on that appraisal report?" Plaintiff responded, "Correct." However, other questioning revealed that there was no evidence that the signature had been obtained improperly; instead, plaintiff admitted voluntarily signing the form without reading it. Further, plaintiff also admitted telling the same

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Robert Phillips at Southern Fidelity that “Mr. Bishop had not been truthful about his income in qualifying for the loan that Southern Fidelity brokered, arranged or gave to the Bishops,” when there was evidence that plaintiff previously had verified defendant’s income to Southern Fidelity. Additionally, defendant stated in his affidavit that “[plaintiff] contacted several of my clients and potential clients and advised them, untruthfully, that I had engaged in various unethical conduct.” Because defendant was launching his own business as an appraiser, plaintiff’s incorrect statements to defendant’s clients and potential clients undoubtedly had the capacity to harm defendant in his trade or profession.

In a second episode, plaintiff admitted reporting to police that defendant had stolen client files. The evidence to support plaintiff’s report was that defendant was seen leaving his old office at plaintiff’s business with a box, and that later a Rolodex was no longer on defendant’s desk, and files containing defendant’s resumes and sample appraisal files were also missing from a file cabinet. Although the investigation subsequently was dropped without any charges being brought, plaintiff admitted communicating to at least one person at Piedmont Home Equity that he suspected defendant had taken files, and had called the police. Again, this statement to a potential client of defendant was capable of harming him in his trade or profession. We therefore conclude that defendant has “‘forecast sufficient evidence of all essential elements of [his] claim[]’ to make a *prima facie* case at trial” to survive plaintiff’s motion for summary judgment. *Camalier v. Jeffries*, 340 N.C. 699, 711, 460 S.E.2d 133, 138 (1995) (quoting *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992)) (second alteration in original). We reverse as to this issue and remand for further proceedings.

II. UNFAIR AND DECEPTIVE TRADE PRACTICES

[2] Defendant’s next claim is that the trial court erred in granting plaintiff’s summary judgment motion as to defendant’s claim that plaintiff engaged in unfair and deceptive trade practices. Defendant’s counterclaim alleged events happening both while defendant was working with plaintiff and after the employment relationship terminated. In granting plaintiff’s motion for summary judgment, the trial judge found as a matter of law that defendant had not made out a claim. We disagree in part, concluding that defendant’s claim as to plaintiff’s activities after they separated should have been submitted to a jury.

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This Court has held that “employer-employee relationships do not fall within the intended scope of [N.C. Gen. Stat. § 75-1.1] . . . [because] . . . [e]mployment practices fall within the purview of other statutes adopted for that express purpose.” *Buie v. Daniel International*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119-20, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982). Therefore, any portion of defendant’s claim for unfair and deceptive trade practices relating to events occurring before 23 September 1997 were properly dismissed.

However, upon termination of the employer-employee relationship, the parties became business competitors. N.C. Gen. Stat. § 75-1.1(a) (1994) declares: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” Defendant alleged that he undertook the process of purchasing a house shortly before his employment with plaintiff ended. It appears from the record that he proceeded through mortgage broker Robert Phillips of Southern Fidelity Mortgage. After defendant left plaintiff’s employ, plaintiff contacted Mr. Phillips to advise that defendant had submitted false information to obtain the mortgage. Although the transaction involved purchase of a house for defendant’s own use, the North Carolina Supreme Court previously has held that the activities of a purchaser and a mortgage broker are activities in commerce. *See Johnson v. Insurance Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988), *reh’g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989). Our Supreme Court has also determined that a letter sent in a business context and containing statements that were libelous *per se*, impeaching a party in its business activities, may come under the purview of section 75-1.1. *See Ellis v. Northern Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 130, *reh’g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). As noted above, defendant’s relationship with Southern Fidelity Mortgage was both that of customer and of future business associate. We see no reason to distinguish libel *per se* from slander *per se* in this context, and hold that slander *per se* may constitute a violation of section 75-1.1. Defendant sufficiently forecast evidence that, if found to be true by a jury, would support a finding by a judge that plaintiff committed an unfair and deceptive trade practice.

[3] We next turn to the issue of damages. In order for defendant to recover under this statute, he must establish actual injury to himself

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or his business, proximately caused by the unfair or deceptive act or practice. See *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991). The jury determines in what amount, if any, the complaining party is injured and whether the occurrence was the proximate cause of those injuries. See *Barbee v. Atlantic Marine Sales & Service*, 115 N.C. App. 641, 647, 446 S.E.2d 117, 121, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 516 (1994) (citation omitted). If the judge determines that the facts found by the jury establish unfair and deceptive business practices, the damages are trebled. See N.C. Gen. Stat. § 75-16 (1994). In his counterclaim, defendant alleged multiple damages; however, many of these are related to claims that were properly dismissed, as we hold below. Viewing the evidence in the light most favorable to defendant, the nonmoving party, the damages alleged by defendant to have been proximately caused by plaintiff's alleged unfair or deceptive acts are (1) loss of time from work to obtain documentation needed to respond to the mortgage company's questions, which arose from plaintiff's allegations of fraud; and (2) emotional distress, which resulted in a hospital visit. These damages were sufficiently pleaded. The trial judge erred in granting summary judgment as to defendant's claim of unfair and deceptive trade practices arising after the business separation of plaintiff and defendant. Because it appears from the record that all the alleged slander also took place after the business separation, on remand the trial court should limit evidence of damages to those related to plaintiff's alleged slander and unfair and deceptive trade practices that took place after defendant left plaintiff's employment.

III. FRAUDULENT MISREPRESENTATION

[4] Defendant claims that plaintiff's acts in (a) representing to defendant that he intended to sign and stamp all of defendant's log sheets at some future date, when in fact he had no such intention, and (b) inducing defendant to sign the 14 April 1997 agreement when plaintiff never intended to compensate defendant according to its terms, constitute fraudulent misrepresentation. For actionable fraud to exist, plaintiff "must have known the representation to be false when making it, or . . . must have made the representation recklessly without any knowledge of its truth and as a positive assertion." *Fulton v. Vickery*, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358, *disc. review denied*, 313 N.C. 599, 332 S.E.2d 178 (1985). In this case, there is no evidence that plaintiff "knew [the statement] was false or made it without any knowledge of its truth and as a positive assertion." *Myers & Chapman*, 323 N.C. at 568, 374 S.E.2d at 391 (citation omit-

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ted) (emphasis omitted). Although defendant cites *Johnson* for the proposition that a promissory misrepresentation may constitute fraud when it is made with the intent to deceive and when the promisor had no intent of complying at the time of making the misrepresentation, there is no evidence of plaintiff's intent at the time the misrepresentations were made. Without such evidence, this argument must fail; summary judgment on this issue was proper.

IV. NEGLIGENT MISREPRESENTATION

[5] Defendant contends that the trial court erred in dismissing his claim for negligent misrepresentation. Although negligence cases "are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury," *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 596, 394 S.E.2d 643, 648 (1990) (citation omitted), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991), we agree with the trial court that defendant's allegations failed as a matter of law to establish any genuine issue of material fact, *see Phelps*, 126 N.C. App. 693, 486 S.E.2d 226. Fraudulent misrepresentation focuses on plaintiff's knowing action, while negligent misrepresentation turns on plaintiff's lack of reasonable care. "The tort of negligent misrepresentation occurs when in the course of a business or other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in a business transaction, without exercising reasonable care in obtaining or communicating the information." *Fulton*, 73 N.C. App. at 388, 326 S.E.2d at 358 (citation omitted). However, a party cannot "be liable for concealing a fact of which it was unaware." *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 190, 374 S.E.2d 135, 137 (1988).

The events cited by defendant to support his allegations of negligent misrepresentation are the same as those cited to support his claims for fraudulent misrepresentation. However, while defendant claims he relied on information supplied by plaintiff to the effect that plaintiff would sign his log sheets, there is no evidence in the record to support his contention that plaintiff failed to exercise reasonable care in communicating that information to defendant. Three years passed between the time plaintiff told defendant to maintain the log sheets to be signed at a later date, and the time when plaintiff conditioned his certification on the effectuation of the non-compete agreement. Even taking this evidence in the light most favorable to defendant, there are no grounds even to infer that plaintiff acted negligently.

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Defendant's second claim of negligent misrepresentation relates to plaintiff's intent to abide by the terms of the 14 April 1997 agreement. However, the record is devoid of any evidence that plaintiff failed to exercise due care when communicating his intentions regarding compensation under this agreement. This claim was properly dismissed.

V. BREACH OF ORAL CONTRACT

[6] Defendant next argues that the trial court erred in dismissing his claim for breach of contract. He contends that the parties entered into an oral contract that required defendant to utilize his contacts in the community to build plaintiff's business, and in return, plaintiff would supervise defendant during his apprenticeship and certify defendant's work. Defendant argues that plaintiff breached this contract by failing to certify defendant's work in November 1994 and thereafter and by anticipatory breach in April 1997 "when [plaintiff] refused to certify the log sheets unless Bishop entered a new written contract containing additional promises"

In order to prevail on this claim, defendant "must show that the alleged breach caused him injury." *Menzel v. Metrolina Anesthesia Assoc.*, 66 N.C. App. 53, 59, 310 S.E.2d 400, 404 (1984) (citation omitted). Despite extensive questioning during his deposition, defendant was unable to establish, or even estimate, damages caused by the alleged breach. The record indicates that plaintiff did supervise defendant and eventually sign all of defendant's log sheets, albeit under questionable conditions. In the absence of evidence of any damage caused by plaintiff's actions, the trial court properly granted plaintiff's motion for summary judgment as to this issue. This assignment of error is overruled.

VI. BREACH OF WRITTEN CONTRACT

[7] Defendant next contends that the parties had an enforceable written contract and that because the 14 April 1997 agreement set out an "annual salary," he was necessarily employed for a term of years. However, we note that the agreement states on its face that: "Employee's employment shall be at will, terminable at any time by either party." As our courts have long held, "[a]n employment contract . . . where the compensation is specified at a rate per year, month, week or day, but where the duration of the contract is not specified, is for an indefinite period." *Freeman v. Hardee's Food Systems*, 3 N.C. App. 435, 437-38, 165 S.E.2d 39, 41 (1969); see also *Wilkerson v. Carriage Park Dev. Corp.*, 130 N.C. App. 475, 503 S.E.2d

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138, *disc. review denied*, 349 N.C. 534, — S.E.2d — (1998). The specific language that the agreement is “at will” easily overrides any implication to the contrary suggested by the annual pay rate. Defendant has not met his burden of establishing a specific duration of the employment contract. See *Rosby v. General Baptist State Convention*, 91 N.C. App. 77, 80, 370 S.E.2d 605, 608 (citing *Freeman*, 3 N.C. App. 435, 165 S.E.2d 39), *disc. review denied*, 323 N.C. 626, 374 S.E.2d 590 (1988).

[8] Defendant further claims that plaintiff breached the written contract by failing to pay commissions due him under the contract during the period from April to July 1997. Although plaintiff responds that this issue was not raised in the court below and cannot be raised for the first time on appeal, we observe that defendant alleged breach of written contract in his counterclaim and stated in his deposition that plaintiff failed to pay in accordance with the agreement for those months. We conclude that this is an adequate forecast of evidence to allow this issue to go forward. This assignment of error is overruled as to defendant’s contention that the contract was for a term of years, but is remanded for further proceedings as to defendant’s claim that plaintiff breached his duty to pay defendant in accordance with the written agreement.

VII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

[9] Defendant next argues that the trial court erred in summarily dismissing his claim for intentional infliction of emotional distress. To establish such a claim, defendant must show that plaintiff engaged in extreme and outrageous conduct that was intended to cause severe emotional distress or was recklessly indifferent to the likelihood that such distress would result, *and* that severe distress did result from plaintiff’s conduct. See *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). Plaintiff must have done more than merely insult or threaten defendant in order to incur liability. See *Wagoner v. Elkin City Schools’ Bd. of Education*, 113 N.C. App. 579, 586, 440 S.E.2d 119, 123, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). Instead, defendant must specify incidents of conduct that “‘exceed all bounds usually tolerated by decent society.’” *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979) (citation omitted). Our review of prior cases reveals that the claimant’s burden of proof is a high one. In *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986), this Court found no intentional infliction of emotional distress where the defendant screamed and shouted at one

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plaintiff, interfered with those under the plaintiff's supervision, and threw menus at the plaintiff. This same defendant also required another plaintiff, who was pregnant, to lift and carry items weighing more than ten pounds, and refused to allow her to leave work to go to the hospital. In the case at bar, defendant claims that plaintiff (1) refused to follow through on his obligation to certify defendant's reports unless defendant entered into an agreement not to compete, (2) contacted the police and caused embezzlement charges to be filed against defendant, and (3) relayed negative and accusatory comments to defendant's creditors and potential clients. Deplorable as this alleged behavior may be, in light of our former decisions, we cannot say that the trial court erred as a matter of law in granting plaintiff's motion for summary judgment. This assignment of error is overruled.

Accordingly, the trial court's grant of summary judgment is reversed as to defendant's claims of slander, reversed in part as to defendant's claims of unfair and deceptive trade practices and breach of written contract, and remanded for further proceedings as directed above. Summary judgment is affirmed as to all other claims.

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

Chief Judge EAGLES and Judge JOHN concur.

STEPHEN M. COX v. BEVERLY J. COX

No. COA98-769

No. COA98-1165

(Filed 18 May 1999)

1. Appeal and Error— notice of appeal—required

An issue as to whether the trial court erred by prohibiting defendant from assigning error to a temporary custody order was not addressed where appellant did not at any time give notice of appeal as to the order.

2. Contempt— condition for purging—vague

The trial court erred in a child custody and support action by entering a civil contempt order including a vague condition

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which made it impossible for defendant to purge herself of the contempt. The condition did not clearly specify what the defendant could and could not do in order to purge herself; the purpose of civil contempt is not to punish but to coerce the defendant to comply.

3. Child Support, Custody, and Visitation— custody—contempt hearing—in-chambers interview of children

The trial court erred in a child custody action by conducting an in-chambers interview of the children over the objection of defendant, but the error was not prejudicial since the parties' attorneys were present during the interview.

4. Child Support, Custody, and Visitation— custody—attorney fees

The trial court erred in a child custody and support action by awarding plaintiff attorney fees where the court concluded that plaintiff did not have sufficient assets with which to pay his attorney fees and that defendant did have the means to pay plaintiff's attorney fees, but there were no findings about plaintiff's monthly income or expenses and the court did not explicitly find that plaintiff acted in good faith when he instituted this action.

5. Child Support, Custody, and Visitation— visitation—findings

The evidence in a custody action supported the court's visitation findings where defendant contended that no competent evidence existed to support the findings since there was no record of the private examination of the children by the court in chambers, but this interview (unlike an earlier interview) was with the consent of both parties and with counsel present. A party cannot complain about what the court learned from speaking with the children when a court makes findings based on information obtained as a result of a private examination conducted with the consent of the parties. Furthermore, the court's findings were also based on evidence presented at another hearing.

6. Child Support, Custody, and Visitation— visitation—supervision of psychologist—findings

The trial court did not abrogate its authority to a child psychologist in a visitation action when it found that visitation with defendant ought to be under the supervision of the psychologist. There was ample evidence to support the finding and the psychologist did not have the authority to end defendant's visitation

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rights, but did have the authority to terminate counseling and treatment, which included supervised visitation, and was required to notify the court when he suspended treatment.

7. Child Support, Custody, and Visitation— custody—attorney fees

The trial court did not abuse its discretion by awarding plaintiff attorney fees in an action for child custody and support where the court made the necessary findings of fact and there was sufficient evidence to support those findings.

8. Child Support, Custody, and Visitation— refusal to enter permanent order—appeal not interlocutory

The trial court erred by refusing to enter a permanent order for child support, attorney fees and visitation and by dismissing defendant's appeal. Although all issues were resolved when the order was entered, the trial judge stated that all of his orders were temporary. A mere designation of an order as temporary is not sufficient to make that order interlocutory and not appealable; a clear and specific reconvening time must be set out in the order and the time interval must be reasonably brief.

9. Contempt— failure to pay attorney fees—no written undertaking

The trial court did not err by holding defendant in contempt for not paying attorney fees as directed by an order where, although defendant contended that she filed an undertaking pursuant to N.C.G.S. § 1-289 to stay enforcement of the award, she did not have a written undertaking executed by a surety.

10. Contempt— attorney fees—findings and conclusions

The trial court did not err by awarding plaintiff attorney fees in the amount of \$875 at a civil contempt hearing where the court made the appropriate findings and conclusions.

Appeal by defendant from orders entered 16 September 1997, 4 November 1997, 6 April 1998 and 10 June 1998 by Judge Albert A. Corbett, Jr. in Lee County District Court. Heard in the Court of Appeals 29 March 1999.

Pursuant to Rule 40 of the Rules of Appellate Procedure and defendant's motion to consolidate which we granted 29 September 1998, COA98-769 and COA98-1165 are consolidated. Accordingly, we address both appeals.

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Defendant (wife) and plaintiff (husband) were married 5 March 1983, separated 23 August 1995 and divorced 12 November 1996. The parties have two sons born of the marriage, Chris, born 2 June 1985 and Shawn, born 19 January 1988. On 16 November 1995, a consent order granted "joint and equal custody" of the minor children to the parties. The children lived with each party for six months during the year. The consent order further provided that neither party would pay child support to the other. The consent order was undisputed until 7 February 1997, when plaintiff filed a motion pursuant to G.S. § 50-13.7 to modify child custody and to establish child support.

After a hearing on 5 September 1997 in which an in-chambers interview of the children was held, the court entered an order on 16 September 1997 modifying the 16 November 1995 consent order. The new order awarded plaintiff primary physical custody of the two minor children. The order reserved plaintiff's motion for child support and attorneys' fees for a hearing in February 1998. The child custody decision was denominated by the trial court as a "temporary" order.

Defendant was ordered to show cause why she ought not be found in contempt of the 16 September 1997 order. At the contempt hearing on 17 October 1997, the trial court found as facts that during the September child custody hearing, defendant had been ordered by the trial court to refrain from administering corporal punishment to the children as she had previously done and that since the September hearing, defendant had violated this provision of the order. The trial court held defendant in civil and criminal contempt, ordered defendant to pay \$1,200 in attorneys' fees to plaintiff's counsel and confined defendant to jail from 17 October 1997 until she purged herself of contempt. On 10 November 1997, the trial court found defendant had purged herself of contempt and ordered her release.

On 5 December 1997, defendant gave notice of appeal from the civil contempt order. The Court of Appeals entered an order on 17 March 1998 extending the defendant's time to serve her proposed record on appeal to 13 April 1998.

On 23 March 1998, the trial court held a hearing on the issues of child support, visitation and attorneys' fees and another in-chambers interview of the children was held. On 6 April 1998, the trial court entered an order requiring that defendant pay child support in the amount of \$502 per month and pay \$7,500 in attorneys' fees to plaintiff's counsel. In addition, the trial court ordered that defendant

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undergo counseling and as part of that treatment, ordered that visitation be supervised when defendant visited her children. On 17 April 1998, defendant gave notice of appeal from the 6 April order allowing temporary child support, attorneys' fees and suspending unsupervised visitation.

On 13 April 1998 when defendant served her record on appeal, she tried to include the 6 April 1998 order on attorneys' fees and child support. The trial court dismissed defendant's appeal relating to the 6 April order because the trial court held it was "temporary and therefore interlocutory and the matter could not be appealed." On 15 May 1998, the trial court held defendant in criminal and civil contempt for failing to pay the \$7,500 in attorneys' fees awarded in the 6 April 1998 order. On 19 June 1998, defendant filed her third notice of appeal which appealed from the trial court's decision to dismiss her appeal of the 6 April 1998 order and from the trial court's second contempt order entered 15 May 1998. Defendant appeals.

Daughtry, Woodard, Lawrence & Starling, L.L.P., by Stephen C. Woodard, Jr. and Reid, Lewis, Deese, Nance & Person, L.L.P., by Renny W. Deese, for plaintiff-appellee.

Staton, Perkinson, Doster, Post, Silverman, Adcock & Boone, P.A., by Jonathan Silverman and Michelle A. Cummins, for defendant-appellant.

EAGLES, Chief Judge.

[1] First, we consider whether the trial court erred when it settled the record on appeal and prohibited defendant from assigning error to the 16 September 1997 temporary custody order. Defendant argues that this trial judge usually enters temporary child custody orders and rarely enters permanent orders, the purpose being to deprive the parties of timely appellate review. In any event, defendant appellant failed to give notice of appeal as to the 16 September 1997 child custody order. Pursuant to Rule 3 of the Rules of Appellate Procedure, the appellant must file a notice of appeal within the time period required under the rule. *See Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683 (1990), *appeal dismissed and disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990). Here, the appellant did not **at any time** give notice of appeal as to the 16 September 1997 child custody order. Accordingly, we need not address this issue. This assignment of error is overruled.

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[2] Next we consider whether the trial court erred and made it impossible for the defendant to purge herself of contempt under the 4 November 1997 civil contempt order. Defendant argues that the condition set out in the trial court's 4 November 1997 civil contempt order was so vague that it was impossible for defendant to purge herself of contempt. After careful review, we agree.

A court order holding a person in civil contempt must specify how the person may purge himself or herself of the contempt. G.S. § 5A-22(a); *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188, 191, 461 S.E.2d 10, 12 (1995). The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order. *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984).

Defendant was held in civil and criminal contempt for violating the 16 September 1997 temporary child custody order. In the 4 November 1997 civil contempt order, one of the conditions listed that defendant must meet to purge herself of the contempt was that Ms. Cox

shall not hereafter at any time place either of the minor children in a stressful situation or a situation detrimental to their welfare. Specifically, the defendant is ordered not to punish either of the minor children in any manner that is stressful, abusive, or detrimental to that child.

This condition does not clearly specify what the defendant can and cannot do to the minor children in order to purge herself of the civil contempt. Accordingly, the trial court committed reversible error and this civil contempt order is reversed.

Because we have reversed the trial court's 4 November 1997 civil contempt order because the vague condition made it impossible for defendant to purge herself of contempt, we need not address appellant's remaining assignments of error. However, in our discretion, we will review two additional issues.

[3] First, we consider whether the trial court erred in receiving testimony from the parties' children in-chambers and outside of defendant's presence at the 17 October 1997 contempt hearing. Defendant argues that the trial court erred by conducting a private examination of the children in-chambers over defendant's objection and without defendant's consent but with counsel for both parties present.

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Defendant contends that her constitutional right to confront witnesses was violated. After careful review, we disagree.

In custody proceedings, the trial court may question a child in open court but the court may question the children privately only with the consent of the parties. *Raper v. Berrier*, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957). In *Raper*, the Supreme Court held:

While we recognize that in many instances it may be helpful for the court to talk to the child whose welfare is so vitally affected by the decision, yet the tradition of courts is that their hearings shall be open. . . .

Without doubt, the court may question a child in open court in a custody proceeding but it can do so privately only by consent of the parties.

Id. In addition in *Raper*, counsel was not present when the children were questioned in-chambers.

Here, defense counsel objected and specifically suggested that the trial court hear the children in the courtroom and suggested that the trial court close the courtroom for their testimony. The trial court denied defendant's request and interviewed the children in his chambers; however, the parties' attorneys were present. Although the defendant objected to the in-chambers interview, defense counsel has failed to specify how his client was prejudiced as a result of the in-chambers interview. The lawyers' presence in-chambers eliminates any prejudice to defendant that might have occurred had defendant's attorneys not been present in the trial judge's chambers. The attorneys' presence adequately protects the parties' rights and interests. Accordingly, although it was error for the trial court to conduct an in-chambers interview of the children over the objection of defendant, the error was not prejudicial since the parties' attorneys were present during the interview. This assignment of error is overruled.

[4] Finally, we consider whether the trial court abused its discretion in awarding plaintiff attorneys' fees in the 17 October 1997 civil contempt order. Defendant argues that there is no disparity between the parties' financial resources and argues that the award of \$1,200 in fees is unreasonable.

An award of attorneys' fees will be stricken only if the award constitutes an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980). Attorneys' fees can be properly awarded in custody, child support and alimony cases upon adequate findings of fact

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that the moving party acted in good faith and had insufficient means to defray the expense of the suit. G.S. § 50-13.6; see *Voshell v. Voshell*, 68 N.C. App. 733, 736-37, 315 S.E.2d 763, 765 (1984). Whether these statutory requirements are met is a question of law, reviewable on appeal. *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996), *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996).

Here the trial court concluded that plaintiff did not have sufficient assets with which to pay his attorneys' fees and that defendant did have the means to pay plaintiff's attorneys' fees. However, there were no findings about plaintiff's monthly income or expenses. See *re Baby Boy Scarce*, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413 (1986), *disc. review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986). In addition the court did not explicitly find that plaintiff acted in good faith when he instituted this action. *Id.* Accordingly, the trial court erred in awarding plaintiff attorneys' fees and this order must be reversed and the matter remanded to the trial court to make sufficient findings of fact consistent with this opinion.

In summary, as to COA98-769, we hold that the trial court's 4 November 1997 civil contempt order is fatally vague and the trial court erred in awarding attorneys' fees. Accordingly, the 4 November 1997 civil contempt order is reversed.

[5] We now turn to COA98-1165. Here the defendant appeals from an order determining temporary child support, attorneys' fees and visitation rights filed 6 April 1998 and an order filed 10 June 1998 dismissing her appeal from the 6 April 1998 order.

First, we consider whether the trial court abused its discretion in denying defendant visitation with her children in the 6 April 1998 child support, visitation and attorneys' fees hearing. Defendant argues that unsupervised visitation with her is in the best interest of the children. Defendant contends that the trial court's findings of fact numbers 13, 15, 17 and 19 are not supported by competent evidence. After careful review, we disagree.

The guiding principle in custody and visitation disputes is the child's best interest. *In re Jones*, 62 N.C. App. 103, 105, 302 S.E.2d 259, 260 (1983). A trial court is given broad discretion in determining the custodial setting that will advance the welfare and best interest of minor children. *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). Our review of the trial court's custody order here is confined to whether the court abused its discretion. *Newsome v. Newsome*, 42

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N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979). Since the trial court had the opportunity to see the parties in person and to hear the witnesses and determine credibility, the trial court's decision should not be reversed absent an abuse of discretion. *Id.*

Here finding of fact number 13 states that

[w]ith consent of both parties and counsel, the court held an in camera interview with each of the minor children separately with counsel . . . present during each interview. Each child was happy, well mannered, and much improved over the emotional stage in which this court saw them during the September 5, 1997 hearing. Each child expressed no desire to visit or see their mother. . . .

Defendant contends that since there is no record of the private examination the court conducted with the minor children during the 23 March 1998 hearing, no competent evidence existed to support the finding. We disagree. When a court makes findings of fact based on information obtained as a result of a private examination of children conducted with the consent of the parties, a party cannot complain about what the court learned from speaking with the children. *Horton v. Horton*, 12 N.C. App. 526, 529, 183 S.E.2d 794, 796-97, *cert. denied*, 279 N.C. 727, 184 S.E.2d 884 (1971). Here, during the 23 March 1998 hearing, the trial court conducted an in-chambers interview with each of the minor children with the consent of both parties (unlike the 17 October 1997 in-chambers interview) and with the parties' counsel present during the in-chambers interview.

Further, the trial court's findings were based not only on evidence adduced at the 23 March 1998 hearing but also on evidence presented at the 5 September 1997 hearing. *See Raynor v. Odom*, 124 N.C. App. 724, 728, 478 S.E.2d 655, 657 (1996) (stating that "it is not improper for a trial court to take judicial notice of earlier proceedings in the same cause"). During the 5 September 1997 hearing, Linda Ingram, a therapist who evaluated the Cox family, reported that the children did not like their mother and that the children's feelings toward their mother were very negative. During the 23 March 1998 hearing, a report produced by Dr. Matthew Mendel, a child psychologist, also stated that the children "are not willing to participate in regular visitation with their mother."

[6] In addition, the defendant complains that findings of fact fifteen and seventeen which relate to future visitations are not supported by competent evidence. We disagree.

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Generally, findings of fact fifteen and seventeen state that unsupervised visitation with defendant is not in the best interest of the children and that visitation with defendant ought to be under the supervision of Dr. Mendel. Here, there was ample evidence to support the court's findings that supervision of defendant's visitation was essential to the best interests of the children. Reports from both Linda Ingram and Dr. Mendel support the trial court's findings. This assignment of error is overruled.

Defendant also argues that the evidence does not support finding of fact number nineteen and that finding nineteen was inappropriate in that the trial court was "abrogating its authority" to determine child custody and visitation rights to Dr. Mendel. We disagree.

Finding of fact nineteen states that

[i]t would be in the best interest of the parties and the minor children if, after continued therapy, a relationship of some degree could be established between the defendant and the minor children, although this court determines that Dr. Mendel may suspend or terminate counseling, treatment, and supervised visitation if he determines that the defendant is not progressing nor working openly and honestly toward improvement. This court should be notified of such termination of counseling.

However, conclusion of law number two states that temporary visitation should continue to be suspended but that with counseling and therapy, supervised visitation in Dr. Mendel's presence will be allowed.

It is in the best interest and materially promotes the best interest of each of the minor children that the defendant's temporary visitation continue to be suspended and that counseling and therapy be continued to allow supervised visitation between the defendant and the minor children in the presence of Dr. Matthew Mendel.

Finding of fact nineteen clearly provides that it is in the best interest of the children to establish a relationship with their mother. However, based on competent evidence, the court determined that visitation should be suspended and that through counseling and therapy, supervised visitation was appropriate. Accordingly, Dr. Mendel did not have the authority to end defendant's visitation rights but did have the authority to terminate defendant's counseling and treatment which included supervised visitation with the minor children. Dr. Mendel

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was required to notify the trial court when he suspended his treatment of defendant. This assignment of error is overruled.

[7] Next we consider whether the trial court abused its discretion in awarding plaintiff attorneys' fees in the 6 April 1998 order. Defendant argues that there is no disparity between the parties' financial resources and the attorneys' fee award was excessive. After careful review, we disagree.

Generally, an award of attorneys' fees will be stricken if the award constitutes an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980). Attorneys' fees can be properly awarded in custody, child support and alimony cases upon adequate findings of fact that the moving party acted in good faith and had insufficient means to defray the expense of the suit. G.S. § 50-13.6; see *Voshell v. Voshell*, 68 N.C. App. 733, 736-37, 315 S.E.2d 763, 765 (1984). The trial court must also make specific findings of fact concerning the lawyer's skill, the lawyer's hourly rate and the nature and scope of the legal services rendered. *In re Baby Boy Scarce*, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413 (1986), *disc. review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986). Whether these statutory requirements are met is a question of law, reviewable on appeal. *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996), *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996). Disparity of financial resources and the relative estates of the parties is not a required consideration. *Id.* at 56, 468 S.E.2d at 37.

Here, the trial court made the necessary findings of fact. We hold there was sufficient evidence to support those findings. The trial court found and concluded that

[t]he plaintiff is an interested party acting in good faith who has insufficient means with which to defray the expense of this suit . . . The defendant has the means and ability with which to pay plaintiff's attorney's fees from her earnings and her estate.

The court also determined that

the plaintiff's attorney has expended at least 50 hours in this matter which should be reimbursed. Plaintiff's attorney is a Board Certified specialist in family law. He has more than 20 years of experience in family law matters. The rate of \$150.00 per hour is a reasonable rate considering the charges by attorneys in the community and the several affidavits received without objection into evidence by this court.

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Accordingly, the trial court's findings of fact supported its conclusions of law. The trial court did not abuse its discretion in awarding plaintiff attorneys' fees.

[8] Next we consider whether the trial court erred when it entered an order on 4 June 1998 dismissing defendant's appeal of the 6 April 1998 "temporary" order for child support, attorneys' fees and visitation. Defendant argues that the trial court erred by denying her appeal of the 6 April order because the trial court stated that defendant could not appeal from a "temporary" order. Defendant argues that she should not be denied appellate review because the trial court stated that an order was temporary even though in reality it was permanent. After careful review, we agree.

Ordinarily, "a temporary child custody order is interlocutory and 'does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits.'" *Berkman v. Berkman*, 106 N.C. App. 701, 702, 417 S.E.2d 831, 832 (1992) (quoting *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807 (1986)). "An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807 (1986) (holding that an appeal is premature where the order provided for temporary custody pending a hearing date set five months later), *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986).

Here, all issues were resolved when the 6 April 1998 order was entered. Issues of custody had been resolved as well as child support, visitation, and attorneys' fees. In addition, the trial judge stated that all his orders were temporary which in effect denies parties appellate review. The trial judge stated:

Yes, I don't—I don't regard them as permanent. That's the reason I've—do I ever give anybody permanent custody? No. And so all my Orders are all temporary so they can be adjusted to meet the needs of the child.

The trial judge went on to say:

We know that I know this, you know this, all my Orders are always temporary and I never enter any final Orders. I just don't do it. That's just—that's the way it is. Now, you have appealed from the Temporary Order. How can you do that? State law—State law says you can't do it.

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A mere designation of an order as temporary by a trial court is not sufficient to make that order interlocutory and not appealable. A clear and specific reconvening time must be set out in the order and the time interval between the two hearings must be reasonably brief. See *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807 (1986) (holding that an appeal is premature where the order provided for temporary custody pending a hearing date set five months later), *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859, (1986). The trial court's refusal to enter a permanent order has deprived defendant of appellate review and the refusal was error.

[9] Next we consider whether the trial court erred when it held defendant in civil contempt on 15 May 1998 for defendant's failure to pay the \$7,500 in attorneys' fees set out in the 6 April 1998 order. Defendant argues that she filed an undertaking pursuant to G.S. § 1-289 which stays the enforcement of the attorneys' fees award in the 6 April 1998 order.

G.S. § 1-289 states that

[i]f the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment. . . .

G.S. 1-289 applies to awards of attorneys' fees. See *Faught v. Faught*, 50 N.C. App. 635, 639, 274 S.E.2d 883, 886 (1981). Here, defendant did not have a written undertaking executed by a surety. Accordingly, the trial court did not err in holding defendant in civil contempt for not paying plaintiff's attorneys' fees as directed by the 6 April 1998 order.

[10] Finally we consider whether the trial court erred in awarding plaintiff attorneys' fees in the amount of \$875 at the 15 May civil contempt hearing. Defendant argues that the award is not supported by the evidence and the award was excessive for the time spent by counsel. After careful review, we disagree.

As we stated earlier, an award of attorneys' fees will be stricken only if the award constitutes an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980). Attorneys' fees can be properly awarded in custody, child support and alimony cases upon adequate findings of fact that the moving party acted in good faith and had insufficient means to defray the expense of the suit. G.S.

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§ 50-13.6; see *Voshell v. Voshell*, 68 N.C. App. 733, 736-37, 315 S.E.2d 763, 765 (1984). The trial court must also make specific findings of fact concerning the lawyer's skill, the lawyer's hourly rate and the nature and scope of the legal services rendered. *In re Baby Boy Scarce*, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413 (1986), *disc. review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986). Whether these statutory requirements are met is a question of law, reviewable on appeal. *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996), *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996).

Here the trial court found that:

Stephen C. Woodard, Jr. has rendered valuable legal services to the plaintiff in representing him in this hearing and plaintiff's counsel submitted affidavits evidencing that he had expended eight (8) hours of time in the preparation of pleadings and the hearing of this matter. Plaintiff's attorney is experienced in family law with some twenty years of experience. He is a board certified specialist in family law. The normal and reasonable value of legal services in this area for attorney of such experience and expertise is at least \$175 per hour. The court determines that the services rendered to the plaintiff by his attorney have a reasonable value of at least \$875.00 within the discretion of this court.

The trial court further found that

[t]he plaintiff does not have sufficient assets, nor means, with which to pay said attorney's fees and the defendant has sufficient income and assets to pay said amount.

The trial court made the appropriate findings and conclusions of law. Accordingly, the trial court did not err in awarding plaintiff attorneys' fees. This assignment of error is overruled.

In summary, as to COA98-769, we reverse the 4 November 1997 civil contempt order. As to COA98-1165 we affirm the trial court's 6 April 1998 decision to order supervised visitation, and award attorneys' fees and we affirm the trial court's 15 May 1998 civil contempt order; however, we hold that the trial court erred in dismissing defendant's appeal of the temporary child support, attorneys' fees and visitation order filed 6 April 1998.

Affirmed in part, reversed in part.

Judges JOHN and EDMUNDS concur.

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DONALD M. MONSON, PLAINTIFF v. PARAMOUNT HOMES, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. SIMPLEX PRODUCTS DIVISION OF K2INC. AND CAROLINA BUILDERS CORPORATION, THIRD-PARTY DEFENDANTS

No. COA98-463

(Filed 18 May 1999)

Statute of Limitations— repose—tolling—synthetic stucco—repairs

The trial court did not err by granting a motion to dismiss claims arising from synthetic stucco on a home and replacement windows and doors. A duty to complete performance may occur after the date of substantial completion; however, a “repair” does not qualify as a “last act” under N.C.G.S. § 1-50(5) unless it is required under an improvement contract by agreement of the parties. To allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose.

Judge GREENE dissenting.

Appeal by defendant and third-party plaintiff Paramount Homes, Inc., from judgment entered 15 January 1998 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 5 January 1999.

Brown, Todd & Heyburn, P.L.L.C., by Julie M. Goodman, and Smith Helms Mulliss & Moore, L.L.P., by Gary R. Govert, for defendant and third-party plaintiff-appellant.

Hunton & Williams, by Steven B. Epstein for third-party defendant-appellee Carolina Builders Corporation.

HUNTER, Judge.

In August 1990, general contractor defendant Paramount Homes, Inc. (“Paramount”) completed the house at issue in this case. Paramount sold the home to the original owner, who subsequently sold the house to plaintiff in 1993. On 29 August 1996, plaintiff filed suit against Paramount for defective construction of the house. Plaintiff alleged use of defective materials and improper installation of windows, doors, and exterior insulation and finish systems (“EIFS”) cladding, also known as synthetic stucco. Paramount, in

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turn, sought indemnity and contribution from Simplex Products Division of K2inc. (“Simplex”), the manufacturer of the EIFS installed at plaintiff’s house, by third-party complaint filed 20 December 1996. During discovery, Paramount learned that Carolina Builders Corporation (“CBC”) had made repairs and replacements to the windows and doors at the house at plaintiff’s request in 1994. CBC had manufactured and sold the materials to Paramount during original construction of the house. Paramount filed a motion on 16 October 1997 to add CBC as a second third-party defendant, which was granted on 23 October 1997. Paramount filed its amended third-party complaint on 29 October 1997 alleging causes of action against CBC for breach of contract, breach of express and implied warranties, and negligence. CBC moved to dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. CBC’s motion was granted on the grounds that Paramount’s claims were filed after the applicable statute of repose had expired. On 28 April 1998, plaintiff filed a voluntary dismissal with prejudice of his lawsuit. On 29 May 1998, Paramount filed a voluntary dismissal with prejudice of its third-party claims against Simplex. Paramount appeals the dismissal of CBC as a third-party defendant.

The parties acknowledge that the applicable statute of repose in the present case is the real property improvement statute which states:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the *later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.*

N.C. Gen. Stat. § 1-50(5)(a) (1996) (emphasis added). While the statute does not clarify the meaning of “last act or omission” any further, “substantial completion” means

that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement.

N.C. Gen. Stat. § 1-50(5)(c) (1996). N.C. Gen. Stat. § 1-50(5) applies to defective improvements to real property by a materialman, meaning

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one who furnishes or supplies materials used in building construction, renovation or repair. *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 444 S.E.2d 423 (1994). Thus, N.C. Gen. Stat. § 1-50(5) applies to CBC in the present case.

Paramount contends the court erred in granting CBC summary judgment because its “last act or omission” giving rise to the relevant claims was the repairs completed by CBC in 1994; therefore, the claim is valid since it was filed in 1997, well within the six year statute of repose. Paramount supports its position by citing *New Bern Assoc. v. The Celotex Corp.*, 87 N.C. App. 65, 359 S.E.2d 481, *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987).

In *New Bern*, plaintiff New Bern Associates brought suit against the Celotex Corporation (“Celotex”) alleging breach of warranties in connection with roofing materials manufactured by Celotex and installed on plaintiff’s building. Construction of the building, including the installation of Celotex’s roofing materials, had been substantially completed on or prior to 18 March 1975. On 28 April 1986, Celotex asserted third-party claims for indemnity and contribution against T.A. Loving Company (“Loving”), the general contractor responsible for constructing the building and installing the roofing materials. In regards to when the statute of repose began to run, the Court held that the 1963 version of the statute applicable in *New Bern* is the same as the 1981 version, stating: “We think it means nothing different from the language of the 1981 version in which the statute runs ‘from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.’” *Id.* at 70-71, 359 S.E.2d at 485. Therefore, the Court found that the claim against Loving would be valid, under the statute of repose, only if the substantial completion date or last act or omission of Loving occurred on or after 28 April 1980.

The evidence in *New Bern* indicated that the completion date was 18 March 1975; however, one of Loving’s employees was involved in continuous efforts to repair the property from the 18 March 1975 completion date until after 28 April 1980. This Court found that the dispute over whether the individual was actually Loving’s agent after 28 April 1980 was a genuine issue of material fact as to whether Loving’s “last act or omission alleged to give rise to plaintiff’s injury occurred within six years of the date Celotex filed its third-party complaint,” and remanded the case in order for this determination to be made. *Id.* at 71, 359 S.E.2d at 485. The Court did not hold

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that the individual's acts, if he were Loving's agent after 28 April 1980, would qualify as Loving's "last act or omission" under the statute of repose. Therefore, *New Bern* is persuasive, but not controlling in the case *sub judice*. The dispositive issue in the present case is whether a repair qualifies as the "last act or omission" under N.C. Gen. Stat. § 1-50(5).

While the Court in *New Bern* referred to the repairs in question as continuous efforts after the completion date, it gave no indication whether these repairs were pursuant to the original improvement contract, a warranty, or new and separate contracts. In the present case, Paramount alleges in its third-party complaint that CBC, pursuant to contract, supplied Paramount with windows, doors, and associated materials for use in construction of the house in 1990. Paramount further alleges that, pursuant to the *plaintiff's* dissatisfaction with the materials:

CBC returned to the House [sic] in approximately the spring or summer of 1994 to inspect, repair, and replace the windows about which the plaintiff had complained. Upon information and belief, CBC performed this repair and replacement work pursuant to a warranty and did not charge the plaintiff for replacement parts provided.

While alleging in its third-party complaint that the repairs were completed pursuant to a warranty given in 1990, Paramount also attempts, in its brief, to classify the 1994 repairs as duties under the original 1990 improvement contract. The allegations of the third-party complaint must be treated as true, as the court is ruling on a motion to dismiss for failure to state a claim upon which relief can be granted. *Hickman v. McKoin*, 337 N.C. 460, 462, 446 S.E.2d 80, 82 (1994). Paramount never alleges in its third-party complaint, or in its brief, that CBC failed to complete performance and finish the improvement in 1990. The record reveals, and both parties concede, that the plaintiff's house was completed in 1990. Thus, CBC had completed its duties under its contract with Paramount in 1990 and the statute of repose began to run.

Paramount has not contended that the 1994 repair should be classified as a new and separate improvement, thus starting the running of a second statute of repose. Therefore, this issue is not addressed. Paramount, however, does contend that the statute of repose did not begin running or was "reset" in 1994 because CBC "must have believed that it had a duty to do those [1994] repairs, and any such

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duty could only have been created pursuant to its contract with Paramount and the warranties provided in connection with that contract.” While Paramount opines as to why CBC made the repairs, it presents no evidence that CBC had a continuing duty to complete any repairs under the original 1990 improvement contract. Also, there is no evidence in the record indicating that CBC had a continuing duty to repair under any implied or express warranty.

Assuming *arguendo* that a continuing duty of repair existed pursuant to a warranty, no evidence indicates that CBC had a continuing duty to repair under the improvement contract with Paramount. A warranty is unique in that it anticipates future performance; therefore, this Court has held that a statute of limitations is tolled during the time the seller endeavors to make repairs to enable the product to comply with a warranty. *Haywood Street Redevelopment Corp. v. Peterson Co.*, 120 N.C. App. 832, 463 S.E.2d 564 (1995). In that case, the defendant gave a written express warranty on a waterproofing surface on plaintiff’s parking lot on 15 June 1988 and agreed to correct deficiencies in the work until 15 March 1993. The Court stated that the warranty “is in the nature of a prospective warranty, in that it guarantees the future performance of the waterproofing for a stated period of time.” *Id.* at 836, 463 S.E.2d at 566 (citations omitted). Therefore, on each day the waterproofing was not free of defects, there was a new breach of the warranty. With the occurrence of each breach, a new cause of action accrued. *Id.* at 837, 463 S.E.2d at 567. The case was reversed and remanded because the statute of limitations was tolled during the repair period, and because the breach of warranty claim was filed within three years pursuant to N.C. Gen. Stat. § 1-52(1) (1983)—the statute of limitations applicable to breach of warranty and contract claims.

Haywood is distinguishable from the present case. Paramount, while alleging breach of implied and express warranties, does not rely on the statute of limitations found in N.C. Gen. Stat. § 1-52(1), which applies to breach of warranty. However, the holding in *Haywood* does indicate that once the improvement to which the warranty applied was completed, the applicable statute of limitations began running. A subsequent repair, pursuant to a warranty, tolled the running of the statute of limitations, but it did not “reset” the running of the statute of limitations. Likewise, Paramount presents no precedent for the proposition that the statute of repose, once it begins running upon completion of the improvement, can be “reset” or “tolled” during a repair. The holding of *New Bern* never determined affirmatively that

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the statute of repose began running at a certain date, thus the issues of “tolling” or “resetting” were never addressed.

In another similar case, *Cascade Gardens v. McKellar & Assoc.*, 240 Cal. Rptr. 113 (4th Dist. 1987), the defendant developed the Cascade Gardens Condominiums from 1972 to 1973 and filed its notice of completion on 13 July 1973. Soon after the homeowners moved into the condominiums, they notified defendant developer of roof leaks, as well as other defects. Defendant contracted with a roofing company to reroof the condominiums, which took from December 1973 to March 1974. The Court did not find that the repair reset the applicable statute of limitations which began at the date of completion, however, the statute was tolled during the four month period of repairs. *Cascade*, 240 Cal. Rptr. at 116-17.

While equitable doctrines may toll statutes of limitation, they do not toll substantive rights created by statutes of repose. *Stallings v. Gunter*, 99 N.C. App. 710, 716, 394 S.E.2d 212, 216 (citing Restatement (Second) of Torts § 899, Comment (g) (1979)), *disc. review denied*, 327 N.C. 638, 399 S.E.2d 125 (1990). The statute of repose codified as N.C. Gen. Stat. § 1-50(5) is “designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property.” *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983). To allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50(5). *See, e.g., Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 56, 332 S.E.2d 67, 74 (1985). A statute of repose “serves as an unyielding and absolute barrier that prevents a plaintiff’s right of action even before his cause of action may accrue,” *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985), and functions to give a defendant a vested right not to be sued if the plaintiff fails to file within the prescribed period. *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 320 S.E.2d 273 (1984). In short, a statute of repose bars an action a specified number of years after a defendant has completed an act, even if the plaintiff has not yet suffered injury. Our Supreme Court has stated:

Statutes of limitation are generally seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may

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be commenced after the cause of action has accrued. Statutes of repose, on the other hand, create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant.

Trustees of Rowan Tech. v. Hammond Assoc., 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985); see *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988) (statute of repose sets a fixed time limit beyond which plaintiff's claim will not be recognized); *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 440, 302 S.E.2d 868, 880 ("unless the injury occurs within the six-year period, there is no cognizable claim").

According to N.C. Gen. Stat. § 1-50(5), the statute of repose begins running at the later of the last act or omission or date of substantial completion. Other courts have held that since all liability has its genesis in the contractual relationship of the parties, an owner's claim arising out of defective construction accrues on completion of performance "no matter how a claim is characterized in the complaint—negligence, malpractice, breach of contract." *SC. Dist. of Newburgh v. Stubbins & Assocs.*, 626 N.Y.S.2d 741, 742-43, 650 N.E.2d 399, 400-01 (1995). We agree with this reasoning. The logical interpretation of our statute includes classifying the later of the last act or omission or date of substantial completion as the date at which time the party (contractor, builder, etc.) has completed performance of the improvement contract. Accordingly, the last omission may occur when the party fails to perform or does not complete performance. A duty to complete performance may occur after the date of substantial completion, however, a "repair" does not qualify as a "last act" under N.C. Gen. Stat. § 1-50(5) unless it is required under the improvement contract by agreement of the parties.

Our holding coincides with the public policy encouraging repairs and subsequent remedial measures, codified in Rule 407 of the North Carolina Rule of Evidence. Rule 407 provides, in part: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." N.C.R. Evid. 407. The commentary to this rule makes its purpose clear:

The . . . more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging

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them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs . . . and the language of the present rule is broad enough to encompass [such application].

Id. (Commentary). The rationale behind this policy is that a party might avoid repairing work it had earlier performed, or a product it had earlier manufactured and sold, if it believed that such repairs might later be construed as an admission that the original work was improper or defective. *See 2 Weinstein's Federal Evidence* § 407.03 [1] (1999). To allow subsequent repairs to restart the statute of repose would defeat the policy underpinning both Rule 407 and N.C. Gen. Stat. § 1-50(5).

Based on the foregoing, we hold that the last act or omission by CBC in completing the improvement at issue—in this case supplying materials for original construction of plaintiff's house—occurred on or prior to August 1990, the date of substantial completion. At that point, performance was completed by CBC and in accordance with N.C. Gen. Stat. § 1-50(5), the statute of repose began to run. The repairs in 1994 did not reset the running of the statute of repose. Therefore, the claims of Paramount against CBC are time-barred under N.C. Gen. Stat. § 1-50(5), as they were not filed until after August 1996, more than six years after the last act and date of substantial completion. The trial court did not err when it granted CBC's motion to dismiss.

Affirmed.

Judge JOHN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I would hold that the trial court erred in dismissing Paramount's complaint; therefore I respectfully dissent from the majority opinion.

When deciding a motion to dismiss, the trial court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory . . ." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). A complaint should not be dismissed " 'unless it affirmatively appears that the plaintiff is enti-

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tled to no relief under any state of facts which could be presented in support of the claim.’” *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 444, 444 S.E.2d 423, 427 (1994) (quoting *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985)); see also *Arroyo v. Scottie’s Professional Window Cleaning*, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995) (noting that complaints must be liberally construed on a motion to dismiss), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996). Accordingly, unlike the majority, I do not find it dispositive that Paramount has “present[ed] no evidence that CBC had a continuing duty to complete any repairs under the original 1990 improvement contract” or that “there is no evidence in the record indicating that CBC had a continuing duty to repair under any implied or express warranty.” *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 239, 515 S.E.2d 445, — (1999). Paramount’s allegations, liberally construed and taken as true, suffice at this stage of the proceedings.

The applicable six-year statute of repose begins to run at *the later of* (1) “the specific last act or omission of the defendant giving rise to the cause of action” or (2) “substantial completion” of the improvement. N.C.G.S. § 1-50(a)(5) (Supp. 1998). The “last act” giving rise to the cause of action is determined by “the nature of the services [the defendant] agreed to perform.” *Hargett v. Holland*, 337 N.C. 651, 656, 447 S.E.2d 784, 788 (construing similar language in section 1-15(c)), *reh’g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994).

In this case, Paramount alleges CBC “made numerous express and implied warranties to Paramount, concerning the windows and associated materials used in construction of the [Monson house].” Accordingly, the nature of the services CBC agreed to perform allegedly included future duties during the warranty period. See *Haywood Street Redevelopment Corp. v. Peterson Co.*, 120 N.C. App. 832, 836, 463 S.E.2d 564, 566-67 (1995) (discussing prospective warranties), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996). In 1994, CBC allegedly repaired and/or replaced windows in the Monson house pursuant to the warranty, *i.e.*, pursuant to its duties to Paramount. It follows that CBC’s “last act” under the contract occurred in 1994.

In any event, Paramount’s complaint further alleges “the CBC windows installed in the [Monson house] continued to leak and allow moisture intrusion behind the EIFS cladding on the [Monson house] even after CBC’s repair and replacement.” It therefore follows that the statute of repose began to “run anew” from the date of CBC’s

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repairs, because the replacement windows were defective and were a proximate cause of damage to the Monson house. *See* 63B Am. Jur. 2d *Products Liability* § 1629 (1997) (noting that the “time period in a statute of repose may run anew with respect to a replacement part for a product, if the replacement part itself is defective . . . and is the proximate cause of the plaintiff’s injuries”).

In addition, I believe *New Bern Assoc. v. The Celotex Corp.*, 87 N.C. App. 65, 359 S.E.2d 481, *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987), controls the outcome of this case. The majority attempts to distinguish *New Bern* by stating that we did not hold that repairs may constitute the “last act” giving rise to a cause of action in that case. I disagree. In *New Bern*, we reversed and remanded the trial court’s grant of summary judgment. Summary judgment, as this Court noted therein, is appropriate “if there is no genuine issue of *material* fact and any party is entitled to judgment as a matter of law.” *New Bern*, 87 N.C. App. at 68, 359 S.E.2d at 483 (emphasis added). The evidence in *New Bern* was equivocal as to whether the individual who had conducted repairs within six years of the filing of the plaintiff’s action acted as the defendant’s agent; accordingly, there existed a genuine issue of fact as to whether *the defendant* had made repairs within the preceding six years. If the repairs at issue could not have constituted the “last act” giving rise to the cause of action, this genuine issue of fact would not have been *material*, and therefore would not have supported our reversal of the trial court’s decision. Contrary to the majority’s conclusion, therefore, this Court has determined that repairs may constitute the “last act” of the defendant giving rise to the cause of action. Accordingly, we are bound, at this stage of the proceedings, to hold that the applicable statute of repose began to run in 1994, the date of the alleged “last act” giving rise to the cause of action. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding one panel of the Court of Appeals is bound by the decisions of other panels unless they have been overturned by a higher court).

Finally, I disagree with the majority’s conclusion that treating a repair as the “last act” would defeat our public policy encouraging repairs. To the contrary, treating a repair as the “last act” would, in fact, encourage repairs as an alternative to litigation. In other words, refusing to treat a repair as the “last act” would encourage the homeowner to bring suit immediately upon noticing a defect (*i.e.*, before the statute of repose has run), rather than working with the contractor (or subcontractor) for a nonlitigious solution.

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POLYGENEX INTERNATIONAL, INC., PLAINTIFF v. POLYZEN, INC. AND
TILAK M. SHAH, DEFENDANTS

No. 98-908

(Filed 18 May 1999)

1. Pleadings— Rule 11 sanctions—complaint signed by corporate officer—not a party in individual capacity

An order imposing attorney fees and costs for filing a complaint not warranted in law, not well-grounded in fact, and for an improper purpose was vacated as to the president of plaintiff corporation, McGarry, where McGarry's verification of the complaint was in his capacity as a corporate officer and not in his individual capacity. McGarry was not a party to the action, was never served with summons, and was not given the necessary notice and opportunity to be heard. The order amounted to an unconstitutional deprivation of his due process rights under both the state and federal constitutions.

2. Pleadings— Rule 11 sanctions—against corporation—proper

The trial court did not err by sanctioning plaintiff corporation under N.C.G.S. § 1A-1, Rule 11 where the court correctly determined that the verified complaint was facially implausible and not warranted by existing law. It could also be concluded that the complaint was not well grounded in existing law, and the court properly inferred that the complaint was interposed for the improper purpose of harrasing defendants.

3. Pleadings— Rule 11 sanctions—attorney fees and costs—amount—findings

The trial court's determination of the amount of a Rule 11 sanction was remanded where the court stated only that defendants had "presented evidence" on the issue and then awarded "reasonable" fees and costs "necessarily incurred." The court did not make any findings regarding the customary fee for like work, plaintiff's attorney's experience and ability, and the amount of time and labor expended.

4. Pleadings— Rule 11 sanctions—sufficiency of allegations

The allegations in a Rule 11 motion were sufficient where defendants contended in the motion that the complaint was not well-grounded in fact; not warranted by existing law or a good

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faith argument for the extension, modification, or reversal of existing law; and was interposed for the improper purpose of harassing defendants.

Appeal by plaintiff from order entered 11 May 1998 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 19 April 1999.

The plaintiff, Polygenex International, Inc. ("Polygenex"), is a North Carolina corporation with its principal office in Cary, North Carolina. Polygenex manufactures and sells knitted gloves for industrial and commercial uses. The president of Polygenex is Joseph D. McGarry.

Defendant Polyzen, Inc. ("Polyzen") is also a North Carolina corporation with its principal office in Cary, North Carolina. Polyzen manufactures plastic medical devices pursuant to certain patents. Defendant Tilak M. Shah is the president of Polyzen.

Prior to 5 December 1997, Polygenex and Polyzen were one corporation doing business under the name of Polygenex International Inc. McGarry operated the Specialty Gloves Division, while Shah operated the Medical Devices and Polymer Compounds/Tubing Division. Due to differences between McGarry and Shah, they agreed that Polygenex International, Inc. would be split into separate corporations along the lines of the divisions that the two men operated.

On 5 December 1997, the shareholders of Polygenex executed a Corporate Separation and Reorganization Agreement ("Agreement"). Pursuant to the Agreement, Polygenex created Polyzen as a subsidiary corporation to which certain assets and liabilities were assigned regarding Polygenex' medical devices business. Polygenex then divested itself of Polyzen. Shah resigned as an officer of Polygenex and transferred his shares of stock to Polygenex, while McGarry resigned as an officer of Polyzen. After the separation, McGarry continued as president of Polygenex and Shah became president of Polyzen.

On 26 January 1998 Polygenex filed a complaint against Polyzen and Shah alleging breach of the Agreement, tortious interference with contract, trademark infringement and unfair and deceptive trade practices. Polygenex sought damages as well as injunctive relief. The complaint was verified by McGarry as an officer and director of

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Polygenex. On 27 January 1998 Polygenex moved for a temporary restraining order, which was denied. On 17 February 1998 defendants moved to dismiss pursuant to Rule 12(b)(6) and also sought costs and attorneys' fees pursuant to Rule 11. On the same day, plaintiff voluntarily dismissed the action without prejudice.

On 24 April 1998 the trial court held a hearing on defendants' motion. On 11 May 1998 the trial court entered an Order finding that the Complaint was not warranted in law, was not well-grounded in fact, and was filed for an improper purpose. The trial court ordered Polygenex and McGarry to pay defendants \$5,750 in attorneys' fees and \$164.64 in costs. Polygenex appealed and an order was entered staying enforcement of the Order.

Howard, Stallings, Story, Wyche, From & Hutson, P.A., by Scott A. Miskimon and Jenna B. Thomas, for plaintiff-appellant.

Kilpatrick Stockton, LLP, by Donald J. Harris and M. Gray Styers, Jr., for defendant-appellees.

EAGLES, Chief Judge.

We first note that on 28 January 1999, McGarry petitioned this Court for writ of certiorari pursuant to Rule 21 of the N.C. R. App. Proc. The petition for writ of certiorari is granted.

[1] We next consider whether the trial court committed reversible error by sanctioning McGarry pursuant to Rule 11. McGarry first argues that the order should be vacated as to him on the grounds that he was deprived of his federal and state constitutional due process rights. Additionally, McGarry argues that “[u]nder the plain and unambiguous language of Rule 11, sanctions apply only to attorneys and parties But there is nothing in the language of Rule 11 that suggests a non-party corporate officer who verifies a complaint on behalf of his company may be sanctioned along with the corporation.” McGarry asserts that the Record shows he was never a party to the litigation, that he was not subject to the jurisdiction of the court, and that he was not provided notice or an opportunity to be heard in his individual capacity at the hearing. Accordingly, McGarry argues that there was no legal basis for sanctioning him. Alternatively, McGarry argues that the trial court made no findings of fact and entered no conclusions of law regarding whether McGarry made a reasonable inquiry into the facts, believed that his position was well-grounded in fact, or in verifying the complaint, acted with an

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improper purpose. McGarry contends that all the findings of fact and conclusions of law were directed exclusively at Polygenex. Accordingly, McGarry asserts that the order is fatally defective as to him and should be vacated.

We find McGarry's arguments persuasive and vacate the order as to McGarry. "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution." *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438 (1998) (quoting *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994)). Here, McGarry was individually sanctioned and ordered to pay attorneys' fees and costs even though he was not a party to the litigation. *Stevens v. Nimocks*, 82 N.C. App. 350, 346 S.E.2d 180, *cert. denied*, 318 N.C. 511, 349 S.E.2d 873 (1986) is analogous. In *Stevens*, the defendant verified the answer in an action against a partnership in his capacity as a partner. The plaintiff sought to subject the defendant to Rule 11 liability in his individual capacity. This Court determined that "[a]ctual notice of a suit against the partnership will not cure the requirement that a partner must be served with a summons to be held individually liable." *Id.* at 352-53, 346 S.E.2d at 181 (citing *Shelton v. Fairley*, 72 N.C.App. 1, 3-4, 323 S.E.2d 410, 413 (1984), *disc. review denied*, 320 N.C. 634, 360 S.E.2d 94 (1987); *Blue Ridge Electric Membership Corp. v. Grannis Brothers*, 231 N.C. 716, 720, 58 S.E.2d 748, 751-52 (1950) (general appearance on behalf of a purported corporation cannot be construed as a general appearance on behalf of a partnership, none of whose members are a party to the action)). McGarry's verification of the complaint was in his capacity as a corporate officer and was not in his individual capacity. This verification was not sufficient to subject McGarry to individual liability pursuant to Rule 11. Accordingly, we hold that because McGarry was not a party to the action and was never served with summons, McGarry was not given the necessary notice and opportunity to be heard and therefore, and as to him, the Order amounted to an unconstitutional deprivation of his due process rights under both the state and federal constitutions. The order is vacated as to McGarry.

[2] We next consider whether the trial court committed reversible error by sanctioning plaintiff corporation pursuant to Rule 11.

The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo*

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as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Plaintiff first argues that the sanctions entered against plaintiff were based upon the perjured testimony of defendant Shah. Plaintiff argues that Shah's perjury can be proven by a copy of a flyer sent out by Polyzen which plaintiff contends "deceptively states" "Nothing has changed but the name" and uses Polygenex' name throughout the text of the advertisement. The advertisement is dated after the separation agreement went into effect and was allegedly sent to Polygenex' customers and vendors. Plaintiff argues that Polyzen was clearly using the advertisement to trade on Polygenex' name and that the advertisement gives the impression that the two companies remain associated with each other. Plaintiff additionally argues that Shah's perjury can be proven by unrefuted evidence that Polyzen contacted Polygenex' customers and had Polygenex' accounts changed over into Polyzen's name. Plaintiff accordingly argues that this evidence contradicts the trial court's findings of fact that neither defendants nor its agents made false or misleading statements, never infringed plaintiff's trademark, and never made inappropriate or false communications with plaintiff's customers.

Plaintiff next argues that the trial court erred in concluding that the complaint was not well-grounded in law. There is a two-part legal analysis to determine whether a complaint is well-grounded in law. "This approach looks first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of 'whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law.'" *Bryson v. Sullivan*, 330 N.C. 644, 661, 412 S.E.2d 327, 336 (1992) (quoting *dePasquale v. O'Rahilly*, 102 N.C.App. 240, 246, 401 S.E.2d 827, 830 (1991)). Pursuant to that analysis, plaintiff first argues that the complaint states a cause of action for breach of contract. Plaintiff argues that the Agreement here calls for a corporate separation, and "implicit" in the Agreement is that the

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companies would be separate entities, that Polyzen would take no action to disturb the customer and vendor relationships retained by Polygenex, and Polyzen would not trade on the goodwill nor misappropriate the Polygenex tradename. Plaintiff contends that the Advertisement demonstrates a blatant violation of the Agreement. Additionally, plaintiff argues that defendants contacted utilities and vendors and had accounts changed into Polyzen's name, and that this interference with business relationships violated "both the letter and spirit of the Agreement." Plaintiff next argues that the allegations that Polyzen interfered with plaintiff's contractual relationships are facially plausible and state a cause of action for tortious interference with contract. Third, plaintiff argues that based on the Advertisement, plaintiff's cause of action for infringement of the tradename of Polygenex is well-grounded in law. Fourth, plaintiff argues that the allegation of tortious interference with contract, plus the aggravating factors that defendants "hijack[ed]" its vendor relationships and falsely communicated with plaintiff's customers, support the cause of action for unfair and deceptive trade practices. Plaintiff finally argues that damages would be inadequate, and that the complaint states a cause of action for injunctive relief. Accordingly, plaintiff argues that the complaint is facially plausible and that no further inquiry is required. Alternatively, plaintiff argues that the allegations were warranted by existing law or a good faith extension, modification or reversal of existing law.

Plaintiff next argues that it undertook a reasonable inquiry into the facts which shows that the complaint was well-grounded in fact. Plaintiff argues that their inquiry showed that defendants illegally obtained and opened plaintiff's mail and that plaintiff made demands upon defendants for an explanation, but that defendants refused to respond. Plaintiff contends that it was justified in believing that there was an attack on their operations by defendants. Additionally, plaintiff argues that there is a fatal defect in the trial court's order because the trial court made no finding of fact on the issue of whether plaintiff undertook a reasonable inquiry into the facts.

Finally, plaintiff argues that there was no evidence to support the trial court's finding of fact and conclusion of law that the complaint was interposed for an improper purpose. Plaintiff asserts that "[t]he need to do discovery in an unfair competition case is obvious, for the defendant will be far more likely to know the scope and effect of his actions than will the plaintiff." Plaintiff contends that it should not have to wait without acting until it has unequivocal proof of all dam-

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ages suffered as a result of defendant's actions. Accordingly, plaintiff asserts that the trial court committed reversible error in ordering sanctions based upon an allegedly improper purpose in filing the complaint.

Defendants argue that the trial court properly concluded that the plaintiff's verified complaint was not well-grounded in fact, not warranted by existing law and interposed for an improper purpose.

First, defendants contend that plaintiff's complaint was facially implausible as to the breach of separation agreement claim because the complaint fails to allege what specific provisions of the Agreement have been breached. Defendants assert that the complaint merely alleges that the acts of defendants violate the " 'letter, intent and spirit' of the Separation Agreement." Defendants argue, however, that "[a]bsent a breach of actual provisions of the Separation Agreement, . . . breach of the implied covenant of good faith does not state a proper cause of action." Additionally, defendants argue that the actions of defendants which effected the alleged breach are vague and contained in conclusory allegations with regard to defendants contacting vendors and changing accounts, use by defendants of plaintiff's credit accounts, and instructions made to the postal service regarding delivery of mail. Defendants also note that plaintiff's allegation of improper contact was made "upon information and belief." Defendants also argue that plaintiff never alleged how such purported conduct violated the agreement. Defendants next argue that plaintiff has not alleged a plausible claim of tortious interference with contract because a true interference with utility and service providers, as alleged by plaintiff, would require an interruption in service, which is not alleged. Accordingly, defendants contend plaintiff did not allege any specific harm. Additionally, plaintiff does not allege that defendants acted without justification in contacting the utility companies to establish their own billing accounts. Third, defendants argue that plaintiff failed to allege a proper claim for trademark infringement because the complaint does not specify the infringing use, does not allege any confusion, mistake or deception, and does not allege how the use damaged plaintiff. Fourth, since the alleged actions fail to properly support any other valid claims for relief, defendants argue that they cannot support an action for unfair and deceptive trade practices. Finally, defendants contend that since plaintiff failed to assert a plausible claim, it failed to establish a right to injunctive relief.

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Defendants next argue that since the complaint is facially implausible, the proper inquiry is whether to the best of plaintiff's knowledge, information and belief formed after reasonable inquiry, the pleading was warranted by existing law. Here, defendants argue that the trial court properly found that there was no evidence of record that plaintiff made any inquiry into defendants' communications with vendors, or what was discovered with regard to those communications. Defendants assert that the trial court properly concluded that plaintiff's inquiry into the law and facts was not objectively reasonable. Defendants additionally argue that a reasonable inquiry would have found that defendants contacted utility and service vendors in order to establish separate billing accounts and effectuate the corporate separation. Defendants also contend that reliance on the "flyer" was misplaced because plaintiff did not know of the flyer when the complaint was filed. Additionally, the flyer contains only true statements because it merely states what the Separation Agreement accomplished, and the use of plaintiff's tradename constituted a "fair use." Defendants conclude that because the complaint is facially implausible, not well-grounded in fact and not warranted by existing law, and because plaintiff did not conduct a reasonable inquiry, the trial court properly inferred that the complaint was interposed for an improper purpose.

After careful consideration of the record, briefs and contentions of the parties, we affirm. There was sufficient evidence to support the trial court's findings of fact, and these findings supported the trial court's conclusions of law. The trial court's conclusions of law in turn support its order sanctioning the plaintiff. First, the trial court found that the complaint was facially implausible. We agree. Plaintiff failed to allege specific provisions of the contract that were breached, alleging only that defendants' actions violated the "letter, intent and spirit" of the Agreement. Furthermore, the trial court found that defendant Shah directed his agents to contact vendors to establish separate billing accounts for the new corporation. Plaintiff did not challenge the trial court's finding. Accordingly, the complaint does not support plaintiff's claim of breach of contract. The trial court also found that there was no evidence in the record that any of defendants' contacts with vendors caused actual damage to the plaintiff. We agree and accordingly conclude that plaintiff has failed to state a claim for tortious interference with contract. Next, plaintiff failed in its complaint to specify the infringing use by defendants of plaintiff's tradename or how any alleged use damaged plaintiff; the complaint simply makes conclusory allegations regarding the use. The trial court found that

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there was no evidence in the record that defendants infringed the Polygenex trademark. We agree and accordingly find that the allegation of tradename infringement is facially implausible. Fourth, since plaintiff has failed to state a claim as explained above, its complaint does not support a claim for unfair and deceptive trade practices nor does it establish irreparable harm and a right to injunctive relief. Accordingly, we conclude that the trial court correctly determined that the verified complaint was facially implausible and not warranted by existing law.

We also conclude that the complaint was not well-grounded in fact. The trial court found that “[g]iven the knowledge and information which can be imputed to Polygenex, a reasonable person under the same or similar circumstances would not have terminated his or her inquiry and formed the belief that the claims brought by Polygenex were warranted under existing law” and that “Polygenex’s inquiry was not objectively reasonable.” The trial court’s findings are supported by the record.

Finally, the trial court found that plaintiff “had no basis for the filing of its Verified Complaint other than to use it as a vehicle to pry into the business affairs of” defendants. Since the complaint was facially implausible, not well-grounded in fact and not warranted by existing law, we conclude that the trial court properly inferred here that the complaint was interposed for the improper purpose of harassing defendants. See *Renner v. Hawk*, 125 N.C. App. 483, 492, 481 S.E.2d 370, 375, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997); *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992). Accordingly, the assignment of error is overruled.

[3] We next consider whether the trial court abused its discretion when it ordered Polygenex to pay defendants’ attorneys’ fees and costs. Plaintiff argues that the trial court abused its discretion by awarding attorneys’ fees without making the necessary conclusions of law, supported by the necessary findings of fact, and without any evidence in the record. Specifically, plaintiff contends the trial court failed to make the necessary findings of fact regarding the time and labor expended by the attorneys, the skill required to perform the legal services rendered, and the customary fee for like work, and the experience and ability of the attorneys. Accordingly, plaintiff argues that the order should be vacated.

Defendants contend that counsel for the defendants submitted a detailed accounting and description of the legal work performed due

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to plaintiff's complaint. Defendants note that upon review of the accounting, the trial court determined that the reasonable hourly rate for the work performed was lower than the amount actually paid by defendants. Accordingly, defendants contend that

[t]he rate reduction imposed by the trial court on defendants' counsel makes clear that the trial court discriminatingly reviewed the undersigned's affidavit concerning costs and fees. It may be confidently inferred from this record that the trial court found that the fees and costs incurred by defendants were reasonable except as to the hourly rate, for which the trial court substituted a rate it deemed reasonable. By not taking issue with other matters reflected in the undersigned's affidavit, such as the nature and amount of work performed, the trial court implicitly signed off on those items.

Additionally, defendants contend that the trial court specifically awarded "reasonable" fees and costs "necessarily" incurred by defendants in responding to the complaint. Accordingly, defendants contend that there is a sufficient record from which this Court can determine the reasonableness of the trial court's award.

We find plaintiff's arguments persuasive and vacate and remand the trial court's determination of the amount of the Rule 11 sanction. In reviewing an award of attorneys' fees and costs, this Court has stated that

the statute [G.S. 75-16.1] requires the award [of attorneys' fees to] be reasonable. In order for this Court to determine if the award of attorney fees is reasonable, the record must contain findings of fact to support the award.

Here, the trial court simply awarded plaintiff an attorney fee of one-third of the total award of \$21,925.83, or \$7,308.61. The judgment contained no findings of fact to support the court's conclusion that this was a reasonable fee such as the time and labor expended, the skill required to perform the legal services rendered, the customary fee for like work, or the experience and ability of the attorney. The failure of the court to consider and set out the factors above renders the findings of fact inadequate to support the amount of the award.

Morris v. Bailey, 86 N.C. App. 378, 387, 394 S.E.2d 120, 125 (1987) (citations omitted). Here, the trial court did not make any findings regarding the customary fee for like work, plaintiff's attorney's expe-

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rience and ability, and the amount of time and labor expended. The trial court only stated that defendants had “presented evidence” on the issue, and then awarded “reasonable” fees and costs “necessarily incurred.” This is not a sufficient finding of fact to support the order or for this Court to determine whether the award was reasonable. Accordingly, the order is vacated and remanded for determination of the amount of the Rule 11 sanction.

[4] Finally, we consider whether the trial court committed reversible error in ordering sanctions against plaintiff because defendants’ Rule 11 motion was defective in failing to specify the bases for the motion. In their motion for sanctions, defendants’ asserted that all three prongs of Rule 11 were violated. Plaintiff argues that “[i]t is obvious that the Defendants’ Motion would have to be based upon one or more of these prongs. But simply stating the obvious does not provide the necessary particularity required for Rule 11 motions.” Accordingly, plaintiff contends that they were denied adequate notice and were deprived of their due process rights and the Order should be vacated.

Defendants contend that “[p]laintiff’s position that due process requires more specific notice of the bases for which the motion sought sanctions is unsupportable.” Defendants argue that it should be “obvious to Plaintiff that the motion might seek sanctions on not just one or two, but all three of the bases allowed by Rule 11.” Defendants assert that its motion for sanctions stated the bases with sufficient particularity to give plaintiff an opportunity to prepare a defense, which plaintiff did. Accordingly, defendants argue that the order should be affirmed.

Defendants’ argument is persuasive. Defendants contended in their Rule 11 motion that the complaint was not well-grounded in fact; was not warranted by existing law, nor by a good faith argument for the extension, modification, or reversal of existing law; and, was interposed for the improper purpose of harassing defendants. We hold that these allegations were sufficient to put plaintiff on notice and allow plaintiff to prepare a defense, which plaintiff in fact did. Accordingly, the assignment of error is overruled.

In conclusion, the order is vacated as to McGarry. The order awarding sanctions against plaintiff is affirmed in part, but vacated and remanded in part for determination of the amount of the Rule 11 sanctions.

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Affirmed in part, vacated and remanded in part.

Judges JOHN and EDMUNDS concur.

JAMES DAVID LILLEY, PLAINTIFF, SHEILA LILLEY, INTERVENOR PLAINTIFF v. BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION, AND FLOYD S. PIKE ELECTRICAL CONTRACTOR, INCORPORATED, DEFENDANTS

No. COA97-1219

(Filed 18 May 1999)

**Negligence— installing utility poles—mountainous terrain—
inherently dangerous activity—activity not collateral—
knowledge by defendant**

Summary judgment was improperly granted for defendant Blue Ridge Electrical Membership Corporation in a negligence action arising from an injury suffered by plaintiff James Lilley while installing a utility pole in steep, mountainous terrain. Setting utility poles forty-five to fifty feet in length and weighing approximately one ton on rugged mountain terrain described as “straight up and down,” making it “difficult to stand or walk,” at a minimum presents a factual question of whether there is a recognizable and substantial danger inherent in the work. The case relied upon by defendant to argue that the injuries resulted from a collateral act, *Hooper v. Pizzagalli Construction Co.*, 112 NC App. 400, involved an underlying activity determined not to be inherently dangerous as a matter of law and the argument that Blue Ridge cannot be held liable because the contract did not describe or establish how the work was to be done contradicts the public policy behind the inherently dangerous activity doctrine. Finally, there was sufficiently forecast knowledge of the circumstances by Blue Ridge to survive summary judgment.

Appeal by plaintiff and intervenor plaintiff from order entered 3 July 1997 by Judge Melzer A. Morgan, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 21 May 1998.

Blanchard, Jenkins & Miller, P.A., by Robert O. Jenkins, and Cunningham & Gray, P.A., by George G. Cunningham, for plaintiff-appellant.

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George E. Francisco for intervenor plaintiff-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by David N. Allen, Josephine H. Hicks and John E. Grupp, for defendant-appellee Blue Ridge Electric Membership Corporation.

JOHN, Judge.

Plaintiff James David Lilley and his wife, intervenor plaintiff Sheila Lilley (plaintiffs), appeal the trial court's grant of summary judgment in favor of defendant Blue Ridge Electric Membership Corporation (Blue Ridge). For the reasons set forth below, we reverse the order of the trial court.

Pertinent factual and procedural information includes the following: Blue Ridge distributes electricity in Watauga County, North Carolina. In 1993, Blue Ridge began upgrading its distribution system in an area of the county known as Lost Ridge. Blue Ridge contracted with defendant Floyd S. Pike Electrical Contractor, Inc. (Pike), to perform work in connection with the project. Plaintiff was employed by Pike as a lineman.

Plaintiff's duties included digging holes in which to place wooden power distribution poles, guiding the poles to the holes, and setting the poles. The utility poles involved were approximately forty-five to fifty feet in length and weighed approximately one ton. The terrain on Lost Ridge was mountainous, being described by Pike's Safety Supervisor as essentially "straight up and down."

On 2 August 1994, plaintiff and other Pike employees were moving poles from their drop-off point to locations designated for installation. Plaintiff was attempting to guide a particular pole to its place using a rock bar, an eight foot long steel pole approximately one inch in diameter, as a winch around which a rope was wound. The rock bar was stuck in the ground at the base of a large rock, with plaintiff and two other employees holding the rock bar. As pressure from the winch was applied to the rope wound around the rock bar, the rope slid up the rock bar, bending the rock bar back. Ultimately, the rope slid off and the rock bar sprang back, striking plaintiff in the forehead and face. He suffered a fractured skull and frontal lobe injury which rendered him permanently and totally disabled.

Plaintiff filed the instant negligence action against Blue Ridge on 14 March 1996. His complaint was amended 3 June 1996 to include Pike as a defendant and add two additional claims. Intervenor plain-

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tiff's subsequent "Motion to Intervene" was allowed in an order filed 11 September 1996, and summary judgment was granted in favor of Blue Ridge in an order filed 3 July 1997. Plaintiffs timely appealed.

Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1990); *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). A summary judgment movant bears the burden of showing that

- (1) an essential element of plaintiff's claim is nonexistent;
- (2) plaintiff cannot produce evidence to support an essential element of its claim; or
- (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim.

Lyles v. City of Charlotte, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996). A court ruling upon a motion for summary judgment must view all the evidence in the light most favorable to the non-movant, accepting all its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). Plaintiff also correctly interjects that negligence actions are not frequently susceptible to summary judgment. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983).

The parties do not dispute that Pike was an independent contractor employed by Blue Ridge. It is well settled in this jurisdiction that

[g]enerally, one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work.

Woodson v. Rowland, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991). However, our Supreme Court has recognized an exception to this rule, in which

[o]ne who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others.

Id. at 352, 407 S.E.2d at 235. This duty is nondelegable when (1) the independent contractor is hired to perform an inherently dangerous

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activity and (2) the general contractor “knows or should know of the circumstances creating the danger.” *Dunleavy v. Yates Construction Co.*, 114 N.C. App. 196, 202, 442 S.E.2d 53, 56 (1994) (quoting *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 153, 416 S.E.2d 193, 197, *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992)). Thus, if the activity engaged in by plaintiff was inherently dangerous and Blue Ridge knew of the circumstances creating the danger, the latter would be charged with a non-delegable duty to “exercise due care to see that [plaintiff] . . . was provided a safe place in which to work and proper safeguards against any dangers as might be incident to the work.” *Woodson*, 329 N.C. at 357, 407 S.E.2d at 238.

In defining “inherently dangerous,” our Supreme Court stated “[i]t is not essential . . . that the work should involve a major hazard.” *Woodson*, 329 N.C. at 351, 407 S.E.2d at 235. Rather,

[i]t is sufficient if there is a recognizable and substantial *danger inherent in the work*, as distinguished from a *danger collaterally created* by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger.

Id. In addition, “inherently dangerous activities are susceptible to effective risk control through the use of adequate safety precautions.” *Id.* at 351, 407 S.E.2d at 234.

Thus, as a threshold matter, we must consider whether the activity engaged in by plaintiff was “inherently dangerous” as a matter of law. Blue Ridge maintains the trial court properly resolved this issue in the negative. Plaintiff disagrees, maintaining

it is a question of fact for a jury whether the work being performed by Pike Electric under subcontract from Blue Ridge Electric on August 2, 1994 was inherently dangerous.

Both parties cite *Woodson*. Discussing whether a trenching situation was inherently dangerous as a matter of law, the Court therein acknowledged

that in some cases such a determination [that an activity is inherently dangerous] can, as a matter of law be made. For example, *Evans* held as a matter of law that maintaining an open trench in a heavily populated area is inherently dangerous from the standpoint of the public, and the landowner who hired an independent contractor could be held liable for the injuries of a

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child who fell into the trench negligently left open by the independent contractor. . . .

Similarly, this Court has held as a matter of law that certain activities resulting in injury are not inherently dangerous. . . .

Despite the fact that some activities are always inherently dangerous while others may never be, unlike the dissenters, we do not believe every act can be defined as inherently dangerous or not, regardless of the attendant circumstances. Though bright-line rules are beneficial where appropriate, their usefulness can be limited. . . . Particular trenching situations . . . appropriately require a jury to decide the inherently dangerous issue.

Woodson, 329 N.C. at 353-54, 407 S.E.2d at 235-36. A survey of post-*Woodson* decisions reveals varied constructions of the foregoing language. See, e.g., *Simmons v. North Carolina Department of Transportation*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998) (“[w]hether an activity is inherently or intrinsically dangerous is a question of law”); *Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 757, 460 S.E.2d 356, 359, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 234 (1995) (“the practice of judicially determining that certain activities, as a matter of law, are inherently dangerous while others not, has since been rejected by our Supreme Court in *Woodson*”); *Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 406, 436 S.E.2d 145, 149-50 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994) (summary judgment properly granted, where, *inter alia*, “the work performed [plumbing] was not an inherently dangerous activity”).

We believe our Supreme Court’s holding in *Woodson* is properly summarized by Blue Ridge as follows:

In other words, there is a spectrum of activities, some of which are never inherently dangerous, as a matter of law, and some of which are always inherently dangerous, as a matter of law.

Mindful of our responsibility to follow Supreme Court decisions “until otherwise ordered” by that court, *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993), we therefore examine “the [instant] attendant circumstances,” *Woodson*, 329 N.C. at 353, 407 S.E.2d at 236, so as to determine their appropriate location on the spectrum. In doing so, we find ourselves unpersuaded that those circumstances fall squarely at either end of the spectrum.

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At the outset, we must observe that setting utility poles forty-five to fifty feet in length and weighing approximately one ton on a “rugged mountain terrain” described as “straight up and down,” making it “difficult to stand or walk,” strikes us, at a minimum, as presenting a factual question of whether “there is a recognizable and substantial danger inherent in the work.” *Woodson*, 329 N.C. at 351, 407 S.E.2d at 235. Blue Ridge responds by pointing to decisions from our courts holding that neither construction work, *see Vogh v. Geer*, 171 N.C. 672, 676, 88 S.E. 874, 876 (1916), nor working on a steep roof, *see Canady v. McLeod*, 116 N.C. App. 82, 88, 446 S.E.2d 879, 883, *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994), were inherently dangerous, and by asserting that setting utility poles consequently may not be characterized as inherently dangerous. Under the facts *sub judice*, we disagree and simply note that neither cited case takes into account the combination of the size and weight of the utility poles and treacherous terrain present herein.

Plaintiff also tendered affidavits of two expert witnesses who described the work being engaged in by plaintiff as inherently dangerous and who stated that the “[i]nherent dangers associated with [the] work could have been substantially eliminated had proper and adequate procedures and safety precautions been utilized.” *Cf. Woodson*, 329 N.C. at 351, 407 S.E.2d at 235 (“inherently dangerous activities are susceptible to effective risk control through the use of adequate safety precautions”). Further, plaintiff offered testimony from Blue Ridge and Pike employees tending to show that the safety of line work was dependent upon certain precautions being taken. In addition, plaintiff tendered Pike’s “New Employees Safety Training Meeting sheet” which stated, “Construction work is dangerous.” Finally, plaintiff produced Pike’s OSHA 200 forms for the years 1992-1996, wherein Pike supplied the Department of Labor a summary of Pike’s work-related injuries. While Blue Ridge takes issue with this evidence, we conclude that, taken in the light most favorable to plaintiff, plaintiff’s forecast of evidence was sufficient to establish a genuine issue of material fact as to whether the activity engaged in by plaintiff was inherently dangerous.

We find unpersuasive the assertion by Blue Ridge that *Simmons*, 128 N.C. App. 402, 496 S.E.2d 790, *Canady*, 116 N.C. App. 82, 446 S.E.2d 879, and *Hooper*, 112 N.C. App. 400, 436 S.E.2d 145, support the determination that the activity engaged in by plaintiff was not inherently dangerous as a matter of law. Each case is distinguishable.

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In *Simmons*, for example, this Court held the work in question was inherently dangerous as a matter of law. Moreover, the case relied upon in *Simmons* for its pronouncement that whether an activity is inherently or intrinsically dangerous is a question of law, *Dietz v. Jackson*, 57 N.C. App. 275, 280, 291 S.E.2d 282, 286 (1982), was a decision of this Court decided prior to *Woodson*. *Canady* may be distinguished in that the focus of the opinion was upon the failure of the evidentiary forecast “to qualify [the roofing activity] as an inherently dangerous activity.” *Canady*, 116 N.C. App. at 88, 446 S.E.2d at 883. Finally, while scaffolding constructed in conjunction with a plumbing job was held not to be inherently dangerous in *Hooper*, 112 N.C. App. at 406, 436 S.E.2d at 149, erecting large utility poles on a precipitously steep mountainside indisputably constitutes a different circumstance.

Blue Ridge also maintains that “plaintiff’s injuries were caused by an act totally collateral to the construction work on the Project.” Plaintiff’s injuries, the argument continues, were caused by the rebound of a “dangerously situated rock bar,” use of which was not specifically set out in the construction contract, and which was caused by “the collateral act of using a rock bar to guide the rope.”

Blue Ridge relies upon *Hooper* to sustain the foregoing argument, noting this Court therein held use of scaffolding by the plaintiff plumber was an act “purely collateral to the work and which ar[ose] entirely from the wrongful act of the independent contractor or his employees,” thereby precluding liability on the part of defendant general contractor. *Hooper*, 112 N.C. App. at 406, 436 S.E.2d at 149. However, in *Hooper*, the underlying activity, plumbing, was determined to be not inherently dangerous as a matter of law. It would be incongruous to hold a general contractor liable for an injury resulting from an act collateral to work which was not inherently dangerous. In the instant case, however, there is a genuine issue of material fact as to whether the activity was inherently dangerous.

Blue Ridge insists, however, that because “Blue Ridge did not instruct Pike on how to do the work” and “[t]he contract did not describe or establish how the work was to be done,” it cannot be held liable. This argument is unavailing and contradicts the public policy behind this well-settled exception to the general rule:

Imposition of this nondelegable duty of safety reflects “the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring

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others to perform them.” . . . By holding both an employer and its independent contractor responsible for injuries that may result from inherently dangerous activities, there is a greater likelihood that the safety precaution necessary to substantially eliminate the danger will be followed.

Woodson, 329 N.C. at 352-53, 407 S.E.2d at 235 (citations omitted).

Finally, Blue Ridge argues that were we to hold, as we have, that there is a genuine issue of material fact as to whether plaintiff's activity was inherently dangerous, summary judgment was nevertheless appropriately granted because plaintiff failed to show Blue Ridge had knowledge of the circumstances creating the danger. *See Dunleavy*, 114 N.C. App. at 202, 442 S.E.2d at 56. Again we disagree.

Blue Ridge focuses upon its knowledge of use of the rock bar, as opposed to its knowledge of setting poles on steep terrain, such as Lost Ridge, and relies upon *Dunleavy*, 114 N.C. App. 196, 442 S.E.2d 53. In *Dunleavy*, the general contractor “did not know that [the independent contractor] . . . had commenced its work at the site.” *Id.* at 203, 442 S.E.2d at 56.

By contrast, plaintiff's evidence at the hearing conducted below tended to show the following: Blue Ridge planned the project and designed its power line to run over the steep and difficult terrain of Lost Ridge. Given its knowledge of the topography, Blue Ridge is chargeable for purposes of summary judgment with an awareness based upon experience and common sense that the ability of workers installing utility poles to stand and use their regular equipment at Lost Ridge would, at a minimum, be significantly challenged. Moreover, Gerald Huffman, a Field Construction Supervisor with Blue Ridge, testified he had visited the Lost Ridge work site when winching activity was taking place the morning of the accident because the crews were “scattered out.” At least one other Blue Ridge employee testified he “would have known [the] status of [the Pike crew] more than likely whatever day it was.” Taking this evidence in the light most favorable to plaintiff, *see Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, we believe it sufficiently forecast knowledge on the part of Blue Ridge so as to survive summary judgment.

Reversed.

Judges McGEE and HORTON concur.

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[133 N.C. App. 264 (1999)]

STATE OF NORTH CAROLINA v. RANDY LAMONT JARRELL

No. COA98-691

(Filed 18 May 1999)

1. Rape— sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of first-degree rape of an eight-year-old child at the close of the State's evidence. Contradictions and discrepancies in the evidence are for the jury to resolve.

2. Discovery— letter written by defendant—defendant not permitted to inspect and copy—letter not in possession of State

The trial court did not err in a prosecution for the first-degree rape of an eight-year-old child by allowing testimony concerning a letter written by defendant to the victim's mother where defendant contended that the use of the letter violated N.C.G.S. § 15A-903, which states that the defendant must be permitted to inspect and copy any relevant written statement made by defendant in the possession, custody, or control of the State. The letter was never in the State's possession and defendant made no showing that the mother destroyed the letter in bad faith. Other testimony about the letter only corroborated the mother's testimony.

3. Discovery— rape—slides from medical examination—discovered during trial

The trial court did not err in a prosecution for the first-degree rape of an eight-year-old child by admitting slides depicting the medical examination of the victim even though the slides had not been provided in response to defendant's discovery request. The State did not know about the slides until defendant elicited the information from a doctor during cross-examination and the court permitted defendant to view the slides during a break.

4. Indictment and Information— statutory rape—date of offenses—bill of particulars denied

The trial court did not err in a prosecution for taking indecent liberties and statutory rape by denying defendant's motion for a bill of particulars as to the dates of the offenses where the indictments alleged that the rapes were "on or about December, 1995," "on or about January 1996," and "on or between February 1 and

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14, 1996.” The indictments listed the month and year that each offense was alleged to have occurred and sufficiently complied with N.C.G.S. § 15A-924(a)(4) by charging that the offense occurred during a designated period of time.

Appeal by defendant from judgment entered 2 February 1998 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 18 March 1999.

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

Chut & Chut, P.A., by Mercedes O. Chut, for defendant-appellant.

WALKER, Judge.

On 2 February 1998, defendant was convicted of taking indecent liberties with a child and two counts of first-degree statutory rape. The trial court consolidated the indecent liberties conviction with one of the first-degree statutory rape convictions and imposed a minimum term of 307 months and a maximum term of 378 months in prison. For the remaining first-degree statutory rape conviction, the trial court imposed a minimum term of 307 months and a maximum term of 378 months to run consecutively.

The State’s evidence tended to show the following: N.W. testified that she was now ten years old and in the fourth grade. Defendant was her mother’s boyfriend who stayed at their house sometimes. She stated that there were times when she stayed alone with defendant in the house. After she turned eight years of age on 4 April 1995, defendant began sexually abusing her. N.W. described the area where defendant touched her as her “privacy.” She illustrated her description by circling the area where defendant touched her on a female diagram with a marker. She described one incident where defendant touched her downstairs in the house while she was laying on the couch and her mother was upstairs taking a shower. She testified that defendant touched her underneath her clothes with his “privacy” which he put into her “privacy” and moved around. She also described a second incident where she was upstairs in her “night clothes” lying in her mother’s bed when her mother was not home and defendant came up there. He pulled down his clothes and started to “feel” her with “his privacy.” Then, he put his “privacy” into her “privacy” and kept doing it over and over again. Later, N.W. told her

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mother what defendant had been doing to her and her mother told her not to tell anyone.

Deborah Wilson, N.W.'s mother, testified that she had dated defendant on and off for six years. Defendant lived with them between November 1995 and February 1996 and he often babysat N.W. She stated that N.W. told her what defendant was doing to her and that she called the police. Wilson also testified that she received a letter from defendant in July of 1996 in which he asked to be forgiven, but he did not specify for what he wanted to be forgiven. She showed the letter to Pam Watkins of the Guilford County Department of Social Services and then later threw it away.

Detective Mike J. Ledford testified that Wilson came to the police department on 19 February 1996 to report that her daughter had been sexually molested by her live-in boyfriend. He contacted Social Services and then arranged an interview with N.W. at her elementary school where she told him that defendant had touched her in "her privacy" a "whole lot of times." She told him that it happened both upstairs and downstairs at her mother's house. He also interviewed her a second time after he was informed by Social Services that N.W. had disclosed that penetration had occurred. He subsequently arrested defendant.

Watkins testified that she was assigned the case involving N.W. on 3 July 1996. N.W. told her that defendant would touch her underneath her clothes and digitally penetrate her and "mess" with her. N.W. also told her that she had trouble sleeping.

Kimberly Madden, a counselor who works with Dr. Angela Stanley at Moses Cone Hospital in the Child Evaluation Clinic, testified that she interviewed N.W. on 9 November 1996. N.W. indicated on a female diagram with a marker where defendant touched her and with what part of his body. N.W. indicated that defendant touched her on her genitals with his hands. N.W. told her that "it burned" when she went to the bathroom. N.W. had a very anxious demeanor throughout the interview and would suck her fingers and hang her head.

Dr. Angela Stanley, a pediatrician at Moses Cone Hospital who does evaluations of children who are suspected of being abused or neglected, testified that she performed a physical examination on N.W. on 9 September 1996 and also interviewed Wilson. She found that N.W. "had a lot of irregularities of her hymen." Her physical examination supported N.W.'s statements that she had been pene-

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trated. After her examination, Dr. Stanley determined that it was “probable” and not “definite” that there was “a penetrating injury” although there was no complete disruption of the hymen or evidence of a sexually transmitted disease.

Defendant presented evidence which included his testimony and that of his sister and his girlfriend. Defendant’s sister, Juana Massey, testified that as long as she had known N.W. she sucked her fingers and hung her head. Defendant’s girlfriend, Sharon Terry, testified that after his arrest she permitted defendant to babysit her nine and ten-year-old daughters.

Defendant testified that he helped raise N.W. from the time she was five years old and that he did not touch her inappropriately. He said that N.W. loved him like a father.

On appeal, defendant contends that the trial court erred (1) in denying his motion to dismiss based on the insufficiency of the evidence; (2) in admitting testimony of Wilson and Dr. Stanley about the contents of a letter written by defendant; (3) in admitting slides depicting the medical examination of N.W.; (4) in denying defendant’s motion for a bill of particulars; and (5) in admitting testimony by Dr. Stanley about statements made to her by Madden.

[1] First, defendant contends that the trial court erred in denying defendant’s motion to dismiss at the close of the State’s evidence. Defendant argues that the evidence presented was insufficient to support the charges of first-degree rape pursuant to N.C. Gen. Stat. § 14-27.2(a)(1) (Cum. Supp. 1998) which provides as follows:

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(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.

When considering a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference which may be drawn. *State v. Overton*, 60 N.C. App. 1, 26, 298 S.E.2d 695, 710 (1982), *appeal dismissed and disc. review denied*, 307 N.C. 580, 299 S.E.2d 652-53 (1983). The State is still “required to produce substantial evidence more than a scintilla to prove the allegations in the bill of indictment.” *Id.*

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In reviewing the evidence in the light most favorable to the State, the record shows that there was substantial evidence in this case that defendant committed the crimes charged. N.W. gave testimony in which she described at least two separate incidents where defendant penetrated her with his penis and also touched her on her private parts. Testimony was also given by N.W.'s mother, as well as the police detective, social worker, and counselor, all of whom interviewed N.W. and relayed similar accounts as to what defendant had done to her. Furthermore, Dr. Stanley stated that based on her findings and observations, N.W.'s vagina had been penetrated on one or more occasions. In *State v. Green*, 95 N.C. App. 558, 562-63, 383 S.E.2d 419, 421-22 (1989), this Court held that a child's testimony along with corroborative evidence from the child's mother, a police detective and a doctor who testified that the findings from his physical examination were "compatible with penile penetration" was sufficient evidence to uphold the trial court's denial of defendant's motion to dismiss the first-degree rape charge. This Court came to the same conclusion in a similar case where the victim's testimony was supported by medical evidence of penetration and there was corroborating evidence by a police officer, social worker, and the victim's foster mother, who testified to statements made to them by the victim and her behavioral patterns. *State v. Dick*, 126 N.C. App. 312, 318, 485 S.E.2d 88, 91, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997).

Defendant argues that N.W.'s testimony was contradictory and that Dr. Stanley's testimony was ambivalent. However, contradictions and discrepancies in the evidence presented are for the jury to resolve and do not warrant a dismissal of a case. *State v. Spangler*, 314 N.C. 374, 383, 333 S.E.2d 722, 728 (1985). Defendant also contends that this case is similar to *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961) and *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 (1984), where our Supreme Court found that there was insufficient evidence to convict the defendant of the first-degree rape of a child. However, in *Whittemore*, 255 N.C. at 586, 122 S.E.2d at 398, the victim never testified as to actual penetration by the defendant and there was no medical evidence of such. In *Robinson*, 310 N.C. at 534, 313 S.E.2d at 574, the child never described an act of sexual intercourse and the medical evidence presented only stated that the vaginal injury in the child "could" have been caused by a male sex organ. Therefore, we find this assignment of error to be without merit.

[2] Next, defendant argues that the court erred in allowing testimony by Wilson and Dr. Stanley about the contents of a letter written by

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defendant. Defendant contends this was in violation of N.C. Gen. Stat. § 15A-903 (1997), which states that the defendant must be permitted to inspect and copy or photograph any relevant written statement made by the defendant which is in the possession, custody, or control of the State.

Here, the letter received by Wilson was never in the State's possession. Wilson testified that she had destroyed the letter from defendant. Thus, the State did not violate N.C. Gen. Stat. § 15A-903(a)(1). Pursuant to N.C. Gen. Stat. § 8C-1, Rule 1004 (1992), an original of a document is not required as evidence of its contents if the original is lost or destroyed unless the proponent lost or destroyed it in bad faith. The defendant made no showing that Wilson destroyed the letter in bad faith.

In addition, defendant argues that the trial court should not have allowed testimony about the letter because its prejudicial effect outweighed its probative value pursuant to N.C.R. Evid. 403. The determination of whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). The trial court's decision will not be disturbed absent a showing of a manifest abuse of discretion. *State v. Smith*, 130 N.C. App. 71, 76, 502 S.E.2d 390, 394 (1998). The defendant has failed to show that the trial court abused its discretion in admitting testimony concerning the letter as there is no evidence that any prejudicial effect the letter may have had was outweighed by its probative value.

Defendant objects to Dr. Stanley's testimony concerning the contents of the letter as being inadmissible hearsay. Defendant also contends that if it were admitted, the trial court should have given a limiting instruction that it could only be used for corroborative purposes. A trial court's ruling as it relates to an evidentiary point will be presumed to be correct unless the appealing party can show that the particular ruling was incorrect. *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988). Even if the appealing party can show that the trial court erred, relief will ordinarily not be granted unless there is a showing of prejudice. *Id.* The erroneous admission of hearsay, like the erroneous admission of any other evidence, "is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986).

Here, even if it is assumed *arguendo* that allowing Dr. Stanley to testify as to the contents of the letter was erroneous, the defendant

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has not shown how it was prejudicial. Testimony as to the content of the letter was properly admitted when Wilson testified. Dr. Stanley only corroborated Wilson's testimony. Therefore, we find this assignment of error to be without merit.

[3] Next, defendant argues that the trial court erred in admitting slides depicting the medical examination of N.W. Defendant contends that because the slides may have contained exculpatory information, the State violated a constitutional duty by not allowing defendant to examine them before trial. The record shows the State did not know about the slides until defendant elicited this fact from Dr. Stanley in his cross-examination of her when she revealed that she had photographic slides made during N.W.'s examination. Prior to allowing the State to question Dr. Stanley on redirect about the slides, the trial court heard arguments from defendant that the slides had not been provided in response to his discovery request. The State indicated it was not aware of the existence of the slides until Dr. Stanley's testimony. The trial court then permitted the defendant to view the slides during the break.

On a defendant's motion, the results of physical examinations "within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may be known to the prosecutor" are required to be disclosed. N.C. Gen. Stat. § 15A-903(e) (1997). Since the State was unaware of the existence of the slides and the fact that defendant was permitted to view them prior to the conclusion of the evidence, we conclude the trial court did not err.

[4] Defendant next argues that the trial court erred in denying defendant's motion for a bill of particulars. Defendant contends that the identification of the dates of the offenses on the indictments was not precise enough and thereby violated N.C. Gen. Stat. § 15A-924(a)(4). The dates on the three indictments for statutory rape were "on or about December, 1995," "on or about January 1996," and "on or between February 1 and 14, 1996." Whether or not to grant a motion for a bill of particulars is within the discretion of the trial court and its denial of the motion will be reversed only on a showing of an abuse of discretion. *State v. Cameron*, 283 N.C. 191, 194, 195 S.E.2d 481, 483 (1973).

According to N.C. Gen. Stat. § 15A-924(a)(4) (1997), a criminal pleading must contain:

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A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

Our Supreme Court has held that in cases involving sexual abuse of children that “in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child’s uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence.” *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984). The failure to state a definite time for the offense will not result in a nonsuit “when there is sufficient evidence that defendant committed each essential act of the offense.” *Id.* This Court recently held that the indictments were sufficiently specific pursuant to N.C. Gen. Stat. § 15A-924(a)(4) where the date of the offenses of first-degree statutory sexual offense of a female child under 13 and taking indecent liberties with a child was “January 1, 1994 through September 12, 1994.” *State v. Blackmon*, 130 N.C. App. 692, 696-97, 507 S.E.2d 42, 44-46, *cert. denied*, 349 N.C. 531, —, S.E.2d —, — (1998). Here, defendant’s indictments listed the month and year that each offense was alleged to have occurred. We conclude these indictments sufficiently comply with N.C. Gen. Stat. § 15A-924(a)(4) by charging the offense occurred during a designated period of time. Thus, we find this assignment of error to be without merit.

We have carefully reviewed defendant’s remaining assignment of error and find it to be without merit. The defendant received a fair trial free of prejudicial error.

No error.

Judges JOHN and McGEE concur.

IN RE T.S.

[133 N.C. App. 272 (1999)]

IN THE MATTER OF T.S., JUVENILE

No. COA98-928

(Filed 18 May 1999)

Indecent Liberties— children’s statute—intent—sufficiency of evidence

The trial court erred in the prosecution of a nine-year-old for taking indecent liberties against a three-year-old under N.C.G.S. § 14-202.2 by denying defendant’s motion to dismiss where the State’s evidence was insufficient to support a finding of purpose. Although intent may be inferred from the act itself under the adult statute, sexual ambitions must not be assigned to a child’s actions without some evidence of the child’s maturity, intent, experience, or other factor indicating his purpose in acting. Although the record includes scant evidence of respondent’s purpose, there was testimony that respondent was mimicking behavior he had seen by others and there is no evidence indicating that he acted for the purpose of arousing or gratifying sexual desires.

Appeal by respondent from order entered 12 March 1998 by Judge Russell G. Sherrill, III, in Wake County District Court, Juvenile Session. Heard in the Court of Appeals 21 April 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Sarah Y. Meacham, for the State.

James R. Ansley for Respondent-appellant.

LEWIS, Judge.

Respondent was charged on 31 December 1997 in a juvenile petition with violation of N.C. Gen. Stat. § 14-202.2 (Cum. Supp. 1998). The petition alleged that “on or about the 17th day of August 1997, the child unlawfully and willfully did commit a lewd and lascivious act upon the body of [the victim] . . . for the purpose of arousing and gratifying sexual desire.” At the time of the offense, respondent was nine years of age and the victim was three. The petition alleged that by virtue of this crime, respondent was a delinquent child as defined by N.C. Gen. Stat. § 7A-517(12) (Cum. Supp. 1998).

The matter was heard on 12 March 1998, and respondent pled “not responsible.” No record was made of the proceedings, but the

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summary of evidence as provided in the record indicates that the victim's mother, a neighbor, and a Cary police officer testified for the State. Quotes are from the evidence as summarized and agreed to by the parties. The State's evidence indicated that on 17 August 1997, the victim's family watched a NASCAR race on television at the home of respondent's neighbors. The victim's mother testified that the children played outside for several hours, and after returning home the victim told her "something funny happened today." The mother further testified that her son told her that respondent told him to pull his pants down and sucked his "pee-pee." The victim's mother testified she called a friend, B., to discuss what her son had told her. B. was a neighbor of respondent who had ongoing problems with respondent's family. B. told the victim's mother to ask the child specifically "if (respondent) touched his pee-pee." B. then confronted respondent and respondent's father. B. testified that respondent denied and then admitted the act, saying he had seen other boys in the neighborhood "do this type of thing." Respondent's father contacted the Cary Police Department.

Officer Guthrie of the Cary Police Department testified that respondent was quiet and shy, and that respondent stated that he "sucked" the younger boy's penis. He further testified that respondent said he had seen other children "doing it" in the woods. Officer Guthrie asked respondent how many times "this" had happened before, and respondent answered "two times," including the alleged incident. When Officer Guthrie asked the victim if respondent sucked his "pee pee," the victim pointed to his pants. The victim told Officer Guthrie that "this" had never happened before.

Respondent presented evidence. Respondent's father testified that respondent never said he "sucked the boy's penis." Another neighbor testified that respondent had not previously behaved in a manner to indicate "this type of action." Detective Tingen of the Cary Police Department investigated the incident. He testified that respondent made no admissions to him during the course of interviews conducted both with and without respondent's father present.

At the close of the State's evidence and again at the close of all evidence, respondent moved to dismiss for the State's failure to prove all elements of the charge in the petition. Specifically, respondent asserted that the State had produced no evidence that the act was "for the purpose of arousing or gratifying sexual desire." Both motions

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were denied. The trial court found the following facts, in their entirety:

Respondent contested the allegation. From evidence presented, the Court found beyond a reasonable doubt that respondent committed the act alleged.

Based on these findings of fact, the trial court concluded as a matter of law, "said juvenile [was] within [the court's] juvenile jurisdiction as Delinquent [sic]."

Respondent argues three assignments of error. He alleges that the trial court erred in denying his motion to dismiss, first at the close of the State's evidence and second at the close of all evidence. Finally, he alleges that the trial court erred in its conclusion of law that the juvenile was responsible, because each element was not proved beyond a reasonable doubt. The assignments of error have a common basis, that the State has failed to show the act was committed for the purpose of arousing or gratifying respondent's sexual desire.

This is the first time the "Indecent liberties between children" statute (hereinafter "Children's statute") has reached our Court. The statute provides:

(a) A person who is under the age of 16 years is guilty of taking indecent liberties with children if the person either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire.

(b) A violation of this section is punishable as a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-202.2 (Cum. Supp. 1998). The adult version of this crime, N.C. Gen. Stat. § 14-202.1 (1993) (hereinafter "Adult statute"), applies to individuals over age 16 and at least five years older than the child victim. The Children's statute act requirements in sections (1)

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and (2) are identical to provisions of the Adult statute, except the Children's statute denotes an additional requirement that a lewd or lascivious act under (a)(2), like an immoral, improper, or indecent liberty under (a)(1), also be for the purpose of sexual arousal or gratification. Language requiring such purpose is present in the Adult statute under only (a)(1). Therefore, the essential elements of indecent liberties between children under G.S. 14-202.2(a)(2) are: (1) a perpetrator under age 16; (2) who willfully commits or attempts a lewd or lascivious act upon the body of a child; (3) where the child is at least three years younger than the perpetrator; (4) for the purpose of arousing or gratifying sexual desire. *Cf. State v. Rhodes*, 321 N.C. 102, 104, 361 S.E.2d 578, 580 (1987) (listing essential elements for adult indecent liberties conviction).

In a juvenile hearing, the evidence presented is evaluated using the same standards as in an adult criminal proceeding. *See In re Cousin*, 93 N.C. App. 224, 225, 377 S.E.2d 275, 276 (1989). In reviewing a motion to dismiss, the evidence is viewed in the light most favorable to the State. *See In re Stowe*, 118 N.C. App. 662, 664, 456 S.E.2d 336, 337 (1995). If a rational trier of fact could find every element of the crime beyond a reasonable doubt from the evidence presented, a motion to dismiss is properly denied in juvenile court just as in adult criminal proceedings. *See id.* at 664, 456 S.E.2d at 337-38. However, as in adult proceedings, if the evidence does not support each element of the crime, the charge must be dismissed. *See In re Alexander*, 8 N.C. App. 517, 520, 174 S.E.2d 664, 666 (1970) (holding nonsuit "no less required in a case in which a juvenile is involved" than it would be in a case against an adult when evidence is insufficient).

Although not present in the summary, both parties agree that respondent was nine years old and the victim was three years old at the time of the incident. While there is sufficient, though hearsay, evidence to support that the act in fact occurred, there is no evidence indicating that respondent acted for the purpose of arousing or gratifying his sexual desires. The State asserts that although no direct evidence of respondent's purpose of arousal or sexual gratification was presented, such intent should be inferred from the very act itself, as has been done in certain of our cases interpreting the Adult statute. *See e.g., Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580 (allowing defendant's act of intercourse to support inference of purpose to arouse or gratify); *State v. Connell*, 127 N.C. App. 685, 690, 493 S.E.2d 292, 295 (1997) (allowing evidence of defendant touching victim's genitals and

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defendant's later exculpatory statements to support inference that he intended to satisfy his sexual desires), *disc. review denied*, 347 N.C. 579, 502 S.E.2d 602 (1998); *State v. Jones*, 89 N.C. App. 584, 598, 367 S.E.2d 139, 147 (1988) (holding that evidence that defendant took victim to an isolated room and touched her genitals was sufficient to infer he acted for the purpose of arousing or gratifying his sexual desires). We agree that intent is seldom provable through direct evidence. See *State v. Creech*, 128 N.C. App. 592, 598, 495 S.E.2d 752, 756, *disc. review denied*, 348 N.C. 285, 501 S.E.2d 921 (1998). However, we do not believe that intent to arouse or gratify sexual desires may be inferred in children under the same standard used to infer sexual purpose to adults.

The trial summary provided in the record includes scant evidence of respondent's purpose in performing fellatio. There was testimony that respondent was mimicking behavior he had seen by others in the woods. The State urges that Officer Guthrie's testimony that respondent told him this act had occurred twice indicates the nine year old had a purpose to arouse or gratify his sexual desires. We do not know whether, when, or with whom the first act took place. The State's conclusory argument ignores that *both* alleged incidents may have been without the purpose to arouse or gratify. If such were the case, there is no evidence of an essential element of the crime.

Furthermore, we are persuaded by the plain language of the statute that the purpose to arouse or gratify sexual desires should not be inferred from the act alone between children. The legislature could have merely lowered the age requirements in the Adult statute if it intended the two classes of indecent liberties perpetrators, children and adults, to receive equal consideration. Instead, an entirely new statute was enacted, and the clause "for the purpose of arousing or gratifying sexual desire" was added in (a)(2) in the Children's statute where it does not appear in the Adult statute. We believe that this addition indicates a legislative recognition that a lewd act by adult standards may be innocent between children, and unless there is a showing of the child's sexual intent in committing such an act, it is not a crime under G.S. 14-202.2.

We note that civil courts also treat adults and children differently when applying presumptions. Our courts presume that a child of respondent's age is incapable of negligence. *Bell v. Page*, 271 N.C. 396, 400, 156 S.E.2d 711, 715 (1967) (holding that there is a rebuttable presumption that a person between ages seven and fourteen is inca-

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pable of contributory negligence). The child's discretion, maturity, knowledge, and experience interact in rebutting the presumption. See *Hoots v. Beeson*, 272 N.C. 644, 649, 159 S.E.2d 16, 20 (1968). It would be incongruous to presume that because of his age respondent is incapable of negligence in his actions, and yet presume that in spite of his age respondent had or sought to arouse sexual desires by his actions. We will not put words in the Legislative mouth by saying a presumption exists here. That branch can speak for itself.

Accordingly, we hold that without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting, sexual ambitions must not be assigned to a child's actions. Adults can and should be presumed to know the nature and consequences of their acts; this is not always the case with children. The common law recognizes this in its age distinctions for negligence liability, and the General Assembly recognized this when it insisted that sexual purpose be shown under *both* sections of the Children's statute.

We are not asked to and do not hold that a nine year old is incapable of acting for the purpose of arousing or gratifying his sexual desires. We have no evidence on this question. We do not believe, however, that the State may rest on an allegation of the act alone between, for example, a four year old and a one year old, to infer sexual purpose. We hold that the element "for the purpose of arousing or gratifying sexual desire" may not be inferred solely from the act itself under G.S. 14-202.2. The evidence presented by the State in respondent's case was insufficient to support a finding of the element of purpose. The motions to dismiss should have been granted at the conclusion of the State's case or after all the evidence. We need not reach respondent's third assignment of error.

Reversed and remanded for entry of order of dismissal.

Judges TIMMONS-GOODSON and HORTON concur.

DEESE v. CHAMPION INT'L CORP.

[133 N.C. App. 278 (1999)]

BRACY DEESE, EMPLOYEE, PLAINTIFF v. CHAMPION INTERNATIONAL CORPORATION, EMPLOYER (SELF-INSURED), DEFENDANT AND SEDGWICK JAMES OF THE CAROLINAS, ADMINISTRATOR, DEFENDANTS

No. COA97-1581

(Filed 18 May 1999)

1. Workers' Compensation— review of deputy commissioner's credibility determination—evidence insufficient

Reconsidering 131 N.C. App. 299 on remand from the North Carolina Supreme Court, the Court of Appeals held that the Industrial Commission erred by reversing the determination of the deputy commissioner that plaintiff had regained his wage earning capacity and that defendants should be permitted to terminate benefits where defendants presented evidence that plaintiff was actively engaged in an automobile sales business. Under *Adams v. AVX Corp.*, 349 N.C.676, the Commission is not required to demonstrate that sufficient consideration was paid to the fact that credibility may best be judged by a first-hand observer and the Commission is the sole judge of the credibility of witnesses and the weight to be given testimony. In finding this plaintiff's testimony that he was not involved in an auto sales business credible, the Commission based its determination on statements made by plaintiff to his psychologist and his rehabilitation nurse and a corroborating statement made by plaintiff's wife; however, those statements were made in 1992 and in early January 1994 and were not relevant to the Commission's credibility determination because plaintiff did not become involved in the auto sales business until February 1994.

2. Workers' Compensation— disability—determination—post-injury earning capacity

The relevant factor in assessing disability is the plaintiff's post-injury earning capacity rather than the actual wages earned.

Appeal by defendants from Opinion and Award entered 4 September 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 1998.

The Supreme Court remanded this case from a unanimous decision of the Court of Appeals, 131 N.C. App. 299, 506 S.E.2d 734 (1998) reversing and remanding the decision of the Commission for reconsideration in light of *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d

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411 (1998). The following opinion replaces the opinion filed on 3 November 1998.

John A. Mraz, P.A., by John A. Mraz, for plaintiff-appellee.

Robinson & Lawing, L.L.P., by Jane C. Jackson and Jolinda J. Steinbacher, for defendants-appellants.

WALKER, Judge.

On 4 August 1989, plaintiff injured his back lifting a box of plugs while employed at defendant's paper mill. Defendant admitted liability and a Form 21 agreement was approved by the Industrial Commission on 16 January 1990.

Since the injury, plaintiff has had four back surgeries. The first two were performed in 1989 by Dr. Steven Stranges and the last two were performed by Dr. Todd Chapman of the Miller Orthopaedic Clinic. Following the last surgery, Dr. Chapman continued to see plaintiff in 1992 and 1993. Dr. Chapman released plaintiff in October 1993 to return as needed. He determined that plaintiff had a thirty percent impairment of the spine and that he could not return to his job with defendant or any job requiring manual labor or prolonged standing.

In addition, beginning on 1 September 1992, plaintiff was treated by Dr. Joshua Miller of the Southeastern Pain Clinic who prescribed various medications for plaintiff's back pain. At that time, plaintiff also began treatment with Dr. Walter J. Lawless, a clinical psychologist, who concluded that plaintiff suffered from depression and anxiety. On 5 March 1993, due to his improvement, plaintiff was released from Dr. Lawless' care.

In February 1994, plaintiff applied for a motor vehicle dealership license so he could start a used car sales business with his brother. The business operated as Deese's Auto Sales from February through May 1994 when plaintiff signed over his interest in vehicles owned by Deese's Auto Sales to his wife, Judith Deese. She then opened a used car business under the name of J & J Auto Sales which continued to do business until late 1994 or early 1995. Mr. William Gregory, a private investigator hired by defendants, conducted surveillance and recorded it on videotapes which showed plaintiff on the premises of J & J Auto Sales on a number of occasions during August and September 1994.

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On 12 December 1994, defendants filed a Form 24 to terminate plaintiff's benefits which they supported with documents and videotapes of plaintiff's activities. Plaintiff filed no response to the application to terminate his benefits and on 13 February 1995, the Commission entered an order terminating benefits as of 15 February 1994.

After a hearing, the deputy commissioner found that plaintiff was actively engaged in the sale of automobiles at J & J Auto Sales; however, he did not report any of this activity to either defendant-employer or their servicing agent. In addition, the deputy commissioner's findings included the following:

17. The investigator, William Gregory, conducted surveillance and recorded it on videotapes which show plaintiff present at J & J Auto Sales on every occasion surveillance was conducted there in 1994. The videotapes depict plaintiff inspecting vehicles, including looking under the hood, talking with customers, and working in the office. At times, plaintiff was the only person present on the premises, clearly indicating he was running the business that day.

18. As shown on the videotapes, and as supported by David Goode's testimony, the work at Deese's Auto Sales was not strenuous and was consistent with plaintiff's capabilities. David Goode testified that he was working at Deese's Auto Sales because he himself could no longer work at Deese's Bait due to a back problem and lifting restrictions. Goode was able to do the sales work at the auto dealership.

19. In addition to the surveillance, William Gregory spoke with David Goode over the phone to ask about the price of a vehicle on J & J's lot. Mr. Goode said he would need to check with the owner and identified Bracy Deese as the owner of the dealership. Mr. Gregory also visited J & J Auto Sales and spoke with Mr. Goode, who told him he worked for Bracy Deese.

20. The business records of J & J Auto Sales also indicate plaintiff's involvement. On October 15, 1994, plaintiff signed a check from the business account of J & J Auto Sales to Linda's Auto Sales for "cars". Notations on other checks for the account dated July 5, 1994, indicate plaintiff was involved in purchasing other items for the business, specifically a motor and a jeep.

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21. At the hearing, plaintiff denied involvement in auto sales, but could not explain why he secured a dealership license in his name. The plaintiff also had attempted to operate these businesses without the knowledge of the defendants. Plaintiff never mentioned either business to the defendants or to any of his treating physicians until after he learned that his activities had been videotaped.

22. The videotapes are significant in that they shed light on the plaintiff's veracity. The plaintiff's attempts to operate these businesses without the knowledge of the defendants, coupled with the contradiction of his testimony by the videos are circumstances the undersigned finds significant in assessing the plaintiff's propensity for truth. In view of the documentary evidence and videotape evidence, the undersigned finds plaintiff's testimony that he was not involved in vehicle sales to be unbelievable.

Based on these findings, the deputy commissioner concluded that as of February 1994, defendants had shown that plaintiff regained his wage earning capacity and were permitted to terminate his benefits as of 15 February 1994.

On appeal, the Commission, with one commissioner dissenting, rejected the findings of the deputy commissioner and awarded plaintiff temporary total benefits. Included in the findings of the Commission are the following:

17. The Deputy Commissioner in this matter found plaintiff's testimony regarding his association with his brother's car business and his later investment in said business was not credible. The Deputy Commissioner found that plaintiff had attempted to keep his involvement with the car business hidden from defendant and that plaintiff had never mentioned his involvement to any of his treating physicians until after he learned that his activities had been videotaped.

18. Despite the Deputy Commissioner's first hand observations of the witness at hearing, the Full Commission finds that plaintiff's testimony regarding his association with his brother's car business and his later investment in said business to be credible for the following reasons: plaintiff informed Dr. Lawless that he had been spending some time with his brother at his brother's car dealership; plaintiff's statements to Dr. Lawless are corroborated by statements to Dr. Lawless by plaintiff's wife; Ms. Donna

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Kropelnicki, the rehabilitation nurse assigned by defendant to plaintiff's case, had knowledge of the fact that plaintiff was attempting to get out of his house and that he had been frequently visiting his brother's business, and; it was only after Ms. Kropelnicki reported these activities to defendant that the later videotapes were taken.

21. As the result of his 4 August 1989 injury by accident, plaintiff has been unable to earn wages in his former employment with defendant or in any other employment from 15 February 1994 through the present and continuing.

[1] Defendants contend the Commission erred in improperly disregarding the credibility determination of the deputy commissioner and failing to give reasons for the reversal of that determination.

A review of decisions by the Commission is limited to whether the findings of fact are supported by any competent evidence and whether those findings support the legal conclusions. *Perry v. Furniture Co.*, 296 N.C. 88, 92, 249 S.E.2d 397, 400 (1978). This Court can go no further than to determine whether the record contains any evidence tending to support such findings. *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). Those findings are binding on appeal if any competent evidence exists to support them even where evidence exists to support contrary findings. *Carroll v. Burlington Industries*, 81 N.C. App. 384, 387-88, 344 S.E.2d 287, 289 (1986), *aff'd*, 319 N.C. 395, 354 S.E.2d 237 (1987). The Commission's legal conclusions are reviewable on appeal to determine if they are justified by the findings of fact. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 128-29, 468 S.E.2d 283, 285-86, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996).

In *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), the Supreme Court asserted that if there is any competent evidence within the record to support the Commission's findings of fact, such findings are conclusive on appeal. In addition, the Court held that "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.'" *Id.* at 681, 509 S.E.2d at 413-14 (*quoting Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 641,

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478 S.E.2d 223, 226 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997)). “The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Id.* at 680, 509 S.E.2d at 413 (*quoting Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)).

Here, after receiving evidence and viewing surveillance videotapes, the deputy commissioner determined plaintiff was involved in the auto sales business beginning with his obtaining a dealer license in February 1994. The deputy commissioner then found plaintiff’s testimony that he was not involved in the auto sales business not to be credible.

In finding the plaintiff’s testimony to be credible, the Commission based its determination on statements made by the plaintiff to his psychologist, Dr. Lawless, and to his rehabilitation nurse, Ms. Kropelnicki. However, plaintiff’s statement that he was “spending some time” at his brother’s car dealership was, according to testimony at the hearing, made to Dr. Lawless in 1992, as was the corroborating statement made by plaintiff’s wife to Dr. Lawless. In addition, the statement made by plaintiff to Ms. Kropelnicki that he was visiting his brother’s car lot was made in early January 1994. We fail to see how these statements were relevant to the Commission’s credibility determination as plaintiff did not become involved in the auto sales business until February 1994.

Thus, since this was the only finding to support the Commission’s determination that defendant was credible, we conclude there was insufficient evidence to support such a finding. Further there was competent evidence in the record that beginning in February 1994 plaintiff applied for and received business permits and licenses in his name; signed business checks; was identified as the business owner by employees; and was videotaped managing the business and performing a variety of tasks at the business on a number of occasions. Plaintiff later transferred the assets of the business into his wife’s name although she had no experience in this type of business, held a non-related job elsewhere, and never actively worked at this business.

In accepted claims where the plaintiff received benefits, the plaintiff is relieved of the initial burden of proving disability. *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436, *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). The presumption of continuing total disability may be rebutted “by showing

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the employee's capacity to earn the same wages as before the injury or by showing the employee's capacity to earn lesser wages than before the injury." *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 330, 477 S.E.2d 197, 202 (1996). The burden is on the defendants to show that plaintiff is employable by proving: (a) that suitable jobs are available for the plaintiff; (b) that taking into account physical and vocational limitations, the plaintiff is capable of obtaining such jobs; and (c) that the jobs would enable the plaintiff to earn wages. *Id.* at 330, 477 S.E.2d at 202-03. If the employer offers evidence sufficient to meet this burden, then the plaintiff has the burden to show continuing disability by offering evidence in support of a continuing disability or evidence to prove a permanent partial disability. *Id.* at 331, 477 S.E.2d at 203. In this case, defendants have met their burden of showing that plaintiff has wage earning capacity by presenting evidence that plaintiff is able to work in the auto sales business. Thus, on remand to the Commission, the burden shifts to plaintiff to show that he continues to be disabled. See *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 209, 472 S.E.2d 382, 388 (Walker, J., concurring), *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996); N.C. Gen. Stat. §§ 97-29 and 30 (1991).

[2] Next, defendants contend the Commission should have applied the standard required by N.C. Gen. Stat. § 97-2(9) of plaintiff's wage earning capacity rather than his actual wages. In order for plaintiff to continue to receive temporary total disability he must be "disabled." Disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (Cum. Supp. 1998).

The plaintiff's post-injury earning capacity rather than his actual wages earned is the relevant factor in assessing the disability. *McGee v. Estes Express Lines*, 125 N.C. App. 298, 300, 480 S.E.2d 416, 418 (1997); *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

This case is remanded to the Commission for further proceedings consistent with this opinion.

Remanded.

Chief Judge EAGLES and Judge MARTIN concur.

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[133 N.C. App. 285 (1999)]

TRACEY KYLES BROOKER, PLAINTIFF v. CHRISTOPHER CHARLES BROOKER
DEFENDANT

No. COA98-867

(Filed 18 May 1999)

1. Child Support, Custody, and Visitation— child support—venue—motion for change denied—no abuse of discretion

The trial court did not abuse its discretion in a child support modification proceeding by denying a motion for change of venue where the original child support order was filed in Iredell County and defendant contended in his motion to transfer that he had relocated to Forsyth County and that plaintiff had relocated to Wilkes County. Iredell is essentially located between Forsyth County and Wilkes County and is in relatively close proximity to both.

2. Child Support, Custody, and Visitation— child support—modification—changed circumstances—findings

The trial court properly concluded that a substantial change in circumstances existed justifying modification of a child support order where the court's findings that the needs of the minor child and the needs of the plaintiff to support the child had increased were amply supported by undisputed evidence.

3. Child Support, Custody, and Visitation— child support—modification—deviation from Guidelines

A trial court order modifying child support was remanded for findings concerning the reasonable needs of the child, the relative ability of the parents to support the child, and a determination of whether a variation from the Guidelines is appropriate on those grounds.

Appeal by defendant from order filed 20 February 1998 by Judge Jimmy L. Myers, in Iredell County District Court. Heard in the Court of Appeals 27 April 1999.

Homesley, Jones, Gaines, Homesley & Dudley, by L. Ragan Dudley, for plaintiff-appellee.

Morrow Alexander Tash Long & Kurtz, by C.R. "Skip" Long, Jr., for defendant-appellant.

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[133 N.C. App. 285 (1999)]

GREENE, Judge.

Christopher Charles Brooker (Defendant) appeals from the trial court's order increasing his child support obligation from \$250.00 to \$446.00 per month.

Defendant and Tracey Kyles Brooker (Plaintiff) were married on 29 July 1989 and divorced on 25 March 1996. On 5 November 1993, one minor child was born of the marriage. The Iredell County District Court entered a consent judgment on 13 December 1995 in which Defendant agreed to pay child support in the amount of \$250.00 per month.

On or about 8 April 1997, Plaintiff filed a motion, in Iredell County District Court, for an increase in Defendant's child support obligation. Defendant subsequently filed notice that "he intends to request a continued deviation from the child-support guidelines, and it will therefore be necessary to inquire as to the parties' reasonable living expenses as well as to the child's reasonable needs." In addition, Defendant filed a motion for change of venue on the grounds that "plaintiff is now a resident of Wilkes County, while defendant is a resident of Forsyth County," noting that "neither party nor the minor child [currently] resides in Iredell County."

Because tapes of the hearings on the parties' motions were deemed unuseable, the parties prepared a narrative statement of the testimony presented at the hearings for the record on appeal. *See* N.C. R. App. P. 9(c)(1). The record, including this narrative statement, reveals that Plaintiff and the minor child lived with Plaintiff's grandmother when the consent judgment setting child support was entered. At that time, Plaintiff earned approximately \$1,190.00 (net) per month. From this amount, Plaintiff paid her grandmother \$100.00 per month for rent and paid "about \$35.00" per month in "grocery and school" expenses for the minor child. In addition, her grandmother provided daycare for the minor child. Since that time, however, Plaintiff's net monthly income has increased to \$1,415.00 per month; in addition, she receives coaching supplements in the amount of \$700.00 per semester. Plaintiff and the minor child have moved out of her grandmother's home, and Plaintiff's rent is now \$270.00 per month. Plaintiff's grocery bills, at the time of the hearing, were \$90.00 per month, and the minor child's daycare expenses were \$65.00 per month. In addition, "the minor child is now becoming involved in recreation department activities that costs [sic] between \$35.00 and \$50.00 per month."

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The record reveals that Defendant's income at the time of the consent judgment was "substantial," but does not reveal the actual amount. Defendant testified that his current gross income is \$28,296.00, and that he "now has a roommate with whom he share[s] expenses." Defendant calculated his total monthly expenses (including the existing \$250.00 child support obligation) at \$1,915.00.

After hearing all the evidence presented by the parties, the Iredell County District Court made the following pertinent findings of fact:

4. That on or about the 13th day of December, 1995, the parties entered into a Consent Judgment filed in the District Court Division, Iredell County, North Carolina; and that said Consent Judgment established jurisdiction before this court and retained jurisdiction over the parties and subject matter herein

5. That since entry of the prior Order, the plaintiff has moved to Wilkes County, and the defendant has moved to Forsyth County; and that Iredell County is the most convenient forum for witnesses and the parties and the minor child.

6. That there has been a substantial change of circumstances with respect to the needs of the minor child and the needs of the plaintiff to support the minor child since the aforesaid Consent Judgment was entered; that over two years have passed during which time the defendant and the plaintiff have received salary increases so that the defendant's gross salary is \$28,296.00 and the plaintiff's gross salary, including supplements, is \$29,412.00; and that the defendant's financial situation is now more stable than the date of the entry of the Consent Judgment as based upon the testimony and affidavits of the parties.

. . . .

8. That the minor child is now 4 years old and has advanced in age so that her needs have greatly increased as based upon testimony of the plaintiff and the plaintiff's affidavit.

9. . . . [T]hat there is a deviation [between Defendant's current child support payment and the] existing North Carolina Child Support Guidelines [(Guidelines)] of 78 percent.

The trial court made no specific findings as to the actual expenses of Plaintiff and/or the parties' minor child. The trial court did, however, make a detailed finding as to Defendant's expenses and found some of Defendant's claimed expenses to be either "unnecessary," "exorbi-

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tant,” or unverified. The trial court was “not persuaded by the evidence of the defendant that the defendant is unable to meet the calculated child support obligation in the amount [of] \$446.00 per month.”

Based on its findings, the trial court concluded that “there exist a substantial changes [sic] in circumstances warranting a modification of the prior Consent Judgment of this Court.” The trial court further concluded that Defendant “has failed to overcome the presumption of the [Guidelines] and is not entitled to a deviation therefrom.” Accordingly, the trial court entered an order on 20 February 1998 denying Defendant’s motion for a change of venue and increasing Defendant’s child support obligation to \$446.00 per month pursuant to the Guidelines.

The issues are whether: (I) the trial court abused its discretion in denying Defendant’s motion for a change of venue; (II) the trial court’s findings of fact support the conclusion of law that changed circumstances exist; and (III) the trial court made sufficient findings of fact to deny Defendant’s request for deviation from the Guidelines.

I

[1] Where custody and support have been determined by the trial court and a party seeks modification of the custody and support order, “the court first obtaining jurisdiction retains jurisdiction to the exclusion of all other courts and is the only proper court to bring an action for the modification of an order establishing custody and support.” *Tate v. Tate*, 9 N.C. App. 681, 682-83, 177 S.E.2d 455, 457 (1970). That court may, in its discretion, enter an order transferring venue to another court for the convenience of the parties, the convenience of the witnesses, and/or in the best interest of the child. *Broyhill v. Broyhill*, 81 N.C. App. 147, 149, 343 S.E.2d 605, 606 (1986).

In this case, the original child support order was filed in Iredell County District Court. Iredell County District Court is therefore the proper forum for motions to modify that order. In his motion to transfer, Defendant contended he had relocated to Forsyth County and Plaintiff had relocated to Wilkes County. Iredell County is, essentially, located between Forsyth County and Wilkes County and is in relatively close proximity to both. Accordingly, the trial court did not abuse its discretion by denying Defendant’s motion to transfer venue to Forsyth County based on its determination that the Iredell County District Court remained the most convenient forum.

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II

[2] An existing child support order may not be modified absent a showing of changed circumstances. N.C.G.S. § 50-13.7(a) (1995). The determination of whether changed circumstances exist is a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (noting that any determination requiring the exercise of judgment or the application of legal principles is a conclusion of law); *cf. Wiggs v. Wiggs*, 128 N.C. App. 512, 514, 495 S.E.2d 401, 403 (changed circumstances determination is a conclusion of law in custody cases), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998); *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) (changed circumstances determination is a conclusion of law in alimony cases). Where the moving party is relying on either an increase or decrease in the child's needs to establish changed circumstances, she has the burden of "showing the child's expenses both at the time the original support order was entered and at the present time." *Davis v. Risley*, 104 N.C. App. 798, 800, 411 S.E.2d 171, 173 (1991). There is no need for the trial court to make specific, or evidentiary, findings of fact reciting the child's past and present expenses.¹ The trial court is required, however, to make ultimate findings necessary to resolve material disputes in the evidence. The trial court is likewise required to make an ultimate finding as to whether the needs of the child have increased or decreased since entry of the prior order to support a changed circumstances conclusion on that ground.

In this case, the trial court found that "the needs of the minor child and the needs of the plaintiff to support the minor child [had increased] since the aforesaid Consent Judgment was entered," and that the minor child's needs "have greatly increased." These ultimate findings support the conclusion that changed circumstances exist, and are themselves amply supported by undisputed evidence revealing that daycare expenses for the minor child have increased by

1. We note that cases decided prior to the imposition of the presumptive Guidelines required the trial court to "make findings of specific fact on the actual past expenditures for the minor child, the present reasonable expenses of the minor child, and the parties' relative abilities to pay" prior to modifying an existing child support order. *See, e.g., Mullen v. Mullen*, 79 N.C. App. 627, 630, 339 S.E.2d 838, 840 (1986); *Norton v. Norton*, 76 N.C. App. 213, 216, 332 S.E.2d 724, 727 (1985). This requirement must be read in light of the then-existing statutory structure allowing trial courts to set child support amounts in their discretion based on the particular facts of each case. Specific findings were not necessary, even then, to support the trial court's changed circumstances conclusion; rather, specific findings were required for effective appellate review of the discretionary child support amount.

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\$65.00 per month, recreation expenses for the minor child have increased by \$35.00 to \$50.00 per month, and the amount Plaintiff must expend for rent and groceries has increased from \$135.00 to \$360.00 per month. Accordingly, the trial court properly concluded that a substantial change in circumstances exists justifying modification of the child support order.

We note that the trial court's finding that Defendant's initial child support obligation deviated from the current Guidelines by 78 percent is irrelevant and cannot support the conclusion that changed circumstances existed, because less than three years had elapsed since entry of the consent judgment setting Defendant's child support obligation. *See* Child Support Guidelines, 1999 Ann. R. N.C. 34 ("If the order is less than three years old, this presumption [of a substantial change in circumstances based on a 15 percent deviation from the Guidelines] does not apply."); *Wiggs*, 128 N.C. App. at 515-16, 495 S.E.2d at 404. In cases where such a finding was the trial court's only finding supporting a conclusion of changed circumstances, we would be required to reverse. In this case, however, the trial court's finding that the child's needs have "greatly increased" amply supports the conclusion that changed circumstances exist. *See Self v. Self*, 55 N.C. App. 651, 654, 286 S.E.2d 579, 582 (1982) ("When findings which are supported by competent evidence are sufficient to support a judgment, the judgment will not be disturbed on the ground that another finding, which does not affect the conclusion, [is erroneous].").

III

[3] Once changed circumstances have been shown, the trial court should "compute the appropriate amount of child support" pursuant to the Guidelines then in effect. *Hammill v. Cusack*, 118 N.C. App. 82, 86, 453 S.E.2d 539, 542, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). The child support amounts provided in the Guidelines are presumptive, N.C.G.S. § 50-13.4(c1) (Supp. 1998); Child Support Guidelines, 1999 Ann. R. N.C. 32; therefore, the trial court is generally not "required to take any evidence, make any findings of fact, or enter any conclusions of law 'relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support'" in setting the support amount, *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991) (quoting § 50-13.4(c)). "[U]pon the request of any party [for a deviation from the Guidelines, however,] the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child

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for support and the relative ability of each parent to provide support.” N.C.G.S. § 50-13.4(c); *Browne*, 101 N.C. App. at 623, 400 S.E.2d at 740. If the trial court “finds by the greater weight of the evidence that the application of the [G]uidelines would not meet or would exceed the reasonable needs of the child . . . or would be otherwise unjust or inappropriate,” then it may deviate from the Guidelines. N.C.G.S. § 50-13.4(c); Child Support Guidelines, 1999 Ann. R. N.C. 32 (“The Court may deviate from the Guidelines in cases where application would be inequitable to one of the parties or to the child(ren).”). This deviation must likewise be supported by “findings of fact as to the criteria that justify varying from the [G]uidelines and the basis for the amount ordered.” N.C.G.S. § 50-13.4(c); Child Support Guidelines, 1999 Ann. R. N.C. 32 (“If the Court orders an amount other than the amount determined by application of the Guidelines, the Court must make written findings of fact that justify the deviation, that state the amount of the award which would have resulted from application of the Guidelines, and that justify the amount of support awarded by the Court.”).

In this case, Defendant requested a variation from the Guidelines. Although the trial court made findings as to the reasonableness of some of Defendant’s claimed expenses, it did not make findings as to the reasonable needs of the parties’ minor child or of the parties’ relative ability to provide support. *See Norton v. Norton*, 76 N.C. App. 213, 218, 332 S.E.2d 724, 728 (1985) (“[E]vidence of, and findings of fact on, the parties’ income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay.”). Such findings are required by section 50-13.4(c) upon a party’s request for a deviation from the Guidelines. Accordingly, we must remand the trial court’s modification order for findings concerning the reasonable needs of the child, the relative ability of the parents to support the child, and a determination of whether a variation from the Guidelines is appropriate on these grounds.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN and McGEE concur.

STATE v. FOREMAN

[133 N.C. App. 292 (1999)]

STATE OF NORTH CAROLINA v. KAREN SEAGLE FOREMAN

No. COA98-676

(Filed 18 May 1999)

1. Search and Seizure— avoidance of DWI checkpoint—auto-mobile followed—hiding in driveway—reasonable and articulable suspicion of criminal activity

There was a reasonable and articulable suspicion of criminal activity prior to defendant's seizure for driving while impaired where defendant made a quick left turn at the intersection immediately preceding a DWI checkpoint, an officer followed without engaging his siren or blue lights, the vehicle made a second abrupt left turn and parked in a residential driveway, the officer used his lights to see into the vehicle, defendant did not attempt to restart or exit the vehicle, all of its occupants remained "scrunched down" in the vehicle even though it was parked with its engine and lights off, the officer continuously watched the vehicle until backup arrived, and the occupants did not change positions. Although a legal left turn at an intersection immediately preceding a posted DWI checkpoint does not justify an investigatory stop without more, it is constitutionally permissible for officers to follow vehicles that legally avoid DWI check points and the defendant here was seized, at the earliest, when backup arrived. The objective facts the officer observed prior to the arrival of backup were sufficient to raise a reasonable and articulable suspicion of criminal activity.

2. Motor Vehicles— driving while impaired—defendant as driver—evidence sufficient

The trial court did not err in a DWI prosecution by denying defendant's motion to dismiss based upon insufficient evidence that she was the driver where an officer observed a small red vehicle making two turns, he found the vehicle in a residential driveway approximately forty-five seconds later, he pulled behind the vehicle and activated lights which enabled him to see inside the vehicle, he watched the individuals in the vehicle until backup arrived and they stayed in their respective positions, and defendant was sitting in the driver's seat with the keys in the ignition when officers subsequently approached the vehicle. These facts and the reasonable inferences drawn from them constitute substantial evidence that defendant was the driver of the vehicle.

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Appeal by defendant from judgment dated 25 February 1998 by Judge James E. Ragan, III, in Craven County Superior Court. Heard in the Court of Appeals 16 March 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Jonathan P. Babb, for the State.

William F. Ward, III, P.A., by William F. Ward, III, for defendant-appellant.

GREENE, Judge.

Karen Foreman (Defendant) appeals her conviction for driving while impaired (DWI).

Defendant received a DWI citation at 2:45 a.m. on 16 November 1996. Prior to trial, Defendant made a motion to suppress the evidence obtained during the investigatory stop of her vehicle on the grounds that the stop was unconstitutional. At a *voir dire* hearing on Defendant's motion, Officer Doug Ipock (Officer Ipock) testified that a DWI traffic enforcement checkpoint had been established on Neuse Boulevard on 16 November 1996. At the intersection of Neuse Boulevard and Midgette Road, which immediately preceded the DWI checkpoint, a large sign was posted reading "DWI Checkpoint Ahead." At approximately 2:00 a.m., Officer Ipock observed a "small red vehicle" traveling towards the DWI checkpoint on Neuse Boulevard. The vehicle "made an immediate left onto Midgette Avenue . . . right there at the [DWI Checkpoint Ahead] sign." Officer Ipock described the turn as a "quick left turn," but noted that he "did not observe anything illegal about the turn." At this point, he could not see who was driving the vehicle. Officer Ipock began to follow the small red vehicle, and was approximately thirty to forty-five yards behind it. Officer Ipock continuously observed the vehicle until it made a second left turn, "also quick and abrupt," onto Taylor Street, the first street intersecting Midgette Road. Officer Ipock briefly lost sight of the small red vehicle once it turned onto Taylor Street. Officer Ipock immediately followed onto Taylor Street, and drove about halfway down the block without crossing any intersecting roads and without seeing a moving vehicle.

I said to myself at that point in time there's no way the vehicle could have gotten all the way to the other end of Taylor Street before I would have been able to reacquire a visual sighting of it. So, therefore, I turned around on [Taylor Street, heading back

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towards Midgette Road,] and began checking each residence as I came down the road.

Approximately forty-five seconds after losing sight of the small red vehicle, Officer Ipock “spotted a red small compact car” parked in a residential driveway on Taylor Street. Officer Ipock “pulled in behind it and I then shined my bright lights on the vehicle and my takedown lights, at which time I then saw people that were scrunched down in the vehicle.”¹ The vehicle’s engine was not running, its lights were off, and the doors of the vehicle were closed. Officer Ipock radioed for backup, and remained in his vehicle continuously watching the small red vehicle until backup arrived less than two minutes later. The occupants remained “scrunched” or “ducked” down and did not change positions in the vehicle. After backup arrived, Officer Ipock approached the vehicle. Defendant was sitting in the driver’s seat of the vehicle, and the keys were still in the ignition. After hearing Officer Ipock’s testimony and the arguments of counsel, the trial court denied Defendant’s motion to suppress the evidence.

At trial, Officer Ipock offered substantially the same testimony as had been elicited during *voir dire*. He further testified that several open containers of alcohol were found in the vehicle once backup arrived, and that the vehicle emitted a “[s]trong odor of alcohol.” Officer Ipock testified that Defendant had a “strong to moderate” odor of alcohol about her person once she was removed from the vehicle.

Officer Kenneth Hunter (Officer Hunter) testified that he arrived at the driveway on Taylor Street in response to Officer Ipock’s call for backup. Officer Ipock “identified [Defendant] as the individual who had been behind the wheel of the car,” and asked Officer Hunter to check Defendant’s sobriety. Officer Hunter testified that Defendant had a “[v]ery strong odor of alcohol about her breath. She was unsteady on her feet.” Officer Hunter further testified:

Upon observing her and learning from Officer Ipock that she was behind the wheel of the car, I did not perform the standardized field sobriety test there at the scene, for two reasons. One, the driveway was not level. It was sloped. And the weather was somewhat cold, if I remember. It was a little chilly on the outside at that time of night. But based on my observations of her I arrested her for driving while impaired.

1. Officer Ipock explained that “takedown” lights are “spotlights that we have that we can illuminate a particular area.”

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When he arrived with Defendant at the police station, Officer Hunter asked Defendant to perform various standardized sobriety tests. He testified that Defendant could not maintain her balance and noticeably wobbled and swayed while trying to perform these tests. Defendant refused to undergo chemical analysis of her breath on an Intoxilyzer.

At the close of the State's evidence, Defendant made a motion to dismiss on the ground that the evidence was insufficient to show that Defendant was the driver of the small red vehicle. The trial court denied the motion. Defendant did not present any evidence.

The issues are whether: (I) Officer Ipock had a reasonable and articulable suspicion that Defendant was engaged in criminal activity prior to her seizure; and (II) there is substantial evidence that Defendant was the driver of the small red vehicle.

I

[1] For purposes of the Fourth Amendment, an "investigatory stop" is a seizure which must be supported by "a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *State v. Hendrickson*, 124 N.C. App. 150, 155, 476 S.E.2d 389, 392 (1996); see also *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893-94 (1980) (per curiam) (noting that "probable cause" is not constitutionally required for brief detentions short of arrest that are supported by a reasonable and articulable suspicion that the seized individual is engaged in criminal activity). Defendant first contends a legal left turn at the intersection immediately preceding a posted DWI checkpoint, without more, does not provide a reasonable and articulable suspicion that the driver is engaged in criminal activity. We agree.²

An individual may legally avoid contact with the police. *State v. Fleming*, 106 N.C. App. 165, 170-71, 415 S.E.2d 782, 785 (1992) (individuals walked "in a direction which led away from the group of officers"). This avoidance, standing alone, is not sufficient to raise a reasonable and articulable suspicion of criminal activity. *Id.*

[An individual] need not answer any question put to him [by an officer]; indeed he may decline to listen to the questions at all and

2. Several states have addressed whether avoidance of a DWI checkpoint is sufficient to justify an investigatory stop. See Robert L. Farb, *Does Avoiding License or DWI Checkpoint Support Reasonable Suspicion to Stop a Vehicle?*, N.C. Inst. of Gov't, Feb. 1999 (summarizing state cases).

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may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

State v. Farmer, 333 N.C. 172, 186, 424 S.E.2d 120, 128 (1993) (quoting *Florida v. Royer*, 460 U.S. 491, 498, 75 L. Ed. 2d 229, 236 (1983) (citations omitted)). Accordingly, a legal left turn at the intersection immediately preceding a posted DWI checkpoint, without more, does not justify an investigatory stop. We emphasize, however, that it is constitutionally permissible, and undoubtedly prudent, for officers to follow vehicles that legally avoid DWI checkpoints, in order to ascertain whether other factors exist which raise a reasonable and articulable suspicion that an occupant of the vehicle is engaged in criminal activity. See *California v. Hodari D.*, 499 U.S. 621, 628, 113 L. Ed. 2d 690, 698 (1991) (noting that a “police cruiser’s slow following of the defendant did not convey the message that he was not free to disregard the police and go about his business” and thus did not constitute seizure). Thus, if Defendant was seized solely based on a legal left turn preceding the DWI checkpoint, that seizure was unconstitutional.

Seizure occurs “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968). Police conduct does not constitute a seizure unless, in view of all of the circumstances, “‘a reasonable person would not feel free to decline the officer’s request or otherwise terminate the encounter.’” In other words, a seizure does not occur until there is a physical application of force or submission to a show of authority.” *State v. Cuevas*, 121 N.C. App. 553, 563, 468 S.E.2d 425, 431 (quoting *State v. West*, 119 N.C. App. 562, 566, 459 S.E.2d 55, 58, *appeal dismissed and disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995)), *disc. review denied*, 343 N.C. 309, 471 S.E.2d 77 (1996). For example, no seizure occurs when an officer approaches an individual in a public place and asks that individual questions. *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 586 (1994) (holding no seizure occurred where officer approached and questioned individual sitting in parked car); *Cuevas*, 121 N.C. App. at 563, 468 S.E.2d at 431 (holding no seizure occurred where officer followed taxicab and opened its door after it stopped because he did not order it to stop, did not engage his siren, and did not order defendant to stay in the taxicab).

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Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Farmer, 333 N.C. at 187, 424 S.E.2d at 129 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980)). A seizure does not occur, however, "when an officer shouts, 'Stop, in the name of the law,' and the person continues to flee. To constitute a seizure, there must be . . . a submission to the officer's show of authority ([i.e.,] the person stops as a result of the officer's command)." Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* at 286 (2d ed. 1992); see *Hodari D.*, 499 U.S. at 629, 113 L. Ed. 2d at 699 (holding officer's pursuit of defendant did not constitute seizure until officer tackled defendant).

In this case, when Officer Ipock began following Defendant's vehicle, he did not engage his sirens or his flashing blue lights, and he did not otherwise indicate that he was stopping the vehicle. After locating Defendant's vehicle parked in a driveway with its lights and engine off, Officer Ipock pulled behind it and turned on his "take-down" lights to enable him to see into the vehicle. Defendant did not attempt to restart or exit the vehicle. At that point, Defendant was not restrained by Officer Ipock and had not submitted to any show of authority, and a reasonable person would have felt free to terminate the encounter. Accordingly, Defendant was seized, at the very earliest, when backup arrived. See *Farmer*, 333 N.C. at 187, 424 S.E.2d at 129 (noting "the threatening presence of several officers" may constitute seizure).

In determining whether Officer Ipock had a reasonable and articulable suspicion that Defendant was engaged in criminal activity, therefore, we consider the objective facts Officer Ipock observed prior to the arrival of backup, the earliest point at which Defendant could have been seized. Prior to this point, Officer Ipock observed Defendant's vehicle make a "quick left turn" at the intersection immediately preceding a DWI checkpoint. Officer Ipock observed the vehicle make a second "abrupt" left turn, and then observed the vehicle parked in a residential driveway. The occupants remained in the vehicle even though the vehicle was parked with its engine and lights off. Finally, the occupants of the vehicle were "scrunched down." All of

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these facts were available to Officer Ipock before Defendant was seized, and these facts are sufficient to raise a reasonable and articulable suspicion of criminal activity.

II

[2] Defendant next contends the trial court erred in denying her motion to dismiss because the evidence was insufficient to establish that she was the driver of the small red vehicle.

A motion to dismiss should be denied if there is substantial evidence of each essential element of the charged offense and substantial evidence that the defendant is the individual who committed it. *State v. Stone*, 323 N.C. 447, 451, 373 S.E.2d 430, 433 (1988). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984)). The court must consider the evidence in the light most favorable to the State. *Id.* Furthermore, the State is entitled to every reasonable inference to be drawn from the evidence. *Id.* at 452, 373 S.E.2d at 433.

Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt.

Id. (citations omitted).

In this case, Officer Ipock observed a small red vehicle driving along Neuse Boulevard turn onto Midgette Road, and from there, onto Taylor Street. Officer Ipock found the small red vehicle in a residential driveway on Taylor Street approximately forty-five seconds later. When Officer Ipock pulled in behind the vehicle, he activated his vehicle's high beams and “takedown” lights, which enabled him to see inside the vehicle. Officer Ipock testified that he watched the individuals in the vehicle until backup arrived, and they stayed in their respective positions. When the officers subsequently approached the vehicle, Defendant was sitting in the driver's seat and the keys to the vehicle were in the ignition. These facts, along with the reasonable inferences drawn from these facts, constitute substantial evidence that Defendant was the driver of the small red vehicle when it was traveling on Neuse Boulevard, Midgette Road, and Taylor Street.

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Accordingly, the trial court did not err in refusing to dismiss the charges against Defendant.

We have thoroughly reviewed Defendant's remaining contentions and find them to be unpersuasive.

No error.

Judges LEWIS and HORTON concur.



R.D. BUCHANAN, C.W. CRABTREE, LARRY EASON, HOLLY FERRELL, AND TERESA PARRISH, PLAINTIFFS-APPELLANTS v. ALBERT L. HIGHT, SHERIFF OF DURHAM COUNTY, N.C., INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY, DEFENDANT-APPELLEE

No. COA98-838

(Filed 18 May 1999)

1. Employer and Employee— sheriff's deputies—termination of employment—breach of contract and due process claims—employment at will

The trial court did not err by granting judgment on the pleadings for defendant on contract and due process claims by several sheriff's deputies arising from the termination of their employment. Plaintiffs made no allegation that they were employed for a definite period of time or that they were exempted from the rule of employment-at-will by one of the well-established exceptions.

2. Public Officers and Employees— sheriff—termination of deputies—action in official capacity

The trial court did not err by granting judgment on the pleadings for defendant-sheriff on all claims in his individual capacity arising from the termination of the employment of several deputies. Although plaintiffs contend that the complaint alleges acts outside defendant's official duties, all of plaintiffs' allegations arise from their termination from the sheriff's department and they admit in their complaint that the sheriff retained final authority over employment decisions, which is given to the sheriff by statute. The terminations were within the official duties of the defendant.

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3. Civil Rights— 1983 action—termination of deputies' employment

The trial court did not err in an action arising from the termination of the employment of several sheriff's deputies by holding that defendant-sheriff was not subject to liability for monetary damages under 42 U.S.C. 1983. Under *Messick v. Catawba County*, 110 N.C. App. 707 and *Stade v. Vernon*, 110 N.C. App. 422, no recovery is available.

4. Constitutional Law—State— law of the land clause—sheriff's deputies—termination of employment

The trial court did not err by granting judgment on the pleadings for defendant-sheriff on claims under the Law of the Land Clause of the North Carolina Constitution in an action arising from the termination of employment of several sheriff's deputies where the plaintiffs lacked the requisite property interest in continued employment to trigger the protections afforded by the State Constitution.

Appeal by plaintiffs from an order entered 12 March 1998 by Judge E. Lynn Johnson in Durham County Superior Court. Heard in the Court of Appeals 25 February 1999.

Loflin & Loflin, by Ann F. Loflin, for plaintiffs-appellants.

Durham County Attorney's Office, by Assistant County Attorney Simoné Frier Alston, for defendant-appellee.

WALKER, Judge.

At the time of the commencement of this action, the five plaintiffs were former employees of the Durham County Sheriff's Department. Each had been terminated by defendant during the months of May and July 1993. All five plaintiffs brought claims seeking injunctive relief and monetary damages for breach of contract deriving from General Order 2.6, which provided for the right to appeal a termination to the Termination Review Board. The General Orders was a set of policies and instructions promulgated by the defendant sheriff as guidelines for the department. The plaintiffs also made claims for denial of due process under the Fourteenth Amendment to the United States Constitution, violation of 42 U.S.C. § 1983, and violation of Art. I, section 19 of the North Carolina Constitution arising out of their terminations. Plaintiffs Ferrell and Parrish brought additional claims

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of sexual discrimination under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §§ 1981a and 1983, and Art. I, sections 1 and 19 of the North Carolina Constitution. Defendant filed an answer on 10 March 1995 and an amended answer on 10 April 1995. In the amended answer, defendant denied the allegations and asserted the defenses of qualified immunity and governmental immunity. On 16 January 1998, defendant filed a motion for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c), which the trial court granted on 12 March 1998.

Judgment on the pleadings is proper where the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. *Trust Co. v. Elzey*, 26 N.C. App. 29, 214 S.E.2d 800, cert. denied, 288 N.C. 252, 217 S.E.2d 662 (1975). All allegations in the non-movant's pleadings except conclusions of law, legally impossible facts, and matters not admissible as evidence are admitted by the movant and all inferences are viewed in the light most favorable to the non-movant. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974).

Plaintiffs argue the following assignments of error: (1) whether the trial court erred in failing to substitute the defendant's successor as party defendant for the purpose of granting injunctive relief, (2) whether the trial court erred in finding that claims were not properly made against the defendant in his individual capacity, (3) whether the General Orders which defendant promulgated formed an employment contract with the plaintiffs from which they can derive injunctive and monetary relief, (4) whether the defendant can be sued in his official capacity under 42 U.S.C. § 1983, and (5) whether the plaintiffs properly stated claims under provisions of the North Carolina Constitution.

[1] Plaintiffs' first and third assignments of error are determined by whether a contract existed from which defendants may claim breach of contract and denial of due process rights. The trial court held that because the complaint did not allege a contract for a definite period, the plaintiffs were terminable at will, and that no property rights are derived from employment-at-will which can be deprived in violation of due process. Plaintiffs argue that the allegations in the complaint, construed liberally in favor of the plaintiffs, state sufficient facts to make valid claims for breach of contract and denial of due process.

North Carolina has embraced the employment-at-will doctrine. *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 331,

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493 S.E.2d 420, 422 (1997), *rehearing denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). In the absence of a contractual agreement establishing a definite term of employment, the relationship between employer and employee is presumed to be terminable at will. *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 480 S.E.2d 685, *rehearing denied*, 345 N.C. 761, 485 S.E.2d 299 (1997). Furthermore, N.C. Gen. Stat. § 153A-103 provides that a sheriff has the exclusive right to hire and discharge all employees within his department, emphasizing the employment-at-will nature of the employment contract within sheriffs' departments. N.C. Gen. Stat. § 153A-103 (1991).

In their complaint, plaintiffs made the following allegations:

9. Plaintiffs' employment at the Durham County Sheriff's Department at all times material hereto has been subject to a document known as the General Orders.

...

11. Paragraph 13 of General Order 2.6 granted terminated employees the right to appeal that termination of employment to a Termination Review Board. Under General Order 2.6, the Review Board conducts a hearing, [and] makes a recommendation to the Sheriff, *who has the final authority to accept or reject the recommendation*.

12. The Defendant Hight, in express violation of General Order 2.6, failed to procure a recommendation from the Review Board after a hearing held for each of the Plaintiffs and further failed to make a decision upon the evidence presented at the Review hearing for each Defendant [sic].

(Emphasis added).

Plaintiffs make no allegation that they were employed for a definite period of time or that they were exempted from the rule of employment-at-will by one of the well-established exceptions. *See Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 422 (exceptions include employment for a definite period, public policy justifications, and federal and statutory exceptions). Further, in paragraph 11, plaintiffs admit that the sheriff retained the final authority over termination decisions. In *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E.2d 357 (1987), our Supreme Court upheld the dismissal of a claim for wrongful termination against a former employer where the plaintiff failed to allege that the employment contract was not terminable at will. While

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plaintiffs claim that their employment was subject to the General Orders, their claim does not withstand defendant's motion for judgment on the pleadings in that their employment was terminable at will. Further, one whose contract for employment is terminable at will has no property interest in the employment which may form the basis for a denial of due process claim. *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 451, 368 S.E.2d 892, 894-95, *disc. review denied*, 323 N.C. 366, 373 S.E.2d 547 (1988). Thus, plaintiffs' first and third assignments of error are overruled.

[2] In their second assignment of error, plaintiffs contend the trial court erred by granting judgment for the defendant on all claims in his individual capacity. The trial court found that the acts alleged by plaintiffs were within the official duties of the defendant as sheriff and failed to state a claim against him in his individual capacity. Plaintiffs argue that *Trantham v. Lane*, 127 N.C. App. 304, 488 S.E.2d 625 (1997) is distinguishable and that the complaint alleges acts outside of defendant's official duties which establish a valid claim.

In *Trantham*, this Court held that the trial court erred in failing to dismiss claims against a deputy sheriff in his individual capacity. *Id.* The caption of the complaint stated individual capacity, but the substantive allegations related solely to actions undertaken as part of his official duties as a sheriff's deputy. *Id.*

If the plaintiff fails to advance any allegations in his or her complaint other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity, and instead, is treated as a claim against defendant in his official capacity.

Id. at 307, 488 S.E.2d at 628.

In this case, plaintiffs Ferrell and Parrish argue that the allegations of sexual discrimination occurred outside the scope of defendant's official duties. However, all of plaintiffs' allegations arise from their termination from the sheriff's department. Plaintiffs admit in their complaint that the sheriff retained final authority over employment decisions which the sheriff is given by statute. *See* N.C. Gen. Stat. § 153A-103 (1991).

Plaintiffs argue that *Epps v. Duke University*, 116 N.C. App. 305, 447 S.E.2d 444 (1994) requires a different result. In *Epps*, this Court, in ruling on the denial of a motion to dismiss, held that the plaintiffs had stated sufficient facts to place the defendant on notice that he

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was being sued in his individual capacity where the complaint did not specifically state the capacity in which defendant was sued. *Id.* In this case, on the basis of all the pleadings, the trial court held that although defendant was named in his individual capacity, the claims were within his official duties as sheriff and did not subject him to personal liability. We agree with the trial court that the terminations were within the official duties of the defendant, and this assignment of error is overruled.

[3] In their fourth assignment of error, plaintiffs contend the trial court erred by holding that the defendant was a “state official” and thus was not subject to liability under 42 U.S.C. § 1983. Plaintiffs argue that because sheriffs are elected by the voters of individual counties and because numerous statutes refer to the local powers of sheriffs, they are local officials. Plaintiffs cite *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991) as authority for that assertion. In *Hull*, this Court held that claims against a sheriff and deputies were properly instituted in superior court and were not required to be brought before the North Carolina Industrial Commission. *Id.* Here, plaintiffs’ arguments are not persuasive because the only two appellate decisions in this State decided since *Hull* and dealing with section 1983 as applied to sheriffs hold to the contrary.

In *Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 282, *rehearing denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), our Supreme Court held that when an action under 42 U.S.C. § 1983 seeking monetary damages is brought against “the State, its agencies, and/or its officials acting in their official capacities” in state court neither the State nor its officials are considered “persons” within the meaning of the statute. Thus, a claim under section 1983 cannot be made against those entities. This rule was applied to sheriffs by this Court in *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993) and *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993). In *Messick*, the plaintiff sued the defendant sheriff claiming section 1983 violations because of an investigation into sexual abuse charges which were later dismissed. 110 N.C. App. at 713, 431 S.E.2d at 493. Applying *Corum*, this Court held that because the plaintiff sought monetary damages, no recovery was available against the sheriff or the county. *Id.* In *Slade*, this Court held that a claim under section 1983 could not be maintained against a sheriff and jailers within his department

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because as “state officials” they were not “persons” within the meaning of the statute. 110 N.C. App. at 429, 429 S.E.2d at 748. Here, plaintiffs seek monetary damages for the alleged violations of section 1983; however, under *Messick* and *Slade* we conclude no recovery is available. *See, e.g., Corum*, 330 N.C. 761, 413 S.E.2d 276; *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 138 L. Ed. 2d 1 (1997); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989). This assignment of error is overruled.

[4] Finally, plaintiffs assign as error the trial court’s order allowing judgment on the pleadings for defendant on plaintiffs’ claims under Art. I, section 19 of the North Carolina Constitution. Plaintiffs argue that because the trial court granted judgment on the pleadings on all of their other claims, they lack an adequate state remedy such that they should be allowed to proceed directly with their claim under this State’s Constitution.

Art. I, section 19 of the North Carolina Constitution is commonly called the Law of the Land Clause and is considered the equivalent of the Due Process Clause of the United States Constitution. *Lorbacher v. Housing Authority of the City of Raleigh*, 127 N.C. App. 663, 674-75, 493 S.E.2d 74, 81 (1997). Where no adequate state remedy exists by statute for a violation of a constitutional right, redress is available through the common law. *Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E.2d 599 (1963), *overruled on other grounds, Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 304 S.E.2d 164 (1983). Thus, a direct claim under the North Carolina Constitution can be made where no other legal remedy is available. *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. However, in this case, plaintiffs lack “the requisite property interest in continued employment to trigger the protections afforded by our State Constitution.” *Lorbacher*, 127 N.C. App. at 675, 493 S.E.2d at 81; *see Peele*, 90 N.C. App. 447, 368 S.E.2d 892. Therefore, plaintiffs are not entitled to assert a direct due process claim under the North Carolina Constitution and this assignment of error is overruled.

For the reasons stated, the order of the trial court is

Affirmed.

Judges JOHN and McGEE concur.

MIDULLA v. HOWARD A. CAIN, INC.

[133 N.C. App. 306 (1999)]

JOSEPH D. MIDULLA AND WIFE, CHERI MIDULLA, PLAINTIFFS v.
HOWARD A. CAIN CO., INC., DEFENDANT

No. COA98-527

(Filed 18 May 1999)

Vendor and Purchaser— return of earnest money—unsatisfactory covenants and restrictions—good faith

Summary judgment was properly granted for plaintiffs in an action to recover an earnest money deposit paid for the purchase of a residence where plaintiffs informed defendants that they were exercising an option to cancel the purchase contract because covenants and restrictions were unsatisfactory and because of problems with the drainage on the property. An addendum to the purchase contract specifically provided that plaintiffs' offer was contingent on a review of covenants and restrictions and, while plaintiffs had a duty to act in good faith, defendant offered no evidence of bad faith. Conclusory statements alone cannot withstand a motion for summary judgment. While there may have been a dispute concerning the condition of the drainage system, that fact was not material because the contract gave plaintiffs the discretionary power to cancel if they were not satisfied with the covenants and restrictions.

Appeal by defendant from order entered 12 February 1998 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 January 1999.

Horack, Talley, Pharr & Lowndes, P.A., by D. Grier Martin, III and Robert B. McNeill, for plaintiffs-appellees.

Erwin and Bernhardt, P.A., by Fenton T. Erwin, Jr., for defendant-appellant.

TIMMONS-GOODSON, Judge.

General contractor, Howard A. Cain Co., Inc. ("defendant"), appeals from an order granting summary judgment for Joseph D. Midulla and Cheri Midulla (collectively "plaintiffs"). For the reasons stated herein, we affirm the order of the trial court.

Defendant built a large single-family residence. Plaintiffs desired to purchase the house from defendant and communicated their offer using the standard North Carolina Bar Association—Real Estate

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Commission Form ("Contract"). The parties also agreed to include several additional provisions as an Addendum to the Contract following lengthy negotiations. On 1 November 1996, defendant accepted the offer.

One of the additional provisions made the purchase contingent upon a "[r]eview of covenants and restrictions, the body of which are satisfactory to Buyer." Under another provision, defendant warranted "that there is no excessive water or unusual drainage under or around [the] house." The Contract required plaintiffs to provide a \$20,000.00 deposit to defendant. The Contract, in paragraph 1 of the Standard provisions, provided that "in the event that any of the conditions hereto are not satisfied" then "the earnest money shall be returned to Buyer."

Following construction of the residence, plaintiffs investigated the drainage on the property and discovered large amounts of standing water and blockage in a catch basin in the front of the property. Plaintiffs then decided to have the drainage system professionally inspected. The inspector recommended changing the down spouts and the catch basin from corrugated piping to PVC piping.

Plaintiffs also reviewed the covenants and restrictions. Plaintiffs thought the covenants and restrictions were too restrictive. In particular, plaintiffs believed several provisions of the covenants and restrictions exposed them to the risk of becoming obligated for payments in which they had an inadequate voice in approving.

Plaintiffs then asked defendant to replace the drainage pipes and kitchen cabinets. Plaintiffs also informed defendant of their concerns regarding the covenants and restrictions. Defendant informed plaintiffs that the company would not pay for the replacement of the kitchen cabinets or for the PVC pipe around the exterior of the house.

On 7 November 1996, plaintiffs informed defendant that they were exercising their option to cancel the Contract because the covenants and restrictions were unsatisfactory and because of problems with the drainage on the property. Defendant did not believe plaintiffs were canceling the Contract because the covenants and restrictions were unsatisfactory. Defendant refused to return to plaintiffs the \$20,000.00 earnest money deposit, believing that plaintiffs exercised their option to cancel the Contract only to avoid their contractual obligations.

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[133 N.C. App. 306 (1999)]

Plaintiffs filed this action to recover their earnest money deposit. Plaintiffs filed a motion for summary judgment on 26 January 1998. On 10 February 1998 summary judgment was granted for plaintiffs by the trial court. Defendant now appeals the order.

The sole issue on appeal is whether the trial court erred in granting summary judgment for plaintiffs. Defendant asserts two bases for assigning error to the trial court's order of summary judgment: (1) a genuine issue of material fact existed regarding plaintiffs' right to cancel the Contract; and (2) a genuine issue of fact was present concerning the drainage problem. For the reasons stated herein, we affirm the order of summary judgment for plaintiffs.

First, defendant argues that plaintiffs were not entitled to judgment as a matter of law because plaintiffs violated their implied duty to act in good faith when reviewing the Contract's covenants and restrictions. Plaintiffs counter that, while they acted in good faith in canceling the Contract with defendant, North Carolina law does not imply a duty of good faith when to do so would rewrite the express agreement between the parties.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c); *Toole v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 291, 294, 488 S.E.2d 833, 835 (1997). All of the evidence is viewed in the light most favorable to the non-moving party. *Garner v. Rentenbach Constructors, Inc.*, 129 N.C. App. 624, 627, 501 S.E.2d 83, 85 (1998). Once the moving party has met its burden, the non-moving party must "produce a forecast of evidence demonstrating that the [non-moving party] will be able to make out at least a prima facie case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

The right to contract is a property right which falls under the protection of the North Carolina and United States Constitutions. *Mark IV Beverage Inc. v. Molson Breweries USA*, 129 N.C. App. 476, 486, 500 S.E.2d 439, 446, *disc. review denied*, 349 N.C. 360, 515 S.E. 2d 705 (1998). Parties have the right to negotiate any type of contract as long as it is not contrary to law or public policy. *Fulcher v. Nelson*, 273 N.C. 221, 223, 159 S.E.2d 519, 521 (1968). When both parties consent to an enforceable contract each party is bound by its terms. *See*

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Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968). "Where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play." *Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E.2d 410, 414 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974).

In the instant case, the Addendum to the Contract specifically provided that plaintiffs' offer was contingent on a "[r]eview of covenants and restrictions, the body of which are satisfactory to Buyer." Therefore, plaintiffs had the discretion to cancel the Contract if they were not satisfied with the covenants and restrictions governing the area where the property was located. However, plaintiffs also had a duty to act in good faith. Defendant's only evidence of plaintiffs' bad faith was in the affidavit of Howard A. Cain ("Cain"), defendant's President. In his affidavit, Cain stated that he did not believe that plaintiffs canceled the Contract because they found the covenants and restrictions unsatisfactory. Cain asserted that plaintiffs canceled the Contract to avoid their contractual obligations. Defendant offered no evidence of plaintiffs' bad faith, but merely conclusory statements regarding his version of the truth. It is well-established that conclusory statements standing alone cannot withstand a motion for summary judgment. *Butler v. Berkeley*, 25 N.C. App. 325, 332, 213 S.E.2d 571, 575 (1975). We conclude that the evidence offered by defendant at the summary judgment hearing was insufficient to survive a motion for summary judgment. This assignment of error is overruled.

Defendant next argues that the trial court erred in entering summary judgment for plaintiffs because there were material issues of fact regarding whether a drainage problem existed. Plaintiffs admit that there were issues of fact regarding the drainage conditions but they assert there were no disputed issues of fact regarding plaintiffs' dissatisfaction with the covenants and restrictions. We agree with plaintiffs.

While the record shows that there may have been a factual dispute concerning the condition of the drainage system, we conclude that this fact was not material. The pertinent issue *sub judice* is whether plaintiffs had the right to exercise their option to cancel the Contract. Therefore, we only need to examine whether the circumstances of the instant case allowed plaintiffs to exercise their rights to cancel the Contract. The Contract gave plaintiffs the discretionary power to cancel the Contract if they were not satisfied with the

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covenants and restrictions. The record reflects that plaintiffs believed that “the covenants and restrictions exposed them to the risk of becoming obligated for payments in which they had an inadequate voice in approving.” Under the terms of the Contract, this would be an adequate reason to cancel the Contract. As previously discussed, there was no evidence to support defendant’s claim that plaintiffs’ cancellation of the Contract was done in bad faith.

Because no genuine issue of material fact exists, we conclude that summary judgment was properly entered in favor of plaintiffs and affirm the order of the trial court.

Affirmed.

Judges LEWIS and WALKER concur.

STATE OF NORTH CAROLINA v. CORNELIUS DION ROSS

No. COA98-467

(Filed 18 May 1999)

Kidnapping— second-degree—removal in connection with another felony

The trial court erred by denying defendant’s motion to dismiss a charge of second-degree kidnapping in a prosecution for armed robbery, conspiracy, and second-degree kidnapping. The evidence falls short of showing that the victim’s movement was a removal separate and apart from the armed robbery and defendant was not exposed to greater danger than that inherent in the armed robbery.

Appeal by defendant from judgments entered 31 October 1997 by Judge Coy E. Brewer, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 11 January 1999.

Attorney General Michael F. Easley, by Associate Attorney General Buren R. Shields, III, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

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McGEE, Judge.

The record in this case tends to show that on 25 December 1995 three men identified as Jackson, Wilkins and Bryant decided to rob George "Frank" Clark, Wilkins' acquaintance. They went to Wilkins' house in a car driven by Bryant to pick up a shotgun to use in the robbery. After they picked up the shotgun they stopped at a gas station, where Jackson telephoned defendant, Cornelius Dion Ross. Jackson, Wilkins and Bryant drove to defendant's house and picked him up. All four discussed plans for the proposed robbery. When they arrived at Clark's apartment, Jackson, Wilkins and defendant got out of the car, and Bryant remained in the car.

Clark was in his apartment with one of his co-workers, Mario Price. At approximately 8:00 p.m., Wilkins knocked on the door of Clark's apartment, determined that Clark was home, and asked to use the bathroom. Shortly thereafter, defendant and Jackson knocked on the door. Clark and Price went toward the door and one of them opened it. Defendant, standing in front of Jackson, asked if Wilkins had come in, and then asked, "Who is Frank?" to determine which occupant of the apartment was Clark. When Clark identified himself, defendant stepped aside, revealing Jackson, who was holding the shotgun. Jackson pointed the shotgun at Clark and Price and ordered them to step back and get down on the floor. Price backed up two or three steps and dropped to the floor in the apartment living room. Clark backed into the apartment kitchen, where he dropped to the floor. Defendant, meanwhile, closed the apartment door part way and apparently stood watch.

Jackson went into the kitchen where Clark was down on the floor and ordered Clark to take off his two rings and hand them over. Jackson then told Clark to take him to Clark's bedroom. In the bedroom, Jackson ordered Clark to get on the floor. Jackson then took money from a pair of Clark's trousers and also took a camcorder, a pager and a leather coat. Jackson called defendant to come into the bedroom. When defendant went to the bedroom door, Jackson tossed Clark's leather coat to defendant. Then Jackson, Wilkins and defendant fled the apartment.

Defendant was convicted of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon and second-degree kidnapping. He was sentenced to seventy-five to ninety-nine months on the armed robbery conviction, twenty-five to thirty-nine months on the conspiracy conviction and 25 to 39 months on the

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second-degree kidnapping conviction, with the sentences to be served consecutively. Defendant appeals.

During trial, defendant moved at the close of the State's evidence and at the close of all the evidence for dismissal of the second-degree kidnapping charge against him. Defendant assigns error to the trial court's denial of his motion to dismiss.

N.C. Gen. Stat. §§ 14-39(a)(2) and 14-39(b) (1998 Cum. Supp.) define second-degree kidnapping:

(a) Any person who shall unlawfully confine, restrain, or remove [another person] from one place to another . . . without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

...

(2) Facilitating the commission of any felony[.]

...

(b) . . . If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree[.]

Our appellate courts have applied the statute in a number of cases in which second-degree kidnapping has been charged in connection with the commission of another felony.

In *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), our Supreme Court stated:

[W]e construe the phrase "removal from one place to another" to require a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony. To permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy. In an armed robbery, for example, punishment for two offenses would be sanctioned if the victim was forced to walk a short distance towards the cash register or to move away from it to allow defendant access. Under such circumstances the victim is not exposed to greater danger than that

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inherent in the armed robbery itself, nor is he subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.

Id. at 103, 282 S.E.2d at 446 (citation omitted).

In *State v. Beatty*, 347 N.C. 555, 495 S.E.2d 367 (1998), our Supreme Court said, “The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping “exposed [the victim] to greater danger than that inherent in the armed robbery itself.” ” *Id.* at 559, 495 S.E.2d at 369-70 (citations omitted).

In considering a motion to dismiss, “[t]he evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.” *State v. Roseborough*, 344 N.C. 121, 126, 472 S.E.2d 763, 766 (1996) (citation omitted).

In the case before us, the defendant argues his actions in concert with Jackson did not amount to “a removal separate and apart” from the commission of the armed robbery. *Irwin* at 103, 282 S.E.2d at 446. The State argues that Jackson removed Clark from the apartment living room to the kitchen. However, the record does not support that assertion. The record indicates that, upon entering the apartment, Jackson pointed the shotgun at Clark and Price and ordered them to step away from the apartment door and get on the floor. Price backed up a few steps and dropped to the floor in the living room, while Clark backed into the apartment kitchen and dropped to the floor. The record contains no evidence that Jackson ordered Clark from the living room into the kitchen. Clark’s testimony was that he backed all the way into the kitchen when Jackson entered the apartment and ordered him and Price to back up and get on the floor. “[T]hat’s as far as I could back up,” Clark testified. The State’s evidence, taken in its strongest light, falls short of showing that Clark’s movement into the kitchen was a removal that was “separate and apart” from the armed robbery. *Irwin* at 103, 282 S.E.2d at 446.

Jackson followed Clark into the kitchen and ordered Clark to take him to Clark’s bedroom. In the bedroom, Jackson ordered Clark to the floor and then took money and other items from the bedroom. Defendant argues that Jackson’s action ordering Clark into the bedroom was an “inherent” part of the armed robbery. *Irwin* at 103, 282 S.E.2d at 446.

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Clark was the particular target of the robbery, and he was ordered into his bedroom as part of the robbery. Clark testified that while the two men were in the bedroom, Jackson asked Clark where he had his money. Clark responded that some money was in the pocket of trousers lying on the bedroom floor, and Jackson took the money from the trousers. While the two men were in the bedroom, Jackson also took the other items noted above. Further, the record contains no evidence suggesting that the removal of Clark to his bedroom as part of the robbery “exposed [him] to greater danger than that inherent in the armed robbery itself.” *Beatty* at 559, 495 S.E.2d at 369 (citations omitted).

The State argues that the facts before us are similar to those in *State v. Joyce*, 104 N.C. App. 558, 410 S.E.2d 516 (1991), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992), an armed robbery case in which our Court upheld the trial court’s refusal to dismiss second-degree kidnapping charges. We disagree. In *Joyce*, the victims of the robbery “were moved from one room to another room where they were confined.” *Id.* at 567, 410 S.E.2d at 521. This Court noted that “[t]he removals were not an integral part of the crime nor necessary to facilitate the robberies, *since the rooms where the victims were ordered to go did not contain safes, cash registers or lock boxes which held property to be taken.*” *Id.* (emphasis added). The facts in the case before us are not comparable to those in *Joyce*. Clark was ordered to go to his bedroom, where Jackson questioned him about the location of his money and where Jackson took money and a number of items. Unlike in *Joyce*, the room where Jackson ordered his victim to go contained property that Jackson stole.

The State also directs our attention to *State v. Brice*, 126 N.C. App. 788, 486 S.E.2d 719 (1997), another armed robbery case in which our Court upheld the trial court’s refusal to dismiss second-degree kidnapping charges, but awarded defendants a new trial on other grounds. But *Brice*, too, is distinguishable from the case before us. In *Brice*, while one defendant, Good, was in a bedroom robbing two male victims of valuables, an accomplice, Tate, was in the living room with a female victim. Defendant Tate threatened the woman with a gun and forced her to lie face down on the living room floor *but took nothing from her.* *Brice* at 791, 486 S.E.2d at 720 (emphasis added). In *Brice*, our Court held that terrorizing the woman in the living room was not an inherent part of the robbery taking place in the bedroom. *Id.* Moreover, while the *Brice* court did not address this point, we observe that in *Brice*, Tate’s action threatening the woman with a gun

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in the living room “exposed [her] to greater danger than that inherent in the armed robbery” that was taking place in the bedroom. *See Beatty* at 559, 495 S.E.2d at 369-70 (citations omitted).

State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986), is another armed robbery case in which our Court denied a motion to dismiss a second-degree kidnapping charge. In *Davidson*, the robbers forced the victims to go thirty to thirty-five feet from the front of a store to a dressing room in the rear and bound the victims with tape. *Davidson* at 543, 335 S.E.2d at 520. The *Davidson* court reasoned that none of the store’s property was kept in the dressing room and that moving the victims there was not an “inherent” part of the robbery. *Id.* Noting the distinction between actions that are “inherent” in an armed robbery and those that are not, the *Davidson* court, citing *Irwin* at 102-03, 282 S.E.2d at 446, said, “A restraint which is an inherent, inevitable element of a felony such as armed robbery will not sustain a separate conviction for kidnapping under N.C. Gen. Stat. 14-39(a).” *Id.* at 542, 335 S.E.2d at 519-20.

In the case before us, the victim Clark was ordered at gunpoint to go to his bedroom, where items were taken from him. Jackson’s actions, while reprehensible, were an “inherent” part of the armed robbery. *Irwin* at 103, 282 S.E.2d at 446. Clark was not “exposed . . . to greater danger than that inherent in the armed robbery[.]” *See Beatty* at 559, 495 S.E.2d at 369-70 (citations omitted).

It was error for the trial court to deny defendant’s motion to dismiss the charge of second-degree kidnapping, and the conviction for second-degree kidnapping is vacated.

Our decision vacating the second-degree kidnapping charge makes it unnecessary for us to address defendant’s other assignment of error related to that charge.

We have reviewed defendant’s remaining assignment of error as to the trial of his case and find it to be without merit.

Vacated in part, no error in part.

Chief Judge EAGLES and Judge MARTIN concur.

BURNETT v. WHEELER

[133 N.C. App. 316 (1999)]

CAROLYN FRYAR BURNETT, PLAINTIFF v. WARREN H. WHEELER, DEFENDANT

No. COA98-868

(Filed 18 May 1999)

1. Child Support, Custody, and Visitation— child support— calculation of income—business losses

The trial court on remand in a child support action correctly computed defendant's income under the Child Support Guidelines by considering defendant's business loss but not balancing that loss against his income. The court's findings are reasonable and satisfy the requirements of the mandate on remand, particularly in light of a finding that defendant was trained as an airline pilot but was not looking for work with freight carrier airlines even though such work was available. The "Potential Income" section of the Guidelines permits a court to consider potential income when a defendant is voluntarily unemployed or underemployed.

2. Child Support, Custody, and Visitation— child support—amount ordered not paid while appeal pending—contempt

The trial court properly found that defendant was in willful contempt where defendant appealed a modified order and continued payments at the old amount. Defendant would have been entitled to a setoff for the overpayment if the order had been reversed; his calculated and deliberate decision to pay the lower amount was at his peril.

3. Child Support, Custody, and Visitation— child support—attorney fees

The trial court did not abuse its discretion by awarding attorney fees to plaintiff's counsel in a child support action where defendant had substantial assets in the form of his retirement and investment accounts, his home, aircraft, a boat, and a business, while plaintiff's income was \$41,000 per year, with modest bank accounts totaling approximately \$2,000.

Appeal by defendant from orders entered 9 April 1998 by Judge Thomas G. Foster, Jr. in Guilford County District Court. Heard in the Court of Appeals 19 April 1999.

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[133 N.C. App. 316 (1999)]

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff-appellee.

Thigpen, Blue, Stephens & Fellers, by T. Byron Smith, for defendant-appellant.

EDMUNDS, Judge.

Plaintiff is the mother of a minor child fathered by defendant. In 1987, plaintiff filed this action against defendant for support of their minor child. In 1990, the trial court ordered defendant to pay \$950 per month in support. By 1995, defendant had retired early from his work as a pilot for USAir and opened his own business (WRA, Inc.), which reduced his annual income. Later that year, defendant moved for a reduction in support, and in October 1995, the trial court reduced his child support payment to \$525 per month. At the same time, the trial court ordered a hearing to determine arrearage owed by defendant. On 12 June 1996, that amount was set at \$6,935. The June order also continued the matter for a review of child support consistent with North Carolina's Child Support Guidelines. In October 1996, the trial court found defendant had either earnings or an earning capacity of \$77,000 per year and that WRA, Inc., a Sub-Chapter S company, showed a \$52,000 loss, which passed through to defendant's personal tax return. Based on its findings, the trial court ordered defendant to pay child support in the amount of \$900 per month. Defendant appealed that decision to this Court while continuing to pay only \$525 per month.

On appeal, this Court held that "the trial court did not abuse its discretion in considering all of defendant's available sources of income in arriving at his gross income." *Burnett v. Wheeler*, 128 N.C. App. 174, 177, 493 S.E.2d 804, 806 (1997). We also stated,

We are unable to determine if the trial court concluded that even with a \$52,000 loss the defendant's income was \$77,000, or if the trial court chose not to find the loss credible at all and therefore did not factor it into its computation.

. . . Because we are unable to determine what the trial court decided relative to the evidence of loss submitted by defendant, we remand for more specific findings indicating the trial court's treatment of the \$52,000 loss and its computation of defendant's gross income.

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Id. at 176, 493 S.E.2d at 806. On remand, the trial court entered an order finding that it did consider defendant's \$52,000 business loss when calculating defendant's income and in setting child support. The trial court again set defendant's support obligation at \$900 per month.

Within two weeks of this Court's order remanding the case, plaintiff moved for attorney's fees and requested the trial court to find defendant in contempt for failing to pay \$900 per month in support. After the trial court entered its findings on remand, it ruled on plaintiff's motions, awarding attorney's fees to plaintiff and holding defendant in civil contempt for failing to make his full monthly child support payments. From these orders, defendant appeals.

[1] Defendant first argues the trial court incorrectly computed his gross income under the Child Support Guidelines, contending the trial court erred when it considered WRA, Inc.'s business loss but failed to balance that loss against defendant's income. We disagree. This Court earlier concluded that the trial court properly considered all of defendant's available resources in determining his gross income. That decision is the law of the case for this appeal. *See Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997) (citing *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974)). We remanded solely for clarification of whether the trial court had considered defendant's \$52,000 loss in its determination that defendant's annual earnings or earning capacity was \$77,000. On remand, the trial court made the following finding of fact:

[T]he presiding Judge having reviewed his notes from the trial in this matter finds that he did take the \$52,000 loss from WRA, Inc. into account when he found that Defendant's income from all sources was at least \$77,000. Defendant has owned this business for twenty years and it has often shown a loss. Further, Defendant's credibility on the subject of this business is minimal. When making this finding the presiding Judge considered the Defendant's retirement accounts totaling \$722,384, stocks valued at \$60,000, land, a house, and a boat purchased in 1994 for \$74,000.

This Court is deferential to determinations of child support by district court judges, who see the parties and hear the evidence firsthand. *See Taylor v. Taylor*, 128 N.C. App. 180, 182, 493 S.E.2d 819, 820 (1997) (citing *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E.2d 642, 644 (1978)). An exercise of discretion by a trial judge in calculating

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the support guidelines will be reversed only if it is “manifestly unsupported by reason.” *Kennedy v. Kennedy*, 107 N.C. App. 695, 700, 421 S.E.2d 795, 798 (1992) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Although Judge Foster declined the opportunity dangled before him by this Court to find that evidence of defendant’s loss lacked all credibility, he found the credibility “minimal.” The above-quoted findings are reasonable and satisfy the requirements of our mandate on remand. They are particularly compelling when considered with the trial judge’s finding in his order of 25 October 1996, that defendant, trained as an airline pilot, was not looking for work with freight carrier airlines even though such work was available. The trial court properly considered these facts under the “Potential Income” section of the Child Support Guidelines. That section permits a court to consider potential income when a defendant is “voluntarily unemployed or underemployed.” Child Support Guidelines, 1999 Ann. R. N.C. 33; see *Osborne v. Osborne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998). This assignment of error is overruled.

[2] Defendant next argues the trial court erred when it found him in contempt. We disagree. Defendant was ordered on 24 October 1995 to make monthly child support payments of \$525. This order was modified on 25 October 1996 to require monthly support payments of \$900. Defendant appealed the modified order on 11 November 1996 and continued to make payments of \$525. On 16 December 1997, this Court remanded the case for further findings on the modified order. On 31 December 1997, plaintiff moved to have the trial court hold defendant in contempt for accrued arrearage under the modified order. On 8 April 1998, the trial court made findings of fact as required by remand, again ordered that defendant pay child support of \$900 per month, and found defendant in civil contempt for violation of its earlier order. “One who wilfully violates an order does so at his peril.” *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962). “If the order from which an appeal is taken is upheld by the appellate court, wilful failure to comply with the order during pendency of the appeal is punishable by contempt on remand.” *Quick v. Quick*, 305 N.C. 446, 461, 290 S.E.2d 653, 663 (1982) (citations omitted). Although *Joyner* and *Quick* were decided prior to the enactment of the current version of N.C. Gen. Stat. § 50-13.4(f)(9) (Cum. Supp. 1998) (granting the trial court continuing jurisdiction to hear contempt proceedings even while an appeal is pending), the quoted holdings remain valid. Having never lost jurisdiction over this issue, the district court could hold a contempt hearing at any time.

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[133 N.C. App. 316 (1999)]

The trial court found defendant's violation of its order willful. We agree.

Although the statutes governing civil contempt do not expressly require willful conduct, *see* N.C. Gen. Stat. §§ 5A-21 to 5A-25 (1986), case law has interpreted the statutes to require an element of willfulness. In the context of a failure to comply with a court order, the evidence must show that the person was guilty of "knowledge and stubborn resistance [sic]" in order to support a finding of willful disobedience.

Sharpe v. Nobles, 127 N.C. App. 705, 709, 493 S.E.2d 288, 290-91 (1997) (citations omitted). Defendant had full notice of the order requiring him to pay \$900 per month. Had he paid that amount, he would have been entitled to a setoff for the overpayment if the order had been reversed. *See Boyles v. Boyles*, 70 N.C. App. 415, 419, 319 S.E.2d 923, 927 (1984). Instead, he made a calculated and deliberate decision to pay the lower amount. He did so at his peril. The trial court properly found that defendant was in willful contempt.

[3] Finally, defendant contends the trial court erred in awarding attorney's fees to plaintiff's counsel. N.C. Gen. Stat. § 50-13.6 (1995) grants the court discretion to award fees to an interested party who acts in good faith but has insufficient means to defray the expense of the suit. The record in this case indicates defendant had substantial assets in the form of his retirement and investment accounts, his home, an aircraft, a boat, and a business. In contrast, plaintiff's income was \$41,000 per year, with modest bank accounts totaling approximately \$2,000. The court did not abuse its discretion in ordering attorney's fees.

The order of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge JOHN concur.

HARDY v. MOORE COUNTY

[133 N.C. App. 321 (1999)]

NICHOLAS A. HARDY, PLAINTIFF v. MOORE COUNTY, MOORE COUNTY TAX
DEPARTMENT, WILEY BARRETT, AND PHILLIP I. ELLEN, DEFENDANTS

No. COA98-1007

(Filed 18 May 1999)

Taxation— foreclosure sale—notice to resident of England

The trial court properly granted summary judgment in favor of defendants in an action alleging failure to comply with N.C.G.S. § 105-375, violations of due process, and constitutional violations arising from a tax foreclosure sale where property in the Pinehurst Resort and Country Club was owned by a resident of England; tax notices were sent to the address furnished by the owner and the taxes were paid; the owner moved to a new address in England in 1993 and arranged for the Royal Mail to forward his mail but did not notify the Moore County Tax Office; tax bills were mailed to the prior address; the only bill returned was in 1994; plaintiff did not pay the 1992 or 1993 bills; the Tax Department filed for a judgment for taxes and began foreclosure in 1994; a notice was mailed by the sheriff to plaintiff's last known address in England; that notice was returned marked "gone away"; the sale was advertised in the local newspaper, as were two subsequent resales; the property was ultimately sold; plaintiff filed this action; and the trial court granted summary judgment for defendants. Although plaintiff contends that there was a genuine issue of material fact as to whether defendants complied with the statutory requirement of due diligence in seeking his address, requiring the Moore County Tax Department to place a telephone call to the Pinehurst Resort and Country Club to obtain plaintiff's address as contended by plaintiff would place an intolerable burden on local taxing units and would render N.C.G.S. § 105-375 impracticable. Having previously paid the taxes, plaintiff was aware of his responsibility to pay the taxes and to keep the Tax Department informed of any change of address.

Judge WYNN dissenting.

Appeal by plaintiff from judgment entered 15 April 1998 by Judge W. Douglas Albright and filed 22 April 1998 in Moore County Superior Court. Heard in the Court of Appeals 1 April 1999.

HARDY v. MOORE COUNTY

[133 N.C. App. 321 (1999)]

Van Camp, Hayes & Meacham, P.A., by Michael J. Newman, for plaintiff-appellant.

Cunningham, Dedmond, Petersen & Smith, by Bruce T. Cunningham, Jr.; and Holshouser & Suggs, L.L.P., by Robert V. Suggs, for defendant-appellees.

WALKER, Judge.

Plaintiff, a resident and citizen of the United Kingdom, challenges the validity of a tax foreclosure sale conducted by the Moore County Tax Department pursuant to N.C. Gen. Stat. § 105-375. In 1987, plaintiff, who was then residing in Hong Kong, purchased a lot at the Pinehurst Resort and Country Club. A few years later, plaintiff moved back to England and resided at Snows Ride Windlesham, 14 Hawkes Leap, Surrey, England. Plaintiff furnished this address to the Tax Department and received tax notices at that address. He paid the property taxes assessed by Moore County in 1990 and 1991 as well as for the previous years. In 1993, plaintiff moved to Pinewood Lodge, Heather Drive, Sunningdale, Berkshire, England. Plaintiff arranged for the Royal Mail to forward his mail to his new address; however, he did not notify the Tax Department of his change of address. The Tax Department mailed tax bills to plaintiff at the prior address in 1991, 1992, 1993, 1994, and 1995. The only bill returned to the Tax Department was the 1994 bill marked "gone away" by the Royal Mail. Plaintiff did not pay the 1992 or 1993 tax bills on the property.

On 24 October 1994, the Tax Department filed a judgment for taxes and began foreclosure proceedings to collect the unpaid taxes on the real property. On 22 May 1995, a Notice of Sale of Land under Execution was filed by the sheriff of Moore County who also mailed a copy by Registered Mail to plaintiff's last known address in England. The notice was returned to the sheriff marked "return to sender—gone away." The sheriff then advertised the notice of sale in *The Pilot*, the local newspaper, pursuant to the requirements of N.C. Gen. Stat. § 105-375(c) for four weeks prior to the sale. The original sale was conducted on 27 June 1995 and two subsequent resales were held on 27 July 1995 and 25 August 1995 due to upset bids. Each of the resales was advertised for two weeks prior to the sale in *The Pilot*. Ultimately, the property was sold to the highest bidders—Wiley Barrett and Phillip I. Ellen—for \$6,000, and a sheriff's deed was executed to them on 20 September 1995.

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Plaintiff learned that his property had been foreclosed and sold in May 1996 and filed this action on 12 July 1996 alleging failure to comply with N.C. Gen. Stat. § 105-375, violations of due process, and the unconstitutionality of N.C. Gen. Stat. § 105-375. Defendants Barrett and Ellen moved for summary judgment which the trial court granted for all defendants on 15 April 1998.

Plaintiff contends there were genuine issues of material fact remaining to be determined and that summary judgment was improperly granted. Plaintiff argues that the issue of whether defendants complied with the statutory requirement of “due diligence” in seeking his address to afford him notice was a question of fact.

Summary judgment is proper when there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. *Daughtry v. McLamb*, 132 N.C. App. 380, 512 S.E.2d 91 (1999); see N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990).

N.C. Gen. Stat. § 105-375 provides an *in rem* method of foreclosure to local taxing units. N.C. Gen. Stat. § 105-375 (1997). The notice provision of N.C. Gen. Stat. § 105-375(c) states in part:

A notice stating that the judgment will be docketed and that execution will be issued thereon shall also be mailed by certified or registered mail, return receipt requested, to the current owner of the property (if different from the listing owner) if: (i) . . . , and (ii) *the tax collector can obtain the current owner's mailing address through the exercise of due diligence*. If within 10 days following the mailing of said letters of notice, a return receipt has not been received by the tax collector indicating receipt of the letter, then the tax collector shall have a notice published in a newspaper of general circulation in said county once a week for two consecutive weeks directed to, and naming, all unnotified lienholders and the listing taxpayer that a judgment will be docketed against the listing taxpayer.

N.C. Gen. Stat. § 105-375(c) (1997) (emphasis added).

Our Supreme Court has held that the notice provision of N.C. Gen. Stat. § 105-375 is sufficient to comport with due process:

When notice of the execution sale is sent by registered or certified mail to the listing taxpayer at his last known address, as is required by G.S. 105-392 (now G.S. 105-375), it is reasonably probable that he . . . will be made aware of the impending sale of the

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property. . . . Such notice, in conjunction with the posting and publication also required by statute, would, in our opinion, be sufficient to satisfy the fundamental concept of due process of law.

Henderson County v. Osteen, 292 N.C. 692, 708, 235 S.E.2d 166, 176 (1977). The Court further noted that a greater requirement on the foreclosing county would “impose an intolerable burden upon the county” and would make the provisions of N.C. Gen. Stat. § 105-375 “completely impracticable.” *Id.*

Plaintiff cites *Jenkins v. Richmond County*, 99 N.C. App. 717, 394 S.E.2d 258 (1990) as the sole authority for his argument that the Tax Department should have been required to call the Pinehurst Resort and Country Club in an effort to obtain plaintiff’s current address. In *Jenkins*, four plaintiffs were deeded a lot within the city of Hamlet by their aunt. *Id.* Plaintiffs listed the property with the Hamlet Tax Office and gave the current mailing address of plaintiff Wimphrey Jenkins who was to be responsible for the property and taxes. Plaintiffs thereafter promptly paid their city taxes but neglected to list the property with the Richmond County Tax Office. Richmond County checked the Register of Deeds and listed the property in the name of Wimphrey Jenkins and used the physical location of the property as the owner’s address. When the taxes became due, Richmond County sent the notice to Wimphrey Jenkins at the street address of the property. Jenkins did not receive the notice, and thereafter the County proceeded to foreclose under N.C. Gen. Stat. § 105-375. This Court held that the sale was invalid because the County had not attempted to mail notice to each listed property owner on the deed. *Id.* at 720, 394 S.E.2d at 261. The Court also noted that Richmond County did not exercise “due diligence” in its search for plaintiffs’ mailing address, noting that a phone call to their counterparts at the Hamlet Tax Office would have provided the mailing address. *Id.* at 721, 394 S.E.2d at 261.

Jenkins is distinguishable from this case in several respects. Richmond County, knowing the property was in the city of Hamlet, neglected to send tax notices or notices of sale to each listed property owner on the deed. Here, plaintiff received at his address in England and paid at least two tax notices from the Tax Department before he moved. In *Jenkins*, Richmond County never obtained a current address for the owners and did not attempt to find one, instead relying on the physical location of the property. In this case, the Tax Department had a current mailing address and had billed the owner successfully at that address. This Court observed in *Jenkins* that the

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County could have made a telephone call to their counterparts in Hamlet to determine whether anyone was paying the city taxes on the property. Here, the Tax Department had an address for plaintiff which he neglected to update.

We conclude that requiring the Moore County Tax Department to place a telephone call to the Pinehurst Resort and Country Club to obtain plaintiff's address as contended by plaintiff would place an "intolerable burden" on local taxing units and would render N.C. Gen. Stat. § 105-375 "impracticable." *See Osteen*, 292 N.C. 692, 235 S.E.2d 166. Having paid the property taxes since he purchased the property in 1987, plaintiff was aware of his responsibility to pay the taxes each year and to keep the Moore County Tax Department informed of any change of address.

Thus, the trial court properly granted summary judgment in favor of the defendants and the trial court's order is

Affirmed.

Judge HUNTER concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I am compelled to dissent in this matter because I find that the defendants have failed to meet the requirements of N.C. Gen. Stat. § 105-375 (1997). Specifically, I find that the defendants failed to exercise due diligence before resorting to publication as a means of providing plaintiff Nicholas Hardy with notice of the foreclosure proceedings against him.

As stated by the majority opinion, N.C. Gen. Stat. § 105-375 provides an *in rem* method of foreclosure to local taxing units. The notice provision of that statute requires the tax collector to inform the relevant party of the proceedings against him by certified mail if he "can obtain the current owner's mailing address through the exercise of due diligence." N.C. Gen. Stat. § 105-375(c). Due Diligence, in turn, requires that he "use all resources reasonably available . . . in attempting to locate [the party]." *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980). When deciding whether the tax collector has used due diligence in attempting to locate a landowner, we are not bound by a restrictive mandatory checklist, rather, we

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decide whether due diligence has been used on a case-by-case basis. *See Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372, *disc. rev. denied*, 301 N.C. 87 (1980).

In the case *sub judice*, defendants attempt to provide Hardy with notice of the foreclosure proceeding consisted solely of their sending a mailed copy of the Notice of Sale of Land under Execution to Hardy's last address. I find that this solitary venture does not meet the due diligence requirement set forth in N.C. Gen. Stat. § 105-375. *See Barclay's American/Mortgage Corp. v. Beca Enter.*, 116 N.C. App. 100, 103, 446 S.E.2d 883, 886 (1994) (holding that sending a certified letter to the defendant's last known address, standing alone, did not constitute due diligence). Indeed, the defendants had other simple and low-cost methods of obtaining Hardy's whereabouts—such as calling the country club where the property was located—which they failed to utilize. Thus, they failed to meet the requirements of N.C. Gen. Stat. § 105-375 and therefore I would reverse the trial court's holding.

STATE OF NORTH CAROLINA v. SHARON L. WILLIAMS

No. COA98-937

(Filed 18 May 1999)

1. Robbery— common law—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a common law robbery charge for insufficient evidence where defendant and Shelton smoked crack for several hours while riding around; defendant stopped at a gas station and Shelton jumped out of the truck and pointed a rifle at the victim, who was using a pay telephone; Shelton struck the victim with the rifle and took his wallet back to the truck; defendant sped off to avoid capture; and she asked Shelton about receiving some of the money.

2. Criminal Law— habitual felon—no express admission of guilt—guilty plea

The trial court did not err by entering judgment against defendant on an habitual felon indictment where defendant contended that she had not entered a guilty plea, but her counsel had

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agreed to proceed in the manner proposed by the court; she stipulated at trial that she had attained the status of an habitual felon; the court asked defendant questions to establish a record of her plea of guilty on this charge; and defendant informed the court that she understood that her stipulations would give up her right to have a jury determine her status as an habitual felon. Defendant did in fact plead guilty to the habitual felon charge despite the fact that she did not expressly admit her guilt.

3. Criminal Law—habitual felon—guilty plea—failure to inform of consequences

Defendant was aware of the consequences of her guilty plea to being an habitual felon where the trial court inquired whether defendant understood that as a consequence of being an habitual felon she would be sentenced as a Class C felon as opposed to a Class G felon, defendant responded in the affirmative and indicated that she had no questions about being an habitual felon, defendant admitted that she had committed each of the felonies listed on the habitual felon indictment, and she admitted that she was proceeding voluntarily and without deals or threats.

Appeal by defendant from judgment entered 13 August 1997 by Judge Henry W. Hight, Jr., Superior Court, Wake County. Heard in the Court of Appeals 22 April 1999.

Attorney George E. Kelly, III for the defendant.

Michael F. Easley, Attorney General, by Robert A. Crabill, Assistant Attorney General, for the State.

WYNN, Judge.

“[W]here two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding or in furtherance of the common purpose.” *State v. Barnes*, 345 N.C. 184, 232, 481 S.E.2d 44, 70 (1997). Because the evidence in this case shows that the defendant acted with another to commit a robbery to receive money to purchase crack, we uphold her conviction for common law robbery. Furthermore, we find no error in classifying her as an habitual felon based on her stipulation that she had attained such status.

The facts of this case show that after being indicted for armed robbery, a jury in Wake County convicted Sharon L. Williams of com-

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mon law robbery and found her to be an habitual felon. The trial court sentenced her to serve 80-105 months imprisonment.

The evidence showed that on 4 June 1997, Michael Shelton and Williams smoked crack for several hours while riding around in her truck. At a gas station, Williams stopped the truck and Shelton jumped out of the truck pointing a rifle at Victor Roughton who was using a pay phone; struck Roughton's neck with the rifle; took his wallet and returned to the truck. Thereafter, Williams sped off to avoid capture and asked Shelton about receiving some of the money that had been taken during the robbery.

Williams contends on appeal that: (1) the trial court erred in failing to grant her motion to dismiss the robbery charge for insufficient evidence, and (2) the trial court erred in entering judgment against her on an habitual felon indictment. For the reasons stated herein, we uphold the trial court's judgment.

I.

[1] Williams first argues that because there was insufficient evidence to support the common law robbery charge, the trial court should have granted her motion to dismiss. We disagree.

"Upon a motion to dismiss by a defendant, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Brayboy*, 105 N.C. App. 370, 373-74, 413 S.E.2d 590, 592 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). "In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997).

"[W]here a privity and community of design has been established, the act of one of those who combined together for the same illegal purpose, done in furtherance of the unlawful design, is, in consideration of law, the act of all.'" *Barnes*, 345 N.C. at 231-32, 481 S.E.2d at 70 (quoting *State v. Haney*, 19 N.C. 390, 395 (1837)).

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In the subject case, Shelton testified that once he and Williams ran out of drugs, they discussed robbing someone to get money to purchase more drugs. Specifically, Shelton made the following statements at trial:

Q. Now as I understand it, you know, that the both of you did this from what you are saying?

A. It was something that we negotiated upon, yes. Talked about.

Q. Was it just one person's idea?

A. No it wasn't. Both of us agreed.

Additionally, Shelton testified that once they arrived at the gas station, Williams urged Shelton to go ahead with the robbery because no one was around the phone booth where Roughton was placing a call. Shelton further stated that Williams waited for him while the robbery was occurring and then asked for her share of the money once the robbery was completed.

Roughton testified that when Shelton was picking up the wallet, Williams was motioning for him to hurry back to the truck. Roughton also testified that once the robbery was completed Shelton got in the truck and Williams sped off.

When viewed in the light most favorable to the State, this evidence is sufficient to establish that Williams acted with Shelton to commit the robbery in pursuance of the original understanding to receive additional money to purchase crack. Therefore, the trial court properly denied her motion to dismiss the robbery charge.

II.

[2] Williams next contends that the trial court erred in entering judgment against her on an habitual felon indictment. Specifically, she asserts that: (1) the trial court's waiver of her right to a jury verdict was erroneous because she did not enter a plea of guilty, and (2) the trial court's failure to inform her of the maximum or minimum possible sentence for the class of offense violated N.C. Gen. Stat. § 15A-1022.

"An accused cannot waive a trial by jury as long as his plea remains not guilty." *State v. Smith*, 291 N.C. 438, 440, 230 S.E.2d 644, 646 (1976). However, there is no requirement that a defendant give an express admission of guilt for a guilty plea to be valid. *See State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987) (holding that defend-

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ant's guilty plea was not invalid on the basis that the trial court did not determine that he knowingly pled guilty to second-degree murder because the defendant's responses to the trial court's questioning clearly indicated that the defendant admitted killing the victim and intended to plead guilty to second-degree murder). In fact,

while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Id. at 603, 359 S.E.2d at 463 (1987) (quoting *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L. Ed.2d 162, 171 (1970)).

Here, Williams' counsel agreed to proceed in the manner proposed by the court. Furthermore, Williams stipulated at trial that she had attained the status of an habitual felon. After this stipulation, the trial court proceeded by asking Williams questions to establish a record of her plea of guilty on this charge. In her answers to the trial court's questions, Williams informed the court that she understood that her stipulations would give up her right to have a jury determine her status as an habitual felon.

We conclude that Williams did in fact plead guilty to the habitual felon charge despite the fact that she did not expressly admit her guilt. Therefore, her assertion that she made no such plea is without merit.

[3] Moreover, the trial court's failure to inform Williams of the maximum or minimum sentence for a Class C offense did not invalidate her guilty plea. N.C. Gen. Stat. § 15A-1022 (1996) provides that:

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance . . . a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences and of the mandatory minimum sentence, if any, on the charge;

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Further, “[i]t is well established that a guilty plea is not considered voluntary and intelligent unless it is ‘entered by one fully aware of the direct consequences. . . .’” *Bryant v. Cherry*, 687 F.2d 48, 49 (4th Cir. 1982) (quoting *Brady v. U.S.*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L. Ed.2d 747, 760 (1970)). Direct consequences have been broadly defined “as those having a ‘definite, immediate and largely automatic effect on the range of the defendant’s punishment.’” *Id.* at 50. (quoting *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005, 94 S.Ct. 362, 38 L. Ed.2d 241 (1973)). This definition, however, should not be applied in a technical, ritualistic manner. *See id.*; *see also State v. Richardson*, 61 N.C. App. 284, 300 S.E.2d 826 (1983).

In *Bryant*, the U.S. Fourth Circuit Court applied the broad definition of “direct consequences” in holding that defendant’s guilty plea was voluntary and intelligent even though the trial court failed to advise the defendant of the seven-year mandatory minimum sentence for armed robbery as provided in N.C. Gen. Stat. § 15A-1022. *Id.* The *Bryant* Court determined that the defendant’s alleged ignorance of the mandatory minimum sentence could not have reasonably affected his guilty plea when he voluntarily entered into a plea agreement with the understanding that the State would recommend that he receive two consecutive life sentences. *Id.*

In the instant case, the trial court in establishing a record of Williams’ guilty plea inquired whether she understood that as a consequence of being an habitual felon she would be sentenced as a Class C felon as opposed to a Class G felon. Williams responded in the affirmative and indicated that she had no questions about being an habitual felon. Furthermore, she admitted that she had committed each of the felonies listed on the habitual felon indictment and admitted that she was proceeding voluntarily and without the inducement of deals or threats.

Following guidance from the *Bryant* court in refusing to apply a technical, ritualistic approach, we find that Williams was aware of the direct consequences of her guilty plea. Therefore, we reject her second assignment of error.

No error.

Judges WALKER and HUNTER concur.

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[133 N.C. App. 332 (1999)]

DAVID NELSON YOUNG, PLAINTIFF v. CYNTHIA THARP YOUNG, DEFENDANT

No. COA98-779

(Filed 18 May 1999)

**Divorce— equitable distribution—listing of marital debts—
local rules—stipulation**

Plaintiff made stipulations in an equitable distribution action which relieved defendant of the burden of proving that certain credit card debts were marital where a form was filed according to local rules (Fifth Judicial District) which listed debts but did not contain any objection, amendment, or supplement by plaintiff to defendant's classification of the credit card debts even though the form contained a column for that purpose. Under the applicable local rules, a party has affirmatively represented that he does not dispute the initiating party's listing where no objections, amendments, or supplements are made. The trial court may treat this affirmative representation as a stipulation.

Appeal by plaintiff from judgment filed 14 November 1997 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 27 April 1999.

Ralph S. Pennington for plaintiff-appellant.

Johnson & Lambeth, by Carter T. Lambeth, for defendant-appellee.

GREENE, Judge.

David Nelson Young (Plaintiff) appeals from the equitable distribution judgment of the trial court.

Plaintiff and Cynthia Tharp Young (Defendant) married 4 September 1987, separated 15 May 1995, and divorced 26 July 1996. The parties' record on appeal contains a form titled "SCHEDULE A." This form, promulgated pursuant to local rules of the Fifth Judicial District (the district in which this case was tried), is a chart with columns for listing: the parties' property; each party's respective contentions as to whether the listed property is marital, separate, or mixed; and each party's respective contentions as to the value of the listed property on the date of separation and at trial. Also included in the record is a form, likewise promulgated pursuant to local rules,

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titled "SCHEDULE D." This form is a chart with columns for listing: the parties' debts; each party's respective contentions as to whether the debt is marital, separate, or mixed; and each party's contentions as to the balance of the debt on the date of separation and at trial. Schedule D lists, among other debts, a "Colonial National Bank Credit Card," an "MBNA Mastercard," a "Chevy Chase Mastercard," and a "VISA." Defendant contended, on this Schedule D, that these credit cards constitute marital debts. Schedule D does not contain any objection, amendment, or supplement by Plaintiff to Defendant's classification of these credit card debts.

A hearing was held on the disputed issues on 18 August 1997. The transcript reveals that the parties and the trial court relied on Schedule A and Schedule D throughout the proceedings and addressed the disputed items listed therein. The trial court subsequently entered an equitable distribution judgment in which it found the "Colonial National Bank Card," the "MBNA MasterCard," the "Chevy Chase MasterCard," and the "Visa Card" to be marital debts. The trial court "conclude[d] that an equal division of marital property is not equitable and an unequal division of property is equitable," divided the marital assets and debts accordingly, and ordered Defendant to make a distributive award in the amount of \$17,500.00 to Plaintiff.

The issue is whether Plaintiff made stipulations which relieved Defendant of her burden of proving certain credit card debts were marital.

The General Assembly has authorized our Supreme Court to promulgate rules of practice and procedure for the superior and district courts. N.C.G.S. § 7A-34 (1995). Pursuant to this authority, our Supreme Court requires the Senior Resident Judge and Chief District Judge in each judicial district to "take appropriate actions [such as the promulgation of local rules] to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion." *Gen. R. Pract. Super. and Dist. Ct.* 2(d), 1999 Ann. R. N.C. 2; *see also* N.C.G.S. § 7A-146 (1995) (non-exclusive listing of the powers and duties of the Chief District Judge). "Wide discretion should be afforded in [the] application [of local rules] so long as a proper regard is given to their purpose." *Lomax v. Shaw*, 101 N.C. App. 560, 563, 400 S.E.2d 97, 98 (1991) (applying local superior court rules) (quoting *Forman & Zuckerman v. Schupak*, 38 N.C. App. 17, 21, 247 S.E.2d 266, 269 (1978)); *McDonald v. Taylor*, 106

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N.C. App. 18, 21, 415 S.E.2d 81, 83 (1992) (applying local district court rules).

Local rules for the New Hanover County District Court require adherence to certain “mandatory discovery procedures” upon a request by any party for equitable distribution. Fifth Judicial District, New Hanover County District Court Local Rules, Rule 6.¹ These mandatory discovery procedures include:

The party requesting an equitable distribution of property (hereafter referred to as the initiating party) shall, **within 30 days** of the filing of the request, . . . deliver to the opposing party a comprehensive listing of the property, both separate and marital, known by the initiating party to exist as of the date of separation. This listing need contain no values, but must state whether it is contended that the property is separate or marital or mixed. The contention as to how the property should be classified is not binding upon the [initiating] party and does not constitute an admission.

Within **60 days following receipt** of the Property List from the initiating party, the responding party shall, using the list received, complete and serve upon the initiating party a single listing which adopts, amends, or supplements the listing received from the initiating party. This listing, again, need contain no values, but must reflect a non-binding contention as to whether each item is separate, marital or mixed. *A failure to [adopt, amend, or supplement the initiating party's listing] shall constitute an admission and an affirmative representation that the list as served is exhaustive and accurate.* The responding party as well as the initiating party is under an affirmative duty to disclose all property about which the court should be aware to classify and equitably distribute all marital property.

. . . .

This procedure should produce a **single Property List** *This list may [thereafter] be supplemented only upon the discovery of additional property which was not known and which with the exercise of reasonable diligence could not have been discovered at the time the final list was produced.*

1. The appendix to the local rules for New Hanover County District Court contains “Forms and Schedules for Equitable Distribution.” Included among these forms and schedules are Schedule A and Schedule D.

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Id. (italics added). It follows that, where no objections, amendments, or supplements are made by the responding party, he has affirmatively represented that he does not dispute the initiating party's listing. The trial court may treat this affirmative representation as a stipulation that the initiating party's listing is undisputed.

A stipulation is a judicial admission. *Blair v. Fairchilds*, 25 N.C. App. 416, 419, 213 S.E.2d 428, 431, *cert. denied*, 287 N.C. 464, 215 S.E.2d 622 (1975); *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, —, 511 S.E.2d 313, 319 (1999) (noting that a stipulation is an "agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys"). "As such, it is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish[] the admitted fact." *Blair*, 25 N.C. App. at 419, 213 S.E.2d at 431 (noting that "[c]ourts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties"). Accordingly, where the initiating party's listing is undisputed, the trial court need not hear evidence either to prove or disprove that listing.

In this case, the parties submitted their Schedule A and Schedule D to the trial court at the equitable distribution hearing. Schedule D lists the credit card debts Plaintiff now contests. Schedule D reveals no objection, amendment, or supplement by Plaintiff to Defendant's classification of these credit card debts as marital. It follows that Plaintiff has made an "affirmative representation," or stipulation, that these debts are marital.² Accordingly, Defendant was relieved of the necessity of producing evidence to establish that these credit card debts are marital.

We have thoroughly reviewed Plaintiff's remaining contentions and find them unpersuasive.

Affirmed.

Judges MARTIN and MCGEE concur.

2. Although a party may seek to have a stipulation set aside, see *Lowery v. Locklear Construction*, 132 N.C. App. 510, 512 S.E.2d 477 (1999), Plaintiff has not done so in this case.

MASSENGILL v. DUKE UNIV. MED. CTR.

[133 N.C. App. 336 (1999)]

JAMIE D. MASSENGILL, PLAINTIFF-APPELLANT v. DUKE UNIVERSITY MEDICAL CENTER, TRADING AND DOING BUSINESS AS DUKE UNIVERSITY HOSPITAL, PRIVATE DIAGNOSTIC CLINIC, DEFENDANT AND PETER ANDREW KNUTSON, DEFENDANT-APPELLEE

No. COA98-1170

(Filed 18 May 1999)

Medical Malpractice— sexual assault upon patient—physicians' assistant not assigned to patient—no professional relationship—summary judgment for defendant

The trial court did not err by granting summary judgment for defendant Knutson in a medical malpractice action which arose from Knutson's sexual assault upon a patient to whom he was not assigned but to whom he had access by way of his employment as a physicians' assistant. Plaintiff failed to present evidence of a professional relationship, which must exist to maintain a medical malpractice claim (although it would not be necessary for a civil assault or battery claim).

Appeal by plaintiff James D. Massengill from judgment entered 21 July 1998 by Judge Dexter Brooks, Superior Court, Johnston County. Heard in the Court of Appeals 29 April 1999.

Lucas, Bryant & Denning, by Sarah E. Mills, for plaintiff-appellant.

Jordan Price Wall Gray Jones & Carlton, L.L.C., by Laura J. Wetsch, for defendant-appellee.

WYNN, Judge.

On 6 June 1995, Jamie Massengill was admitted to Duke University Hospital for emergency surgery and further care relating to injuries he suffered during an automobile collision that day. At the time Massengill was admitted to Duke Hospital, Peter Knutson worked in the cancer/oncology unit as a licensed physicians' assistant.

In this action, Massengill contends that on 9 and 10 June 1995, Knutson came into his hospital room, told him that he was going to examine his surgical incisions, and thereafter committed unlawful sexual acts upon him—touched his genitals, placed his fingers inside his rectum, and committed fellatio upon him. Undisputedly, Duke did

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not assign or instruct Knutson to provide medical care to Massengill. Knutson, however, did have access to Massengill by way of his employment.

As a result of the alleged unlawful acts, Massengill brought a medical malpractice action against Duke University Medical Center d/b/a Duke University Hospital, Private Diagnostic Clinic as an alleged joint venturer with Duke Hospital, and Knutson as an alleged agent of Duke Hospital and Private Diagnostic Clinic. Thereafter, the trial court granted summary judgment in favor of Knutson concluding that he was not providing professional services necessary to support a medical malpractice claim.

On appeal, Massengill contends that the trial court erred in granting Knutson's Motion for Summary Judgment because there are genuine issues of material fact as to whether Knutson acted unlawfully while performing "professional services" for Massengill.

Summary judgment is proper 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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). When ruling on a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party. See *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986). Although the granting of summary judgment is a drastic remedy, it is appropriate if the moving party meets the burden of proving that an essential element of the non-moving party's claim is nonexistent. See *LaBarre v. Duke Univ.*, 99 N.C. App. 563, 565, 393 S.E.2d 321, 323, *disc. review denied*, 327 N.C. 635, 399 S.E.2d 122 (1990).

A medical malpractice action is one "for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (Supp. 1996). Both parties concede that Knutson, as a licensed physicians' assistant, is a "health care provider" under the statute. Indeed, the sole issue raised on appeal is whether Knutson committed the unlawful acts while furnishing "professional services" to Massengill. We hold that Knutson was not furnishing Massengill "professional services," an essential element under N.C. Gen. Stat. § 90-21.11, and therefore the trial court properly found that a medical-malpractice action may not be maintained against Knutson.

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Although the legislature failed to define the term “professional services” as set forth in N.C. Gen. Stat. § 90-21.11, our Supreme Court has stated that “the term ‘professional services’ refers to ‘those services where a professional relationship exists between plaintiff and defendant—such as a physician-patient or attorney-client relationship.’” *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 665, 488 S.E.2d 215, 223 (1997). Indeed, it is well settled that the relationship of health-care provider to patient must be established to maintain an actionable claim for medical malpractice. See *Easter v. Lexington Mem. Hosp.*, 303 N.C. 303, 305, 278 S.E.2d 253, 255 (1981).

In the case *sub judice*, Massengill failed to present evidence of a professional relationship between himself and Knutson. Indeed, Massengill concedes that Knutson was never directed to provide him with medical care or otherwise attend to his needs. In fact, the record shows that Knutson was assigned to work in the cancer/oncology unit—a practice area distinct from where Massengill was being treated. Accordingly, Knutson has failed to prove an essential element to his medical malpractice claim, to wit, the existence of a professional relationship between himself and the health-care provider in this case, Knutson.

We note that Massengill cites *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 463 S.E.2d 397 (1995), in support of his argument that a medical malpractice claim can be based upon sexual advances made by a health care professional. That case, however, is distinguishable. In *Johnson*, we stated that a patient who was sexually assaulted by a clinical assistant while in an alcohol and drug rehabilitation hospital could maintain a medical malpractice claim against the hospital. *Id.* at 533-34, 463 S.E.2d at 400-01. The assailant in *Johnson*, however, was specifically hired by the hospital as clinical assistant, assigned to care for the victim and committed the unlawful acts while performing medical tasks that he had been assigned to do. *Id.* Therefore, the plaintiff in *Johnson* was able to demonstrate a professional relationship between the health-care provider and the patient—an element Massengill has been unable to prove here.

In sum, we hold that Massengill failed to present evidence of a professional relationship between himself and the health-care provider in this case, Knutson.¹ Since a professional relationship

1. We note that Massengill was not without a remedy in this case because such a relationship would not be necessary to bring a civil assault or battery claim against Knutson.

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must exist between the patient and a health care provider to maintain a medical malpractice claim, we must affirm the trial court's judgment holding that a medical malpractice action may not be maintained against Knutson.

Affirmed.

Judges WALKER and HUNTER concur.

GREEN TREE FINANCIAL SERVICING CORP., PLAINTIFF-APPELLANT v. ELIJAH B. YOUNG D/B/A E.B. YOUNG & SONS, JANICE LANGSTON D/B/A E.B. YOUNG & SONS, DEFENDANTS-APPELLEES

No. COA98-1153

(Filed 18 May 1999)

1. Civil Procedure— Rule 52—findings insufficient—facts undisputed

Plaintiff's argument that the trial court erred in an action for possession of a mobile home and a counterclaim for a towing and storage lien by failing to find sufficient facts to support its conclusion was rejected where the court's findings were in essence legal conclusions, but the facts were undisputed and only one inference could be drawn.

2. Liens— towing and storage of mobile home—contract—implied

The trial court did not err by finding a towing and storage lien for a mobile home even though plaintiff presented no evidence of a contract as required under N.C.G.S. § 44A-2(d). This case is guided by the reasoning of *Case v. Miller*, 68 N.C. App. 729, and *State v. Davy*, 100 N.C. App. 551, which involved an implied contract with a legal possessor to tow and store a vehicle in a situation whereby the legal possessor had no intention of paying the requisite towing and storage costs.

Appeal by plaintiff Green Tree Financial Servicing Corp. from judgment entered 28 May 1998 by Judge Kimbrell Kelly Tucker, District Court, Cumberland County. Heard in the Court of Appeals 29 April 1999.

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[133 N.C. App. 339 (1999)]

Frederic E Toms & Associates, by John H. Capitano and Frederic E. Toms, for plaintiff-appellant.

Cooper, Davis & Cooper, by William R. Davis, for defendants-appellees.

WYNN, Judge.

During July 1990, Brunson Housing Center, Inc. sold Linda Burnette a mobile home and perfected a purchase money security interest in it. Thereafter, Brunson Housing Center assigned the security interest, along with the retail installment contract, to Green Tree Financial Servicing Corp. At all times pertinent to this appeal, Green Tree held that security interest.

Burnette lived in the mobile home on a parking space that she leased from Lillian Brunson. However, in August 1997, she abandoned the mobile home and as a result, Brunson obtained a Judgment in Summary Ejectment and writ of possession over the mobile home.

Thereafter, Brunson contacted Elijah Young, agent for defendant Young & Sons, and requested that he remove the mobile home from her property. Accordingly, Young, with the aid of a subcontractor, removed the mobile home. Neither party conversed with Burnette about the mobile home's removal. Moreover, it was understood between the parties that Brunson would not be responsible for the towing and storage costs.

The mobile home was stored on Young & Sons' property for sixty days until Green Tree attempted to gain possession of it. At that time, Young & Son asserted a lien for towing and storing the mobile home. In response, Green Tree filed suit to obtain possession of the mobile home and Young & Sons counterclaimed asserting a towing and storage lien. Following a bench trial, District Court Judge Kimbrell Tucker entered judgment for Young & Sons in the amount of \$4000. Green Tree appeals this ruling.

[1] Initially, we address Green Tree's argument that the trial court committed reversible error by failing to find sufficient facts to support its conclusion. Under rule 52(a) of the North Carolina Rules of Civil Procedure,

[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specifically and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

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N.C. Gen. Stat. § 1A-11; N.C.R. Civ. P. 52(a). The purpose of this rule is to allow reviewing courts to determine from the record whether the judgment and its underlying legal conclusions represent a correct application of the law. *See Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). This requirement is not a mere formality, but rather is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their roles properly. *Id.*

Rule 52(a), however, does not require the trial court to recite all the evidentiary facts before it. *See Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982). Rather, rule 52(a) only requires the court to find those facts which are material and necessary to the determination of whether the findings are supported by the evidence and whether they support the legal conclusions reached. *Id.* Moreover, when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them. *See Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988).

In the case *sub judice*, the trial court made the following pertinent findings of fact:

1. That the Plaintiff has a perfected security interest and lien on that certain 1990 Peachtree mobile home which was the subject of this action.
2. That the Defendant, Janice Langston (Young), d/b/a E.B. Young & Sons, has a towing and storage lien pursuant to N.C.G.S. Section 44A-2, which is superior to the lien of the Plaintiff.

Green Tree argues that these findings, though labeled findings of fact, are in essence legal conclusions. We agree. Indeed, the trial court never found facts to support its “finding” that Young & Sons has a towing and storage lien. Despite the court’s error in this regard, we reject this aspect of Green Tree’s argument because we find that the facts are undisputed and only one inference can be drawn from them—Young & Son’s have a lien on the mobile home. *See Harris*, 91 N.C. App. at 150, 370 S.E.2d at 702. Accordingly, we proceed to the substantive issues this case presents.

[2] Green Tree contends that the lien on the mobile home should be dismissed because Young & Sons presented no evidence of a contract as required under N.C. Gen. Stat. § 44A-2(d). That statute states, in

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relevant part, that any person who tows or stores motor vehicles in the ordinary course of business pursuant to,

an *express or implied contract* with the owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such . . . towing or storing This lien has priority over perfected and unperfected security interests.

N.C. Gen. Stat. § 44A-2(d) (1995) (emphasis supplied). Because a mobile home is a motor vehicle for purposes of this statute, both parties concede that it directly guides our result in this matter. *See King Homes, Inc. v. Bryson*, 273 N.C. 84, 88, 159 S.E.2d 329, 332 (1968).

Green Tree contends that Young & Sons cannot lawfully assert a lien over the mobile home because N.C. Gen. Stat. § 44A-2 requires a person asserting a lien over a motor vehicle to have an “express or implied contract with the [motor vehicle’s] owner or legal possessor.” It is undisputed that Burnette, the owner of the mobile home, did not have an express or implied contract with Young & Sons. However, it is further undisputed that after obtaining a Judgment of Summary Ejectment and writ of possession, Brunson became the legal possessor of the mobile home. Young & Sons, however, concedes that it did not expect Brunson, the legal possessor, to pay for the mobile home’s towing and storing, but rather expected that the mobile home’s owner would pay those fees.

Nonetheless, in any event, the cases of *Case v. Miller*, 68 N.C. App. 729, 315 S.E.2d 737 (1984), and *State v. Davy*, 100 N.C. App. 551, 397 S.E.2d 634 (1990) guide our decision in this case. In those cases, we held that a storage or towing company may obtain a lien over a motor vehicle under N.C. Gen. Stat. § 44A-2(d) when the company is directed by a sheriff to tow or store that vehicle. These holdings are analogous to the case *sub judice* because they involve an implied contract with a legal possessor, i.e., the sheriff, to tow and store a vehicle in a situation whereby the legal possessor has no intention of paying the requisite towing and storage costs. We see no reason to depart from the reasoning of these cases. Accordingly, we reject this assignment of error.

Affirmed.

Judges WALKER and HUNTER concur.

MITTENDORFF v. MITTENDORFF

[133 N.C. App. 343 (1999)]

ROGER WAYNE MITTENDORFF, PLAINTIFF v. APRIL MARIE MITTENDORFF,
DEFENDANT

No. COA98-810

(Filed 18 May 1999)

Child Support, Custody, and Visitation— child support—reduction—voluntary reduction of income—no showing that child's needs decreased

The trial court erred by reducing defendant's child support obligation based upon a voluntary reduction in income without a showing that the needs of the child decreased.

Appeal by plaintiff from order filed 16 March 1998 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 4 May 1999.

Roger T. Smith for plaintiff-appellant.

No brief filed for defendant-appellee.

GREENE, Judge.

Roger Mittendorff (Plaintiff) appeals from the trial court's order allowing April Mittendorff (Defendant) a reduction in child support.

By a judgment filed 10 June 1997, Defendant was ordered to pay the weekly sum of \$78.23 as child support for the parties' son. The amount of support was based upon a finding that Defendant would be earning \$7.50 per hour in a new job.

On or about 16 January 1998, Defendant served a motion and notice of hearing for modification of child support order seeking to decrease the amount of her child support obligation.

During the hearing upon the motion, Defendant testified she did not take the job paying \$7.50 per hour named in the judgment, but took another job in which she was earning \$7.15 per hour. At the time of the hearing, Defendant had voluntarily quit her job earning \$7.15 per hour and was earning \$6.53 per hour in a new job. Defendant admitted that there had been no change in her son's financial needs.

After hearing the evidence, the trial court entered an order in which it found there had been a change of circumstances warranting

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a reduction in child support payments because “[Defendant] earns [\$]6.51 [sic] per hour instead of [\$]7.50 per hour.” Based upon this sole finding of fact, the trial court granted Defendant’s motion and reduced her child support obligation to the amount of \$130.00 every two weeks effective 20 October 1997. Plaintiff appeals.

The dispositive issue is whether a voluntary reduction in a non-custodial parent’s income, absent any showing that the needs of the child have decreased, is sufficient to constitute a “changed circumstance” justifying a modification of a child support award.

Child support orders may be modified only upon a showing of substantial changed circumstances. *Wiggs v. Wiggs*, 128 N.C. App. 512, 515, 495 S.E.2d 401, 403, *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998); *Davis v. Risley*, 104 N.C. App. 798, 800, 411 S.E.2d 171, 172 (1991). A substantial and *involuntary* decrease in a parent’s income constitutes a changed circumstance, and can justify a modification of a child support obligation, even though the needs of the child are unchanged. *Wiggs*, 128 N.C. App. at 515, 495 S.E.2d at 403. A *voluntary* decrease in a parent’s income, even if substantial, does not constitute a changed circumstance which alone can justify a modification of a child support award. *Schroader v. Schroader*, 120 N.C. App. 790, 794, 463 S.E.2d 790, 793 (1995). A *voluntary* and substantial decrease in a parent’s income can constitute a changed circumstance only if accompanied by a substantial decrease in the needs of the child. *Id.* In determining whether the party has sustained a decrease in income, the party’s actual earnings are to be used by the trial court if the voluntary decrease was in good faith. *See Chused v. Chused*, 131 N.C. App. 668, 671, 508 S.E.2d 559, 561-62 (1998). If the voluntary decrease in income is in bad faith, the party’s earning capacity is to be used by the trial court in determining whether there has in fact been a decrease in income. *Id.* The burden of showing good faith rests with the party seeking a reduction in the child support award.

In this case, all the evidence in the record shows Defendant decided to redirect her career voluntarily and that the result was a reduction in her income. Assuming the reduction is considered substantial and in good faith, there has been no showing that the needs of the child have decreased. Defendant, indeed, admitted there had been no change in her son’s financial needs. Defendant, therefore, failed to meet her burden of proof. Accordingly, the trial court’s order reducing the child support award must be reversed.

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[133 N.C. App. 345 (1999)]

Reversed.

Judges WALKER and SMITH concur.

U. BRENT MASTIN, GUARDIAN AD LITEM FOR MINOR CHILD, DEREK BRENT MASTIN,
PLAINTIFF v. JACKSON GRIFFITH AND WIFE, KATHY GRIFFITH, DEFENDANTS

BRENT MASTIN AND DEBBIE MASTIN, PLAINTIFFS v. JACKSON GRIFFITH AND
WIFE, KATHY GRIFFITH, DEFENDANTS

No. COA98-432

(Filed 18 May 1999)

**Appeal and Error— jurisdiction of appellate court—directed
verdict not signed or filed**

An appeal to the Court of Appeals was dismissed where the record contained a draft of the directed verdict order from which plaintiffs appealed, but the order was never signed by the trial judge or filed with the clerk. Entry of judgment by the trial court is the event which vests jurisdiction in the Court of Appeals, and entry occurs when a judgment is reduced to writing, signed by the judge, and filed with the clerk of court. Announcement of the judgment in open court merely constitutes rendering of judgment, not entry.

Appeal by plaintiffs from order rendered 2 September 1997 by Judge Ronald E. Bogle in Wilkes County Superior Court. Heard in the Court of Appeals 17 February 1999.

Vannoy, Colvard, Triplett, McLean & Vannoy, by Jay Vannoy and Howard C. Colvard, Jr., for plaintiffs-appellants.

Willardson, Lipscomb & Beal, LLP, by John S. Willardson, for defendants-appellees.

TIMMONS-GOODSON, Judge.

U. Brent Mastin instituted an action on behalf of his minor son, Brent, against Jackson and Kathy Griffith (defendants) for personal injuries allegedly caused by defendants' negligence. In addition, Mr. Mastin and his wife, Debbie Mastin, (plaintiffs) filed a complaint

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[133 N.C. App. 345 (1999)]

against defendants to recover medical expenses incurred as a result of their son's injuries. The cases were consolidated for trial and came on for hearing at the 1 September 1997 civil session of Wilkes County Superior Court. At the close of plaintiffs' evidence, defendants moved for a directed verdict. The trial court granted the motion, and plaintiffs appeal.

Initially, we must examine whether we have jurisdiction to entertain the present appeal. Because the record indicates that the order allowing defendants' motion for directed verdict has not been entered, this Court lacks jurisdiction and the appeal must be dismissed.

Under Rule 58 of the North Carolina Rules of Civil Procedure, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (Cum. Supp. 1997). "Announcement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). "Entry of judgment by the trial court is the event which vests jurisdiction in this Court." *In re Estate of Walker*, 113 N.C. App. 419, 420, 438 S.E.2d 426, 427 (1994). Thus, an order may not properly be appealed until it is entered. *Id.*

The record in the instant case contains a draft of the order allowing defendants' motion for directed verdict, but the order was never signed by the trial judge or filed with the clerk. Therefore, entry has not occurred, and we are without jurisdiction to consider the merits of this appeal. Accordingly, plaintiffs' appeal is

DISMISSED.

Judges MARTIN and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 MAY 1999

ARTIS v. WILLIAMS No. 98-1156	Wilson (97CVS436)	Affirmed
BECK v. FIRST CITIZENS BANK No. 98-789	Ind. Comm. (532099)	Affirmed
BUCKNER v. GENERAL SIGNAL TECH. No. 98-1092	Buncombe (98CVS00477)	Affirmed
CALLOWAY v BE&K CONSTR. CO. No. 98-587	Ind. Comm. (154015)	Affirmed
COLEY v. WILLIAMS No. 98-1157	Wilson (97CVS437)	Affirmed
COX v. BAILEY No. 98-483	Wilson (96CVS1756)	No Error
DAWSON v. WAL-MART STORES, INC. No. 98-1079	Durham (97CVS02754)	Affirmed
FISHER, FISHER, GAYLE, CLINARD & CRAIG, P.A. v. BOWLING No. 98-274	Davidson (96CVS1482)	No Error
HARBORGATE PROP. OWNERS ASS'N v. MT. LAKE SHORES DEV. CORP. No. 98-1172	Davidson (96CVS552)	Affirmed
HESTER v. WACHOVIA BANK No. 98-981	Wake (97CVS05801)	Affirmed
IN RE TANNER No. 98-1349	Wake (97J467)	Affirmed
KAMM v. COURT ONE CORP. No. 98-1054	Wake (97CVS4250)	Appeal Dismissed
KITCHIN v. SUPERIOR PROPERTIES, INC. No. 98-619	Ind. Comm. (475687)	Affirmed
McCLERIN v. ALEXANDER No. 98-884	Mecklenburg (96CVS2469)	Reversed and Remanded
PULLIAM v. NOVA SOUTHEASTERN UNIV. No. 98-887	Guilford (97CVS9009)	Affirmed

REED v. TOWN OF LONG VIEW No. 98-1363	Catawba (98CVS965)	Dismissed
SIMMONS v. MILLER No. 98-1065	Catawba (97CVS2882)	Affirmed
STATE v. BAGLEY No. 98-1272	Pasquotank (97CRS2856) (97CRS2857) (97CRS2858) (97CRS2859) (97CRS2860)	No Error
STATE v. BLOUNT No. 98-1161	Forsyth (96CRS26973)	No Error
STATE v. BRACEY No. 98-1262	Rutherford (96CRS10190) (96CRS10191)	No Error
STATE v. BROWN No. 98-1042	Forsyth (98CRS13)	No Error
STATE v. BROWN No. 98-1291	Wake (95CVS14824) (95CVS14825) (95CVS14826) (95CVS14827)	No Error
STATE v. BURGESS No. 98-1106	Stokes (97CRS5417)	Affirmed
STATE v. COLVIN No. 98-1273	Wake (97CRS56047)	New Trial
STATE v. DUBOSE No. 97-1175	Wake (96CRS16978) (96CRS16979)	No Error
STATE v. FARABEE No. 98-1411	Davidson (96CRS21162)	No Error
STATE v. GOINS No. 98-1190	Lee (95CRS7344) (95CRS7567) (95CRS7632) (95CRS7633)	No Error
STATE v. GOVINE No. 98-1237	Onslow (96CRS17844)	No Error
STATE v. HARDY No. 98-1373	Mecklenburg (95CRS89897)	No Error
STATE v. HERNANDEZ No. 98-1429	Wake (97CRS55551)	No Error

STATE v. HUGHES No. 98-853	Guilford (97CRS41203)	New Trial
STATE v. JOHNSON No. 98-1242	Rockingham (97CRS11701)	No Error
STATE v. LONG No. 98-1278	Cabarrus (97CRS12787) (97CRS12788) (97CRS12789) (97CRS12790)	No Error
STATE v. SANDERS No. 97-1147	Gaston (92CRS4057) (92CRS5206) (92CRS5208)	No Error
STATE v. SMITH No. 98-934	Buncombe (97CRS58935) (97CRS7972) (97CRS7973)	No Error
STATE v. STEWART No. 98-705	Wake (97CRS23176) (97CRS23177) (97CRS23178) (97CRS110397)	No Error
STATE v. WHITE No. 98-647	Wilkes (97CRS894)	No Error
TATUM v. BCI HOLDINGS No. 98-1312	Ind. Comm. (160022)	Affirmed
TERRY v. HOME LUMBER CO. No. 98-931 No. 98-1264	Ind. Comm. (342668)	COA98-931 Affirmed. As to COA98-1264, appeal dismissed and double costs taxed against counsel for plaintiff-appellant.
UNIVERSAL UNDERWRITERS INS. CO. v. ADAMS No. 98-623	Avery (97CVS339)	Affirmed
WHITTED v. VILLAGE GREEN CARE CTR. No. 98-234	Ind. Comm. (316182)	Affirmed
WILLIAMS v. MIMS No. 98-1404	Durham (94CVS05422)	Affirmed
ZODDA v. SINGH No. 98-1005	Pitt (96CVS2537)	Appeal Dismissed

SHORE v. FARMER

[133 N.C. App. 350 (1999)]

JENNY BARBEE SHORE, PLAINTIFF v. RAY FARMER, T/D/B/A,
RAY FARMER BONDING, DEFENDANT

No. COA98-408

(Filed 1 June 1999)

1. Appeal and Error— preservation of issues—bootstrapped argument—not allowed

Defendant in an action arising from a bail bond was not allowed to bootstrap his unpreserved argument regarding submission of punitive damages to the jury onto his challenge to the court's allowance of plaintiff's motion to amend her pleadings.

2. Pleadings— amendment—punitive damages

The trial court did not abuse its discretion in an action arising from a bail bond by allowing plaintiff's motion to amend her pleadings to conform to the evidence and seek punitive damages. The specific language of the complaint sufficiently articulated a claim for punitive damages so as to put defendant on notice in that the complaint alleged that defendant wrongfully arrested plaintiff, thereby inflicting severe emotional distress, and that his acts were deliberate, vicious, malicious, and without just cause or excuse. Defendant advanced no suggestion of additional witnesses he might have called, further cross-examination he would have conducted, supplementary witnesses he would have introduced, or how amendment otherwise prejudiced him in maintaining his defense.

3. Appeal and Error— preservation of issues—instructions on punitive damages—no objection

Defendant waived any challenge to an instruction on punitive damages in an action arising from a bail bond by not objecting at trial.

4. Trial— comments by judge—clarification of testimony—not prejudicial

Defendant in a civil claim arising from a bail bond did not show that comments by the trial court were so disparaging in their effect that they could reasonably be said to have prejudiced defendant where there was no indication that the trial court in any manner renounced the seriousness of the trial or discredited the sanctity of the courtroom and the probable effect of the court's interjections may reasonably be considered as having

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been to clarify testimony and ensure that jurors were able to hear.

5. Appeal and Error— preservation of issues—no argument in brief—issue waived

A cross assignment of error which was not supported by an argument in the brief was waived.

Judge WALKER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 30 July 1997 by Judge Thomas W. Seay, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 29 October 1998.

David Y. Bingham and Thomas M. King for plaintiff-appellee.

The Holshouser Law Firm, by John L. Holshouser, Jr., for defendant-appellant.

JOHN, Judge.

Defendant Ray Farmer, t/d/b/a Ray Farmer Bonding, appeals the judgment of the trial court, arguing the court (1) “abused its discretion in allowing [p]laintiff to [a]mend her [c]omplaint . . . after the close of all of the evidence;” and (2) “erred by submitting the issue of [p]unitive [d]amages to the [j]ury.” Defendant also assigns error to certain comments by the trial court. Plaintiff Jenny Barbee Shore cross-assigns as error the court’s “failure to submit the issue of . . . unfair and deceptive trade practice[s] to the jury.” We conclude the trial court committed no prejudicial error.

Pertinent facts and procedural history include the following: During a June 1991 vacation in Myrtle Beach, South Carolina, plaintiff and her husband were arrested on North Carolina warrants. The couple waived extradition and were transported to the Ashe County jail. Three days later, plaintiff was transferred to the Watauga County jail.

Defendant, a professional bail bondsman, subsequently represented to plaintiff that \$75,000.00 in premiums would procure the requisite bail bonds to secure her release. On 25 June 1991, plaintiff advanced defendant a portion of the specified amount and promised tender of the balance within ten (10) days of her release. Upon defendant’s posting of plaintiff’s bail, she was released and subsequently paid defendant the amount due on 29 June 1991. At that time,

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plaintiff and defendant discussed bond for plaintiff's husband. The latter was released two days later upon defendant's posting of bail upon receipt of a \$10,000.00 premium procured by placing a charge in that amount on the Gold Master Credit Card of Bob LaBianca (LaBianca). On 26 July 1991, however, defendant was informed by LaBianca's bank that LaBianca had signed a statement indicating he did not authorize the \$10,000.00 credit.

On 12 August 1991, Shore and her husband, along with their two children, traveled to the Allegheny County courthouse for a scheduled bond hearing. However, defendant and two other bondsmen were waiting to arrest and surrender plaintiff and her husband into custody. While handcuffing plaintiff in the presence of her children and other onlookers, defendant stated he was causing her to be surrendered because her husband had not paid his bond in consequence of LaBianca's rescission of the \$10,000.00 credit card charge.

On 16 October 1995, plaintiff filed the instant action alleging breach of contract, unfair and deceptive trade practices, and false imprisonment or wrongful arrest resulting in "severe emotional distress." By answer filed 9 January 1996, defendant generally denied plaintiff's allegations and asserted that "all actions taken by [d]efendant with respect to plaintiff were fully authorized and prescribed by law."

At trial, upon oral motion by plaintiff to amend after presentation of all evidence, the trial court submitted an issue of punitive damages to the jury. Plaintiff thereafter filed a written amendment to her complaint so as to assert a claim for "punitive damages in an amount in excess of Ten Thousand Dollars (\$10,000.00)." The jury found in plaintiff's favor and awarded, *inter alia*, \$150,000.00 in punitive damages. Plaintiff and defendant filed timely notice of appeal.

[1] We first consider defendant's contention that the trial court "abused its discretion in allowing plaintiff-appellee to amend her complaint to request punitive damages." We disagree.

We note initially that this issue, as argued by defendant in his appellate brief and discussed by the dissent, is not properly before us. The parties recite only that plaintiff's oral motion to amend her complaint to allege a claim for punitive damages was allowed by the trial court, over defendant's objection, during an unrecorded, in-chambers conference during which the court's charge to the jury was discussed. Both defendant and the dissent presently challenge the

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action of the trial court on grounds, in the words of defendant, that “punitive damages are not recoverable in a mere breach-of-contract case.”

However, as noted below, defendant lodged no objection on the record to the submission of a punitive damages issue to the jury either at the recorded charge conference or subsequent to the trial court’s jury charge. *See* N.C.R. App. P. 10(b)(2) (“[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict”). We do not believe defendant may now properly attempt to bootstrap his unpreserved argument regarding submission of punitive damages to the jury onto his challenge to the court’s allowance of plaintiff’s motion to amend. *See State v. Trull*, 349 N.C. 428, 446, 509 S.E.2d 178, 191 (1998) (where evidence admitted over objection and later admitted without objection, “the benefit of the objection is lost”), and *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (pre-trial motion *in limine* fails to preserve issue for appellate review when no objection lodged at time challenged evidence is introduced at trial). Accordingly, it is unnecessary to address either defendant’s contentions or the exhaustive commentary by the dissent regarding the propriety of punitive damages in a case wherein a surety is accused of wrongfully surrendering a principal.¹

1. Notwithstanding, we note the dissent asserts that “broad powers” are accorded to sureties and “bounty hunters.” We do not question that professional sureties play a significant and vital role in the operation of our criminal justice system, nor that sureties possess “sweeping power . . . to apprehend the principal . . .” *State v. Mathis*, 349 N.C. 503, 512, 509 S.E.2d 155, 160 (1998). However, defendant surrendered plaintiff because her husband had not paid *his* bond, and the record contains no evidence that plaintiff was involved in her husband’s bond such that his failure to pay might be attributable to her or that she might be construed as a principal reference his bond. Defendant’s rationale cannot be deemed subsumed within the statutory provisions justifying surrender of a *principal* based upon “breach of the undertaking in any type of bail or fine and cash bond.” N.C.G.S. § 58-71-20 (1994). Indeed, all the evidence reflected plaintiff had paid *her* bond premium in full some six days earlier than contemplated by her agreement with defendant and had otherwise fully complied with that agreement and the conditions of her release; further there was no suggestion plaintiff was at risk to “jump bail” or fail to appear. Had the evidence been otherwise, plaintiff’s claim for breach of contract, much less for punitive damages, would have failed.

Additionally, the dissent posits the necessity of a separate “identifiable tortious act” to support an award of punitive damages. However, this Court has stated

[n]o . . . case[] . . . require[s] proof of a *separate* identifiable tort unrelated to the contract [T]he tort [wrongful arrest in the instant case] need only be “identifiable” and . . . punitive damages may be recoverable “even though the tort also constitutes . . . a breach of contract.”

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[2] Turning to the question actually before us, we observe that

[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court *that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits*. The court may grant a continuance to enable the objecting party to meet such evidence.

N.C.G.S. § 1A-1, Rule 15(b) (1990) (Rule 15(b)) (emphasis added).

The effect of Rule 15(b)

is to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, *i.e.*, where he had a fair opportunity to defend his case.

Roberts v. Memorial Park, 281 N.C. 48, 59, 187 S.E.2d 721, 727 (1972). Further, the trial court's ruling on a motion to amend pleadings may be reversed on appeal only upon a showing of abuse of discretion. *See Hassett v. Dixie Furniture Co.*, 104 N.C. App. 684, 688, 411 S.E.2d 187, 190 (1991), *rev'd on other grounds*, 333 N.C. 307, 425 S.E.2d 683 (1993).

In the case *sub judice*, plaintiff's complaint alleged defendant wrongfully arrested her thereby inflicting "severe emotional distress," and that his acts were "deliberate, vicious, malicious, and without just cause or excuse." The specific language of the complaint thus sufficiently articulated a claim for punitive damages as to put defendant on notice of such a claim. *See Holloway v. Wachovia Bank*

Dailey v. Integon Ins. Corp., 75 N.C. App. 387, 395-96, 331 S.E.2d 148, 154 (quoting *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976)), *disc. review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985).

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& Trust Co., 339 N.C. 338, 348, 452 S.E.2d 233, 238 (1994) (complaint alleging intentional infliction of emotional distress and “intentional acts of the type . . . giving rise to punitive damages” sufficiently put defendants on notice of plaintiffs’ punitive damages claim); *see also Stanback v. Stanback*, 297 N.C. 181, 196-98, 254 S.E.2d 611, 621-24 (1979) (plaintiff’s punitive damages claim properly submitted to jury where “plaintiff’s complaint with respect to punitive damages [was] sufficient at least to state a claim for damages for an identifiable tort accompanying a breach of contract” and also alleged defendant acted “wilful[ly], malicious[ly] . . . recklessly and irresponsibly and with full knowledge”).

Moreover, we note defendant has advanced no suggestion of additional witnesses he might have called, further cross-examination he would have conducted, supplementary exhibits he would have introduced, or how amendment otherwise prejudiced him in maintaining his defense. *See Trucking Co. v. Phillips*, 51 N.C. App. 85, 90, 275 S.E.2d 497, 500 (1981) (“defendants failed to show how the amendments [to pleadings so as to conform to the evidence] would [have] prejudice[d] them in maintaining their defense”).

Accordingly, we cannot say the trial court abused its discretion in allowing plaintiff’s motion to amend her pleadings so as to conform to the evidence presented. Rather, it appears defendant was afforded adequate notice of plaintiff’s claim for punitive damages and that he had “fair opportunity” to defend against such claim. *See Roberts*, 281 N.C. at 59, 187 S.E.2d at 727.

[3] Returning to defendant’s argument as presented in his appellate brief that the trial court “erred by submitting the issue of punitive damages to the jury,” we reiterate that the record reflects no objection by defendant to any evidence tending to support plaintiff’s claim for punitive damages or, as previously noted, to the court’s instruction of the jury on that issue. Indeed, the transcript reflects the following multiple opportunities at which defendant might have lodged objection to a jury instruction on punitive damages:

The Court: I’ll hear each of you . . . does anybody want to say anything at all about the issues that I’ve [set out], beyond what we have here?

[Brief response from counsel for plaintiff; no response from counsel for defendant.]

....

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The Court: So, that's what I—does anybody want to say anything before I send her out to type up the issues?

[Counsel for Plaintiff]: As to the charge which your Honor has indicated he'd give, we'd concur.

The Court: Mr. Holshouser?

[Counsel for defendant]: (No response.)

....

The Court: This is in the absence of the jury. Before sending the verdict sheet I will entertain any specific objections to the charge from the plaintiff.

[Counsel for plaintiff]: We have none, Your Honor.

The Court: From the defendant?

[Counsel for defendant]: None, Your Honor.

(emphasis added).

Therefore, as no objection was proffered at trial to evidence sustaining plaintiff's claim for punitive damages or to the court's jury instruction on that issue, defendant has waived his right to challenge such instruction on appeal. See N.C.R. App. P. 10(b)(2); see also *J.M. Westall & Co. v. Windswept View of Asheville*, 97 N.C. App. 71, 76, 387 S.E.2d 67, 69, *disc. review denied*, 327 N.C. 139, 394 S.E.2d 175 (1990) (if "no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, [then] the issue raised by the evidence may be placed before the jury").

[4] Defendant also maintains the trial court

improperly expressed [it]s opinion by making disparaging remarks in verbal exchanges with defendant and remarks regarding defendant's witnesses in the presence of the jury.

This assertion is unfounded.

A trial court 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.G.S. § 15A-1222 (1997). However, to justify award of a new trial on appeal, a defendant must establish that comments of the trial court "were so disparaging in their effect that they could reasonably be said to have prejudiced the defendant." *Board of Transportation v. Wilder*, 28 N.C. App. 105, 107, 220 S.E.2d 183, 184

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(1975); *cf.* N.C.G.S. § 1A-1, Rule 61 (1990) (harmless error does not warrant new trial). The criteria for determining whether comments of the trial court unfairly prejudiced a party is the “probable effect [of the allegedly improper comments] on the jury.” *Saintsing v. Taylor*, 57 N.C. App. 467, 473, 291 S.E.2d 880, 884, *disc. review denied*, 306 N.C. 558, 294 S.E.2d 224 (1982).

Defendant points to some seven allegedly prejudicial statements of the trial court, relying upon *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 368 S.E.2d 619 (1988). In *McNeill*, our Supreme Court held a new trial was required based upon approximately thirty-seven (37) remarks of the trial court determined to have been unfairly prejudicial. The Court stated the trial judge therein had “diminished the seriousness of the [trial]” through “the appearance of antagonism towards the defense attorney” and his repeated commentary which produced “episodic laughter sufficient in time and manner to warrant notation by the court reporter.” *Id.* at 429, 368 S.E.2d 622.

As an example of the remarks *sub judice* which defendant characterizes as “harsh rebukes,” “disparaging,” and as “express[ing] a distinct dislike of [defendant] and an antagonism toward his case,” defendant cites the occasion of his testimony concerning receipt of a subpoena:

Q: Does the back of the subpoena, which contains the service information, indicate the date that that [sic] was received?

A: I didn't receive it-

Q: No, the date received is what?

A: It's got marked on there, “7-17.”

THE COURT: Would you just listen to the question he asks you, Mr. Farmer, and answer the question he asks you, now. Just let him answer the question. Look on the form and see if it's got a date it was received. There's nothing difficult about that. Answer the question Mr. Farmer.

....

Q: And this indicates that Ray Farmer was subpoenaed by telephone communication, doesn't it?

A: Yes, sir.

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Q: But, your testimony is that these Court records are wrong. Is that correct?

A: Yes, sir.

THE COURT: You say you didn't get subpoenaed? That that subpoena wasn't served on you by telephone as it reflects in the record? This is important stuff, Mr. Farmer.

A. I know, Your Honor.

....

THE COURT: And you didn't get served by telephone by anybody?

A: I was called by someone. I don't know who.

THE COURT: You got called.

Our review of the instant record reveals the trial court's remarks, considered in context, were not unduly prejudicial to defendant and are distinguishable from the comments of the trial court deemed prejudicial in *McNeill*. First, there is no indication the trial court in any manner renounced the seriousness of the trial or discredited the sanctity of the courtroom. *See id.* at 429, 368 S.E.2d 622. In addition, defendant's protestations to the contrary, the "probable effect," *Saintsing*, 57 N.C. App. at 472, 291 S.E.2d at 884, of the court's interjections noted above, as well as the other instances complained of, may reasonably be considered as having been to clarify the testimony of witnesses and ensure that the jurors were able to hear what was being said. *See Roberson v. Roberson*, 40 N.C. App. 193, 194, 252 S.E.2d 237, 238 (1979) ("[T]he power of the trial judge to maintain absolute control of his courtroom is essential to the maintenance of proper decorum and the effective administration of justice"); *see also N.C. State Bar v. Talman*, 62 N.C. App. 355, 362, 303 S.E.2d 175, 179 (trial judge has privilege and duty to ask questions of witnesses when necessary for purpose of clarification and to ascertain truth), *disc. review denied*, 309 N.C. 192, 305 S.E.2d 189 (1983).

Perhaps more significantly and unlike the situation in *McNeill* where the "disaffection" displayed toward the defendant's attorney by the trial court was not "visited upon plaintiff's witnesses," *McNeill*, 322 N.C. at 429, 368 S.E.2d at 622, comments by the trial court herein similar to those set out above were expressed during plain-

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tiff's presentation of evidence. For example, the court directed plaintiff's witnesses to listen to the questions they were being asked, and sought on occasion to clarify questions and answers elicited on behalf of plaintiff. In short, defendant has failed to show the challenged comments of the trial court "were so disparaging in their effect that they could reasonably be said to have prejudiced the defendant." *Wilder*, 28 N.C. App. at 107, 220 S.E.2d at 184.

[5] Concerning plaintiff's cross-assignment of error asserting the trial court failed "to submit the issue of whether Defendant's conduct was an unfair and deceptive trade practice to the jury," we observe plaintiff has set forth no argument in her appellate brief in support of this contention. As such, plaintiff has waived this issue on appeal and we decline to consider it. See N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

No error.

Judge MARTIN concurs.

Judge Walker concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I agree that some of the trial court's questions and remarks made during the defendant's evidence showed some impatience on the part of the court. However, I agree with the majority that these comments were not sufficiently prejudicial to warrant a new trial. I respectfully dissent from the majority's conclusion that the trial court did not err in allowing plaintiff's motion to amend her pleadings to conform to the evidence as the evidence in this case does not support a claim for punitive damages.

In her complaint, plaintiff alleged a cause of action for breach of contract, unfair and deceptive trade practices, and intentional infliction of emotional distress. At the close of all the evidence, the trial court refused plaintiff's request to submit the issues of unfair and deceptive trade practices and intentional infliction of emotional distress to the jury. However, over defendant's objection, the trial court allowed plaintiff's motion to amend her complaint to conform to the evidence and request punitive damages.

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The majority states that the issue of whether the trial court abused its discretion in allowing the plaintiff to amend her complaint to request punitive damages is not properly before this Court since the defendant did not further object after the trial court instructed the jury. N.C.R. App. P. 10(b)(1) provides as follows:

General. 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. . . .

The record is clear that defendant objected to plaintiff's motion to amend her complaint to assert a claim for punitive damages. No further objection by the defendant was required in order to preserve this issue for appeal. In support of its position, the majority points to *State v. Hayes*, 350 N.C. 79, 511 S.E.2d 302 (1999) in which our Supreme Court held that a *motion in limine* will not be sufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to object to the evidence when it is offered at trial. In that case, the Court reasoned that a *motion in limine* is "preliminary in nature and subject to change at trial, depending on the evidence offered. . . ." *Id.* at 80, 511 S.E.2d at 303. In contrast, the trial court may allow the pleadings to be amended to conform to the evidence. N.C. Gen. Stat. § 1A-1, Rule 15(b) (1990). The trial court's ruling on a motion to amend will only be reversed on a showing of abuse of discretion. *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 629, 347 S.E.2d 473, 476 (1986). Thus, since all the evidence has been presented, a motion to amend at this stage is not preliminary in nature; therefore, defendant was not required to object a second time in order to preserve this issue for review on appeal.

Plaintiff's evidence tended to show that in 1991 she and her husband were arrested in South Carolina on North Carolina warrants. Defendant, a bail bondsman, posted the required bond to secure plaintiff's release and she paid the premium. Subsequently, defendant posted a bond for plaintiff's husband after receiving the appropriate premium on a credit card. Later, the charge on the credit card was denied. Defendant offered evidence that plaintiff and her husband concealed themselves from defendant by failing to keep him accurately apprised of their location and by being unable to be reached by telephone for the period from the time of their release in June 1991

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until defendant learned they were to appear in court on 12 August 1991. At that time, the defendant surrendered the plaintiff and her husband to the custody of law enforcement.

It is well-settled that punitive damages are generally not allowed for a breach of contract with the exception of breach of contract to marry. *Newton v. Insurance Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976); *Taha v. Thompson*, 120 N.C. App. 697, 704-05, 463 S.E.2d 553-58 (1995), *disc. review denied*, 344 N.C. 443, 476 S.E.2d 130-31 (1996). Punitive damages are not allowed even when the breach is wilful, malicious or oppressive. *Newton*, 291 N.C. at 111, 229 S.E.2d at 301. However, "when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages." *Taha*, 120 N.C. App. at 704-05, 463 S.E.2d at 558. Mere allegations of an identifiable tort are "insufficient alone to support a claim for punitive damages." *Id.* Furthermore, in order to sustain a claim for punitive damages, there must be an identifiable tort which is accompanied by or partakes of some element of aggravation. *McDaniel v. Bass-Smith Funeral Home, Inc.*, 80 N.C. App. 629, 634, 343 S.E.2d 228, 231 (1986). Here, there was no identifiable tortious act since the trial court refused to submit the issues of unfair and deceptive trade practices and intentional infliction of emotional distress to the jury. Therefore, even if the actions of the defendant amounted to a breach of contract, there was no identifiable tort to support punitive damages.

The majority holds that a separate identifiable tortious act is not required to support an award of punitive damages in a breach of contract case, *citing Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148, *disc. review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985) in support of this proposition. However, in that case, this Court found that the tort alleged the defendant's bad faith refusal to settle, "not only accompanied the breach of contract, it also was a breach of contract that was accomplished or accompanied by some element of aggravation." *Id.* at 396, 331 S.E.2d at 154. This Court further found that "the record is replete with evidence of defendant's malice, oppression, wilfulness and reckless indifference to consequences." *Id.* at 396, 331 S.E.2d at 155. Therefore, this Court found an identifiable tort from the plaintiff's allegations sufficient to support a claim for punitive damages in a breach of contract action.

Furthermore, the defendant acted within his rights as a bail bondsman when he surrendered the plaintiff to the custody of law enforcement. The concept of bail is rooted in English common law.

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Bail bondsmen and the bounty hunters they employ to track down fugitives are essential in the American judicial system. Bounty hunters return to custody over ninety-nine percent of the criminal defendants who contract with a bondsman and then “jump” bail which amounts to well over 25,000 fugitives a year. Andrew DeForest Patrick, Note, *Running From the Law: Should Bounty Hunters be Considered State Actors and Thus Subject to Constitutional Restraints?*, 52 Vand. L. Rev. 171, 176 (1999). Due to a state’s limited resources and the efficiency of bail bondsmen, it is clear what a critical role they play in the criminal justice system. *Id.*

Traditionally, the bail bondsman or surety was granted the same rights and powers as a sheriff capturing an escaped prisoner. *State v. Mathis*, 349 N.C. 503, 509, 509 S.E.2d 155, 158 (1998). Since the defendant or “principal was never out of the ‘custody’ of the surety, the surety could take him at any time, ‘when and where he pleases.’ ” *Id.* (quoting *Read v. Case*, 4 Conn. 166, 170 (1822)). The United States Supreme Court has summarized the powers of bail bondsmen as follows:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuation of the original imprisonment. *Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done.*

...

It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern it is said: “The bail have their principal on a string, and may pull the string whenever they please and render him in their discharge.”

Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371-72, 21 L. Ed. 287, 290 (1872) (emphasis added).

The broad power given to bail bondsmen is derived from a contractual relationship between the surety and the principal. *Mathis*, 349 N.C. at 510, 509 S.E.2d at 159. As our Supreme Court stated “the bond agreement provides that the surety post the bail, and in return, *the principal agrees that the surety can retake him at any time, even before forfeiture of the bond.*” *Id.* (emphasis added). The government is not to interfere with this private right to recapture on the part of the surety and the “seizure of the principal by the surety is

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technically not an ‘arrest’ at all and may be accomplished without process of law.” *Id.*

The common law of North Carolina has always recognized the broad powers of bail bondsmen. *Id.* at 511, 509 S.E.2d at 160. In addition, N.C. Gen. Stat. § 58-71-20 (Cum. Supp. 1998) provides as follows:

At any time before there has been a breach of the undertaking in any type of bail or fine and cash bond the surety may surrender the defendant to the official to whose custody the defendant was committed at the time bail was taken, or to the official into whose custody the defendant would have been given had he been committed; in such case the full premium shall be returned within 72 hours after the surrender. The defendant may be surrendered without the return of the premium for the bond if the defendant does any of the following:

- (1) Willfully fails to pay the premium to the surety or willfully fails to make a premium payment under the agreement specified in G.S. 58-71-167.
- (2) Changes his or her address without notifying the surety before the address change.
- (3) Physically hides from the surety.
- (4) Leaves the State without the permission of the surety.
- (5) Violates any order of the court.

Thus, it is clear that a bail bondsman may take a defendant into custody *at any time*. Bail bondsmen usually base their decision to surrender a principal based on concern that the defendant will “jump” bail and fail to appear; however, they are not required to do so. If a bail bondsman turns in a defendant without justification, he is liable only in contract. As the statute provides, the bail bondsman would be required to refund the bond premium to the principal. In this case, regardless of whether or not plaintiff has a valid claim for a breach of contract, when the defendant surrendered the plaintiff, he was within his right to do so. Therefore, there can be nothing aggravating about defendant’s conduct to warrant punitive damages since he acted within the bounds of the law when he surrendered plaintiff. Any further restraints placed on the broad powers accorded bail bondsmen should be done by the legislature, not by subjecting them to punitive damages where juries do not have an understanding of

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the rights of the bail bondsmen or of the role they perform in the criminal justice system.

DOROTHY ROWEN HUTELMYER, PLAINTIFF v. MARGIE B. COX, DEFENDANT

No. COA98-624

(Filed 1 June 1999)

1. Alienation of Affections— sufficiency of evidence—directed verdict

Plaintiff presented sufficient evidence to overcome defendant's motions for directed verdict and j.n.o.v. and the trial court properly submitted plaintiff's claim for alienation of affections to the jury where, taken in the light most favorable to plaintiff, the evidence tended to show that plaintiff and Mr. Hutelmyer had "a fairy tale marriage" prior to 1993 and that the love and affection that once existed between the plaintiff and her husband was alienated and destroyed by defendant's conduct.

2. Alienation of Affections— punitive damages—sufficiency of evidence

Plaintiff presented sufficient additional circumstances of aggravation to warrant submission of punitive damages to the jury on a claim for alienation of affections where evidence that plaintiff's marriage deteriorated due to defendant's ongoing adulterous relationship with plaintiff's husband was sufficient to submit the issue of alienation of affections and additional evidence tended to show that defendant publicly displayed the intimate nature of the relationship with plaintiff's husband, welcomed plaintiff's husband into her home at all hours of the day and night despite her knowledge of the harm that their relationship would cause his wife and young children, traveled with Mr. Hutelmyer on business trips, and called plaintiff's home on Thanksgiving Day to discover his whereabouts.

3. Criminal Conversation— punitive damages—evidence sufficient

The trial court did not err by submitting to the jury the issue of punitive damages on a criminal conversation claim where the evidence was conclusive that defendant engaged in a sexual rela-

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tionship with plaintiff's husband for several years during the course of plaintiff's marriage. That evidence, as well as evidence of additional circumstances of aggravation, provided overwhelming support for an award of punitive damages.

4. Alienation of Affections; Criminal Conversation— compensatory damages—sufficiency of evidence

Plaintiff presented sufficient evidence to support a \$500,000 award of compensatory damages for alienation of affections and criminal conversation where, in addition to evidence showing a loss of income, life insurance and pension benefits resulting from the actions of defendant, there was plenary evidence that plaintiff likewise suffered loss of consortium, mental anguish, humiliation, and injury to health.

5. Alienation of Affections; Criminal Conversation— punitive damages—amount of award

The trial court did not abuse its discretion by upholding a jury's award of \$500,000 in punitive damages in an action for alienation of affections and criminal conversation. Plaintiff presented sufficient evidence to show her entitlement to punitive damages and there was evidence before the jury concerning the reprehensibility of defendant's motives and conduct, the likelihood of serious harm, defendant's awareness of the probable consequences of her conduct, the duration of the conduct, and the actual damages. The jury awarded \$500,000 in compensatory damages and the maximum amount of punitive damages was therefore \$1,500,000; it cannot be said that the amount of punitive damages was excessive as a matter of law. The question of whether the court properly instructed the jury with regard to subdivisions (1) and (2) of N.C.G.S. § 1D-35 was not presented for review, but trial judges are encouraged to comply with the mandate of N.C.G.S. § 1D-40.

6. Alienation of Affections; Criminal Conversation— abolish-ment—not Court of Appeals prerogative

Although defendant contended that the North Carolina Supreme Court's decision in *Cannon v. Miller*, 313 N.C. 324, (refusing to abolish the torts of alienation of affections and criminal conversation) should be reconsidered, it is not the Court of Appeals prerogative to overrule or ignore clearly written decisions of the Supreme Court.

Judge HUNTER concurring in part and dissenting in part.

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Appeal by defendant from order entered 30 September 1997 by Judge J. Kent Washburn in Alamance County District Court. Heard in the Court of Appeals 17 February 1999.

Walker & Bullard, by Daniel S. Bullard, for plaintiff-appellee.

Wishart, Norris, Henninger & Pittman, P.A., by Pamela S. Duffy, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Margie B. Cox (defendant) appeals from an order denying her motion for a new trial or, in the alternative, for remittitur of the compensatory and punitive damages awarded to Dorothy Rowen Hutelmyer (plaintiff) in her action for alienation of affections and criminal conversation. Having thoroughly examined defendant's assignments of error, we uphold the decision of the trial court.

Plaintiff brought this action against defendant on 8 March 1996 for alienating the affections of her husband and for criminal conversation. Plaintiff's evidence tended to show the following facts. Plaintiff and Joseph Hutelmyer were married on 14 October 1978 and lived together with their three children until 5 January 1996, when Mr. Hutelmyer left the marital home to live with defendant. Plaintiff and Mr. Hutelmyer subsequently divorced, and on 15 May 1997, he and defendant were married.

Throughout the 1980's and into the early 1990's, plaintiff and Mr. Hutelmyer had what plaintiff described as "a fairy tale marriage"—one that was loving, warm, and devoted. They vacationed together with their family, and plaintiff often traveled with Mr. Hutelmyer on business trips to England, Hawaii, Arizona, Florida, West Virginia, Boston and San Francisco. Together, they also coached their children's soccer teams and volunteered in church and community organizations.

Mr. Hutelmyer often expressed his love for plaintiff by writing romantic poetry for her. In 1981, Mr. Hutelmyer wrote a poem entitled "Why I Love You," and in 1990, he wrote the sequel entitled "Why I Love You, II" as a gift for plaintiff on Valentine's Day. Mr. Hutelmyer conceded that "things must have been going pretty well then . . . to write that poem and give it to her." For Valentine's Day in 1992, Mr. Hutelmyer recorded a collection of love songs for plaintiff and gave her a card, in which he drew a heart and wrote "1992." The couple

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also maintained an active sexual relationship, engaging in sex at least once or twice per week.

During the marriage, Mr. Hutelmyer was employed at Seaboard Underwriters, and defendant began work as his secretary in 1986. According to her co-workers, defendant's demeanor when she began her employment was "matronly." She wore predominantly dark clothing and long skirts. Then, in May of 1992, defendant separated from her husband, and she, thereafter, became openly flirtatious and spent increasingly more time alone with Mr. Hutelmyer. Defendant's co-workers testified that she changed her appearance. She cut and dyed her hair and wore short skirts, low-cut blouses, and tight clothing to the office. At or near the same time, defendant and Mr. Hutelmyer began to arrive at work together or within minutes of each other, to dine together alone, and to work late hours at the office. Many nights, defendant and Mr. Hutelmyer were the only employees working late. The testimony of defendant's co-workers also revealed that although defendant rarely traveled in connection with her employment prior to 1990, in 1992, she began accompanying Mr. Hutelmyer on business trips.

Plaintiff's evidence further showed that beginning in 1993, Mr. Hutelmyer began to spend a considerable amount of time at defendant's home. Defendant's former neighbor testified that she frequently saw Mr. Hutelmyer's vehicle parked at defendant's home overnight, from approximately 9:00 p.m. until 5:30 a.m. the following morning. In addition, a co-worker of defendant and Mr. Hutelmyer testified that when she visited her parents, who resided near defendant, she observed Mr. Hutelmyer's car at defendant's house at all hours of the day and night.

Co-workers of defendant and Mr. Hutelmyer also testified that the couple flaunted their familiarity with one another. The lovers would hold hands at the workplace, and defendant would sit in Mr. Hutelmyer's office in a dress with her legs thrown sideways across the chair. Additionally, defendant often straightened Mr. Hutelmyer's ties and brushed lint from his suits. During a work-related outing at a Putt-Putt facility, defendant stood very close to Mr. Hutelmyer and ate ice out of his drinking cup.

As defendant and Mr. Hutelmyer became closer, he began to spend less time with his wife and family. Plaintiff testified that their sexual relationship began to deteriorate because Mr. Hutelmyer began to lose interest in her sexually. On one occasion in 1992 when

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plaintiff attempted to initiate intimacy with her husband, he stated, "I—I don't feel right about doing this." When she asked him what was wrong, he claimed to be experiencing work-related pressures but maintained that he was still very much in love with her. Plaintiff further testified that Mr. Hutelmyer began coming home very late at night, and when he went to their children's evening soccer games, he would not come home with the family after the games were over, claiming that he had to go back to work.

Plaintiff also recalled that in 1992, Mr. Hutelmyer stopped allowing her to travel with him on business trips. When she questioned him about the change, he told her that there had been a change in the company policy which excluded spouses from work-related trips. Despite the changes in Mr. Hutelmyer's behavior, plaintiff believed that her husband still loved her. She continued to regard their marriage as strong and loving, until 1994, when Mr. Hutelmyer lost all desire to have sex with plaintiff and their sexual relationship ceased. The couple, nonetheless, remained together until 5 January 1996, when Mr. Hutelmyer told plaintiff that he was leaving. Plaintiff testified that she was shocked and heartbroken by the news, because it was the first time they had mentioned separation.

According to defendant, she and Mr. Hutelmyer began a sexual relationship in 1994, which continued, with few interruptions, throughout the duration of his marriage to plaintiff. Defendant claimed that Mr. Hutelmyer had told her that he and plaintiff were separated, and she believed that he had moved out of the marital home and into an apartment. Mr. Hutelmyer told defendant at various times in their relationship that he wanted to end the affair and try to work things out with his wife. Invariably, however, they resumed their relationship, and on 1 January 1996, Mr. Hutelmyer gave defendant an engagement ring. On 5 January 1996, he left the marital home and moved in with defendant.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant moved for a directed verdict on all claims. The trial court denied the motions, and the case was submitted to the jury. The jury returned a verdict finding defendant liable for alienation of affections and criminal conversation, for which the jury awarded plaintiff \$500,000 in compensatory damages and \$500,000 in punitive damages. Defendant's subsequent oral motions for judgment notwithstanding the verdict (j.n.o.v.), to set aside the award of punitive damages, and for remittitur were all denied. Then, on 15 August 1998,

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defendant filed a written motion for a new trial under Rule 59(a) of the North Carolina Rules of Civil Procedure. The trial court denied the motion by order dated 30 September 1997, and defendant appeals.

[1] Defendant, by her first assignment of error, contends that the trial court erroneously denied her motions for directed verdict and j.n.o.v. on plaintiff's claim for alienation of affections. Defendant argues that the evidence was insufficient as a matter of law to show that she acted maliciously in alienating the affections of plaintiff's husband. We must disagree.

A motion for directed verdict or j.n.o.v. tests the sufficiency of the evidence to carry the case to the jury. *Chappell v. Redding*, 67 N.C. App. 397, 399, 313 S.E.2d 239, 241 (1984). In deciding whether to grant or deny a motion for directed verdict or j.n.o.v., the trial court must examine the evidence in the light most favorable to the plaintiff, who is entitled to the benefit of every inference and intendment that may reasonably be drawn from the evidence. *Id.* Where, after engaging in such an analysis, the trial court finds that there is more than a scintilla of evidence supporting each element of the plaintiff's claim, the motion for directed verdict or j.n.o.v. should be denied. *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998).

To survive a motion for directed verdict or j.n.o.v. on a claim for alienation of affections, the plaintiff must present evidence to show that: "(1) plaintiff and [her husband] were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of defendant produced the alienation of affections." *Chappell*, 67 N.C. App. at 399, 313 S.E.2d at 241. A defendant is not liable for the tort simply because she has "becom[e] the object of the affections that are alienated from a spouse." *Peake v. Shirley*, 109 N.C. App. 591, 594, 427 S.E.2d 885, 887 (1993). "There must be active participation, initiative or encouragement on the part of the defendant in causing one spouse's loss of the other spouse's affections for liability to arise." *Id.* However, it is not necessary that the malicious conduct of the defendant, by itself, provoke the alienation of affections. *Heist v. Heist*, 46 N.C. App. 521, 265 S.E.2d 434 (1980). All that is necessary to establish the tort is to show that the wrongful acts of the defendant were "the controlling or effective cause of the alienation, even though there were other causes, which might have contributed to the alienation." *Id.* at 523, 265 S.E.2d at 436. Furthermore, evidence of marital

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difficulties does not compel a directed verdict or j.n.o.v. in favor of the defendant on the plaintiff's claim for alienation of affections. *Chappell*, 67 N.C. App. at 400, 313 S.E.2d at 241.

Taken in the light most favorable to plaintiff, the evidence tended to show that prior to 1993, plaintiff and Mr. Hutelmyer had "a fairy tale marriage." They traveled together, volunteered in church and community organizations together, and coached their children's soccer teams together. In addition, Mr. Hutelmyer often expressed his love and affection for plaintiff through sentimental poetry. One such poem, written in 1990 and entitled "Why I Love You, II", read as follows:

Three little angels, trips for two each May; lunch with couch potato, a rocking horse, sleigh, hunting eggs at Easter, puzzles on the wall; Indians in summer, soccer spring and fall; sleepy eyes at sunrise, T.V. time at nine; volunteer extra ordinaire, play games at any time; special gift with children, sound sleep without end; patience and understanding, my very, very best friend. Happy Valentine's Day. Love, Joe.

Plaintiff's evidence also tended to show that the love and affection that once existed between her and her husband was alienated and destroyed by defendant's conduct. In 1992, following the breakup of her marriage, defendant openly flirted with plaintiff's husband and spent increasingly more time alone with him. She dined alone with him, worked late hours alone with him, arrived at work with him or within minutes of him, and traveled with him on business. Mr. Hutelmyer also began spending the night at defendant's home.

Plaintiff testified that in 1992, her husband began to lose interest in her sexually and that the couple's sexual relationship began to deteriorate as a result. As he spent more time with defendant, plaintiff's husband began to spend increasingly less time with plaintiff and their children. Accordingly, we hold that plaintiff presented sufficient evidence to overcome defendant's motions for directed verdict and j.n.o.v., and the trial court properly submitted plaintiff's claim for alienation of affections to the jury.

[2] With her next assignment of error, defendant challenges the sufficiency of the evidence to support the award of punitive damages for alienation of affections and criminal conversation. Defendant contends that "adultery may support an award of compensatory damages for alienation of affections and/or criminal conversation, but aggra-

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vating conduct beyond the mere adultery must be shown to support an award of punitive damages for either tort." We are not persuaded.

Our legislature has said that "[p]unitive damages may be awarded, in an appropriate case . . . , to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1 (1997). In an action for alienation of affections, punitive damages are recoverable "where the defendant's conduct was willful, aggravated, malicious, or of a wanton character." *Chappell*, 67 N.C. App. at 403, 313 S.E.2d at 243. To establish entitlement to punitive damages for alienation of affections, the plaintiff must present "evidence of circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in alienating the affections between the spouses which was necessary to sustain a recovery of compensatory damages." *Id.*

In the instant case, evidence that plaintiff's marriage deteriorated due to defendant's ongoing adulterous relationship with plaintiff's husband was sufficient to submit the issue of alienation of affections to the jury. As to the additional circumstances of aggravation justifying punitive damages, the evidence tended to show that defendant publicly displayed the intimate nature of her relationship with plaintiff's husband. A co-worker of defendant and Mr. Hutelmyer testified that the paramours often held hands in the workplace, and defendant frequently straightened Mr. Hutelmyer's ties and brushed lent from his suits at business functions. Another co-worker testified that in 1994, during a work outing at a Putt-Putt facility, defendant stood very close to plaintiff's husband and ate ice out of his drinking cup. Defendant's behavior toward Mr. Hutelmyer was such that most of their co-workers knew of their affair.

The evidence further showed that defendant welcomed plaintiff's husband into her home at all hours of the day and night, despite her knowledge of the harm that their relationship would cause his wife and three young children. Defendant's former neighbor testified that from 1993 to 1995, she frequently saw Mr. Hutelmyer's car parked at defendant's home overnight. A co-worker of defendant and Mr. Hutelmyer whose parents lived near defendant testified that beginning in 1993, she saw Mr. Hutelmyer's car at defendant's house at all times of the day and in the evening.

Taken in the light most favorable to plaintiff, the evidence also showed that defendant traveled with Mr. Hutelmyer on business trips, and like the defendant in *Jennings v. Jessen*, 103 N.C. App. 739, 407

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S.E.2d 264 (1991), defendant in the present case “was audacious enough to call plaintiff’s home [on Thanksgiving Day in 1995] to discover her husband’s whereabouts.” *Id.* at 744, 407 S.E.2d at 267. Therefore, we hold that plaintiff presented sufficient additional circumstances of aggravation to warrant submission of the punitive damages issue to the jury on plaintiff’s claim for alienation of affections.

[3] We hold similarly regarding the issue of punitive damages on plaintiff’s claim for criminal conversation. In *Horner v. Byrnett*, 132 N.C. App. 323, 511 S.E.2d 342 (1999), this Court held that “the same sexual misconduct necessary to establish the tort of criminal conversation may also sustain an award of punitive damages.” *Id.* at 327, 511 S.E.2d at 345. As support for our decision, we looked to Professor Lee’s treatment of 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.”

Id. (quoting 1 Suzanne Reynolds, Lee’s North Carolina Family Law § 5.48(C) (5th ed. 1993)).

The evidence is conclusive that during the course of plaintiff’s marriage, defendant engaged in a sexual relationship with plaintiff’s husband which endured for several years. This evidence, as well as the evidence of additional circumstances of aggravation discussed above, provided overwhelming support for an award of punitive damages on plaintiff’s claim for criminal conversation. Accordingly, we conclude that the trial court did not err in submitting the issue of punitive damages for criminal conversation to the jury. Defendant’s assignment of error, then, fails.

[4] Defendant next assigns as error the trial court’s failure to grant a new trial on the issue of compensatory and punitive damages for

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alienation of affections and criminal conversation. Defendant contends that as to compensatory damages, plaintiff failed to present evidence establishing a loss of support commensurate to the damages awarded. Regarding punitive damages, defendant argues that the jury awarded excessive damages as a matter of law. We will address the issues of compensatory damages and punitive damages separately.

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). Thus, 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 *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E.2d 104 (1969), this Court described the injuries for which compensatory damages are appropriate in an alienation of affections action:

In a cause of action for alienation of affections of the husband from the wife, the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by her through the defendant's wrong. In addition thereto, she may also recover for the wrong and injury done to her health, feelings, or reputation.

Id. at 219, 170 S.E.2d at 115. As for criminal conversation, our courts have recognized that the measure of damages is incapable of precise computation. *Gray v. Hoover*, 94 N.C. App. 724, 730, 381 S.E.2d 472, 475 (1989). In awarding such damages, the jury "may consider the loss of consortium, mental anguish, humiliation, injury to health, and loss of support[.]" *Sebastian*, 6 N.C. App. at 220, 170 S.E.2d at 116. Consortium is defined as the "[c]onjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection, and aid of the other in every conjugal relation." *Id.* at 219-20, 170 S.E.2d at 115 (quoting Black's Law Dictionary, 4th ed.) Therefore, loss of support is but one element of damages in an action for alienation of affections or criminal conversation. *Heist*, 46 N.C. App. at 525, 265 S.E.2d at 437. Indeed, as Professor Lee notes, "the gravamen of damages in these torts is mental distress, a fact that gives juries considerable freedom in their determinations." Reynolds, *supra* § 5.48(A).

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In addition to plaintiff's evidence showing a loss of income, life insurance, and pension benefits resulting from the actions of defendant, there was plenary evidence that plaintiff likewise suffered loss of consortium, mental anguish, humiliation, and injury to health. Plaintiff's testimony revealed that after defendant became involved with Mr. Hutelmyer, the sexual relationship between plaintiff and her husband deteriorated and ultimately ceased. In addition, Mr. Hutelmyer spent considerably less time in the company of plaintiff and their children.

The evidence further showed that plaintiff became physically and emotionally ill after Mr. Hutelmyer left the marital home. She had problems sleeping, and she lost twenty pounds due to her lack of appetite. To cope with the emotional pain and stress she and her children were experiencing, she sought counseling at a Women's Resource Center. Therefore, we conclude that plaintiff presented sufficient evidence to support the \$500,000 award of compensatory damages for alienation of affections and criminal conversation. We turn, then, to the issue of punitive damages.

[5] Chapter 1D of our General Statutes governs the punitive damage award made in the instant case. Section 1D-35 states that in determining the amount to be awarded in punitive damages, the jury "[s]hall consider the purposes of punitive damages set forth in G.S. 1D-1." N.C. Gen. Stat. § 1D-35(1) (1997). With respect to what evidence is relevant in setting a punitive damages amount, the statute provides that the jury may take into account only that evidence which pertains to the following:

- a. The reprehensibility of the defendant's motives and conduct.
- b. The likelihood, at the relevant time, of serious harm.
- c. The degree of the defendant's awareness of the probable consequences of its conduct.
- d. The duration of the defendant's conduct.
- e. The actual damages suffered by the claimant.
- f. Any concealment by the defendant of the facts or consequences of its conduct.
- g. The existence and frequency of any similar past conduct by the defendant.
- h. Whether the defendant profited from the conduct.

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i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

N.C.G.S. § 1D-35(2). Section 1D-25(b) limits the amount of recovery in punitive damages as follows:

Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), *whichever is greater*. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

N.C. Gen. Stat. § 1D-25(b) (1997) (emphasis added).

As previously held, the plaintiff presented sufficient evidence to show her entitlement to punitive damages for alienation of affections and criminal conversation. Furthermore, there was evidence before the jury concerning "[t]he reprehensibility of the defendant's motives and conduct," "[t]he likelihood . . . of serious harm," "[t]he degree of the defendant's awareness of the probable consequences of its conduct," "[t]he duration of the defendant's conduct," and "[t]he actual damages suffered by the claimant." N.C.G.S. § 1-35(2). Once the right to punitive damages is established, the amount of such 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 v. Deans*, 108 N.C. App. 486, 495-96, 424 S.E.2d 154, 160 (1993) (quoting *Carawan v. Tate*, 53 N.C. App. 161, 165, 280 S.E.2d 528, 531 (1981)). Here, the jury awarded plaintiff \$500,000 in compensatory damages and \$500,000 in punitive damages for alienation of affections and criminal conversation. Under section 1D-25(b), the maximum amount of punitive damages the jury could have awarded was \$1,500,000 (three times the amount of compensatory damages); therefore, we cannot say that the amount of punitive damages was excessive as a matter of law. Hence, the trial court did not abuse its discretion in upholding the jury's award, and defendant's assignment of error to the contrary must fail.

In passing, we note that under section 1D-40, "the court shall instruct the jury with regard to subdivisions (1) and (2) of G.S. 1D-35." N.C. Gen. Stat. § 1D-40 (1997). While the court, in the instant case, instructed the jury that in determining the award amount, it

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must bear in mind the purpose of punitive damages (subdivision (1)), the court failed to charge the jury regarding which factors it may consider when setting the amount of punitive damages (subdivision (2)). Defendant has not presented this issue for our review and, thus, we do not address it at this juncture. We mention the matter simply to encourage trial judges to comply with the mandate of section 1D-40 in future litigation.

[6] By her final assignment of error, defendant argues that our Supreme Court's decision in *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985), refusing to abolish the torts of alienation of affections and criminal conversation should be reconsidered. While defendant's arguments are skillfully presented, "it is not our prerogative to overrule or ignore clearly written decisions of our Supreme Court." *Kinlaw v. Long Mfg.*, 40 N.C. App. 641, 643, 253 S.E.2d 629, 630, *rev'd on other grounds*, 298 N.C. 494, 259 S.E.2d 552 (1979). Hence, we summarily overrule defendant's assignment of error.

Based upon the foregoing, we conclude that defendant enjoyed a fair trial, free of prejudicial error.

No error.

Judge SMITH concurs.

Judge HUNTER concurs in part and dissents in part.

Judge HUNTER concurring in part and dissenting in part.

I disagree with the majority opinion which states that "plaintiff presented sufficient additional circumstances of aggravation to warrant submission of the punitive damages issue to the jury on plaintiff's claim for alienation of affections" and, therefore, respectfully dissent from that narrow portion of the majority opinion. I concur with the balance of the majority opinion since we are bound by prior decisions of the North Carolina Supreme Court and this Court as to the other issues raised in this appeal. I note further that our General Assembly has recently rejected an effort to abolish the common law cause of action for alienation of affections.

"Punitive damages may be awarded [to plaintiff] in an action of alienation of affections . . . for the wilful, wanton, aggravated or malicious conduct of defendant *towards her*." *Heist v. Heist*, 46 N.C. App. 521, 526-27, 265 S.E.2d 434, 438 (1980) (emphasis added); *see also*

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Powell v. Strickland, 163 N.C. 393, 79 S.E. 872 (1913). "It is incumbent on the plaintiff to show circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in causing the separation of plaintiff and her husband which was necessary to sustain a recovery of compensatory damages." *Heist*, 46 N.C. App. at 527, 265 S.E.2d at 438.

In the present case, I believe plaintiff's wrongful conduct, as set forth in the majority opinion, was sufficient to establish the tort but I do not believe plaintiff has shown sufficient additional circumstances of aggravation *directed to her* to justify submitting the issue of punitive damages to the jury. See *Jennings v. Jessen*, 103 N.C. App. 739, 407 S.E.2d 264 (1991) (punitives upheld because defendant's known cohabitation with plaintiff's spouse in property owned by plaintiff and her husband was a sufficient additional circumstance of aggravation beyond the acts substantiating the claim of alienation of affections); *Shaw v. Stringer*, 101 N.C. App. 513, 400 S.E.2d 101 (1991) (punitives upheld because defendant's repeated sexual relations with plaintiff's wife in the marital home and callous laughter when told plaintiff had learned of the affair constituted sufficient additional acts in aggravation to support the claim for punitive damages); *Chappell v. Redding*, 67 N.C. App. 397, 403, 313 S.E.2d 239, 243, *disc. review denied*, 311 N.C. 399, 319 S.E.2d 268 (1984) (punitives set aside because Court found "while plaintiff's evidence of the problems caused in his marriage by defendant's actions and the increasing amounts of time spent with plaintiff's wife was enough to permit the alienation of affections issue to go to the jury, plaintiff has not shown additional circumstances of aggravation to justify the submission of the punitive damages issue"); *Heist*, 46 N.C. App. 521, 265 S.E.2d 438 (punitives set aside for lack of showing of additional aggravating circumstances sufficient to justify submitting the issue of punitive damages to the jury).

The cases upholding punitive damages awards are characterized by some offensive contact between plaintiff and defendant which flaunted the relationship between the defendant and plaintiff's spouse. Here, other than the one telephone call on Thanksgiving Day in 1995 where defendant merely left a message for Mr. Hutelmyer to call her, there is no evidence that defendant flaunted the relationship in plaintiff's face. In fact, the uncontradicted evidence established by plaintiff's own testimony is that she never knew about the relationship between her husband and defendant until her husband left her in January of 1996.

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For the foregoing reasons, I believe the punitive damages award with respect to the alienation of affections claim should be set aside as a matter of law. Since the punitive damages award in this case was in one lump sum for both the alienation of affections and criminal conversation claims, this matter should be remanded for a determination of that amount to which plaintiff is entitled.



GREGORY LEE HAUSER, DEPENDENT OF THE LATE JANET NOBLE HAUSER, EMPLOYEE, PLAINTIFF-APPELLEE v. ADVANCED PLASTIFORM, INC., EMPLOYER; ZENITH INSURANCE COMPANY (F/K/A RISCORP OF NORTH CAROLINA, INC.), CARRIER, DEFENDANT-APPELLANTS

No. 98-904

(Filed 1 June 1999)

1. Workers' Compensation— employee murdered—course and scope of employment

The full Industrial Commission in a workers' compensation action did not err by concluding that an employee's death arose out of and in the course of her employment where the employee was an office manager who was kidnapped and murdered by a recently laid off employee. There was sufficient evidence to allow a reasonable inference that the nature of decedent's employment created the risk of attack rather than some personal relationship and the evidence tends to show that decedent was called to action by some person superior in authority. Although defendants argued that the compensability of decedent's death depended upon interpretation of the evidence presented through witnesses, the Commission based its decision on the facts and the law.

2. Workers' Compensation— attorney fees—evasive and incomplete interrogatories

The Industrial Commission in a workers' compensation action did not err by awarding attorney fees where the Commission found bad faith, unfounded, stubborn litigiousness, and that plaintiff was forced to prove the existence of material evidence suppressed by defendants. N.C.G.S. § 1A-1, Rule 37 provides sanctions including attorney fees to parties who provide evasive or incomplete answers to discovery requests.

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3. Workers' Compensation— appeal from deputy commissioner—issues raised

The issue of attorney fees in a workers' compensation action was properly before the full Commission even though defendants argued that plaintiff waived the issue by failing to identify it on his Form 44. Plaintiff raised the issue in his brief to the deputy commissioner and, inasmuch as the Commission decides claims without formal pleadings, it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission. Plaintiff appealed the issue in accordance with the guidelines in N.C.G.S. § 97-85.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission filed 20 March 1998. Heard in the Court of Appeals 18 March 1999.

Lore & McClearen, by R. James Lore, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by C.D. Taylor Pace and W. Scott Fuller, for defendant-appellants.

McGEE, Judge.

Plaintiff seeks workers' compensation benefits in the death of his wife, Janet Noble Hauser (Hauser), who was murdered 4 December 1995. Hauser was the office manager for Advanced Plastiform, Inc. (Advanced Plastiform). She was kidnapped and murdered by Leroy Mann (Mann), a former employee of Advanced Plastiform who had recently been laid off. A deputy commissioner of the North Carolina Industrial Commission filed an opinion and award 9 June 1997 denying plaintiff's claim for benefits, concluding that "[t]he decedent's death did not arise out of and in the course of her employment with the defendant." The deputy commissioner also denied plaintiff's request for attorneys' fees. Plaintiff appealed to the Full Commission.

The Full Commission found as a fact that "[o]n or about Friday, 1 December 1995, [Advanced Plastiform] made a decision to lay off several production personnel, one of whom was Leroy Mann." Steve Judd and Deborah Judd were co-owners of Advanced Plastiform. Steve Judd testified that after Advanced Plastiform made the layoff decisions, he agreed that Hauser should "put a memo together to explain" to the laid off employees how to obtain unemployment benefits. The Commission found that Hauser, "under the supervision of Deborah Judd . . . had typed an informational sheet regarding unem-

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ployment benefits” to be distributed to the laid off employees. The Commission found that defense witness Albert Tripp (Tripp), Advanced Plastiform’s production manager supervisor, informed Mann by telephone Sunday afternoon, 3 December 1995, that he was being laid off, and “referred Mann to call Janet Hauser . . . for further information regarding his unemployment benefits.”

The Commission found that “[c]ontemporaneous with leaving to meet Leroy Mann, Janet Hauser informed a person who answered the phone for [Advanced Plastiform] at lunch, Donna Timm[.]” of her lunch appointment with Mann at a local restaurant and the fact that she was “carrying Mann a piece of paper[.]” The Commission found that there was “overwhelming evidence” presented that this piece of paper “referred to the employee informational sheet regarding unemployment benefits previously typed by Janet Hauser and approved by Deborah Judd.”

The Full Commission reversed the opinion and award of the deputy commissioner in an opinion and award filed 20 March 1998, concluding that plaintiff “is entitled to receive all benefits under the Workers’ Compensation Act resulting from [Janet Hauser’s] death.” The Commission concluded that “critical evidence on the issue of [the] compensability of plaintiff[’]s case” had been suppressed by Advanced Plastiform and the Judds, and that “independent sanctions for discovery abuse” were justified. The Commission awarded plaintiff attorneys’ fees and \$2,000.00 as reimbursement for funeral expenses. Defendants appeal.

I.

[1] Defendants argue that the Industrial Commission’s opinion and award should be reversed because “in reversing the Deputy Commissioner’s credibility findings, on a cold record, without explanation, and without good cause, the full Commission failed to follow North Carolina law.” Defendants also argue that Hauser’s murder did not arise out of and occur in the course and scope of her employment. We disagree.

The standard by which we review decisions by the Industrial Commission is stated in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986) (citation omitted): “The Commission’s fact findings will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding.”

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Our Supreme Court recently stated:

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* [*v. Broyhill Furniture Industries*, 124 N.C. App. 637, 478 S.E.2d 223 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997)] 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. To the extent that *Sanders* is inconsistent with this opinion, it is overruled.

Adams v. AVX Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 413-14 (1998). Defendants argue that the “Deputy Commissioner[s] . . . findings hinge[d] on credibility determinations[,]” and that “[i]t was only by rejecting *nearly* all of the testimony which [the] Deputy Commissioner . . . found credible and convincing that the Full Commission managed to conclude that Hauser’s murder arose out of and occurred in the course and scope of her employment[.]”

Defendants further argue that “whether Hauser’s death is compensable is a direct function of one’s interpretation of the evidence presented through the witnesses.” To the contrary, whether Hauser’s death arose out of and in the course of her employment, and is therefore compensable, is a mixed question of fact and law. *See Pittman v. International Paper Co.*, 132 N.C. App. 151, —, 510 S.E.2d 705, 707 (1999) (citation omitted). The findings of the Full Commission tend to show that the Commission based its decision to award plaintiff workers’ compensation benefits on the facts of the case and the law and not, as defendant argues, by merely attempting to interpret the evidence as it was “presented through the witnesses.”

The North Carolina Workers’ Compensation Act defines “injury” to “mean only injury by accident arising out of and in the course of the employment[.]” N.C. Gen. Stat. § 97-2(6) (Cum. Supp. 1998). “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.” *Pittman* at —, 510 S.E.2d at 707 (citations

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omitted). In *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963), our Supreme Court stated: "Where any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.'"

Deborah Judd testified that she is the "corporate president" of Advanced Plastiform and that Hauser "reported to" her or her husband, Steve Judd. She further testified that Hauser was an "office manager" with no managerial responsibility, and that Tripp, while not Hauser's supervisor, was the "direct supervisor" of the production workers and was considered a manager.

The evidence presented supports the Full Commission's conclusion of law that Hauser's death "arose out of and in the course of her employment[.]" The following exchange took place on direct examination of Tripp:

Q. Did you have any discussion with Mr. [Leroy] Mann about what he might do or anybody at the company he might contact about [obtaining] the unemployment benefits?

A. Yes, I did.

...

I said, "If you do not understand what I'm telling you," I said, "we have a form at work that explains how to deal with the unemployment, how to get it, the number to call." I said, "You'll need to get up with Jan [Hauser] to get that form or information you may need. You can give her a call on Monday."

Tripp testified that he told Mann to "call or get up with" Hauser because he "didn't want to be involved" in the unemployment benefits process, and he was "kind of letting [Hauser] deal with that end of it." Tripp also testified that on 4 December 1995 Hauser informed him that she was going to meet Mann for lunch. Tripp testified that when he told Mann over the phone that he was being laid off, Mann had seemed "much more upset" than other employees Tripp had contacted, and that Mann's reaction caused him concern. Tripp testified that he did not "want to run into" Hauser and Mann at lunch and he thought an "altercation" might arise if he did. Tripp stated that he believed that Mann's layoff and Advanced Plastiform's layoffs in general were "the only thing that they would be talking about" over

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lunch, and that he became concerned for his own safety once he had learned that Hauser was missing.

The evidence before the Full Commission tended to show that Tripp knew that Hauser had prepared the memorandum concerning unemployment compensation and had “distributed [the memorandum] to the employees” on the Friday preceding the Monday of Hauser’s murder. Tripp also knew that Mann had not been at work that Friday and thus had not received the memorandum. This evidence supports the Full Commission’s finding of fact that the “piece of paper” Hauser was carrying to Mann was the “employee informational sheet regarding unemployment benefits previously typed by” her.

“The mere fact that the injury is the result of the willful or criminal assault of a third person does not prevent the injury from being accidental.” *Goodwin v. Bright*, 202 N.C. 481, 484, 163 S.E. 576, 577 (1932) (citation omitted). In *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 377 S.E.2d 777 (1989), a waitress employed at a resort filed a workers’ compensation claim to recover for injuries sustained when she tried to escape from a guest of the resort who kidnapped and sexually assaulted her. The attack occurred after the employee’s work day had ended and she had stopped on a resort road to assist the guest with apparent car trouble. Our Court stated that “[b]ecause [plaintiff’s] *decision to stop* [on the roadside and assist the resort guest] *had its origin in her employment*, we hold that her actions were sufficiently ‘work-connected’ to warrant a conclusion that her injuries arose out of the employment.” *Id.* at 249, 377 S.E.2d at 781 (emphasis in original). “Injuries resulting from an *assault* are caused by ‘accident’ within the meaning of the [Workers’ Compensation] Act when, from the employee’s perspective, the assault was unexpected and was without design on her part.” *Culpepper* at 247, 377 S.E.2d at 780 (citations omitted). We further stated in *Culpepper* that:

The words “arising out of . . . the employment” refer to the origin or cause of the accidental injury. Thus, our first inquiry “is whether the employment was a *contributing cause* of the injury.” Second, a contributing proximate cause of the injury must be a *risk* inherent or incidental to the employment, and must be one to which the employee would not have been equally exposed apart from the employment. Under this “increased risk” analysis, the “causative danger must be *peculiar to the work and not com-*

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mon to the neighborhood.” Finally, an injury will be deemed to “arise out of” the employment if the employee’s acts on behalf of a third person are of “*appreciable benefit*” to the employer.

Id. at 248, 377 S.E.2d at 781 (citations omitted) (emphasis in original). The evidence in *Culpepper* tended to show that plaintiff “was instructed when she was hired ‘to be very cordial and friendly and nice and [to] *offer any assistance that [she] could*’ to members and guests[.]” *Id.* at 244, 377 S.E.2d at 779 (emphasis in original). Our Court concluded that “the *only* reason [plaintiff] stopped on the resort road . . . was to offer a guest assistance, as her employer instructed her to do.” *Id.* at 248, 377 S.E.2d at 781 (emphasis in original). We further stated that “[c]ompensation should be denied only if the circumstances surrounding an assault will not permit a reasonable inference that the *nature* of the employment, rather than some personal relationship, created the risk of attack.” *Id.* at 249, 377 S.E.2d at 781-82 (citation omitted) (emphasis in original).

In *Stewart v. Dept. of Corrections*, 29 N.C. App. 735, 737-38, 225 S.E.2d 336, 338 (1976) (citations omitted), this Court stated:

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.

...

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 present case, the evidence tends to show that the reason Hauser met Mann for lunch was to give him the memorandum she had drafted pertaining to unemployment benefits. Steve Judd agreed that Hauser should prepare this work-related document, and Tripp told

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Mann to “get up with [Hauser]” if he had any questions about unemployment benefits. Thus there is sufficient evidence to allow “a reasonable inference that the *nature* of the [plaintiff’s decedent’s] employment, rather than some personal relationship, created the risk of [her] attack.” *Culpepper* at 249, 377 S.E.2d at 781-82 (citation omitted) (emphasis in original). Moreover, this evidence tends to show that Hauser was “called to action by some person superior in authority to [her].” *Stewart* at 737, 225 S.E.2d at 338. The Full Commission did not err in concluding that Hauser’s death “arose out of and in the course of her employment[.]”

II.

[2] Defendants argue that the Commission’s award of attorneys’ fees should be reversed because (1) the issue was not preserved on appeal to the Full Commission, (2) the ruling was not supported by the evidence, and (3) “reversing the Deputy Commissioner’s denial of plaintiff’s motion for attorney fees, on a cold record, without explanation, and without good cause,” is contrary to North Carolina law. We disagree. It was within the Full Commission’s discretion to address the issue of attorneys’ fees.

We first note that “[a]n abuse of discretion standard of review is applied in an award of attorney fees by the Industrial Commission.” *Childress v. Trion, Inc.*, 125 N.C. App. 588, 590, 481 S.E.2d 697, 698, *disc. review denied*, 346 N.C. 276, 487 S.E.2d 541 (1997) (citation omitted).

In the case before us, the Full Commission found as fact that:

21. [The] information[] that Janet Hauser was carrying a work-related paper to Leroy Mann on 4 December 1995[] was known or reasonably should have been known to the Judds, the owners of [Advanced Plastiform], but in response to discovery, the Judds, on behalf of [Advanced Plastiform], failed to disclose this information to the plaintiff. This information was material to one of the most important issues involved in this case, i.e., the work-related nexus of Janet Hauser’s trip to meet with Leroy Mann. Failure to disclose this information regarding such a material fact, explained by Ms. Judd as being because Ms. Timm did not actually “see” the document, demonstrates bad faith on the part of the Judds and [Advanced Plastiform] as well as an unfounded stubborn, litigiousness in defense of this case before the Deputy Commissioner. On the other hand, defense counsel

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were unaware of this information until the hearing when the testimony of Ms. Timm was taken by telephone.

The Commission also stated that “[a]s a result of the Judds’ failure to respond to discovery . . . plaintiff was forced to prove and did, in fact, prove the existence of the evidence suppressed by the Judds, which was material to this case, i.e., the work-related nexus of Janet Hauser’s trip.” The Full Commission awarded plaintiff “25% of the benefits awarded herein as attorney fees.”

Defendants’ answers to plaintiff’s first set of interrogatories, dated 6 August 1996, particularly interrogatory number six, support the Full Commission’s finding of fact that in response to discovery defendants demonstrated bad faith in defending this case. Plaintiff asked defendant the following question:

6. Identify each document regarding which you have information may have been transported by decedent, Janet Noble Hauser, to Leroy Mann on Monday, December 4, 1995.

Despite “overwhelming evidence” that Hauser had prepared an “employee informational sheet regarding unemployment benefits” and was carrying that document to Mann, defendants responded:

ANSWER: Defendants are not aware of any work-related documents that Mrs. Hauser transported to Mr. Mann on or about December 4, 1995. Defendants object to the remainder of Interrogatory #6 which asks defendants to speculate as to what “may have been transported” by Mrs. Hauser to Mr. Mann.

Plaintiff also asked defendants through interrogatories to: (1) “identify any person” who knew that Hauser was “carrying any type of document[] associated with” Mann’s employment to Mann when she met him for lunch on 4 December 1995, and (2) identify anyone aware that on the date Hauser met Mann, she was “intending to help him with applying for unemployment benefits[.]” To each of these interrogatories defendants responded that “no such person exists.” However, the evidence before the Commission showed that Timm, who answered Advanced Plastiform’s telephones at lunch, and Tripp, Advanced Plastiform’s production manager supervisor, were aware of Hauser’s work-related reason for meeting Mann.

N.C. Gen. Stat. § 97-88.1 (1991) states: “If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the

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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." Rule 802 of the Workers' Compensation Rules of the North Carolina Industrial Commission provides that "failure to comply" with the Workers' Compensation Rules "may subject the violator to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure, including reasonable attorney fees to be taxed against the party or his counsel whose conduct necessitates the order." Rule 37 provides for various sanctions, including attorneys' fees, against parties who, among other things, provide "evasive or incomplete answer[s]" in response to discovery requests. N.C.R. Civ. P. 37(a)(3). Defendants' responses to plaintiff's interrogatories were clearly "evasive and incomplete."

[3] Defendants argue that "by failing to appeal from [the] Deputy Commissioner[s] . . . ruling by identifying this issue on his Form 44[,] plaintiff has "waived this issue[.]" The record on appeal reflects that plaintiff did raise the issue of attorneys' fees in his brief to the deputy commissioner; the deputy commissioner denied plaintiff's motion; plaintiff appealed to the Full Commission from the deputy commissioner's opinion and award in accordance with the requirements of N.C. Gen. Stat. § 97-85 (1991); and the Full Commission reversed the deputy commissioner, awarding plaintiff workers' compensation benefits and attorneys' fees. However, in his assignments of error in his Form 44, plaintiff did not specifically address the issue of attorneys' fees.

Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission is entitled "Appeal to the Full Commission." Rule 701(2) states:

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant Form 44 upon which he must state the grounds for his appeal. The grounds must be stated in particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds[.]

In *Joyner v. Rocky Mount Mills*, 85 N.C. App. 606, 355 S.E.2d 161 (1987), the deputy commissioner awarded plaintiff \$8,000.00 per lung for loss of lung function as a result of an occupational disease. Defendants appealed the award to the Full Commission. The

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Commission affirmed the opinion and award of the deputy commissioner but modified the amount payable to \$4,000.00 per lung. The Full Commission also reduced the deputy commissioner's award of attorneys' fees from \$4,000.00 to \$2,000.00. Plaintiff argued on appeal to this Court that "the full commission erred in failing to address" the issue of future medical expenses in its opinion and award. *Joyner* at 607, 355 S.E.2d at 161. We dismissed plaintiff's appeal pursuant to Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission. Our Court stated:

[T]he Deputy Commissioner made no award for medical expenses pursuant to G.S. 97-59 and plaintiff never appealed from that opinion and award. Only the defendants appealed to the full Commission and the record before us states that the sole issue on appeal was whether the commissioner "erred in awarding plaintiff compensation in the amount of \$8,000.00 per lung pursuant to G.S. 97-31(24)."

...

Plaintiff has failed to properly preserve his right to appeal the failure of the Deputy Commissioner to order payment of medical expenses under G.S. 97-59. The *record* must in some way reflect that the matter was before the full Commission.

Id. at 607-08, 355 S.E.2d at 162.

In the present case, however, the opinion and award of the Full Commission indicates that the issue of attorneys' fees was before the Commission. Unlike the chronology of events in *Joyner*, the deputy commissioner denied plaintiff's motion for attorneys' fees and plaintiff appealed to the Full Commission in a notice of appeal dated 12 June 1997, well within the time limits proscribed by N.C. Gen. Stat. § 97-85, which states:

If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]

In *Tucker v. Workable Company*, 129 N.C. App. 695, 701, 501 S.E.2d 360, 365 (1998) (citation omitted) (emphasis in original), our Court stated:

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Although Rule 701 provides that the appellant must state with particularity the grounds for appeal, “[t]his Court has held that when the matter is ‘appealed’ to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to decide *all of the matters in controversy between the parties.*”

We further stated, “ [i]nasmuch as the Industrial Commission decides claims without formal pleadings, it is the duty of the Commission to *consider every aspect of plaintiff’s claim* whether before a hearing officer or on appeal to the full Commission.’ ” *Id.* (citations omitted) (emphasis in original).

[T]he Commission is allowed to award attorneys’ fees to the employee, in addition to the compensation amount originally awarded. Furthermore, N.C. Gen. Stat. § 97-80 (1991) provides the Industrial Commission with certain powers, including the taxing of costs and contempt powers; and N.C. Gen. Stat. § 97-88.1 (1991) allows the Industrial Commission to assess the entire costs, including attorneys’ fees, when a case is unreasonably defended.

Tucker at 704, 501 S.E.2d at 366 (citation omitted).

Plaintiff appealed the issue of attorneys’ fees in accordance with the guidelines set forth in N.C. Gen. Stat. § 97-85. As *Tucker* indicates, it is incumbent upon “the full Commission to decide *all of the matters in controversy between the parties.*” *Tucker* at 701, 501 S.E.2d at 365 (citation omitted) (emphasis in original). Upon careful examination of the opinion and award of the Full Commission, we find no abuse of discretion in awarding plaintiff attorneys’ fees. The opinion and award of the Full Commission is affirmed.

Affirmed.

Judges JOHN and WALKER concur.

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JANICE MAULDIN CAUBLE, PLAINTIFF v. TED JAMES CAUBLE, DEFENDANT

No. COA97-1274

(Filed 1 June 1999)

1. Child Support, Custody, and Visitation— child support— calculation of income—closely held corporation

The trial court did not abuse its discretion in a child support action by imputing income to defendant from a closely held farm supply business without finding that defendant had deliberately depressed his income where the uncontradicted evidence supported the finding that the profits were available to defendant by virtue of his controlling interest in the closely held corporation.

2. Child Support, Custody, and Visitation— child support— calculation of income—accrual accounting

The trial court did not abuse its discretion in a child support action by not considering the accrual accounting method used by defendant's closely held corporation in calculating defendant's income. Although defendant argued that the accrual method creates fictional income and that the court could make no determination of income actually available, accrual accounting figures represent income which is taxable for federal tax purposes and such amounts are thus properly considered for purposes of the Child Support Guidelines. Furthermore, in determining an obligor's gross income derived from an interest in a closely held corporation, the court in its discretion may allow appropriate adjustments.

3. Child Support, Custody, and Visitation— child support— closely held corporation—bad debts

The trial court did not abuse its discretion in a child support action by not allowing claimed bad debt and depreciation expenses from a closely held corporation in computing defendant's gross income. Under the Guidelines, the court is accorded the discretion to discern those business expenses which are inappropriate for determining gross income for purposes of calculating child support.

4. Child Support, Custody, and Visitation— child support— calculation of income—losses

The trial court erred in a child support action by not including in defendant's income losses from a corporation. Although

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straight line depreciation may be excluded from an obligor's gross income in the court's discretion, the order in this case contains no reference to defendant's ownership interest in this corporation and fails to reflect its treatment of these corporate figures. The findings are not sufficiently specific to indicate whether the court properly applied the Guidelines.

Appeal by defendant from order filed 5 May 1997 by Judge Susan C. Taylor in Stanly County District Court. Heard in the Court of Appeals 18 August 1998.

Morton, Grigg & Phillips, by Ernest H. Morton, Jr. and David L. Grigg, Jr., for plaintiff-appellee.

Tucker, Slaughter & Singletary, P.A., by William C. Tucker, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's child support order, asserting the court erred by (1) "improperly calculating the income of the [defendant] from the Farm Supply business"; and (2) "not including in the income of the [defendant] the losses from the Fun Park corporation." We vacate in part and remand in part.

Pertinent facts and procedural history include the following: Plaintiff and defendant, both residents of Stanly County, were married 29 December 1968. Amanda Beth Cauble, the sole child of the marriage, was born 24 November 1985. Following separation in early 1991, the parties divorced 26 September 1994. Subsequent to a hearing at the 28 October 1996 Session of Stanly County District Court, an order awarding plaintiff custody of Amanda was filed 24 March 1997.

Plaintiff's claim for child support was heard during the 19 March 1997 Civil Non-Jury Session of District Court of Stanly County. In its 5 May 1997 order, the court entered the following relevant findings of fact:

7. The plaintiff testified that she was employed by Home Savings Bank of Albemarle and that her current gross monthly earnings are \$2,885.00. . . .

8. In June of 1983, plaintiff and defendant founded Stanly Farm Supply, Inc. (hereinafter called "Stanly Farm") with the

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defendant owning 51% of the outstanding shares of capital stock, namely, 251 shares, and the plaintiff owning 49% of the outstanding shares of capital stock, namely, 249 shares.

9. Stanly Farm is a closely held corporation.

10. Since June 1, 1983, defendant has managed the Stanly Farm business as its chief executive officer.

11. Since June 1, 1983, Stanly Farm has been engaged in the business of selling feeds, seeds, fertilizer, farm equipment, farm supplies and other related items to the farming communities in Stanly County and other surrounding counties.

12. Since January 1, 1983, Stanly Farm has been a C corporation with its fiscal year being the same as the calendar year and its method of accounting being the accrual method.

13. For more than three years, the defendant's annual salary with Stanly Farm has been \$8,000.00. In addition he has rented a dump truck to Stanly Farm and has received annual rental income of \$5,400.00

....

15. Since June 1, 1983, Stanly Farm has had taxable income each calendar year, with the exception of 1996, which tax return shows a taxable income loss of \$1,498.71.

16. All income after payment of taxes of Stanly Farm since its inception in June of 1983 have been retained and the accumulated retained earnings on December 31, 1996 was \$470,676.20.

In arriving at defendant's gross income from Stanly Farm Supply, Inc. (Stanly Farm), the trial court allowed the following as ordinary and necessary business expenses of the corporation:

Salaries and wages	\$62,599.72
Taxes and Licenses	\$10,532.72
Interest	\$ 487.56
Advertising	\$ 5,533.72
Other deductions	\$74,409.79

However, "in the interest of justice," the court excluded the sums of \$6,447.53 and \$71,886.68, claimed by Stanly Farm on its 1996 tax

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return as deductions respectively for depreciation and bad debt. The court's order provided in this regard that:

19. The depreciation of \$6,447.53 . . . represents straight line depreciation or lower than straight line depreciation. Stanly Farm in earlier years did use an accelerated component of depreciation.

20. The bad debts . . . represent[] bad debts from sales in previous years and does not represent cash dollars flowing out of Stanly Farm during 1996.

21. Defendant also received from Stanly Farm in 1996, \$540.00 as reimbursement for the use of his personal vehicle for Stanly Farm and \$5,400.00 rental income.

. . . .

23. On December 31, 1996, Stanly Farm had on hand a cash balance of \$69,301.49. . . .

24. Defendant, as the owner of 51% of the outstanding shares of the capital stock of Stanly Farm, had the authority as to the disbursement of any monies owned by Stanly Farm.

25. Since June 1, 1983, Stanly Farm has never paid dividends to its shareholders.

The court thereupon concluded:

2. The defendant's annual gross income from his operation of Stanly Farm for purposes of calculating child support is \$49,206.00 . . . [and the] appropriate level of monthly gross income available to defendant to satisfy his child support obligation is \$4,100.00. . . .

. . . .

5. The defendant's monthly obligation for child support . . . is \$467.00.

Also at issue at the child support hearing was defendant's 100% ownership of Fun Park, Inc. (Fun Park), a Subchapter-S corporation established by defendant in 1996. Fun Park reported a loss of \$43,321.11 in 1996. Defendant's evidence tended to show that \$13,347.63 of this figure consisted of the straight line depreciation component. The trial court's order contained no findings or conclusions addressing defendant's income or loss from Fun Park.

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Defendant filed timely notice of appeal 25 April 1997.

Initially, defendant argues the trial court improperly (1) “imputed to [him] income of [Stanly Farm] without finding that he had deliberately depressed his income”; (2) determined the “amount of income available to him through [Stanly Farm] by disregarding Stanly Farm’s accrual accounting method; and (3) “fail[ed] to deduct from [the] income of [Stanly Farm] the reasonable and necessary expenses of depreciation and bad debt . . . incurred in an accrual accounting tax computation.” Each of these contentions is unfounded.

The

ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the father [mother] to meet the needs.

Pittman v. Pittman, 114 N.C. App. 808, 810, 443 S.E.2d 96, 97 (1994). The statute governing child support provides that:

[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, [and] accustomed standard of living of the child and the parties

N.C.G.S. § 50-13.4(c) (Supp. 1997).

Prospective child support is “normally determined under the North Carolina Child Support Guidelines (the Guidelines),” *see* G.S. § 50-13.4(c), which utilize the “gross income” of each parent in calculating the amount of child support required to be paid thereunder by an obligor. Absent a request for variance,

support set consistent with the [G]uidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance.

Browne v. Browne, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991).

Under the Guidelines, gross income is defined as “income from any source,” including “income from . . . dividends, . . . pensions, . . . interest, [and] trust income.” *North Carolina Child Support Guidelines*, AOC-A-162 (1994). Further, concerning calculation of the gross income of a parent who is self-employed or operates a business, such as defendant herein, the Guidelines provide:

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For income from self-employment, rent, royalties, proprietorship of a business, or *joint ownership of a partnership or closely held corporation*, gross income is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation.

Id. (emphasis added).

Specifically excluded from “ordinary and necessary expenses” are

amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or *any other business expenses determined by the Court to be inappropriate* for determining gross income for purposes of calculating child support.

Id. (emphasis added). In addition, the

income and expenses from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation.

Id.

The amount of a trial court’s child support award will not be disturbed on appeal except upon a showing of abuse of discretion. *See Burnett v. Wheeler*, 128 N.C. App. 174, 177, 493 S.E.2d 804, 806 (1997). In addition,

[b]ecause the Guidelines vest the trial court with the discretion to disallow the deduction of any business expenses which are inappropriate for the purposes of calculating child support, the trial court’s decision . . . to disallow the claimed expenses must be upheld unless it is “manifestly unsupported by reason” and therefore an abuse of discretion.

Kennedy v. Kennedy, 107 N.C. App. 695, 700, 421 S.E.2d 795, 798 (1992) (citations omitted).

Moreover,

[t]his Court is bound by the trial court’s findings where there is competent evidence to support them. “If different inferences may be drawn from the evidence, [the judge sitting without a

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jury] determines which inferences shall be drawn . . .”, and the findings are binding on the appellate court.

Monds v. Monds, 46 N.C. App. 301, 302, 264 S.E.2d 750, 751 (1980) (bracketed language in original) (citations omitted). In this latter regard, suffice it to state that our examination of the instant record reflects competent evidence in support of each of the trial court’s findings, and we thus are “bound by . . . [said] findings.” *Id.*

[1] Bearing the foregoing in mind, we proceed to consider *ad seriatim* defendant’s contentions as to the trial court’s treatment of his interest in Stanly Farm. Defendant first maintains the trial court erroneously imputed to him income of Stanly Farm without finding he had deliberately depressed his income. Although defendant correctly asserts that income may be imputed to a party “only if there is a finding that the party deliberately depressed his income,” *Burnett*, 128 N.C. at 177, 493 S.E.2d at 806, the trial court herein did not impute income to defendant. Rather, the court’s computation of defendant’s income included his fifty-one per cent (51%) ownership of Stanly Farm, which accorded him “the authority to make decisions as to the disbursement of any monies owned by Stanly Farm.”

This Court has previously held that

setting an amount of child support [is] dependent . . . upon the amount of [defendant’s] income and the nature of his *estate*—whether exclusively owned or controlled by defendant.

Shaw v. Cameron, 125 N.C. App. 522, 528, 481 S.E.2d 365, 369 (1997). In the instant case, the uncontradicted evidence supports the trial court’s finding that the profits of Stanly Farm were available to defendant by virtue of his controlling interest in the closely-held corporation. Thus, notwithstanding defendant’s declination to disburse said corporate income, the trial court did not abuse its discretion in allocating to him that amount of income earned by Stanly Farm corresponding to his corporate interest. See *Guidelines* (“[gross] income from [a] . . . closely held corporation [is] . . . gross receipts minus ordinary and necessary expenses”); see also *Barham v. Barham*, 127 N.C. App. 20, 26, 487 S.E.2d 774, 778 (1997) (income of plaintiff owning 50% of corporation included certain cash reserves plaintiff had pledged to a creditor bank for business financing because plaintiff had made the choice to encumber said reserves, and as such the reserves were “available to plaintiff”), *aff’d*, 347 N.C. 570, 494 S.E.2d 763 (1998); *Burnett*, 128 N.C. App. at 177, 493 S.E.2d at 806 (no abuse of discretion by trial court to include in defendant’s gross income

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retirement accounts, stocks, and land, because court must consider all available sources of income); *cf. Roth v. Roth*, 406 N.W.2d 77, 79 (Minn. App. 1987) (profits of subchapter S Corporation must be attributed to sole shareholder and officer); *Merrill v. Merrill*, 587 N.E.2d 188, 190-91 (Ind. App. 1992) (retained earnings of Subchapter-S corporation constituted profit attributable to defendant as controlling shareholder).

Notwithstanding, defendant points to this Court's opinion in *Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996), and argues the trial court should have considered only the income actually received by defendant from Stanly Farm in its computation of his gross income. *Taylor* is inapposite.

First, defendant neglects to consider that the Guidelines were not applicable in *Taylor* and that the court's award of child support therein was derived solely from its conclusions as to "the amount of support necessary to meet the reasonable needs of the child and the relative abilities of the parties to provide that amount." *See id.* at 362, 455 S.E.2d at 447. The trial court herein, however, was obligated to follow the Guidelines which direct computation of an obligor's income based upon the amount of his "taxable income . . . from any source;" which amount may include "potential income if [voluntarily] unemployed or underemployed." *Guidelines*.

More significantly, unlike the instant record, no evidence in *Taylor* indicated the obligor owned a controlling corporate interest whereby he might have directed distribution of corporate profits to his benefit. *See Taylor*, 118 N.C. App. at 358, 455 S.E.2d at 444. Defendant's reliance upon *Taylor* is thus unavailing.

[2] Defendant next asserts the trial court erred in determining the "amount of income available to him through [Stanly Farm]" because the court did not take into consideration the accrual accounting method utilized by Stanly Farm. According to defendant,

[u]nder the accrual method of accounting, income is accounted for when the right to receive it is created. Thus, it is not the actual receipt of the income but the right to receive which results in an income entry.

Therefore, defendant continues, the "accrual method creates fictional income" and "the trial court can make no determination of the income actually available to the [defendant]."

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While it appears no North Carolina authority directly addresses the significance of the accrual method of accounting in relation to an award of child support, accrual accounting figures represent income which is taxable for federal tax purposes, *see* 26 U.S.C. § 446 (1998) and 26 U.S.C. § 61 (1998), and such amounts are thus properly considered as “gross receipts” for purposes of the Guidelines. *See Guidelines* (in determining gross income, “[a]ll income is assumed to be taxable”). Further, in determining an obligor’s gross income derived from the latter’s interest in a closely held corporation, the trial court may in its discretion allow appropriate adjustments upon “careful[] review[]” of the “income and expenses from self employment.” *See id.*; *see also Lawrence v. Tise*, 107 N.C. App. 140, 147, 419 S.E.2d 176, 181 (1992) (“Guidelines . . . vest the trial court with the discretion to deduct . . . straight line depreciation”).

The trial court found that Stanly Farm at the end of its 1996 fiscal year “had on hand a cash balance of \$69,301.49,” and that “[a]ll income after payment of taxes of Stanly Farm since its inception in June of 1983 have been retained and the accumulated retained earnings . . . [are] \$470,676.20.” Our careful review of the record reveals that save for evidence of an approximate \$19,000.00 bad debt deduction in 1995, defendant introduced no evidence tending to establish that percentage of the annual gross income of Stanly Farm which typically comprised bad debt, *i.e.*, money Stanly Farm would never receive. Absent evidence to the contrary, therefore, use of accrual figures in the trial court’s calculations herein was reflective of “an appropriate level of gross income available to the [defendant],” *see Guidelines*, and the trial court’s reliance upon such accrual figures was not “manifestly unsupported by reason.” *See Kennedy*, 107 N.C. App. at 700, 421 S.E.2d at 798.

[3] Defendant’s third contention is that the court

fail[ed] to deduct from [the] income of [Stanly Farm] the reasonable and necessary expenses of depreciation and bad debt incurred in an accrual accounting tax computation.

This argument is also unpersuasive.

Under the Guidelines, the trial court is accorded the discretion to discern those business expenses which are “inappropriate for determining gross income for purposes of calculating child support.” *See Guidelines*. In the case *sub judice*, the trial court disallowed “in the interest of justice” deductions of \$71,886.68 in bad debt and \$6,447.53

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in depreciation taken by Stanly Farm in 1996. The court stated in its order that the bad debt “d[id] not represent cash dollars flowing out of Stanly Farm during 1996.” The court also noted that

[s]ince June 1, 1983, Stanly Farm . . . had taxable income each calendar year, with the exception of 1996, which tax return shows a taxable income loss of \$1,498.71.

In light of such findings, as well as those specifying the retained earnings and cash on hand of Stanly Farm, we cannot say the trial court’s disallowance of Stanley Farm’s claimed bad debt and depreciation expenses in computing defendant’s gross income from the corporation was “manifestly unsupported by reason.” *Kennedy*, 107 N.C. App. at 700, 421 S.E.2d at 798.

[4] In a separate assignment of error, defendant argues the trial court erred by “not including in the income of the [defendant] the losses from the Fun Park corporation.” Defendant’s final argument has merit.

It is well established that

[e]ffective appellate review of an order entered by a trial court . . . is largely dependent upon the specificity by which the order’s rationale is articulated. Evidence must support findings, findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

In the case *sub judice*, the trial court’s child support order contains no reference to defendant’s 100% ownership interest in Fun Park. *See Shaw*, 125 N.C. App. at 528, 481 S.E.2d at 369 (“[a]ny judgment . . . setting an amount of child support [is] dependent in significant part upon the amount of [defendant’s] income and the nature of his *estate*—whether exclusively owned or controlled by defendant”). We note defendant introduced evidence tending to show that Fun Park reported a loss in 1996 of \$43,321.11. The business employed an accelerated method of depreciation resulting in a 1996 deduction of \$39,725.13, the accelerated component being \$26,377.50 and the straight line component totaling \$13,347.63. Although straight line

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depreciation may be excluded from an obligor's gross income in the court's discretion, *see Tise*, 107 N.C. App. at 147, 419 S.E.2d at 181, the trial court's order herein fails to reflect its treatment of the Fun Park figures. For example, considering only the straight line depreciation, the loss of Fun Park in 1996 might have totaled \$16,953.61, or \$3,595.98 without consideration of depreciation in any amount. As such, "the findings in this regard are not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing [defendant's] gross income." *Id.* at 148, 419 S.E.2d 181.

Based on the foregoing, those portions of the trial court's order purporting to compute defendant's gross income and award child support thereon must be reversed. In addition, this matter is remanded for additional findings regarding the income or loss, if any, of defendant from Fun Park as well as re-computation of defendant's gross income and entry of a new child support award in light of such findings. 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.

Heath v. Heath, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

Affirmed in part; vacated in part and remanded with instructions.

Judges GREENE and TIMMONS-GOODSON concur.

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DEPARTMENT OF TRANSPORTATION, DEFENDANT/APPELLEE

No. COA98-819

(Filed 1 June 1999)

**Highways and Streets— successive right-of-way agreements—
abutter's rights—access rights appurtenant**

Summary judgment was erroneously granted for defendant in an action which arose from a 1960 right-of-way agreement which succeeded a 1953 right-of-way agreement and created a restricted

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access highway, leading to closure of a crossover created under the 1953 agreement which provided access to plaintiff's property. The 1960 agreement only released "abutter's rights" and "access rights appurtenant" to plaintiff's property, but failed to release plaintiff's separate and distinct rights to the crossover. While contradictory evidence external to the agreement suggests the contrary, the clear and unambiguous language of the agreement itself does not release the crossover rights created by the 1953 agreement and therefore cannot bar enforcement of that agreement.

Appeal by plaintiff from judgment entered 17 April 1998 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 27 April 1999.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General David R. Minges, for defendant-appellee.

MARTIN, Judge.

Plaintiff is the owner of a tract of land in High Point, Guilford County, North Carolina, located on the south side of U.S. Highway 29-70. In 1953, plaintiff's predecessors in title, the Clinard heirs entered into a right-of-way agreement (the 1953 agreement) with the State Highway Commission (now defendant Department of Transportation), in which they granted a right-of-way over their property for the construction of U.S. Highway 29-70. The proposed highway split the property retained by the Clinards to the north and the south. The 1953 agreement required the Commission to provide a crossover to enable the Clinards to have access between the portions of their property to the north and south of the highway. The 1953 agreement further required the Commission to build a service road from the Clinard property, along the highway, and extending east to the proposed crossover, in order to insure the Clinard heirs access to the crossover from their own property. It is not disputed that the crossover was built by defendant and that it never abutted the Clinard property. In addition to the crossover, the 1953 agreement restricted the Clinards' right of access to the highway to specific survey stations, corresponding with the ramps that connect the highway to other existing public roads.

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In 1959-60, defendant initiated Project 8.15306, converting U.S. Highway 29-70 to a controlled access facility. In connection with this project, defendant acquired additional land from the Clinards by another right-of-way agreement (the 1960 agreement). The 1960 Agreement stated:

This conveyance is made for the purposes of a freeway and adjacent frontage road and *the grantor hereby releases and relinquishes to the grantee any and all abutter's rights including access rights appurtenant to grantor's remaining property in and to said freeway*, provided however, that such remaining property of the grantor as may abut upon the frontage road shall have access to said frontage road which will be connected to the freeway or other public roads only at such points as may be established by the Commission. Interchange ramps are considered to be part of the freeway and as such are subject to full control of access (emphasis added).

Beyond the reference to "abutter's rights" and "access rights appurtenant to grantor's remaining property," the 1960 agreement made no specific reference to the crossover. The 1960 agreement also provided for construction of a "Closure Road D," connecting the service road along the highway with a public road from the south (Model Farm Road). Included in defendant's appraisals of just compensation for the land acquired by the 1960 agreement was compensation for elimination of all rights of access along the highway, leaving the Closure Road connection to Model Farm Road as the only remaining highway access from the Clinard property to the south.

On 25 July 1990, defendant closed the crossover. In apt time, plaintiff, as successor to the Clinard heirs' title, filed this action seeking a declaration of the parties' rights pursuant to G.S. § 1-253 *et seq.*, specific performance of the 1953 agreement, or alternatively, damages for breach of contract. Defendant Department of Transportation answered asserting *inter alia* the affirmative defenses of sovereign immunity and the release of plaintiff's rights to the crossover under the 1960 Agreement.

Defendant's motion to dismiss on the grounds of sovereign immunity was denied. Defendant appealed to this Court which held that plaintiff's claim for breach of contract was not barred by the doctrine of sovereign immunity and affirmed the denial of defendant's motion to dismiss. *Southern Furniture Co. of Conover, Inc. v. Department*

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of Transportation, 122 N.C. App. 113, 468 S.E.2d 523 (1996), *disc. review improv. allowed*, 346 N.C. 169, 484 S.E.2d 552 (1997).

On remand, defendant moved for summary judgment in its favor as to all issues. Plaintiff moved for summary judgment in its favor “as to all issues other than damages or the remedy of specific performance”¹ Plaintiff’s motion was denied, and defendant’s motion was granted. In the summary judgment order dismissing plaintiff’s action, the trial court concluded “as a matter of law that the 1960 right of way agreement, asserted as an affirmative defense by the defendant in this action, eliminated any right of access to the median crossover located thereon which the plaintiff or plaintiff’s predecessor may have had under the 1953 agreement.” Plaintiff appeals.

The issue presented by this appeal is whether the 1960 agreement eliminated plaintiff’s rights to the crossover created by the 1953 agreement. As a matter of law it did not, and we reverse summary judgment in favor of defendant and remand for entry of judgment in plaintiff’s favor.

When a contract is plain and unambiguous, its interpretation is a question of law for the court. *Department of Transp. v. Idol*, 114 N.C. App. 98, 440 S.E.2d 863 (1994); *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 385 S.E.2d 553 (1989). “If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.” *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996).

The language of the deed being clear and unequivocal, it must be given effect according to its terms, and we may not speculate that the grantor intended otherwise. “The grantor’s intent must be understood as that expressed in the language of the deed and not necessarily such as may have existed in his mind if inconsistent with the legal import of the words he has used.”

Parker v. Pittman, 18 N.C. App. 500, 506, 197 S.E.2d 570, 574 (1973) (quoting *Pittman v. Stanley*, 231 N.C. 327, 56 S.E.2d 657). When terms with special meanings or terms of art appear in an instrument, they are to be given their technical meaning; whereas, ordinary terms are to be given their meaning in ordinary speech. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 246 S.E.2d 773 (1978); *IRT*

1. We interpret plaintiff’s motion as one for partial summary judgment as to all issues except the issue of the appropriate remedy, which has not been addressed by the trial court and is not before this Court.

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Property Co. v. Papagayo, Inc., 338 N.C. 293, 449 S.E.2d 459 (1994); *Lovin v. Crisp*, 36 N.C. App. 185, 243 S.E.2d 406 (1978).

Both of the phrases found in the 1960 release, "abutter's rights" and "access rights appurtenant" are terms of art to be interpreted as a matter of law. We conclude that the crossover created by the 1953 agreement is not within the scope of either of these terms, and was therefore not released by the 1960 agreement.

I. Abutter's Rights

The term "abutter's rights" is a legal term of art referring to certain rights of private property owners adjacent to public roads. *See e.g., Department of Transportation v. Craine*, 89 N.C. App. 223, 227, 365 S.E.2d 694, 697, *disc. review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988) ("By statute, an abutter's right of access can be appropriated by the State but it cannot be taken without just compensation."). For the following reasons we hold the 1960 agreement used the term in this special sense and therefore did not release the crossover rights arising under the 1953 agreement.

It is well settled in North Carolina that when a public road is opened adjacent to private property, the owner of the abutting private property has special rights at law regarding access and use of the public road. *Hiatt v. City of Greensboro*, 201 N.C. 515, 160 S.E. 748 (1931); *Wofford v. North Carolina State Highway Commission*, 263 N.C. 677, 681, 140 S.E.2d 376, 379, *cert. denied*, 382 U.S. 822, 15 L.Ed.2d 67 (1965) ("As stated in *Hiatt*, the owner of land abutting a street has two distinct rights, (1) a public right which he enjoys in common with all other citizens, and (2) a private right which arises from his ownership of property contiguous to a street."); *see also Snow v. North Carolina State Highway Commission*, 262 N.C. 169, 136 S.E.2d 678 (1964); *Sanders v. Town of Smithfield*, 221 N.C. 166, 19 S.E.2d 630 (1942). An abutter's right to access a public road is a right of entry arising by operation of law. *Hiatt, supra*. Common law abutter's rights may be restricted by the Department of Transportation in the development of controlled-access highways by entering into agreements with abutting landowners, compensating them for the loss of the rights of access. *Abdalla v. State Highway Commission*, 261 N.C. 114, 118-19, 134 S.E.2d 81, 84 (1964). Once modified by agreement, the common law abutter's rights are restricted by a valid "Right of Way Agreement" between the Department of Transportation and the landowner. *Id.*

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In the present case, the 1953 agreement created a crossover and then limited the right of access to certain survey stations:

[T]he Commission at its own expense will construct a Service Road to the right of Station 180 to 187 where a *cross-over has been provided between lanes of pavement.*

. . . It is further understood and agreed that *other than indicated above*, the undersigned and their heirs and assigns *shall have no right of access to the highway* constructed on said right of way except at the following survey stations: . . . (emphasis added).

By the terms of the 1953 agreement, the crossover was an additional right, distinct from other rights of entry described in the latter part of the grant. The crossover was created by express contract and was not considered merely a right to access the highway.

In *French v. State Highway Commission*, 273 N.C. 108, 113, 159 S.E.2d 320, 323 (1968), the North Carolina Supreme Court interpreted a right of way agreement as creating both access rights and a crossover.

Here, on the contrary, the plans to which the Right of Way Agreement refer, specifically showed a crossover from one service road to the other at each point designated and subsequently the commission constructed those crossovers and maintained them in use for several years. *It is clear that the parties did not contract with reference to access to the service road only* (emphasis added).

The *French* Court considered the crossover as “an easement, which is a property right and which the defendant took from him by the removal of the crossovers and the construction of the fences between the service roads and the through traffic lanes of the highway.” *Id.* at 112, 159 S.E.2d at 323. Likewise in the present case, the parties to the 1953 agreement contracted with respect to rights of access distinct from the right to cross the lanes of traffic. The crossover, connecting plaintiff’s property from north to south, gave plaintiff rights distinct from common law abutter’s rights of access.

The term “abutter’s rights” as used in the 1960 release does not include the crossover created by the 1953 agreement. As discussed above, “abutter’s rights” are rights of access arising by law. Like the grant in *French*, the 1953 agreement “did not contract with reference

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to access to the . . . road only.” The crossover was more than a right of access, it was a right to cross between lanes of traffic. Also, the crossover did not arise by operation of law. Therefore, the term “abutter’s rights” as stated in the 1960 agreement does not include the additional crossover rights created by the 1953 agreement.

Nevertheless, defendant cites *McNeill v. North Carolina State Highway Commission*, 4 N.C. App. 354, 167 S.E.2d 58 (1969), for the proposition that there is no distinction between rights abutting the property which arise by law, and rights created by contract which do not touch the property. *McNeill* is inapposite to the issue before us. The dispute in *McNeill* concerned only rights of access, not distinct crossover rights. Moreover, the issue in *McNeill* was whether the plaintiff should be compensated for the taking of a property right. For the purposes of compensation, it does not matter whether the property right arose by contract or operation of law, or whether the new property right abuts the original property. *Id.* at 360, 167 S.E.2d at 62 (comparing the situation where “the access points abutted the plaintiff’s land” and where “access points did not abut the original grantors’ tract of land” and concluding that for the purposes of compensating the grantor for restricted access rights, “this difference is not a distinction in law”). However, when determining whether a crossover right, such as the one in the present case, has been released, the distinction between abutter’s rights and other kinds of rights is important. For the reasons discussed above, we hold that the “abutter’s rights” released by the 1960 agreement do not include the additional crossover rights created by the 1953 agreement.

II. Access Rights Appurtenant

In addition to “abutter’s rights,” the 1960 agreement also released “access rights appurtenant to grantor’s remaining property in and to said freeway.” Defendant also contends that the crossover was an “access right appurtenant” and was thereby released by the 1960 agreement. Again, we disagree.

The crossover created by the 1953 agreement is an easement appurtenant for the purpose of crossing the lanes of traffic. The crossover is “appurtenant” in the sense that it was intended to run with the land and was not merely personal to the grantee. *Brown v. Weaver-Rogers Associates, Inc.*, 131 N.C. App. 120, 505 S.E.2d 322 (1998).

If the easement is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the parties

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as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant and not an easement in gross.

Id. at 123, 505 S.E.2d at 325. Although the crossover is appurtenant, it is not merely an "access right." As discussed above, the crossover is more than a right of access; it is an express easement for the purpose of crossing lanes of traffic. We conclude the 1960 release of the "access rights appurtenant" did not release the express rights to the crossover contained in the 1953 agreement. This conclusion is supported by the fact that the 1960 agreement made no reference to the 1953 crossover right, located off the property, and that the crossover does not appear on the plats or maps incorporated into the 1960 agreement.

Therefore, the 1960 agreement only released "abutter's rights" and "access rights appurtenant" to plaintiff's property, but failed to release plaintiff's separate and distinct rights to the crossover. The trial court therefore erred in its conclusion that the plaintiff's effort to enforce rights under the 1953 agreement is barred by the 1960 agreement. While contradictory evidence external to the 1960 agreement suggests that the Department of Transportation meant for the release to apply to all rights of access in order to create a controlled access facility, and that plaintiff's predecessor may have been compensated with a total release in mind, the clear and unambiguous language of the agreement itself does not release the crossover rights created by the 1953 agreement, and therefore cannot bar enforcement of that agreement.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c); *Toole v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 291, 294, 488 S.E.2d 833, 835 (1997). There is no genuine issue of material fact with respect to the terms of the 1960 agreement; as a matter of law it did not effect a release of the rights to the crossover created by the 1953 agreement. Therefore, plaintiff is entitled to entry of summary judgment in accordance with its motion.

In its brief and at oral argument, defendant Department of Transportation has attempted to renew its argument that the trial court could have properly dismissed this matter on the grounds of

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sovereign immunity. "According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) (citing *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974), and *NCNB v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983)); see also *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997). Thus we decline to reconsider defendant's argument.

The judgment of the trial court is reversed and this case is remanded for further proceedings to determine the appropriate remedy.

Reversed and remanded.

Judges GREENE and MCGEE concur.

SHARON LYNN LOVELACE, ADMINISTRATRIX OF THE ESTATE OF SHAYLA MEAGEN MOORE, AND SHARON LYNN LOVELACE, INDIVIDUALLY, PLAINTIFFS v. CITY OF SHELBY AND THOMAS LOWELL LEE, DEFENDANTS

No. COA98-1015

(Filed 1 June 1999)

1. Appeal and Error— appealability—motion to dismiss denied—public duty doctrine

The City's appeal from the denial of a motion to dismiss was interlocutory but was heard because it was grounded on the defense of governmental immunity through the public duty doctrine.

2. Governmental Immunity— public duty doctrine—911 call— no individual relationship

The trial court erred by denying defendant-City's motion to dismiss a negligence action arising from a slow response to a 911 call reporting a fire where plaintiffs alleged that by receiving the 911 call the City acknowledged that fire protection or other appropriate emergency response would be forthcoming. No individual relationship existed between the dispatcher and the plain-

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tiffs which increased their risk; to hold otherwise would impute a “special duty” in every case where a 911 call is received.

3. Telecommunications— Public Safety Telephone Act—no private cause of action

The Public Safety Telephone Act, N.C.G.S. § 62A-2, contains no provision for a private cause of action and any violation by a slow 911 response does not create an exception to the public duty doctrine for purposes of governmental immunity to a negligence action.

Judge WYNN dissenting

Appeal by defendant City of Shelby from an order entered 12 March 1998 by Judge Ronald K. Payne in Cleveland County Superior Court. Heard in the Court of Appeals 1 April 1999.

Deaton & Biggers, P.L.L.C., by W. Robinson Deaton, Jr. and Lydia A. Hoza; and Hamrick, Mauney, Flowers, Martin & Moore, by Fred A. Flowers, for plaintiffs-appellees.

Stott, Hollowell, Palmer & Windham, LLP, by Martha Raymond Thompson, for defendant-appellant City of Shelby.

WALKER, Judge.

Plaintiff Sharon Lynn Lovelace, individually and in her capacity as administratrix of the estate of her daughter, Shayla Meagen Moore, filed this action on 5 November 1997. Plaintiffs alleged that the defendant City of Shelby (City) was negligent in the dispatch of fire-fighting personnel to plaintiffs’ home resulting in the death of Shayla. Plaintiffs also made claims against defendant Thomas Lowell Lee, the owner of the house; however, he is not a party to this appeal. The allegations in plaintiffs’ amended complaint relating to the claims against the City may be summarized as follows: Plaintiff and her children, including Shayla, resided at 706 Calvary Street within the corporate limits of the City. A fire was discovered inside their home, and plaintiff and two of her children exited the home, but Shayla did not. At the request of plaintiff, two or more persons contacted the City’s police department by calling the 911 emergency number. Helen Earley, the 911 system operator, answered the calls and informed the callers that emergency response was forthcoming; however, she delayed six minutes before notifying the fire department. The fire department arrived approximately ten minutes after the calls were

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made even though the station was approximately 1.1 miles from the burning home.

Also included in plaintiff's amended complaint were allegations that the actions of the City had created a "special duty" or "special relationship" between the City and plaintiff:

10. The City of Shelby, by and through its protective officers, agents and employees, created a special duty to the plaintiff and the plaintiff's decedent by acknowledging or promising protection to the plaintiff and the plaintiff's decedent, by answering the 911 calls alleged herein and by further acknowledging that, in effect, fire protection service or other appropriate emergency response would be forthcoming. The plaintiff and the plaintiff's decedent relied on the promise of protection.

11. The defendant City of Shelby, by and through its servants and agents as alleged hereinbefore, undertook to furnish protection to specific individuals, to wit, the plaintiff and the plaintiff's decedent.

...

21. As alleged hereinbefore, a special relationship was formed between the plaintiff, the plaintiff's decedent and the City of Shelby, in that the 911 operator acknowledged and accepted a responsibility of dispatching the appropriate fire protection or other protection services to the scene of the fire at plaintiff's home.

22. The defendant City of Shelby, by and through the acts of its agents and servants, breached its promise of protection to the plaintiff and the plaintiff's decedent, and breached its promise of providing emergency protection to the plaintiff and the plaintiff's decedent.

23. The plaintiff and the plaintiff's decedent relied on this promise of protection, and their reliance on this protection which was not forthcoming, was causally related to the injuries and death sustained by the plaintiff's decedent.

24. The breach of this special duty and breach of agreement regarding this special relationship between the plaintiff, the plaintiff's decedent and the defendant City of Shelby was a direct and proximate cause of the injuries and death suffered by the plaintiff's decedent.

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The City filed a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6) which was denied by the trial court.

[1] First, we note plaintiff has moved to dismiss the City's appeal as interlocutory. In this case, the trial court's order "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Thus, the appeal is interlocutory. However, the appeal may be heard "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations omitted); *see* N.C. Gen. Stat. § 1-277 (1996). Our courts have held that orders denying motions to dismiss grounded on the defense of governmental immunity through the public duty doctrine affect a substantial right and are immediately appealable. *Hedrick v. Rains*, 121 N.C. App. 466, 466 S.E.2d 281, *affirmed*, 344 N.C. 729, 477 S.E.2d 171 (1996); *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 442 S.E.2d 75, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994). Therefore, plaintiff's motion to dismiss the City's appeal is denied.

[2] The City contends on appeal that the trial court erred in denying its motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The City argues that the public duty doctrine insulates it from liability in this instance and that the plaintiff has failed to plead any exceptions to the doctrine.

A motion to dismiss pursuant to Rule 12(b)(6) "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 (1998). The motion should be allowed when the factual allegations fail as a matter of law to state the elements of a legally recognizable claim. *Id.* at 791, 501 S.E.2d at 381. An action for negligence is predicated on the existence of a legal duty owed by the defendant to the plaintiff. *Lynn v. Overlook Development*, 98 N.C. App. 75, 389 S.E.2d 609 (1990), *affirmed in part and reversed in part*, 328 N.C. 689, 403 S.E.2d 469 (1991). Therefore, a pleading asserting a claim sounding in negligence must assert a duty on the part of the defendant to the plaintiff.

The public duty doctrine is a common law rule first recognized by our Supreme Court in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), *rehearing denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). The rule holds that "a municipality and its agents act for the benefit

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of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals.” *Id.* at 370, 410 S.E.2d at 901. *Braswell* recognized the doctrine in the context of police protection. Since that holding, our appellate courts have expanded the doctrine to include many government services or responsibilities. *See, e.g., Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 495 S.E.2d 711, *rehearing denied*, 348 N.C. 79, 502 S.E.2d 836, *cert. denied*, — U.S. —, 142 L. Ed. 2d 449 (1998) (workplace safety inspections); *Clark*, 114 N.C. App. 400, 442 S.E.2d 75 (investigation of taxicab driver license application); *Prevette v. Forsyth County*, 110 N.C. App. 754, 431 S.E.2d 216, *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993) (animal control); *Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998) (amusement ride safety inspection); *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995) (fire protection); *Sinning v. Clark*, 119 N.C. App. 515, 459 S.E.2d 71, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995) and *Simmons v. City of Hickory*, 126 N.C. App. 821, 487 S.E.2d 583 (1997) (building inspections).

Exceptions to the public duty doctrine arise where some form of “special duty” exists between the parties. *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 511 S.E.2d 41 (1999). A “special duty” exception 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 *Davis*, 119 N.C. App. at 56, 457 S.E.2d at 909). Often mentioned as a separate exception, but actually a subset of the “special duty” exception, is the “special relationship” such as the relation between law enforcement officers and a state’s witness or informant wherein the officers give special protection to the witness or informant because of the information or testimony that will be given and the accompanying greater risk undertaken. *Hunt*, 348 N.C. at 199, 499 S.E.2d at 751. This relationship is formed by “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 v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991). In order to survive the application of the public duty doctrine, the plaintiff’s allegations must fit within an exception to the doctrine. Thus, to properly set forth the “special duty” exception, the complaint must allege an “overt promise” of protection by defendant, detrimental reliance on the promise, and a causal relation between

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the injury and the reliance. *Derwort*, 129 N.C. App. at 793-94, 501 S.E.2d at 382.

In this case, plaintiffs allege that the “special duty” was created “by answering the 911 calls alleged herein and by further acknowledging that, in effect, fire protection service or other appropriate emergency response would be forthcoming.” Plaintiffs cite *Davis*, 119 N.C. App. 44, 457 S.E.2d 902, as authority that supports these allegations. In *Davis*, the allegations of a “special duty” were found to be sufficient where a firefighter informed a dispatcher that his fire department would respond even though the burning home was near the border with an adjacent fire district. *Id.* The fire trucks turned around within a mile of the house and returned to their station when they observed that the burning home was across the district line. *Id.* The homeowner relied on that direct promise of protection and did not call other fire departments. *Id.* This Court held that the plaintiff’s allegations stated enough to satisfy the substantive elements of the exception to the public duty doctrine.

Here, the plaintiffs alleged that by receiving the 911 call, the City acknowledged that “fire protection service or other appropriate emergency response would be forthcoming.” However, there are no allegations of any other promise by the City creating a “special duty.” To hold otherwise would impute a “special duty” in every case where a 911 call is received.

A “special relationship” cannot be established by the facts alleged. The relationship between the 911 operator and the plaintiffs is not comparable to the relationship between a law enforcement officer and a state’s witness or informant. *See Hunt*, 348 N.C. at 199, 499 S.E.2d at 751. Further, the relationship did not place the plaintiffs in a position of risk which was “something more than that to which the victim was already exposed.” *Hull*, 104 N.C. App. at 38, 407 S.E.2d at 616. Plaintiff cites *Isenhour v. Hutto*, 129 N.C. App. 596, 501 S.E.2d 78, *disc. review allowed*, 349 N.C. 360, 517 S.E.2d 896 (1998) as authority that a “special relationship” existed. In *Isenhour*, this Court held that a “special relationship” existed between a school crossing guard and a child who was hit by a car after the crossing guard had allowed the child to cross the street. The plaintiffs’ allegations were sufficient to establish a duty on the part of the crossing guard to each child who crossed the street. *Id.* In this case, no individual relationship existed between the dispatcher and the plaintiffs which increased their risk.

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[3] Plaintiff also alleges that the City's employee, Helen Earley, violated N.C. Gen. Stat. § 62A-2, the Public Safety Telephone Act, by delaying her notification of the fire department and that her violation constitutes negligence *per se*. Plaintiff argues negligence *per se* as an additional justification for the trial court's order denying the City's motion to dismiss. Without determining whether N.C. Gen. Stat. § 62A-2 is a safety statute creating any duty, we note that violation of a statutory duty does not create a "special duty" between parties unless the statute also creates a private cause of action. *Vanasek*, 132 N.C. App. at 338-39, 511 S.E.2d at 44. N.C. Gen. Stat. § 62A-2 sets out the legislative purpose for the Public Safety Telephone Act and contains no provision for a private cause of action. *See* N.C. Gen. Stat. § 62A-2 (1997). Thus, any alleged violation does not create an exception to the public duty doctrine.

For the reasons stated herein, we reverse the order of the trial court and remand for entry of an order allowing the City's motion to dismiss.

Reversed and remanded.

Judge HUNTER concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

Although I agree with the conclusion reached by the majority, I must dissent because the case *sub judice* is indistinguishable from our prior holding in *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995). The plaintiffs in this matter, like the plaintiff in *Davis*, have alleged facts sufficient to establish a *prima facie* case of negligence as well as sufficient facts to demonstrate that their case falls within the "special duty" exception to the public duty doctrine. Therefore, I am obliged to follow the precedent set forth in *Davis* and find that the plaintiffs have alleged sufficient facts to warrant reversal of the trial court's granting of the defendants' Rule 12(b)(6) motion.

Additionally, I believe that our Supreme Court should reexamine the vitality of the public duty doctrine adopted in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991). Since the pronouncement of that decision, our courts have struggled to pigeonhole individual cases into specific, narrow exceptions to reach justifiable

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results. Indeed, the majority opinion cites numerous examples of such cases. A more appropriate solution may be a return to our time-tested prior law which allowed for recovery in cases where the plaintiff can present evidence of gross or reckless negligence. That approach adequately balanced the state's ability to protect governmental entities from the floodgates of litigation while at the same time protecting its citizens from blatantly unlawful conduct. Moreover, this approach would simplify this area of jurisprudence so that our citizens can better understand this arena of our common law.



ELIZABETH J. TYSON, PLAINTIFF v. LACY M. HENRY, ADMINISTRATOR, CTA OF THE ESTATE OF WILLIAM FRANCIS TYSON, VANCE B. TAYLOR, JULIE MCKENZIE JONES, CONNIE TYSON BUNN, JAMES AUSTIN CONGLETON, A MINOR, AND BRETT TYSON CONGLETON, A MINOR, ALL UNKNOWN AND UNBORN BENEFICIARIES UNDER THE WILL OF WILLIAM FRANCIS TYSON, DEFENDANTS

No. COA98-222

(Filed 1 June 1999)

1. Trusts— creation—transfer of property

An inter vivos trust was not created where the instrument clearly expressed the decedent's intent to create a trust but the decedent never transferred his property to the designated trustee.

2. Trusts— creation—incorporation by reference

A valid trust was created by the doctrine of incorporation by reference where the decedent created a trust agreement prior to executing his will and the will clearly and distinctly referred to the trust agreement. The will clearly expressed an intent on the part of the grantor to make the trust agreement part of his will and it makes no difference whether the purported trust was legally valid.

Appeal by defendants from judgment entered 26 November 1997 by Judge G.K. Butterfield in Pitt County Superior Court. Heard in the Court of Appeals 21 October 1998.

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[133 N.C. App. 415 (1999)]

Colombo, Kitchin, Johnson, Dunn & Hill, L.L.P., by Michael A. Colombo, W. Walton Kitchin, Jr. and Micah D. Ball, for plaintiff-appellee.

McLawhorn & Associates, by Charles L. McLawhorn, Jr., for defendant-appellant Henry.

Gaylord, McNally, Strickland & Snyder, L.L.P., by Emma Stallings Holscher and Danny D. McNally, for defendant-appellant Jones.

Owens, Rouse & Nelson, by James A. Nelson, Jr., for defendants-appellants Congleton.

Law Office of E. Keen Lassiter, by E. Keen Lassiter, for defendant-appellant unknown and unborn beneficiaries under the will of William Francis Tyson.

TIMMONS-GOODSON, Judge.

This action arises out of an effort by Elizabeth J. Tyson (“plaintiff”) to have a trust agreement executed by William Francis Tyson (“Tyson”) declared void. The evidence tends to show that Tyson died on 16 October 1996. Prior to his death, Tyson executed a Last Will and Testament (“Will”) on 29 April 1996. Article V of the Will stated the following:

I bequeath and devise all tract or parcels of land which I own at the time of my death to VANCE B. TAYLOR, as Trustee under the provisions of a certain Trust Agreement executed on the ___ day of April, 1996, by me as the Grantor and VANCE B. TAYLOR as the Trustee therein designated; and I hereby direct that my interests in such tracts or parcels of land so devised to such Trustee shall be added to and administered as a part of the trust estate created and established under the terms and provisions of the said Trust Agreement for the benefit of beneficiaries and their successors in interest as therein defined.

Prior to executing the Will, Tyson also executed on the same date a purported trust agreement. Five dollars was recited as being delivered to Vance B. Taylor (“Taylor”), the trustee. The trust agreement further provided that other properties described therein may later be delivered to the trust. The trust agreement, however, was never signed by Taylor, the appointed trustee and a trustee was never appointed by a court.

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In the trust agreement, Tyson provides income to plaintiff, his wife, for life and further provides for the distribution of his real property upon plaintiff's death. The beneficiaries of the trust agreement are plaintiff, Connie Tyson Bunn, James Austin Congleton, Julie McKenzie Jones, and Taylor. It is stipulated by the parties that the trust agreement was signed by Tyson prior to executing the Will. However, in the unverified answer, Taylor asserted that he never executed the trust agreement, did not receive any cash or property to be held as part of the trust agreement and refused to serve as trustee.

The Will was admitted to probate in common form. Defendant Lacy M. Henry was appointed Administrator, CTA, of the Estate of Tyson. On 17 April 1997, plaintiff filed suit to void the trust agreement executed by Tyson. After reviewing the pleadings, the Will, the trust agreement, stipulations of counsel, and hearing arguments of counsel, the trial court found in favor of plaintiff and declared the trust agreement void. All defendants, except for Connie Tyson Bunn and Vance Taylor, now appeal.

[1] In their sole assignment of error, defendants argue that the trial court erred in holding that the trust agreement executed by Tyson was not a valid trust. Defendants specifically argue that a valid *inter vivos* trust or a trust pursuant to the doctrine of incorporation by reference was created by Tyson on 29 April 1996.

In order to create a valid *inter vivos* trust there must be: "(1) sufficient words to raise it, (2) a definite subject, and (3) an ascertained object." *Thomas v. Clay*, 187 N.C. 778, 122 S.E. 852 (1924). "The creation of a trust is a present disposition of property, and not an undertaking to make a disposition in the future." *Baxter v. Jones*, 14 N.C. App. 296, 307, 188 S.E.2d 622, 628 (1972) (quoting 1 Restatement of Trusts 2d, § 16, p. 58). "In order to create an enforceable trust it is necessary that the donor or creator should part with his interest in the property to the trustee by an actual conveyance or transfer, and, where the creator has legal title, that such title should pass to the trustee." *Id.* (quoting 89 C.J.S., Trusts, § 63, p. 837).

The record indicates that the Tyson instrument clearly expressed the decedent's intent to create a trust. A trustee was designated and his obligations and duties were explained. Furthermore, the beneficiaries were clearly designated along with their interest in decedent's real property. However, the instant instrument can not qualify as an *inter vivos* trust because the decedent never transferred his property

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interest to the designated trustee, Taylor. *Id.* In his unverified answer, Taylor admitted that he never received any cash or property from Tyson. Therefore, Tyson never disposed of his property to the trustee, Taylor. As a result, Taylor was never given full legal title or equitable ownership of Tyson's real property. Based on the aforementioned evidence, we are compelled to hold that an inter vivos trust was not created.

[2] We now must examine whether the trial court erred in determining that there was not a valid trust created by the doctrine of incorporation by reference. Our Supreme Court has clearly set forth the requirements for an incorporation by reference in *Watson v. Hinson*, 162 N.C. 72, 77 S.E. 1089 (1913):

It is well recognized in this State that a will, properly executed, may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will, the conditions being that the paper referred to shall be in existence at the time the second will be executed, and the reference to it shall be in terms so clear and distinct that from a perusal of the second will, or with the aid of parol or other proper testimony, full assurance is given that the identity of the extrinsic paper has been correctly ascertained.

Id. at 79-80, 77 S.E. 1092. Generally, in order for a document to be incorporated by reference: (1) the defective document referred to must have been in existence at the time of the will's execution and (2) the reference to the defective document must be "clear and distinct" so full assurance is given that the defective document was intended to be incorporated in the testamentary wishes of the decedent. *In Re Estate of Norton*, 330 N.C. 378, 384, 410 S.E.2d 484, 487 (1991).

It is undisputed that the first element of the *Watson* test is satisfied because the parties stipulated that on 29 April 1996, prior to executing his last Will, Tyson created a trust agreement.

The second element of the *Watson* test is also satisfied, because the evidence shows that Tyson's Will "clearly and distinctly" referred to the trust agreement, providing assurance that the decedent intended that the trust agreement be incorporated in the Will itself. Tyson's Will stated the following, "I bequeath and devise all tract or parcels of land which I own at the time of my death to VANCE B. TAYLOR, as Trustee under the provisions of a certain Trust Agreement executed on the ___ day of April, 1996, by me as the

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Grantor and VANCE B. TAYLOR as the Trustee therein designated[.]” The evidence satisfies the second prong of the *Watson* test for several reasons. First, the record indicates that the trust agreement admitted into evidence was dated 29 April 1996, the same date that the Will was executed. Second, Tyson was the grantor and Taylor was the designated trustee of the document. Third, Tyson’s Will specifically refers to a trust agreement executed in April of 1996. There was no evidence in the record that any other trust agreement was created by Tyson, with Taylor as the designated trustee, in April of 1996. Lastly, Tyson’s Will clearly expressed an intent on the part of the grantor to make the trust agreement part of his Will. Thus, we hold that the purported trust agreement was incorporated in the Tyson Will by reference and made an integral part of the Will. By said incorporation it makes no difference whether the purported trust was legally valid.

The Supreme Court case *Godwin v. Trust Co.*, 259 N.C. 520, 131 S.E.2d 456 (1963), is very close to the case at bar and provides further support for our holding. In *Godwin*, a purported trust agreement was executed by a husband and wife. The validity of the trust was questioned because the wife had not been privately examined in compliance with the law. On the same day that the trust agreement was purportedly executed, the husband and wife each executed a last will and testament. The language of the will at issue included in pertinent part:

I hereby will, devise, bequeath all my property of every sort, kind, description to N.H. Godwin, Attorney, as Trustee, to be disposed of as provided in a Trust Agreement executed by me and my beloved husband, Frank C. Griffin.

Id. at 524, 131 S.E.2d at 459. The North Carolina Supreme Court held: “[S]uch [trust] agreement was incorporated . . . by reference and made an integral part thereof as effectively, in our opinion, as if the trust agreement had been set out in full[.]” *Id.* at 526, 131 S.E.2d at 460. In *Godwin*, as in the instant case, the trust agreement contained no date of execution.

For the reasons herein stated, we conclude that a valid trust was created by the doctrine of incorporation by reference.

The order granting judgment in favor of plaintiff is reversed and remanded to the trial court for entry of judgment in favor of defendants.

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[133 N.C. App. 420 (1999)]

REVERSED.

Judges MARTIN and HORTON concur.

STATE OF NORTH CAROLINA v. JAMES SCOTT NESBITT

No. COA98-815

(Filed 1 June 1999)

1. Indecent Liberties— presence of children—sufficiency of evidence

The trial court correctly denied defendant's motion to dismiss a charge of indecent liberties under N.C.G.S. § 14-202.1(a)(1) where defendant let his dogs into his yard to encourage children to stop and play; defendant, while inside his house 35 feet away and in clear view of the children, exposed himself and masturbated while the children were playing with the dogs; and defendant acknowledged the children's presence by waving to them in one instance and changing his position in another instance. The fact that the children were outside defendant's home while he was inside is not material, and neither is the fact that the children were 35 feet away. It is material that defendant involved the children in his scheme to engage in an indecent liberty for the purpose of arousing his own sexual desire.

2. Indecent Liberties— presence of children—not unconstitutionally vague

N.C.G.S. § 14-202.1(a)(1), the indecent liberties statute, is not unconstitutionally vague as applied where defendant was 35 feet away inside his home behind a glass door.

3. Indecent Liberties— instructions—masturbation

The trial court did not err in an indecent liberties prosecution by instructing the jury that "masturbation in the presence of another would be an immoral or indecent act."

Appeal by defendant from judgments dated 29 January 1998 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 30 March 1999.

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[133 N.C. App. 420 (1999)]

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert J. Blum, for the State.

Tamura D. Coffey, for defendant-appellant.

GREENE, Judge.

James Scott Nesbitt (Defendant) appeals from his jury convictions of six counts of taking indecent liberties with a minor child in violation of N.C. Gen. Stat. § 14-202.1(a)(1).

Prior to trial, Defendant moved to dismiss the indictments on the ground that section “14-202.1 is unconstitutional as applied” to him. In support of this motion Defendant argued that “there is absolutely no way he could have known that his conduct was in violation of 14-202.1 as it is written.” This motion was denied by the trial court.

The State’s evidence at trial tended to show that Defendant lived in the Walkertown area of Winston-Salem, North Carolina. The side of Defendant’s house has a sliding glass door facing the roadway, which is approximately thirty-five feet away from the door. The yard on the side of Defendant’s house is fenced in and contains a porch. On 24 March 1997, several young children, while walking home from a school bus stop near Defendant’s home, stopped to play with dogs that were in Defendant’s yard. All of the children saw Defendant standing in his house naked behind the glass door, waving at them and fondling his penis.¹ The children informed their parents of Defendant’s actions, and several parents contacted Deputy Sheriff Danny Carter (Deputy Carter) of the Forsyth County Sheriff’s Department. Deputy Carter visited the home of one of the children on that same afternoon and spoke with that child and two other families.

The next day, 25 March 1997, Deputy Carter set up a surveillance point outside of Defendant’s home. Deputy Carter positioned himself so that he could observe the sliding glass door of Defendant’s home, so neither Defendant nor the children exiting the school bus could see him. Because the observation point was approximately 1,100 feet from the glass door, Deputy Carter used 10-power binoculars to view inside of Defendant’s home. Before the school bus arrived, Deputy Carter observed Defendant at the sliding door fully clothed. When the school bus arrived, Defendant let the dogs out into

1. The record contains eight different written statements from children who observed Defendant.

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the yard and disappeared for a short time period. The children exited the bus and began walking toward Defendant's home. Two of the children stopped to play with the dogs in Defendant's yard. Deputy Carter then observed Defendant reappear in front of the glass door completely naked with "his penis in his right hand and was jerking on it." Defendant also "moved his pelvic area back and forth a couple of times." Deputy Carter observed the boys looking at Defendant, at which time Defendant "turned toward them at an angle and arched his back and started doing it some more."

At the close of the State's evidence, Defendant moved to dismiss the case due to insufficient evidence, but his motion was denied. Defendant then presented the testimony of Rob Guerette, a private investigator, who testified regarding information obtained from several of the children in private interviews that was inconsistent with their testimony at trial. Defendant renewed his motion to dismiss at the close of all the evidence, and his motion again was denied.

While instructing the jury on the law regarding taking indecent liberties with a minor child, the trial court stated, "Masturbation in the presence of another would be an immoral or indecent act." The jury subsequently found Defendant guilty of six counts of taking indecent liberties with a minor child and he was sentenced to a minimum of 100 and maximum of 120 months for all six convictions.

The dispositive issues are whether: (I) there is substantial evidence that Defendant was "with" the children who were in the yard some thirty-five feet away, when Defendant masturbated behind the clear glass door of his home; (II) section 14-202.1(a)(1) is unconstitutionally vague; and (III) it was error to instruct the jury that "Masturbation in the presence of another would be an immoral or indecent act."

I

Motion to Dismiss—Insufficiency of Evidence

[1] Defendant was charged with and found guilty of violating subpart (a)(1) of section 14-202.1. Section 14-202.1 provides in part:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

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- (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties *with any child* of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
- (2) Willfully commits or attempts to commit any lewd or lascivious act *upon or with the body* or any part or member of the body *of any child* of either sex under the age of 16 years.

N.C.G.S. § 14-202.1 (1993) (emphasis added).

Defendant contends there is not substantial evidence in this record that he was “with” the children, within the meaning of section 14-202.1(a)(1), and the trial court therefore erred in denying his motion to dismiss the charges. We disagree.

Although “with” as used in section 14-202.1(a)(1) has not been defined by our legislature, our courts have set its parameters. It is well settled that a physical touching of a child by the defendant is not required in order to show an indecent liberty “with” the child in violation of section 14-202.1(a)(1). *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981); *cf.* N.C.G.S. § 14-202.1(a)(2) (lewd or lascivious acts must be “*upon or with the body* or any part or member of the body of any child”). It is necessary, however, that the defendant, at the time of the immoral, improper, or indecent liberty, be either in the actual or constructive “presence” of the child. *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990); *State v. McClees*, 108 N.C. App. 648, 654, 424 S.E.2d 687, 690 (conviction sustained where defendant videotaped child undressing in another room while child was unaware of the videotaping), *disc. review denied*, 333 N.C. 465, 427 S.E.2d 626 (1993). There is no requirement that the defendant “be within a certain distance of or in close proximity to the child.” *State v. Strickland*, 77 N.C. App. 454, 456, 335 S.E.2d 74, 75 (1985) (conviction sustained where defendant was “62 feet away” from the children at the time of the indecent liberty).

In this case, when viewing the evidence in the light most favorable to the State and giving the State the benefit of all reasonable inferences, the evidence reveals: (1) Defendant let his dogs out in his yard to encourage children to stop and play with the dogs; (2) while the children were playing with his dogs, Defendant, while inside his house and in clear view of the children in his yard some thirty-five feet away, exposed his penis and masturbated; and (3) Defendant

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acknowledged the children's presence by waving to them in one instance and changing his position in another instance. These facts are sufficient to support the conclusion that Defendant was "with" the children at the time he exposed his penis and masturbated. *See State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72 (1996) (if there is relevant evidence which a reasonable mind would find sufficient to support a conclusion, there exists substantial evidence). The fact that the children were outside Defendant's home, while he was inside the home, is not material. The fact that the children were some thirty-five feet away from Defendant also is not material. It is material, however, that Defendant involved the children in his scheme to engage in an indecent liberty for the purposes of arousing his own sexual desire. *See Hartness*, 326 N.C. at 567, 391 S.E.2d at 180 (defendant's purpose for committing the indecent liberty is the gravamen of the offense). Because there is substantial evidence that Defendant was "with" the children, the trial court correctly denied Defendant's motion to dismiss on this ground. *See State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (motion to dismiss should be denied if there is substantial evidence of each essential element of the offense charged).

II

Motion to Dismiss—Vagueness

[2] As a general proposition, the vagueness of a criminal statute must be judged in the light of the conduct that is charged to be violative of the statute. *See United States v. Powell*, 423 U.S. 87, 92, 46 L. Ed. 2d 228, 233-34 (1975). In other words, the question is whether the statute is unconstitutionally vague as applied to the defendant's actions in the case presented. *Id.* Thus a party receiving fair warning, from the statute, of the criminality of his own conduct is not entitled to attack the statute on the ground that its language would not give fair warning with respect to other conduct. *Parker v. Levy*, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 458 (1974). If, however, the statute reaches "a substantial amount of constitutionally protected conduct," the statute is vulnerable to a facial attack. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 71 L. Ed. 2d 362, 369, *reh'g denied*, 456 U.S. 950 72 L. Ed. 2d 476 (1982). In this event, the defendant can challenge the constitutional vagueness of the statute, even though his conduct clearly is prohibited by the statute. *Kolender v. Lawson*, 461 U.S. 352, 358 n.8, 75 L. Ed. 2d 903, 910 n.8 (1983).

A penal statute survives a void for vagueness challenge if it defines "the criminal offense with sufficient definiteness that ordi-

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nary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.* at 357, 75 L. Ed. 2d at 909. The more important aspect of the vagueness doctrine is “the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Id.* at 358, 75 L. Ed. 2d at 909. This is necessary in order to prevent policemen, prosecutors, and juries from pursuing their own predilections. *Id.* In determining whether the statute is sufficient to appraise citizens, policemen, prosecutors, judges and juries of the proscribed conduct, it is appropriate to consider any limiting construction placed on the statute by courts or agencies. *See Grayned v. City of Rockford*, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 228-29 (1972). It is also proper to consider whether it would be practical for the legislature to draft the statute more precisely. Laurence H. Tribe, *American Constitutional Law* § 12-31 (2d ed. 1988). Finally, there is no requirement that legislation include only words that are subject to mathematical certainty. *Grayned*, 408 U.S. at 110, 33 L. Ed. 2d at 228-29.

Defendant contends the term “with” contained in section 14-202.1(a)(1) “is unconstitutionally vague as applied to him in this case because he could not possibly have known and was not given fair notice that his conduct inside his private home behind a glass sliding door placed him ‘with’ children outside his home, some 35 feet away.” We disagree. Admittedly the word “with” is not meticulously specific, but as construed by our courts it is clear what conduct the statute seeks to prohibit and thus gives sufficient guidance to our citizens, our police, our prosecutors, our judges, and our juries. Section 14-202.1(a)(1), therefore, is not impermissibly vague, and the trial court correctly denied Defendant’s pre-trial motion to dismiss the indictments on this ground.²

III

Jury Instructions

[3] Defendant’s final contention is the trial court erred by instructing the jury that, “Masturbation in the presence of another would be an immoral or indecent act.” We disagree. This Court has passed upon this identical argument and found “no prejudicial error in the challenged instruction.” *Turman*, 52 N.C. App. at 377, 278 S.E.2d at 575.

2. We acknowledge that our North Carolina courts previously have held that section 14-202.1(a)(1) is not unconstitutionally vague. *E.g. State v. Elam*, 302 N.C. 157, 161-62, 273 S.E.2d 661, 664-65 (1981). These cases, however, do not address the specific language challenged in this case.

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Furthermore, when a charge, as a whole, presents the law accurately, fairly, and clearly to the jury, reversible error does not occur. *State v. Corbett*, 309 N.C. 382, 402, 307 S.E.2d 139, 151 (1983); *State v. Simpson*, 302 N.C. 613, 618, 276 S.E.2d 361, 364 (1981). We have examined the entire jury charge given by the trial court and there is no prejudicial error in the instruction.

No error.

Judges MARTIN and McGEE concur.



JWL INVESTMENTS, INC. AND THAD CRAVEN, PETITIONERS v. THE GUILFORD COUNTY BOARD OF ADJUSTMENT AND GUILFORD COUNTY, RESPONDENTS

No. COA98-1081

(Filed 1 June 1999)

1. Zoning— Board of Adjustment member—conflict of interest

Although petitioners in a Board of Adjustment decision involving a claim of grandfathered property contended on appeal that their due process rights were violated because one of the members of the Board was a former planning department employee who had been consulted about the possibility of rezoning the property, the assignment of error was without merit because petitioners did not object during the hearing and made no showing of prejudice.

2. Zoning— denial of nonconforming use—supporting authority for Board's decision

The Board of Adjustment had ample authority to support its decision that petitioners' use of their property was not "grandfathered" where petitioners presented no evidence to establish a continuous nonconforming use and respondents presented evidence showing that the use had not been continuous.

3. Zoning— scenic corridor ordinance—not an unconstitutional taking

A scenic corridor ordinance did not deprive petitioners of all economically beneficial or productive use and no unconstitutional taking occurred.

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4. Zoning— Board of Adjustment—authority to impose civil penalty

The Guilford County Board of Adjustment had the authority to impose civil penalties because, under N.C.G.S. § 153A-345(b), the Board possesses all of the powers of the enforcement officer and the Guilford County ordinance states that an enforcement officer may impose civil penalties.

5. Zoning— denial of nonconforming use—substantial evidence

The trial court properly concluded that there was substantial evidence to affirm the decision of a Board of Adjustment denying a nonconforming use and the decision of the Board was not arbitrary and capricious.

6. Zoning— statutes—constitutional protections

N.C.G.S. §§ 153A-340 through 345 provide adequate constitutional protections for an aggrieved party.

Appeal by petitioners from judgment entered 9 June 1998 by Judge Michael E. Beale in Guilford County Superior Court. Heard in the Court of Appeals 22 April 1999.

Max. D. Ballinger for petitioners-appellants.

Guilford County Attorney's Office, by Deputy County Attorney J. Edwin Pons, for respondents-appellees.

WALKER, Judge.

Petitioners own a tract of land in Guilford County, North Carolina located behind 7964 National Service Road, on County Tax Map ACL-94-6999, Block 1093, Parcel 35 in Deep River Township. The property adjoins the right-of-way of Interstate 40 (I-40). The property is zoned RS-40, a residential zoning classification and is subject to a scenic corridor ordinance.

On 22 November 1996, petitioners were served by the Guilford County Planning and Development Department with a "Notice of Violation." The cited violation on the property was "a vehicle storage yard which is not a permitted use in the RS-40 zoned district and in the scenic corridor" pursuant to Guilford County Development Ordinance § 4-3.1 (Table 4-3-1) Permitted Use Schedule. Petitioners appealed from the notice of violation and on 4 March 1997, a hearing

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was held before the Guilford County Board of Adjustment (the Board). At the hearing, petitioners admitted using the property to store vehicles on a residential lot in a scenic corridor, but argued that such use should be allowed to continue as the property was also previously used, in part, to store commercial vehicles. Petitioners acquired an interest in the property sometime before 1987. Petitioners alleged the property was used to park operable vehicles which they either use or sell at their business in Rockingham County. Prior to petitioners' ownership of the property, it was owned by an individual with a concrete business who littered it with debris and stored both junked and operable vehicles. Petitioners presented testimony from two neighbors as to the use of the property by its previous owners. Respondents presented evidence of aerial photos of the property taken in 1970, 1986, and 1991 which showed the property to be undeveloped and not in use. The notice of violation was affirmed and the Board gave petitioners 45 days to comply before the start of any civil penalties.

The petitioners sought review by filing a writ of certiorari and on 25 May 1998 a hearing was held. The trial court then entered judgment on 9 June 1998 in which it affirmed the decision of the Board and remanded the case to the Board for imposition of civil penalties.

On appeal, petitioners contend the trial court committed prejudicial error: (1) in finding petitioners' due process rights were not violated; (2) in finding that the Board did not lack authority to support its decision; (3) in finding and concluding that the Board had authority to impose civil penalties; (4) in finding and concluding that N.C. Gen. Stat. § 153A-340 through 345 afforded adequate constitutional protections; (5) in finding that the decision of the Board was not arbitrary and capricious, oppressive, and attended with manifest abuse of authority; and (6) in finding the decision of the Board was supported by competent, material, and substantial evidence in the whole record.

In reviewing the decisions of a board of adjustment, the trial court sits in the posture of an appellate court and is responsible for the following:

- (1) Reviewing the record for errors of law,
- (2) Insuring that procedures specified by law in both statutes and ordinances are followed,

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- (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.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *rehearing denied*, 300 N.C. 562, 270 S.E.2d 106 (1980); *Ball v. Randolph Co. Bd. of Adjust.*, 129 N.C. App. 300, 302, 498 S.E.2d 833, 834, *disc. review improvidently allowed*, 349 N.C. 348, 507 S.E.2d 272 (1998); *See also*, N.C. Gen. Stat. § 153A-345(e) (Cum. Supp. 1997). If a petitioner contends the Board's decision was based on an error of law, "de novo" review is proper. *In re Appeal of Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998). However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the "whole record" test. *Id.* It is not the function of the reviewing court, upon writ of certiorari under N.C. Gen. Stat. § 153A-345(e), to find the facts, but instead, it is to determine if the findings made by the Board are supported by the evidence. *Godfrey v. Zoning Bd. Of Adjustment*, 317 N.C. 51, 54, 344 S.E.2d 272, 274 (1986). The role of appellate courts is to review the trial court's order for errors of law. *Id.* "The process has been described as a two-fold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Willis*, 129 N.C. App. at 501, 500 S.E.2d at 726, (*quoting Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

The petitioners' first several assignments of error relate to whether an error of law was committed by the trial court and as such, *de novo* review is proper and this review requires a court "to consider a question anew." *See Willis*, 129 N.C. App. at 501, 500 S.E.2d at 726; *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). We find the trial court applied the appropriate standard of review; thus, we look to see if "the court did so properly." *See Willis*, 129 N.C. App. at 501, 500 S.E.2d at 726.

[1] First, petitioners argue that their due process rights were violated because one of the members of the Board was a former

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employee of the County Planning Department, and in that capacity, she had been consulted by petitioners about the possibility of rezoning the property. "A party claiming bias or prejudice may move for recusal and in such event has the burden of demonstrating 'objectively that grounds for disqualification actually exist.'" *In re Ezzell*, 113 N.C. App. 388, 394, 438 S.E.2d 482, 485 (1994) (quoting *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993)). The petitioners did not object during the hearing to this member's presence on the Board. Furthermore, petitioners have made no showing that they were prejudiced by this member's participation in the case. Thus, we find this assignment of error to be without merit.

[2] Next, petitioners argue that the trial court erred in finding that the Board did not lack authority to support its decision. Petitioners concede that the use of their property does not conform with the ordinance; however, they contend that the use of their property to store vehicles is "grandfathered in." According to § 3-14.2(B)(4) of the County's development ordinance, a non-conforming use of property that pre-dates the enactment of an ordinance is permitted so long as the non-conforming use is not discontinued for a period of time greater than one year. At the hearing, petitioners presented testimony from Jane Wood, a resident of the area who related the uses of property in the surrounding area and the petitioners present use of the property and Ruth Cannon, the Secretary of J.W.L. Associates, who testified to the previous owner's use of the property. Petitioners presented no evidence to establish a continuous non-conforming use of the property which would entitle them to be "grandfathered in." On the contrary, respondents presented evidence consisting of aerial photographs that showed the non-conforming use had not been continuous since the imposition of the ordinances.

Property uses that are non-conforming are not favored by the law. *CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992). "Zoning ordinances are construed against indefinite continuation of a non-conforming use." *Forsyth Co. v. Shelton*, 74 N.C. App. 674, 676, 329 S.E.2d 730, 733 (1985). Thus, we find the Board has ample authority with which to support its decision.

[3] Petitioners further contend the scenic corridor ordinance is unconstitutional on its face and, as applied in this case, it amounts to a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Specifically, petitioners argue the property is unacceptable for resi-

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dential purposes because it adjoins I-40. In order to determine whether an unconstitutional taking of property has occurred, it must be determined whether, under the “ends means” test, the particular exercise of police power by the government was legitimate, whether the means chosen to regulate are reasonable, and “whether the ordinance was invalid because the interference with the plaintiffs’ use of the property amounted to a taking.” *Guilford Co. Dept. of Emer. Serv. v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 11-12, 441 S.E.2d 177, 183, *disc. review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994) (*quoting Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14, *reh’g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989)). An interference with property rights amounts to a taking where the plaintiffs are deprived of “all economically beneficial or productive use.” *Id.*

The legitimacy and reasonableness of enforcement of the ordinance are not contested; therefore, we need only address whether the ordinance is invalid because it constitutes a taking. *See id.* We conclude the scenic corridor ordinance has not deprived petitioners of “all economically beneficial or productive use” of their property. Thus, no unconstitutional taking has occurred.

[4] Next, petitioners argue the trial court erred in finding and concluding the Board had authority to impose civil penalties. We note that the Board stayed the imposition of a civil penalty for 45 days. N.C. Gen. Stat. § 153A-345(b) (1991) provides:

The board of adjustment may reverse or affirm, in whole or in part, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, that in its opinion ought to be made in the circumstances. To this end the board has all of the powers of the officer from whom the appeal is taken.

Section 8-4 of the Guilford County Development Ordinance states that an enforcement officer may impose civil penalties against any person who violates a provision of the ordinance. Therefore, since the Board possesses all of the powers of the enforcement officer for non-compliance, the trial court did not err in finding that the Board had authority to impose civil penalties.

[5] Petitioners’ last two assignments of error concern whether the decisions of the Board are supported by substantial, competent evidence or are arbitrary and capricious, thus the reviewing court looks to the “whole record” to determine whether the Board’s findings are

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supported by substantial evidence in the whole record. See *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 513 S.E.2d 70 (1999). 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). Furthermore, a decision will be reversed and found to be arbitrary and capricious only when it is established by the petitioner that "the decision was whimsical, made patently in bad faith, [or] indicates a lack of fair and careful consideration." *Whiteco Outdoor Adver.*, 132 N.C. App. at 468, 513 S.E.2d at 73. "When the Court of Appeals applies the whole record test and reasonable but conflicting views emerge from the evidence, the Court cannot substitute its judgment for the administrative body's decision." *CG&T Corporation*, 105 N.C. App. at 40, 411 S.E.2d at 660. We find the trial court exercised the appropriate scope of review; thus, we look to see if "the court did so properly." See *Willis*, 129 N.C. App. at 501, 500 S.E.2d at 726.

Here, the trial court properly concluded that there was substantial evidence to affirm the decision of the Board. Therefore, the decision of the Board was not arbitrary and capricious in finding that petitioners violated the ordinances and the trial court did not err.

[6] As to petitioners' remaining assignment of error that N.C. Gen. Stat. §§ 153A-340 through 345 fail to provide adequate constitutional protections for an aggrieved party such as the petitioners, we agree with the trial court that this contention is without merit.

Affirmed.

Judges WYNN and HUNTER concur.

IN RE McDONALD

[133 N.C. App. 433 (1999)]

IN RE SHANNON MARIE McDONALD, JUVENILE

No. COA98-1276

(Filed 1 June 1999)

1. Probation and Parole— condition of probation of juvenile—no television

When placing three juveniles on probation for injury to real property in converting what they believed to be an abandoned boat house to a clubhouse, the trial court did not err by placing an additional condition on the appealing juvenile's probation where the juvenile spray painted the words "Charles Manson" because she had recently watched a television documentary, and the court found that the juvenile's susceptibility to the influences of television contributed to her delinquent conduct and ordered that she not watch television for one year. The condition of probation was within the judge's power because it was related to both the juvenile's unlawful conduct and her needs. Her First Amendment rights were not violated because the judge took her words into account only to determine what factors influenced her delinquent conduct and the best way to remove those factors from her life.

2. Probation and Parole— restitution—evidence insufficient

The trial court erred by ordering a juvenile to pay restitution for rearranging items and spray painting words and pictures on a boat house wall where the only evidence of the extent of the damage consisted of pictures of the spray painted walls. It is undisputed that the State failed to provide any evidence about the monetary amount of damages suffered by the boat house owner and it appears that the court looked at the pictures and speculated as to the damage.

Appeal by juvenile Shannon Marie McDonald from judgment entered 27 April 1998 by Judge Edgar L. Barnes, District Court, Camden County. Heard in the Court of Appeals 11 May 1999.

Michael F. Easley, Attorney General, by Ted R. Williams, Assistant Attorney General, for the State.

Frank P. Hiner, IV, for defendant-appellant.

IN RE McDONALD

[133 N.C. App. 433 (1999)]

WYNN, Judge.

Between 25 December 1997 and 5 January 1998, defendant Shannon McDonald and two other fourteen-year-old girls spent part of their Christmas break playing in what they believed to be an abandoned boat house. At some point, the girls decided to transform the boat house into a “clubhouse” and accordingly rearranged some items and spray painted words and pictures on the boat house walls. McDonald spray painted, *inter alia*, the words “Charles Manson Rules.” The other two girls spray painted words such as “Nicole and Deanna Best Friends.”

Ultimately, the three girls were found “responsible” for the charge of injury to real property. All three girls were given twelve months of juvenile probation with virtually identical conditions; including the condition that they pay the boat house custodian restitution in the amount of two hundred dollars.

During the disposition phase, McDonald informed the judge that she spray painted the words “Charles Manson” because she had recently watched a documentary on television about him. This revelation led the judge to believe that McDonald was “too susceptible to impression to be watching television” and accordingly he ordered an additional condition of probation, to wit, that she not watch television for one year. McDonald appeals both this additional condition and the judge’s restitution order.

[1] On appeal, McDonald first contends that the judge’s decision to place an additional condition on her probation—that she not watch television for a year—violates her First Amendment rights. Specifically, McDonald contends that Judge Barnes singled her out for special punishment because of the content of her writings rather than her conduct in spray painting the structure.

Initially, we note that under N.C. Gen. Stat. § 7A-649(8) a judge may place a juvenile on probation and “shall specify conditions of probation that are related to the needs of the juvenile.” In deciding the conditions of probation, the trial judge is free to fashion alternatives which are in harmony with the individual child’s needs. *See In re Groves*, 93 N.C. App. 34, 376 S.E.2d 481 (1989). Indeed, the statutory framework was designed to provide flexible treatment in the best interests of both the juvenile and the State. *See In re Khork*, 71 N.C. App. 151, 321 S.E.2d 498 (1984).

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In the case *sub judice*, the judge found that McDonald's susceptibility to the influences of television contributed to her delinquent conduct. Accordingly, the judge concluded that it was in her best interests to avoid those influences for one year. Because this condition of probation was related to both McDonald's unlawful conduct and her needs, it was within the judge's power to impose this condition. Therefore, we need only determine whether the judge, by imposing a greater sentence upon McDonald based upon the content of her words, violated McDonald's First Amendment rights.

We find the United States Supreme Court case of *Wisconsin v. Mitchell*, 508 U.S. 476, 124 L. Ed. 2d 436 (1993) controlling. In *Mitchell*, the Court confronted the constitutionality of a penalty-enhancing statute which provides for an increased penalty if a person commits the underlying offense "because of" the race of the victim. The Court began by noting that "sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant" including their motive for committing the crime. *Id.* at 485, 124 L. Ed. 2d at 443. Thereafter, the Court noted that although a defendant's abstract beliefs, no matter how obnoxious, cannot be considered, those beliefs can be permissibly taken into account when they are relevant to underlying crime or the weighing of aggravating or mitigating circumstances. *Id.* at 486, 124 L. Ed. 2d at 443. That is, the Court held that a judge may consider a defendant's underlying motives and beliefs so long as they are relevant to the proceedings.

In the case *sub judice*, the judge's consideration of McDonald's words were directly relevant to the proceedings. Specifically, the judge took McDonald's words into account only to determine what factors influenced her delinquent conduct and the best way to remove those factors from her life. Moreover, the judge sentenced McDonald differently not because his beliefs about Charles Manson differed from hers, but rather because he felt that she was too susceptible to the influences of television. Indeed, it has not been argued nor has there been any evidence that McDonald even believed in the teachings of Charles Manson. Rather, it appears that she was emulating what she observed on television and the judge was merely trying to alleviate some of those potentially damaging influences. This is evidenced by the fact that the judge's order in no way prohibits McDonald from learning about Charles Manson or any other figure through other means. Accordingly, this assignment of error is rejected.

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[2] McDonald also contends that the trial court erred in ordering her to pay restitution because it failed to make appropriate findings of fact. This Court has previously stated that “[a]n order of restitution must be supported by appropriate findings of fact, and those findings must in turn be supported by some evidence in the record.” *In Re Davis*, 126 N.C. App. 64, 66 (1997). In the case *sub judice*, it is undisputed that the State failed to provide any evidence about the monetary amount of damages suffered by the boat house owner. The State’s only evidence regarding the extent of damage consisted of pictures of the spray-painted walls. These pictures, however, did not provide the trial court with factual support for its determination that the boat house suffered six hundred dollars damage. Indeed, it appears that the trial court looked at these pictures and simply speculated as to the extent of damage. Accordingly, because there is no factual support underlying the trial court’s restitution order, we must reverse this aspect of its ruling.

Affirmed in part, reversed in part.

Judges GREENE and MARTIN concur.

JILL M. ROBINSON, PLAINTIFF v. CLARA THOMPSON LEACH, DEFENDANT

No. COA98-1105

(Filed 1 June 1999)

**Insurance— underinsured motorist policy—subrogation—
South Carolina statute**

The trial court erred by granting summary judgment for defendant in an action which arose from an automobile accident in South Carolina between residents of Brunswick County, North Carolina where defendant’s insurer tendered its policy limits to plaintiff, plaintiff’s insurer paid that amount and later its remaining underinsured motorist coverage to plaintiff to protect its subrogation rights under the North Carolina statute, and defendant contended that South Carolina substantive tort law applies and that a South Carolina statute bars insurance companies from being subrogated to the rights of an insured. The South Carolina statute does not regulate the contractual relationship between a North Carolina insurer and its insured where benefits are paid

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under a policy issued in North Carolina; moreover, North Carolina courts are not required to extend comity to the law of another state where that law is contrary to the public policy of this state, or where the law of another state would operate in opposition to our settled statutory policy or override express provisions of our statutes.

Appeal by North Carolina Farm Bureau Mutual Insurance Company, the unnamed plaintiff, from summary judgment entered by Judge D. Jack Hooks, Jr., on 19 June 1998 in Brunswick County Superior Court. Heard in the Court of Appeals 10 May 1999.

On 7 September 1995, Jill M. Robinson (plaintiff or Ms. Robinson) was operating a vehicle owned by Barbara A. Fantauzzo (Ms. Fantauzzo) in Little River, South Carolina. Ms. Robinson collided with a vehicle driven by defendant Clara Leach (defendant or Ms. Leach). Both Ms. Robinson and defendant were citizens and residents of Brunswick County, North Carolina, at the time of the accident. Ms. Leach had minimum single bodily injury liability insurance coverage in the amount of \$25,000.00 through Integon Indemnity Corporation (Integon). The automobile driven by Ms. Robinson was insured through Farm Bureau Mutual Insurance Company (Farm Bureau) with single bodily injury underinsured limits of \$100,000.00.

Integon tendered its \$25,000.00 limits to Ms. Robinson and notified Farm Bureau of the tender. Within 30 days' notice, Farm Bureau advanced Integon's liability limit of \$25,000.00 to Ms. Robinson. Later, Farm Bureau paid the remaining \$75,000.00 in underinsured motorist coverage to Ms. Robinson. Farm Bureau and Ms. Robinson then filed this negligence claim in the Brunswick County Superior Court in the name of Ms. Robinson against Ms. Leach. Defendant's motion for summary judgment against Farm Bureau was granted by the trial court, and Farm Bureau appealed.

Cox, Ennis & Newton, by Stephen C. Baynard, for unnamed plaintiff appellant, North Carolina Farm Bureau Mutual Insurance Company.

Johnson & Lambeth, by Maynard M. Brown, for defendant appellee.

HORTON, Judge.

This automobile accident occurred in South Carolina and is pending in the Superior Court of Brunswick County, North Carolina.

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[133 N.C. App. 436 (1999)]

Under well-settled conflict of laws principles, the tort law of South Carolina governs the substantive issues of liability and damages, while procedural rights are determined by the laws of North Carolina. *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988). The issue before us is whether a provision of the insurance law of South Carolina that underinsured motorist benefits are not subject to subrogation or assignment is a part of that state's substantive tort law. We hold that South Carolina law does not prevent a North Carolina insurance company from being subrogated to the extent of its underinsured motorist payments to its North Carolina resident-insured, and reverse the entry of summary judgment by the trial court.

There is no dispute that Farm Bureau, an insurance carrier qualified to do business in North Carolina, issued a policy of automobile insurance to plaintiff, a North Carolina resident. The policy complied with applicable North Carolina law and afforded underinsured motorist coverage in the amount of \$100,000.00 to Ms. Robinson. It is also agreed that Ms. Robinson was involved in an automobile accident with Ms. Leach, also a North Carolina resident, near Little River, South Carolina, on the occasion in question here. Ms. Leach was insured by Integon Insurance Company, a company also qualified to do business in North Carolina. Her automobile policy provided \$25,000.00 single bodily injury liability coverage. Following the accident, Farm Bureau was notified that Integon had tendered its \$25,000.00 limits to Ms. Robinson. In order to protect its rights of subrogation under the provisions of N.C. Gen. Stat. § 20-279.21, Farm Bureau paid \$25,000.00 to Ms. Robinson within the statutory period, and later paid its remaining \$75,000.00 of underinsured motorist coverage to her. Ms. Robinson and Farm Bureau (as an unnamed plaintiff) then brought this action against Ms. Leach, with Ms. Robinson seeking to recover damages against Ms. Leach, and Farm Bureau seeking to protect its rights of subrogation to the extent of its payments to its insured, Ms. Robinson.

The parties agree that under North Carolina law, Farm Bureau is subrogated to the extent of its underinsured motorist payments in any recovery by Ms. Robinson. N.C. Gen. Stat. § 20-279.21 (Cum. Supp. 1997). Under S.C. Code Ann. § 38-77-160, the South Carolina statute here in question, a South Carolina automobile insurance carrier must offer underinsured motorist coverage to the limits of its insured's automobile liability coverage, but underinsured motorist benefits are "not subject to subrogation and assignment."

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Defendant contends that, since South Carolina substantive tort law applies in this case, Farm Bureau's subrogation action is barred. We disagree.

The statute in question is part of Title 38, Chapter 77, "Automobile Insurance," of the South Carolina Code. That chapter regulates the issuance of automobile insurance policies in South Carolina, sets out minimum limits for liability coverage (Code § 38-77-140), requires uninsured motorist coverage in at least the minimum liability limits (Code § 38-77-150), and provides that carriers must offer additional uninsured and underinsured motorist coverages at the option of the insured (Code § 38-77-160). At one time, South Carolina allowed their carriers providing underinsurance and uninsured benefits the rights of subrogation and assignment. S.C. Code Ann. § 56-9-831 (Supp. 1986). A 1987 amendment to the statute, now codified as § 38-77-160, deleted that provision however. *See Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 n.2 (1989). The provision in question, therefore, clearly bars South Carolina automobile insurance companies from being subrogated to the rights of an insured by reason of the payment of underinsured motorist benefits. It seems equally clear, however, that the South Carolina statute does not purport to regulate the contractual relationship between a North Carolina insurer and its insured, where benefits are paid under a policy issued in North Carolina. Indeed, the definitions section of Chapter 77 of the South Carolina Code defines an "automobile-insurer" as an "insurer licensed to do business in South Carolina and authorized to issue automobile insurance policies." S.C. Code Ann. § 38-77-30(2) (Supp. 1998). There is no evidence in the record that North Carolina Farm Bureau was licensed to do business in South Carolina, yet there is evidence in the record which suggests Farm Bureau's policy was issued in North Carolina, pursuant to North Carolina law and to a North Carolina resident.

In addition, we note that the provisions of S.C. Code Ann. § 38-77-160, insofar as it prevents an insurance carrier from being subrogated to its underinsured motorist payments to an insured, is in direct conflict with the settled statutory policy of this State as it is found in N.C. Gen. Stat. § 20-279.21. Our courts are not required to extend comity to the law of another state where that law is contrary to the public policy of this state, or where the law of another state would operate in opposition to our settled statutory policy, or override express provisions of our General Statutes. *Ellison v. Hunsinger*, 237 N.C. 619, 627, 75 S.E.2d 884, 891 (1953); *Bank v.*

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Ramsey, 252 N.C. 339, 345, 113 S.E.2d 723, 728 (1960); and *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 96 n.1, 305 S.E.2d 528, 532 n.1 (1983).

Assuming, without conceding, that defendant had standing to object to Farm Bureau's inclusion as an unnamed plaintiff, the trial court erred for the above reasons in granting summary judgment against Farm Bureau.

Reversed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

WESLEY PRICE, PLAINTIFF v. DEBORAH PRICE, DEFENDANT

No. COA98-1040

(Filed 1 June 1999)

1. Appeal and Error— domestic violence protective order— findings and evidence insufficient—remand futile

Remand of a domestic violence protective order would be futile and the order was reversed where the trial court failed to make findings and conclusions to support its order, but the record contained no evidence which could support a conclusion that domestic violence occurred.

2. Assault— domestic violence protective order—sufficiency of evidence

There was insufficient evidence to issue a domestic violence protective order under N.C.G.S. § 50B-3(a) where the evidence showed at most that defendant entered plaintiff's trailer and spilled pasta and spices on the floor. There was no evidence that defendant attempted to cause or intentionally caused plaintiff bodily injury, placed him or any member of his family or household in fear of imminent serious bodily injury, or committed any sexual offense.

Appeal by defendant from order filed 5 May 1998 by Judge Jack E. Klass in Davidson County District Court. Heard in the Court of Appeals 25 May 1999.

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[133 N.C. App. 440 (1999)]

No brief for plaintiff-appellee.

Central Carolina Legal Services, Inc., by Andrea S. Kurtz, for defendant-appellant.

GREENE, Judge.

Deborah Price (Defendant) appeals from the trial court's order granting her husband Wesley Price's (Plaintiff) request for a domestic violence protective order.

On 28 April 1998, Plaintiff filed a complaint seeking a domestic violence protective order against Defendant. At the trial, Plaintiff testified that: (1) on the weekend of 25 April 1998, he was away from his home, and someone dumped pasta and spices on the floor of his living room and kitchen; (2) he believed Defendant, his estranged wife, was the person who committed the act; (3) an individual named Jimmy, who lived with him in his trailer, was home during the weekend; (4) Plaintiff had placed some of Defendant's personal property on the porch outside the trailer; and (5) Defendant had obtained a domestic violence protective order against him in December 1997.¹ Defendant admitted at the hearing that she approached the trailer on the weekend in question in order to determine whether her personal property had been left out on the porch, but did not enter the trailer or spill pasta or spices on the floor of the trailer. Defendant also testified she did not take any of her personal property at that time. Defendant moved to dismiss the case both at the close of Plaintiff's evidence and at the close of all the evidence, but both motions were denied by the trial court.

Following the hearing, the trial court entered a domestic violence protective order on 5 May 1998: (1) ordering Defendant to "stay away from [Plaintiff's] residence"; (2) authorizing a law enforcement officer to arrest Defendant if the officer has probable cause to believe she has violated the order; and (3) specifying a date and time for Defendant to pick up her belongings from Plaintiff. This order did not contain any findings of fact or conclusions of law.²

1. Defendant has narrated the testimonial evidence in this case pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure.

2. We note the Protective Order entered by the trial court was a form order printed by the Administrative Office of Courts and includes several boxes, in the "Findings" and "Conclusions" sections of the form, to be checked by the trial court. None of the boxes were checked. Because of the large number of domestic violence cases filed each year in North Carolina, we appreciate the usefulness of form orders. The trial court, however, should not neglect its responsibility to make necessary findings and conclusions.

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The dispositive issue is whether sufficient evidence was presented to justify the entry of the trial court's domestic violence protective order.

Defendant contends the trial court erred by denying her motion to dismiss and by failing to make findings of fact and conclusions of law. We agree.

[1] Because the trial court failed to make findings of fact and conclusions of law to support its order, this matter could be remanded for the entry of a new order containing findings and conclusions. *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980). The record, however, contains no evidence which could support a conclusion that domestic violence, as defined in N.C. Gen. Stat. § 50B-1, occurred, therefore remand, in this case, would be futile. *Arnold v. Charles Enterprises*, 264 N.C. 92, 99, 141 S.E.2d 14, 19 (1965) (holding that although the trial court omitted a material finding of fact which would ordinarily require remand, remand would be futile because the party with the burden of proof failed to offer any evidence in support of the finding).

[2] A court may grant a protective order to bring about the cessation of any act of domestic violence. N.C.G.S. § 50B-3(a) (1996). Domestic violence is 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, but does not include acts of self-defense:

- (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.

N.C.G.S. § 50B-1(a) (Supp. 1998). Sections 14-27.2 through 14-27.7 statutorily define rape and other criminal sexual offenses.

In this case, there is no evidence that Defendant attempted to cause or intentionally caused Plaintiff bodily injury, placed him or

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any member of his family or household in fear of imminent serious bodily injury, or committed any sexual offense. At most, the evidence shows Defendant entered Plaintiff's trailer and spilled pasta and spices on the floor. The order, therefore, must be reversed.

Reversed.

Judges WALKER and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 JUNE 1999

BARTLETT v. BARTLETT No. 98-1132	Alamance (98CVS277)	Appeal Dismissed
BENJAMIN v. GOODWILL INDUS. No. 98-1194	Ind. Comm. (355977)	Affirmed
BOONE v. MIZELLE No. 98-1478	Hertford (98CVS20)	Affirmed
BURICK v. FAULKNER No. 98-1201	Stokes (97CVS584)	Reversed
DIXON v. SKF-CHICAGO RAWHIDE INDUS. No. 98-1232	Ind. Comm. (576066)	Affirmed
HOFFNER v. OLIVE No. 98-1483	Wake (96CVS12969)	Affirmed
IN RE McGUINN No. 98-1334	Buncombe (98CVS1950)	Affirmed
IN RE RUSSELL No. 98-1430	Buncombe (96J188)	Affirmed
KRIEBEL v. KRIEBEL No. 98-1255	Orange (97CVD826)	Vacated
MORGAN v. WESTERN PIEDMONT RADIOLOGY No. 98-777	Iredell (98CVS00276)	Affirmed
NELL v. ANDERSON No. 98-481	Catawba (95CVD1133)	Affirmed
PERRY v. GAYLORD CONTAINER CORP. No. 98-1450	Ind. Comm. (539141)	Affirmed
ROBINSON v. OLLO No. 98-902	Mecklenburg (96CVS11697)	Dismissed
RODMAN v. FAULKNER No. 98-1265	Pitt (97CVS949)	Affirmed
SOOTS v. SOOTS No. 98-1100	Brunswick (95CVD912)	Vacated

STATE v. ARRINGTON No. 98-1060	Nash (95CRS6665) (95CRS6666) (95CRS6667) (95CRS6668)	No Error
STATE v. BLANTON No. 98-739	New Hanover (97CRS8448)	No Error
STATE v. BLOUNT No. 98-668	Hertford (96CRS3914)	No Error
STATE v. CASH No. 98-1290	Rutherford (97CRS4218) (97CRS4219) (97CRS4216)	No Error
STATE v. CLINDING No. 98-1358	Wake (98CRS148)	No Error
STATE v. CUNNINGHAM No. 98-1585	Gaston (97CRS4462) (97CRS4463) (96CRS26656) (96CRS26657)	No Error
STATE v. EVANS No. 98-1371	Pitt (97CRS28391) (97CRS4205)	No Error
STATE v. FAIRLEY No. 98-1379	Cumberland (96CRS55880) (96CRS55881) (96CRS55882) (96CRS59101) (96CRS59102)	No Error
STATE v. GARNER No. 98-1180	Wayne (97CRS8920)	No Error
STATE v. HODGIN No. 98-1481	Lee (97CRS11246) (97CRS11249) (97CRS11251) (97CRS11252) (97CRS11254) (97CRS11255) (97CRS11256) (97CRS11316) (97CRS11317) (97CRS11318) (97CRS11343) (97CRS11454)	No Error

STATE v. KING No. 98-257	Lenoir (94CRS9234A) (97CRS5630)	No Error
STATE v. NDUKU No. 98-1375	Wake (96CRS56639)	No Error
STATE v. POE No. 98-1322	Guilford (97CRS23414) (96CRS78345) (96CRS78346)	No Error
STATE v. TART No. 98-1420	Columbus (96CRS9686)	Affirmed
STATE v. TRUSELL No. 98-195	Lee (97CRS196) (97CRS197) (97CRS198) (97CRS199) (97CRS200) (97CRS1249) (97CRS1250)	No Error
STATE v. TUCKER No. 98-1196	Cabarrus (97CRS12793) (97CRS12794)	No Error
STATE v. WARD No. 98-337	Guilford (95CRS76042) (95CRS70915) (95CRS71068)	No Error
STATE v. WILLIAMS No. 98-1382	Duplin (96CRS5843) (96CRS5844) (96CRS5845)	No Error
STATE v. WRIGHT No. 98-1366	Mecklenburg (96CRS24224) (96CRS19698)	No Error
STOGDALE v. GEORGIA PACIFIC CORP. No. 98-1283	Ind. Comm. (115002)	Appeal Dismissed
TRAILMOBILE, INC. v. WILSON TRACTOR SALES AND SERV. No. 98-1245	Wilson (91CVS1763)	Appeal Dismissed
UPCHURCH v. UPCHURCH No. 98-1360	Durham (89CVD1099)	Affirmed
USREY v. TOMES No. 98-1034	Johnston (97CVD207)	Dismissed

VICK v. ROCKY MOUNT
MILLS
No. 98-67

Ind. Comm.
(462714)

Affirmed

WALKER v. FAMILY
DOLLAR STORES
No. 98-1435

Wayne
(95CVS2060)

Reversed

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STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. THOMAS RICHARD JONES,
DEFENDANT-APPELLANT

No. COA98-429

(Filed 15 June 1999)

1. Homicide— felony murder—deadly weapon—not unconstitutionally vague

The lack of a specific definition of “deadly weapon” in the felony murder statute, N.C.G.S. § 14-17, did not make the statute unconstitutional in a case involving the deaths of two college students following a collision with an automobile driven by an impaired driver. The determinative inquiry is “the destructive capabilities of the weapon or device” and a deadly weapon has been defined by case law to include a variety of instruments, including automobiles.

2. Constitutional Law— ex post facto laws—application of felony murder to impaired driving

The application of the felony murder rule to a case involving the deaths of two college students following a collision with an automobile driven by an impaired driver did not violate the prohibition against ex post facto laws. The felony murder rule has existed in its present form since 1977 and automobiles have been recognized as deadly weapons in North Carolina since 1922. Although a felony perpetrated with an automobile has apparently not been used to support a felony murder conviction in the past, there is nothing to preclude its use for that purpose, nor does it expand the statute in any manner. Defendant can hardly complain that he was not on notice that he was taking serious risks and facing serious consequences when he continued to operate his automobile under the influence of drugs and alcohol.

3. Constitutional Law— equal protection—application of felony murder to impaired driving

The application of the felony murder rule to a case involving the deaths of two college students following a collision with an automobile driven by an impaired driver did not violate equal protection. Defendant did not state the suspect class to which he belongs that has been discriminated against and did not show which fundamental right will be affected. Stating that the felony murder rule would not be applied if there had not been multiple injuries does not make out a prima facie case for violation of the

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Equal Protection Clause; it is not a violation of equal protection to punish a defendant more severely because more victims have been harmed.

4. Homicide—felony murder—legislative intent

Application of the felony murder rule to a prosecution which arose from the deaths of two college students after a collision with an automobile driven by an intoxicated driver did not violate legislative intent. The General Assembly modified the felony murder rule in 1977 and made it more specific, but did not exclude automobiles from the definition of “deadly weapons” even though automobiles had often been treated as “deadly weapons” prior to the amendment. Although the more specific statutes of felony and misdemeanor death by vehicle exist, they have not preempted all other statutes when a death occurs when a defendant has been driving while impaired. However, it was noted that this decision was grounded on the facts of this case.

5. Evidence—prior crime or act—capital first-degree murder—impaired driving—other charges—conduct just before offense

In a capital first-degree murder prosecution arising from the deaths of two college students in a collision with an automobile driven by defendant while he was impaired with alcohol and drugs, the trial court did not err by allowing evidence about a pending DWI charge, defendant’s 1992 conviction for DWI, and evidence of defendant’s conduct just before the offense, all of which were used to show malice.

6. Homicide—felony murder—instructions—proximate cause of death

The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision by not giving defendant’s requested instruction on felony murder that the State must prove that there was no other proximate cause of the death of the victim. It is sufficient if a defendant’s culpable negligence is a proximate cause of the death.

7. Homicide—culpable negligence—instructions—insulating negligence

The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision by not giving defendant’s requested instruction on insulating negligence. Defendant was in the victim’s lane of travel and she was forced to

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swerve into the left lane in an effort to avoid a collision; the argument that she should have swerved to the right and hit a telephone pole and mailbox is completely unpersuasive.

8. Homicide— culpable negligence—instructions—driving on left half of roadway—exceeding posted speed

The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision in its instruction on culpable negligence. Our cases have held that an individual may be culpably or criminally negligent when traveling at excessive rates of speed or when driving on the wrong side of the road.

9. Homicide— first-degree murder—sufficiency of evidence—impaired driving

The trial court correctly denied a motion to dismiss a charge of first-degree murder arising from an impaired driving automobile collision.

10. Criminal Law— jurisdiction of district court before indictments—production of medical records

The district court had jurisdiction to enter orders for the production of defendant's medical records in a capital first-degree murder prosecution arising from an impaired driving collision where the order was entered before the indictments were returned. Jurisdiction is in the district court before a case is bound over to superior court or indictments returned. N.C.G.S. § 7A-272(b).

11. Evidence— expert testimony—impaired driving—blood alcohol and drugs

The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision by allowing testimony from a doctor that defendant was appreciably impaired when his blood alcohol level reached .046 because the doctor was qualified as an expert in forensic toxicology and had examined a sample of defendant's blood, or testimony from another doctor about the effects of combining alcohol and Xanax. Any problems in the testimony go to its weight, not its admissibility.

12. Homicide— felony murder—no merger of underlying felony

The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision by submitting

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felony murder where defendant argued that the underlying felony of assault with a deadly weapon inflicting serious injury merged with the homicide.

Judge WYNN concurring in part and dissenting in part.

Appeal by defendant from judgments entered 6 May 1997 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 7 January 1999.

The facts in this tragic case are largely undisputed. On 4 September 1996 at approximately 10:30 p.m., Thomas Richard Jones (defendant) crashed his automobile into an automobile driven by Margaret Penney (Margaret), a nineteen-year-old college student, killing two people and seriously injuring three others. Defendant was driving west on Polo Road, a two-lane thoroughfare in Winston-Salem, North Carolina, while Margaret was traveling east. As Margaret drove around a curve which preceded the "T" intersection of Polo Road and Brookwood Road, she saw two headlights approaching her in her lane of travel. Aline Iodice (Aline) also saw the two headlights and later testified that the headlights "were moving so quickly and [she] realized they were in [their] lane from the very first time [she] saw them until" the car collided with them.

Margaret lifted her foot from the accelerator pedal but could not pull the automobile off the road to the right because of the presence of a telephone pole and mailbox. Margaret tried to avoid a head-on collision with defendant by swerving into the left lane and turning onto Brookwood Road. Defendant, however, also swerved into his proper lane of travel and crashed into Margaret's automobile.

The collision killed Maia Witzl and Julie Marie Hansen, both nineteen-year-old college students who were passengers in Margaret's automobile, and injured Margaret. Melinda Warren, Aline, and Lea Billmeyer were also passengers in Margaret's automobile and were seriously injured. Defendant, however, suffered only minor injuries and was released from the hospital in less than twenty-four hours.

The crash investigation showed that defendant had been drinking alcohol and had a blood-alcohol content of .046. He had also taken the narcotic drugs Butalbital, Alprazolam (Xanax), and Oxycodone. Defendant was taking the prescription narcotics under the supervision of his doctor to alleviate pain from the medical conditions from

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which he was suffering. At trial, an expert stated that this combination of narcotic painkillers impairs one's ability to drive an automobile as they can cause dizziness, confusion, and disorientation. The drugs may also decrease motor control, impair concentration and judgment, and diminish reaction time and perception.

Evidence in the record also shows that just a few minutes before the accident, defendant was involved in another automobile incident and engaged in reckless conduct. A mother and child were stopped at a red light at the intersection of University Parkway and North Point Boulevard. Defendant drove up behind their automobile and twice bumped into it, indicating that they should move out of the way even though the light was red. A witness testified that defendant yelled, "Get the f--k out of the way." When the light changed to green, defendant sped around the automobile in front of him and drove away at an excessive rate of speed.

The driver of the automobile which defendant had bumped followed him to obtain his license plate number and report him to the police. The driver saw that defendant continued to drive recklessly, including driving up onto the curb of the road. The driver eventually got the license plate number, called the police, and told them that defendant was "driving real crazy" and that "if somebody doesn't get him he's going to kill somebody." There was also evidence that defendant had been convicted of driving while impaired (DWI) in 1992 and was awaiting trial on another pending DWI charge.

In April of 1997, defendant was tried capitally before a jury. The jury returned the following verdicts: (1) guilty of assault with a deadly weapon inflicting serious injury on Aline; (2) guilty of assault with a deadly weapon inflicting serious injury on Melinda Warren; (3) guilty of assault with a deadly weapon on Margaret; (4) guilty of assault with a deadly weapon inflicting serious injury on Lea Billmeyer; (5) guilty of driving while impaired; (6) guilty of first-degree murder of Maia Witzl under the felony murder rule; and (7) guilty of first-degree murder of Julie Hansen under the felony murder rule.

The jury recommended that defendant be sentenced to life without parole for the deaths of Maia Witzl and Julie Hansen. The trial court sentenced defendant to life without parole and arrested judgment on the three convictions for assault with a deadly weapon inflicting serious injury. The trial court also sentenced defendant to 120 days' imprisonment for assault with a deadly weapon on

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Margaret and to 90 days' imprisonment for driving while impaired. Defendant appealed.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Jonathan P. Babb, for the State.

White and Crumpler, by David B. Freedman, Dudley A. Witt, and Laurie A. Schlossberg; and Teeter Law Firm by Carroll L. Teeter, for defendant appellant.

HORTON, Judge.

In 1893 our General Assembly codified the common law offense of murder and divided it into first and second degrees. *State v. Davis*, 305 N.C. 400, 422, 290 S.E.2d 574, 588 (1982). The killings considered to be the most heinous were classified as first-degree murder and then subdivided into three classes: "(1) murders perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, (2) premeditated murder, and (3) killings occurring in the commission of" any arson, rape, robbery, burglary, or other felony. *Id.* at 423, 290 S.E.2d at 588. This third class of first-degree murder is commonly referred to as felony murder.

In 1977, the General Assembly amended the definition of felony murder to its present form. It is now defined as a killing "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon" N.C. Gen. Stat. § 14-17 (Cum. Supp. 1998). Therefore, for a defendant to be found guilty of felony murder, the State must prove that another person was killed while defendant was committing or attempting to commit any felony in which a deadly weapon was involved. *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). In the instant case, the defendant was charged with the underlying felony of assault with a deadly weapon inflicting serious injury, which is comprised of the following elements: (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury; and (4) not resulting in death. N.C. Gen. Stat. § 14-32(b) (1993).

An assault is defined as an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to another person. *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). This show of force or vio-

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lence must be sufficient to place a person of reasonable firmness in fear of immediate bodily harm. *Id.* A deadly weapon has been defined by our Supreme Court as any “‘article, instrument or substance which is likely to produce death or great bodily harm.’” *State v. Torain*, 316 N.C. 111, 120, 340 S.E.2d 465, 470 (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)), *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). An automobile which is driven in a dangerous manner can be a deadly weapon. *See State v. Sudderth*, 184 N.C. 753, 755, 114 S.E. 828, 829-30 (1922); *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955); *State v. McBride*, 118 N.C. App. 316, 318-19, 454 S.E.2d 840, 841-42 (1995).

A driver who operates an automobile in such a manner that it is a deadly weapon can be convicted of the felony of assault with a deadly weapon inflicting serious injury if the driver has either “(1) an actual intent to inflict injury, or (2) [commits a] culpabl[y] or criminal[ly] negligenc[t] [act] from which such intent may be implied.” *Eason*, 242 N.C. at 65, 86 S.E.2d at 778. Culpable or criminal negligence, in turn, has been defined as “such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.” *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933). In *State v. Hancock*, 248 N.C. 432, 435, 103 S.E.2d 491, 494 (1958), our Supreme Court stated that “[t]he violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional.” If, however, the statute is unintentionally or inadvertently violated, culpable negligence exists if the violation is “accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others.” *Id.*

In this case, all the elements to sustain a conviction of first-degree murder by application of the felony murder rule are present. Two people were killed while defendant was perpetrating the felony of assault with a deadly weapon inflicting serious injury. Defendant committed the assault with his automobile by driving it in a reckless manner, oblivious to the safety of others. Although the evidence supports defendant’s conviction for felony murder because the elements of the underlying felony were met, defendant nonetheless contends that his conviction should be overturned because: (I) the felony murder statute is unconstitutionally vague in that it does not define

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“deadly weapon”; (II) application of the felony murder rule against defendant is an *ex post facto* violation; and (III) defendant’s conviction is a violation of the Equal Protection Clause. We disagree with defendant on all of these contentions and with (IV) the dissent’s opinion that it was not the legislature’s intent for the felony murder rule to apply to the facts of this case.

Defendant also presents the following evidentiary and instructional error arguments: (V) that the trial court erred in allowing the State to introduce evidence of a pending DWI charge, a 1992 conviction for DWI, and evidence of defendant’s driving prior to the offense in question; (VI) that the trial court (A) erred in failing to instruct the jury about proximate cause and insulating acts of negligence, and (B) should not have instructed the jury that driving left of the center line and exceeding the speed limit were culpable negligence; (VII) the trial court erred in denying defendant’s motion to dismiss at the close of all the evidence; (VIII) the district courts were without jurisdiction to enter orders to allow the State access to defendant’s medical orders and these orders allowed the State improper *ex parte* contact with defendant’s physicians; (IX) the trial court erred in allowing testimony by Dr. Mason in giving his opinion about defendant’s level of impairment and by Dr. Stuart about the effects of barbiturates on the human body; and (X) the trial court erred in submitting the felony murder charges because the underlying felonies of assault with a deadly weapon inflicting serious injury merged with the offense of felony murder.

I

[1] Defendant first contends that the failure of North Carolina’s General Assembly to define the term “deadly weapon” in N.C. Gen. Stat. § 14-17 necessarily results in the statute being unconstitutionally vague as applied to this defendant. We disagree.

It is well settled in North Carolina that a statute may be void for vagueness and uncertainty. “A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998) (citations omitted), *cert. denied*, 525 U.S.1111, 142 L. Ed. 2d 783 (1999). A deadly weapon, however, has been defined by our case law to include a variety of different instruments, including automobiles. As we stated earlier, a “deadly weapon is *any* article, instrument, or substance that is

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likely to produce great bodily harm or death.” *State v. Hales*, 344 N.C. 419, 426, 474 S.E.2d 328, 332 (1996) (emphasis added).

A variety of items have been held to be deadly weapons. *See State v. Lang*, 309 N.C. 512, 527, 308 S.E.2d 317, 325 (1983) (hands, fists or feet can be deadly weapons); *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373-74 (1978) (Pepsi-Cola bottle could be deadly weapon); *State v. Strickland*, 290 N.C. 169, 178, 225 S.E.2d 531, 538 (1976) (plastic bag can be a deadly weapon). The determinative inquiry is “the destructive capabilities of the weapon or device.” *State v. Moose*, 310 N.C. 482, 497, 313 S.E.2d 507, 517 (1984). Indeed, this Court has specifically held that an automobile can be a deadly weapon within the meaning of the felony of assault with a deadly weapon. *Eason*, 242 N.C. at 65, 86 S.E.2d at 778. Because North Carolina cases provide adequate notice of what constitutes a deadly weapon, defendant has not been deprived of due process. His argument, therefore, that the lack of a specific definition of “deadly weapon” necessarily makes the felony murder statute unconstitutional in this case, is unpersuasive.

II

[2] Defendant next contends that the application of the felony murder rule in this case would violate the prohibition against *ex post facto* laws. We disagree.

Both the North Carolina and United States Constitutions forbid the enactment of *ex post facto* laws. U.S. Const. art. I, § 10; N.C. Const. art. I, § 16. From the beginning of American jurisprudence, the United States Supreme Court has defined an *ex post facto* law to be a law that “(1) makes an action criminal which was done before the passing of the law and which was innocent when done, (2) aggravates a crime or makes it greater than when it was committed, (3) allows imposition of a different or greater punishment than was permitted when the crime was committed, or (4) alters the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time the offense was committed.” *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991). *See also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 650 (1798). In other words, in order for a criminal law to be an *ex post facto* violation, it must be both retrospective by applying to events which occurred “before its enactment, and it must disadvantage the offender affected by it.” *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 23 (1981)).

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Although *ex post facto* laws have traditionally been directed specifically at legislative actions, the United States Supreme Court has held that the Fifth and Fourteenth Amendments to the U.S. Constitution “forbid retroactive application of an unforeseeable judicial modification of criminal law, to the disadvantage of the defendant.” *Id.* In this case, however, there is no judicial modification of any criminal law. The felony murder rule has existed in its present form since 1977 and automobiles were treated as deadly weapons well before the date of the offense in this case. Although a felony perpetrated by an automobile has apparently not been used to support a felony murder conviction in the past, there is nothing to preclude its use for that purpose, nor does it expand the statute in any manner. Indeed, our Supreme Court has allowed human hands to be considered as deadly weapons to sustain an underlying felony in order to convict a defendant of felony murder. *See State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997). We therefore hold this argument to be unpersuasive.

Defendant argues that he was not fairly placed on notice that his conduct might result in a capital prosecution under the felony murder rule. Prior to this tragic incident, defendant had been convicted of driving while impaired on an earlier occasion. Further, about a month before this incident, defendant, while under the influence of drugs and alcohol, drove his automobile into the opposite lane, and ran another motorist off the road. Defendant was awaiting trial for that second incident at the time of the collision in this case.

An automobile has been recognized as a deadly weapon in North Carolina since 1922. *See Sudderth*, 184 N.C. 753, 114 S.E. 828. At least since 1925 motorists have been prosecuted for murder arising out of automobile accidents caused by their operation of their vehicles while under the influence. *See State v. Trott*, 190 N.C. 674, 130 S.E. 627 (1925), in which both the owner and the operator of an automobile were jointly indicted for first-degree murder and convicted of second-degree murder arising out of the tragic death of a fifteen-year-old girl in a traffic accident. Both defendants were under the influence of alcohol at the time of the accident. The driver did not appeal the conviction; the owner’s conviction was affirmed by our Supreme Court. *Id.* In recent years, defendants have been frequently prosecuted and convicted of second-degree murder arising out of automobile accidents. *See, e.g., State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984); *State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992); *State v. McBride*, 109 N.C. App. 64, 425 S.E.2d 731 (1993). Defendant in the

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case before us can hardly complain that he was not on notice that he was taking serious risks—and facing serious consequences—when he continued to operate his automobile under the influence of drugs and alcohol. This assignment of error is overruled.

III

[3] Defendant next contends that the application of the felony murder rule to him violates his right to equal protection under the law. We again disagree.

The Equal Protection Clause of both the U.S. and North Carolina Constitutions requires that all persons similarly situated be treated in the same manner. *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). “If the statute does not impact upon a suspect class or a fundamental right, it is necessary to show only that the classification created by the statute bears a rational relationship to some legitimate state interest.” *Id.*

In this case, defendant does not state the suspect class to which he belongs that has been discriminated against, nor does he show us which fundamental right will be affected. He merely contends that, if a similar accident had occurred and there were not multiple injuries, the felony murder rule could not be applied. This argument is unpersuasive in that it does not make out a *prima facie* case for a violation of the Equal Protection Clause, *see Green*, 348 N.C. at 602, 502 S.E.2d at 827, and because it is not a violation of the Equal Protection Clause to punish a defendant more severely because more victims have been harmed. *See* N.C. Gen. Stat. §§ 15A-1340.16(d)(8) and 15A-2000(e)(11) (1997). This assignment of error is accordingly overruled.

IV

[4] We next address an issue not specifically discussed by defendant in his brief, but clearly presented by the dissent. The dissent states that our legislature did not intend for the felony murder rule to be used in situations such as the present one. Specifically, the dissent opines that when the General Assembly modified the felony murder rule in 1977 and defined it as a killing “committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]” N.C. Gen. Stat. § 14-17, it limited the coverage of the rule by limiting the felonies which would sustain a felony murder charge.

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Although we agree that the General Assembly did make the rule more specific as to the type of underlying felony necessary to sustain a felony murder conviction, it specifically denoted felonies perpetrated with the use of a “deadly weapon.” As discussed above, a variety of items have been held to be deadly weapons within the meaning of the statute. See, e.g., *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. Indeed, the General Assembly did not exclude automobiles from the definition of “deadly weapons” in this statute, although automobiles had often been treated as “deadly weapons” prior to the 1977 amendment.

The dissent further supports its conclusion by stating that when a specific statute addresses an issue, that specific statute prevails over a more general statute, “‘unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto’” *Utilities Comm. v. Electric Membership Corp.*, 3 N.C. App. 309, 314, 164 S.E.2d 889, 892 (1968) (citation omitted). Indeed, in *State v. Beale*, 324 N.C. 87, 376 S.E.2d 1 (1989), our Supreme Court did apply a more specific statute dealing with abortion and similar offenses rather than the felony murder rule.

This idea that the felony murder rule cannot be used in this context because the General Assembly has enacted the more specific statutes of felony death by vehicle and misdemeanor death by vehicle (N.C. Gen. Stat §§ 20-141.4(a1) and 20-141.4(a2) (1993)), however, is not well grounded. Although these statutes do exist, they have not preempted all other statutes when a death occurs when a defendant has been driving while impaired. Indeed, there is abundant case law to support convictions for second-degree murder and involuntary manslaughter in DWI cases, even after the enactment of the felony and misdemeanor death by vehicle statutes. See, e.g., *State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998), *disc. review denied*, 350 N.C. 102, — S.E.2d — (1999); *McBride*, 109 N.C. App. 64, 425 S.E.2d 731; *Byers*, 105 N.C. App. 377, 413 S.E.2d 586. Logically, therefore, there is no reason why the felony murder statute cannot be used in this context if an underlying felony was also committed.

Despite our conclusion, we are mindful of the core concern expressed in the dissent. We perceive that our duty as an intermediate appellate court is to apply existing law to the facts of the case before us, and that duty inevitably compels the result we reach here. Novel or imaginative uses of existing statutes and case law are the stock in trade of capable attorneys, and a prosecutor may properly weigh the harm resulting from a defendant's actions in determining

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the charges he will pursue against a defendant. Such an evaluation undoubtedly took place here. Few traffic fatalities involve actions as flagrant as those before us. We expect district attorneys to continue to be mindful of the gravity of first-degree murder prosecutions in such cases. Both the verdict and sentence imposed are appropriate under the facts of this case, and our decision is grounded on those facts. This assignment of error is overruled.

V

[5] We now turn to defendant's assignments of error concerning instructional and evidentiary errors. Defendant contends that the trial court should not have allowed evidence about a pending DWI charge, defendant's 1992 conviction for DWI, and evidence of defendant's conduct just before the offense in question. We disagree with defendant on all of these arguments.

Rule 404(b) of the North Carolina Rules of Evidence allows evidence of other crimes, wrongs, or acts by a defendant if it is used to show a mental state such as malice. *Byers*, 105 N.C. App. at 383, 413 S.E.2d at 589. Evidence of other crimes, wrongs, or bad acts cannot, however, be used to prove a defendant's propensity to commit a crime. *Id.*

In this case, evidence of defendant's pending DWI charge and his 1992 conviction for DWI was used to show that defendant had the requisite mental state of malice, one of the elements of the charge of second-degree murder which was submitted to the jury. The trial court did not abuse its discretion in that the danger of undue prejudice did not outweigh any probative value of the evidence. Furthermore, evidence of defendant's conduct immediately prior to the offense in question was also properly admitted. Defendant bumped another automobile stopped at a traffic light, yelled obscenities and then sped off without acknowledging any damage which occurred. This evidence tended to show malice on the part of defendant and was proper under Rule 404(b).

VI

Defendant next contends that the trial court (A) erred in failing to instruct the jury about proximate cause and insulating acts of negligence and (B) should not have instructed the jury that driving left of the center line and exceeding the speed limit were culpable negligence. We disagree with these arguments.

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A

[6] Defendant argues that the trial court should have instructed the jury that in order to find him guilty of first-degree felony murder, the jury must find that “the defendant’s actions were the sole and only proximate cause of the death of the victim. The State must prove that there was no other proximate cause of the death of the victim.” Although the trial court must give an instruction to the jury if the requested instruction is correct in itself and is supported by evidence, see *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993), the requested instruction in this case was not correct. If a defendant’s culpable negligence is “a” proximate cause of the death, that is sufficient to find him criminally liable. *State v. Hollingsworth*, 77 N.C. App. 36, 39, 334 S.E.2d 463, 465 (1985). Indeed, there may be more than one proximate cause, but criminal responsibility arises when the offense committed is one of the proximate causes. *Id.* As a result, defendant’s requested instruction was a misstatement of the law and did not have to be given to the jury.

[7] As to the instruction for insulating acts of negligence, the trial court was correct in not submitting the charge. “In order for [the] negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant’s negligence; otherwise, defendant’s culpable negligence remains a proximate cause, sufficient to find him criminally liable.” *Id.* In this case, there was no evidence of any negligence on the part of Margaret while driving her automobile. Defendant was in her lane of travel and she was forced to swerve into the left lane in an effort to avoid a collision. Defendant’s argument that Margaret should have swerved to the right and hit a telephone pole and mailbox is completely unpersuasive and is, accordingly, overruled.

B

[8] The trial court gave the jury the following instruction on culpable negligence.

Under the law of this state, culpable negligence is such recklessness or carelessness proximately resulting in injury or death as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. An intentional, willful or wanton violation of the statute designed for the protection of human life or limb which proximately results in injury or death such as driving on the left half of the roadway or exceeding the posted speed limit is culpable negligence.

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Where there is an unintentional or inadvertent violation of the law, such violation standing alone does not constitute culpable negligence. To constitute culpable negligence, the inadvertent or unintentional violation of the law must be accompanied by recklessness of probable consequences of a dangerous nature when tested by the rule of reasonable foresight amounting all together to a thoughtless disregard of consequences or heedless indifference to the safety of others.

This language of the instruction tracks the language set forth by the Supreme Court in *State v. Sealy*, 253 N.C. 802, 804, 117 S.E.2d 793, 795 (1961) and was correct. Defendant complains that the trial court mischaracterized the law when it stated that "driving on the left half of the roadway or exceeding the posted speed limit is culpable negligence." This argument, however, is without merit. Our cases have held that an individual may be culpably or criminally negligent when traveling at excessive rates of speed. *See, e.g., State v. Wilson*, 218 N.C. 769, 12 S.E.2d 654 (1941); *State v. Steelman*, 228 N.C. 634, 46 S.E.2d 845 (1948); *State v. Floyd*, 15 N.C. App. 438, 190 S.E.2d 353, *cert. denied*, 281 N.C. 760, 191 S.E.2d 363 (1972); *State v. Grissom*, 17 N.C. App. 374, 194 S.E.2d 227, *cert. denied*, 283 N.C. 258, 195 S.E.2d 691 (1973). Our cases have also held that driving on the wrong side of the road can be culpable negligence. *See State v. Hefler*, 60 N.C. App. 466, 299 S.E.2d 456 (1983), *aff'd*, 310 N.C. 135, 310 S.E.2d 310 (1984); *State v. Atkins*, 58 N.C. App. 146, 292 S.E.2d 744, *appeal dismissed and disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982).

VII

[9] A trial court correctly denies a motion to dismiss at the close of all the evidence if there is substantial evidence to support each essential element of the offense charged and that defendant committed the offense. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Morgan*, 111 N.C. App. 662, 664-65, 432 S.E.2d 877, 879 (1993). The trial court must examine the evidence in the light most favorable to the State and the State is entitled to every reasonable inference which can be drawn from the evidence. *Id.* In this case, there was substantial evidence to warrant submission of the charges to the jury and the trial court did not err in denying the motion to dismiss.

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VIII

[10] Defendant's next argument concerns orders entered by the district court for the production of his medical records for the State. Although the case law prohibits *ex parte* communications with a party's health care provider in civil cases absent the party-patient's express consent, *see Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990), defendant has cited no authority to extend this rule to criminal defendants. Furthermore, there is no indication in the record that defendant objected to the orders at trial or moved to suppress the information. As a result, any error which occurred has been waived by defendant. N.C.R. App. P. 10(b)(1).

Defendant's contention that the district court judges who signed two of the orders lacked jurisdiction because the case was to be tried in superior court is likewise without merit. N.C. Gen. Stat. § 7A-272(b) (Cum. Supp. 1997) states that a "district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause . . ." Until a case is "bound over" to the superior court, or indictments are returned by the Grand Jury, jurisdiction is in the district court. In this case, the two orders signed by the district court were entered on 6 September 1996 and 20 September 1996, while the first indictments against defendant were not returned until 21 October 1996. Since the indictments had not been returned, nor the cases bound over to the superior court when the orders in question were signed, the district court retained jurisdiction of these preliminary matters.

IX

[11] Defendant next argues that the trial court erred in admitting testimony of two of the State's expert witnesses. Again, we disagree with defendant's contentions and hold that the trial court was correct in allowing the testimony.

Rule 702 of the Rules of Evidence will allow an expert witness to testify to a scientific opinion if it will "assist the trier of fact to understand the evidence or to determine a fact in issue . . ." N.C. Gen. Stat. § 8C-1, Rule 702 (Cum. Supp. 1997). In this case, defendant objects to testimony by Dr. Mason that, in his opinion, defendant was appreciably impaired when his blood alcohol level reached .046. This testimony, however, was appropriately admitted because Dr. Mason was qualified as an expert in the field of forensic toxicology and had

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examined a sample of defendant's blood and therefore could give his opinion as to the effects of the various impairing substances in defendant's body.

This same rationale applies to the testimony of Dr. Stuart. Dr. Stuart was accepted by the trial court as an expert in trauma surgery and medicine. Defendant contends that Dr. Stuart should not have been allowed to testify about the effects of combining alcohol and Xanax because it was outside of his field of knowledge. We reject this argument, however, because in North Carolina, "the opinion testimony of an expert witness is competent if there is evidence to show that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Maloney v. Hospital Systems*, 45 N.C. App. 172, 177, 262 S.E.2d 680, 683, *disc. review denied*, 300 N.C. 375, 267 S.E.2d 676 (1980). In this case, Dr. Stuart was an expert in the field of medicine and was better qualified than the jury to offer an opinion about the effects of combining alcohol and Xanax. Any problems in the testimony go to the weight it is given by the jury, not to its admissibility.

X

[12] In his final argument, defendant contends that the trial court erred in submitting the felony murder charge because the underlying felony of assault with a deadly weapon inflicting serious injury merged with the homicide. Specifically, defendant is asking this Court to reexamine our Supreme Court's holding in *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), and hold that the offenses must be merged if the victims are different persons. This Court is bound by the decisions of our Supreme Court, and therefore we are unable to accept defendant's argument. *See State v. Coria*, 131 N.C. App. 449, 508 S.E.2d 1 (1998).

In conclusion, we hold that no prejudicial error was committed at defendant's trial. We are aware that the felony murder rule has been criticized in some jurisdictions, and we understand the dissent's concern that harsh results could result from the application of the felony murder rule to other fatal automobile accidents regardless of the circumstances surrounding them. We are bound, however, by the plain language of the statute and earlier appellate decisions, and do not find on the facts of this case that application of the felony murder rule resulted in a fundamentally unfair result. Any modifications of N.C. Gen. Stat. § 14-17 to yield a different result in situations similar

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to the hypothetical case set out in the dissent must be left to our General Assembly.

No error.

Judge EDMUNDS concurs.

Judge WYNN concurs in part and dissents in part with separate opinion.

Judge WYNN concurring in part and dissenting in part.

If this Court could render a decision which solely addressed the issue of whether defendant Thomas Richard Jones could lawfully be subjected to possible capital punishment for causing death and serious injury while driving in a dangerously intoxicated manner, I would be more inclined to join in the majority opinion. This Court, however, cannot look at this case and its concomitant issues in such a discrete vacuum. Rather, as an appellate court we must view this case in a broader light, understanding that we cannot remain blind to the legal and societal ramifications of our decision. Ultimately, we must remain cognizant of the fact that our pronouncements transcend the rights and duties of the immediate parties by creating precedent binding upon every citizen of this State.

Examining the case *sub judice* under this time-tested foresight elucidates the fact that our decision concerns and affects not only intoxicated motorists, but also every North Carolina vehicular driver who utilizes our highways. Indeed, under the majority opinion, any motorist in North Carolina whose culpable negligence¹ results in an accident causing at least one death and one serious injury is now potentially subject to the death penalty². This holding has significant implications because North Carolina jurisprudence holds that a motorist can be found culpably negligent if he exceeds the posted

1. Under *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955), a driver charged with assault with a deadly weapon must have a *mens rea* requirement of at least culpable negligence to be lawfully convicted of that crime. Accordingly, I will analyze this issue with respect to that *mens rea* requirement.

2. The majority opinion holds that a culpably negligent motorist whose conduct results in at least one death and one serious injury can be lawfully prosecuted for felony murder. Under our statutory framework, an individual convicted of felony murder must be sentenced to death or life imprisonment.

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speed limit or fails to keep a reasonable lookout³. See e.g. *Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 284, 156 S.E.2d 265, 272 (1967) (stating that failing to keep a reasonable lookout coupled with dangerous speed constitutes reckless driving); *State v. Grissom*, 17 N.C. App. 374, 375, 194 S.E.2d 227, 228 (holding that excessive speed can constitute reckless driving), *disc. rev. denied*, 283 N.C. 258, 195 S.E.2d 691 (1973). That is, the majority has failed to draw a bright line between an intoxicated, reckless driver whose unlawful conduct results in death or serious injury and any other driver who does little more than violate this State's traffic rules and regulations. In so doing, the majority has enveloped this State with a unique and draconian form of criminal liability.

Further, the majority opinion represents the first time that any court in this nation has determined it appropriate to subject a culpably negligent motorist to the death penalty. See *Langford v. State*, 354 So.2d 313, 315-16 (Ala. 1977) ("no case has been cited, or found, wherein an . . . automobile driver was found guilty of murder in the first degree"). Indeed, such a law is noticeably absent from this State or any other state's criminal law.

In my opinion, if North Carolina desires to undertake such a far-reaching extension of its criminal law, it should do so through the legislative functions assigned to our General Assembly,⁴ not through a

3. Although the cases holding this involve persons convicted of reckless driving, they are equally applicable to our analysis given that "[t]he language in each section of the reckless driving statute defines culpable negligence." *Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 284, 156 S.E.2d 265, 271 (1967). (citations omitted).

4. In fact, our General Assembly has already contemplated situations similar to the one in the case *sub judice* and has legislated appropriate sanctions. Specifically, our General Assembly passed N.C. Gen. Stat. § 20-141.4 entitled "Felony and Misdemeanor Death By Vehicle" which provides in pertinent part,

(a1) **Felony Death by Vehicle**—A person commits the offense of felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving

(a2) **Misdemeanor Death by Vehicle**—A person commits the offense of misdemeanor death by vehicle if he unintentionally causes the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving

N.C. Gen. Stat. § 20-141.4 (1993). Significantly, the sanctions associated with these crimes are substantially less draconian than the capital trial the defendant faced. That is, the General Assembly has demonstrated its belief that the conduct undertaken by the defendant, though egregious and deserving of sanction, does not warrant the severity of sanctions concomitant with felony-murder prosecution.

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clever prosecutor and the majority panel of two judges on this Court. Nonetheless, the majority opinion arrogates the legislative function and usurps powers the Constitution ordained to ordinary political processes. Unfortunately, this arrogation adds vitality to the familiar charge that the “imperial judiciary” has overstepped its bounds and impermissibly intruded upon matters that our Founding Fathers intended to be left to the democratic process. *See* Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, 36 NO. 1 Judges’ J. 4 (1997).

With the preceding principles in mind, I examine two compelling arguments the defendant presents which challenge the validity of applying the felony-murder rule to a culpably negligent driver. First, I will address the defendant’s contention that the State violated his due process rights by applying the felony-murder rule without meeting the constitutional requisite of fair notice. Thereafter, I will analyze the defendant’s argument that the felony-murder rule was improperly utilized because the General Assembly neither contemplated nor intended that it be applied to a culpably negligent driver.

I.

The defendant first contends that the State’s novel and unforeseen application of the felony-murder rule operated as a quasi *ex post facto* law in violation of his due process rights. Specifically, the defendant argues that the State failed to meet its constitutional mandate of providing him with fair notice that his conduct subjected him to the felony-murder rule and its stringent penalties.

Before endeavoring to analyze this issue, I must clarify a distinction of substantial import to the defendant’s due process argument. The defendant has not contended, nor am I insinuating, that the State failed to provide him with fair notice that his egregious conduct subjected him to a murder conviction. Indeed, the defendant’s brief specifically states that “[a]t the time [the defendant] committed the offense, the law that was in place would have permitted conviction of involuntary manslaughter or even second degree murder.” Therefore, the issue before us is not whether the defendant, or for that matter any other reckless driver, was provided fair notice that his conduct subjected him to a murder conviction, but rather whether he was provided fair notice that his conduct subjected him to the felony-murder rule and the potential death sentence associated with it.

North Carolina’s felony-murder rule, set forth in N.C. Gen. Stat. § 14-17 (Supp. 1996), provides in pertinent part:

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A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, or burglary, or *other felony committed or attempted with the use of a deadly weapon* shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life

(Emphasis added.) Accordingly, an individual can be convicted under the felony-murder rule if a killing occurred during the commission of a felony committed with the use of a deadly weapon. N.C. Gen. Stat. § 14-17; *State v. Davis*, 305 N.C. 400, 423-24, 290 S.E.2d 574, 588 (1982).

In the case *sub judice*, the defendant was charged with the underlying felony of assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) (1993). The elements of that crime are (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, and (4) not resulting in death. See N.C. Gen. Stat. § 14-32(b); *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997).

Although there is no statutory definition of assault, our Supreme Court has defined it as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). With respect to the *mens rea* or criminal intent requirement for assault, I note there is conflict among our jurisprudence. Indeed, while this Court stated in *State v. Curie*, 19 N.C. App. 17, 20, 198 S.E.2d 28, 30 (1973), that "[i]ntent is not an element of . . . assault with a deadly weapon," it also stated in *State v. Coffey*, 43 N.C. App. 541, 543, 259 S.E.2d 356, 357 (1979) (citations omitted), that "intent is an essential element of the crime of assault." Because it is undisputed that the defendant had the requisite *mens rea*, I need not confront this discrepancy.

Proceeding, "[a] deadly weapon is any article, instrument, or substance that is likely to produce great bodily harm or death." *State v. Hales*, 344 N.C. 419, 426, 474 S.E.2d 328, 332 (1996). The focus of the inquiry is upon "the destructive capabilities of the weapon or device" and the "circumstances of its use." See *State v. McBride*, 118 N.C. App. 316, 318, 454 S.E.2d 840, 841-42 (1995). It is well settled that a motor vehicle, if used in a dangerous or reckless manner, can consti-

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tute a deadly weapon. *Eason*, 242 N.C. at 65, 86 S.E.2d at 778; *State v. Sudderth*, 184 N.C. 753, 755, 114 S.E. 828, 829-30 (1922); *McBride*, 118 N.C. App. at 318; 454 S.E.2d at 841. Notably, our Supreme Court has stated that the operator of a motor vehicle may be convicted of assault with a deadly weapon when, by means thereof, he strikes and injures a person so long as there is either (1) an actual intent to inflict injury, or (2) culpable or criminal negligence from which such intent may be implied. See *Eason*, 242 N.C. at 65, 86 S.E.2d at 778.

In this case, all the elements of assault with a deadly weapon inflicting serious injury are present. The defendant drove his motor vehicle, a deadly weapon, in a culpably or criminally negligent manner. As a result thereof, the defendant inflicted serious injuries upon Aline J. Iodice, Melinda P. Warren, and Lea Temple Billmeyer. Accordingly, the defendant was properly convicted of these crimes.

Given that the defendant was properly convicted of assault with a deadly weapon inflicting serious injury, the language of our felony-murder statute ostensibly condones his felony-murder conviction. Indeed, I concur with the majority's acceptance of the State's syllogistical reasoning: (1) one can be convicted of a felony-murder crime if a killing occurs during a felony that involves the use of a deadly weapon; (2) an individual who recklessly drives a motor vehicle into another causing a serious injury but not death has committed the felony of assault with a deadly weapon inflicting serious injury; (3) the defendant killed one person and seriously injured others while recklessly driving his motor vehicle; (4) accordingly, the defendant is guilty of assault with a deadly weapon inflicting serious injury; (5) therefore, the defendant is also guilty of felony murder.

Although the State's reasoning appears sound, syllogistic logic does not end our analysis. Specifically, a thorough and proper analysis of a criminal conviction also requires this Court to analyze the constitutional considerations surrounding this matter. It is in this respect that I analyze the defendant's argument that his due process rights were violated by the State's quasi *ex post facto* application of the felony-murder rule. Because the defendant's due process argument involves principles and tenets of *ex post facto* jurisprudence, I begin this analysis with a brief introduction and outline of *ex post facto* law.

Since its earliest decisions, the United States Supreme Court has defined an *ex post facto* law as one which: (1) makes an action criminal which was done before the passing of the law and which was

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innocent when done, (2) aggravates a crime or makes it greater than when it was committed, (3) allows imposition of a different or greater punishment than was permitted when the crime was committed, or (4) alters the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time the offense was committed. See *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39 (1990); *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798); *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991). "Two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 23 (1981).

The prohibition against *ex post facto* laws set forth in both Article I, Section 10 of the United States Constitution and Article I, Section 16 of the North Carolina Constitution is directed toward legislative action. See *Marks v. United States*, 430 U.S. 188, 191-92, 51 L. Ed. 2d 260, 264-65 (1977); *Vance*, 328 N.C. at 620, 403 S.E.2d at 500. Nonetheless, the United States Supreme Court has held that "[i]f a state legislature is barred by the *Ex post facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bowie v. City of Columbia*, 378 U.S. 347, 353-54, 12 L. Ed. 2d 894, 900 (1964). Consequently, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids," *Id.* at 353, 12 L. Ed. 2d at 899, and therefore is unconstitutional under the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. See *Vance*, 328 N.C. at 620, 403 S.E.2d at 500.

Significantly, it is of no import that the defendant knew his conduct was criminal at the time it occurred. As stated by the United States Supreme Court, "[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty" and is accordingly equally prohibited. *Collins*, 497 U.S. at 44, 111 L. Ed. 2d at 40. In fact, the bulk of *ex post facto* jurisprudence involves claims that a law inflicted a greater punishment than the law annexed to the crime when committed. See *Lynce v. Mathis*, 519 U.S. 433, 441, 137 L. Ed. 2d 63, 72 (1997). This jurisprudence summarily holds that constitutional-due-process protections, like *ex post facto* protections, proscribe judicially enforced changes in legal interpreta-

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tions which unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time he committed the criminal act. See *Helton v. Fauver*, 930 F.2d 1040, 1045 (3rd Cir. 1991); *Dale v. Haeblerlin*, 878 F.2d 930, 934 (6th Cir. 1989), *cert. denied*, 494 U.S. 1058, 108 L. Ed. 2d 767 (1990).

Concomitant with the due-process analysis relating to *ex post facto* laws is the due-process requirement of fair notice. That is, if an actor has fair notice that his conduct is proscribed by a statute or a judicial construction of that statute, then the actor has no rightful due-process claim that a later judicial construction operated like a quasi *ex post facto* law.

The fair-notice requirement has three related manifestations. First, the vagueness doctrine bars enforcement of a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 328 (1926). Second, "as a sort of 'junior version of the vagueness doctrine,' the canon of strict construction of criminal statutes, or rule of lenity, ensures fair notice by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266, 137 L. Ed. 2d 432, 442 (1997) (citation omitted). Third, "although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed within its scope." *Id.*; see also *Marks*, 430 U.S. at 191-92, 51 L. Ed. 2d at 260. Accordingly, a criminal statute may only be used as the basis for a conviction or an increased penalty if the statute and its accompanying interpretation meet all three of the fair-notice requirements.

In this case, this Court is asked to determine whether the defendant was provided fair notice that his culpably negligent driving would subject him to our felony-murder rule and possible capital punishment. The majority opinion concludes that the defendant's current and prior convictions for drunk driving evidence that he received constitutionally adequate notice that a culpably negligent driver in North Carolina could be subjected to the death penalty. Specifically, the majority opinion contends that the defendant was provided adequate notice because any reasonably intelligent person knows that driving while intoxicated subjects him to potentially harsh sanctions. In support of this argument, the majority opinion cites *State v. Trott*,

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190 N.C. 674, 130 S.E. 627 (1925), where our Supreme Court upheld the defendant's conviction for *second-degree* murder when, while intoxicated, he allowed another intoxicated person to operate his motor vehicle.

The majority opinion, by citing *Trott*, sets forth the proposition that the defendant had adequate notice that he could be convicted of second-degree murder. I concur in this proposition because it is well supported by North Carolina jurisprudence. See N.C. Gen. Stat. § 14-17; N.C. Gen. Stat. § 20-141.4; *State v. Rich*, 1999 WL 100916 (1999) (affirming second-degree murder conviction for driver who was speeding and veered out of his lane of travel); *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984) (affirming second-degree murder conviction in facts substantially similar to those in the case *sub judice*). Indeed, I conclude this dissent by noting that the State could have constitutionally obtained two life sentences against the defendant if it had charged him with second-degree murder.

Nonetheless, I emphasize that *Trott* fails to support the majority opinion's proposition that a culpably negligent motorist, regardless of his level of sobriety, can be lawfully convicted of first-degree-felony murder when, as a result of his unlawful conduct, death and serious injury occur. The majority opinion implies that *Trott* supports such a proposition by noting that the defendants in that case were *indicted* for first-degree murder. It is unclear from the opinion, however, whether the defendants were in fact charged in this manner⁵. More importantly, the defendants were ultimately convicted of second-degree murder and accordingly our Supreme Court never addressed the pertinent issue of whether the charged defendants could have been lawfully convicted of first-degree murder. *Id.* Therefore, the majority opinion's reliance on *Trott* is unfounded.

Additionally, the majority opinion states that the defendant was provided fair notice because he knew that "he was taking serious risks—and facing serious consequences—when he continued to operate his automobile under the influence of drugs and alcohol." This reasoning is unpersuasive. Just because an individual knows that his conduct is risky and subjects him to potential sanctions, that

5. Specifically, the opinion states that "[t]he defendant and one Robert Michael were jointly indicted for the murder of Evelyn Rowe. When the case was called for trial, the solicitor announced that the State would prosecute the defendants only for murder in the second degree, or for manslaughter. Both were convicted of murder in the second degree." *Trott*, 190 N.C. at 674, 130 S.E. at 627. I do not interpret this language as evidence that the defendants were indicted for first-degree murder.

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does not mean that the individual can be prosecuted under any law. Indeed, specific laws are created and passed to address specific issues. It would be absurd, for example, to say that an embezzler could be lawfully convicted of murder because he knew that his unlawful acts were risky and subjected him to serious consequences. That is, a distinction must be made between having notice that your actions are unlawful and having notice with respect to which laws and punishments apply to that unlawful conduct. Perhaps more distressing is the majority opinion's continued and significant reliance on the defendant's intoxicated state as providing him with constitutionally fair notice that his conduct subjected him to the felony-murder rule and possible capital punishment. A proper examination of the record illustrates that the defendant's intoxicated state, though morally repugnant, bore no legal consequence to his felony-murder conviction. The defendant's intoxication was legally immaterial because the underlying felony supporting his felony-murder conviction was assault with a deadly weapon, not felonious driving while impaired.

Recognizing and addressing this distinction is of paramount importance because the State was not required to present any evidence of the defendant's intoxication to provide the jury with sufficient evidence to convict him of assault with a deadly weapon. Accordingly, the majority, by classifying the defendant as an *intoxicated* culpably-negligent driver, rather than simply as a culpably negligent driver, ignored the distinction between an individual whose felony-murder conviction is supported by a charge of assault with a deadly weapon and an individual whose felony-murder conviction is supported by felonious driving while impaired.

The majority's failure to discern this distinction results in an opinion that addresses this watershed issue too narrowly. In effect, the majority opinion examines this case only with respect to how it affects intoxicated motorists as opposed to motorists in general. Moreover, the majority opinion addresses the defendant's arguments only as they pertain to an intoxicated motorist, disregarding the fact that we must determine these issues as they pertain to a culpably negligent driver. Significantly, the majority opinion analyzed the issue of whether the defendant received fair notice by determining whether an intoxicated motorist knew or should have known that his conduct would subject him to potential capital punishment. If the underlying felony in this case had been felonious driving while impaired, such an analysis would have been warranted. However, since the underlying

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felony in the case *sub judice* was assault with a deadly weapon, the appropriate analysis involves a determination as to whether a culpably negligent driver—whether intoxicated or sober—knew or should have known that his conduct subjects him to potential capital punishment. Because the majority opinion failed to make this distinction, I now proceed to analyze this compelling issue.

Undoubtedly, a culpably negligent driver in North Carolina should contemplate that his conduct requires punitive repercussions; however, such repercussions are expected to be proportional to the unlawful conduct. See generally *State v. Kirkpatrick*, 345 N.C. 451, 454, 480 S.E.2d 400, 405 (1997) (“A primary purpose of sentencing is to punish an offender with the degree of severity that his culpability merits.”). Prior to the case *sub judice*, no culpably negligent driver in this State had ever been prosecuted under the felony-murder rule. Accordingly, North Carolina drivers most assuredly had no precedent alerting them that culpably negligent driving may subject them to a capital trial and the prospect of the death penalty.

To emphasize this point, consider the following hypothetical case: a grandmother is involved in an accident when, in an effort to get to her grandchild’s school on time, she weaves through traffic at eighty miles-per-hour in a sixty-five mile-per-hour zone. Although this hypothetical appears factually distinct from the case *sub judice*—comparing a drunk driver who has a pattern of reckless behavior with a woman who only appears to be violating a traffic regulation—legally speaking, these cases are indistinguishable. Reiterating, because the underlying offense for the defendant’s felony-murder conviction was assault with a deadly weapon inflicting serious injury, the fact that the defendant was impaired at the time of the offense is immaterial to the legal issue in this case. It was the accident at the University Parkway intersection, coupled with the defendant’s speeding and driving in the wrong lane of travel, which standing alone constituted the culpable or criminal negligence needed to support his conviction for assault with a deadly weapon inflicting serious injury.

To clarify, a North Carolina motor vehicle operator may properly be convicted of assault with a deadly weapon when he strikes and injures a person while operating his vehicle *in a culpably or criminally negligent manner*. See *Eason*, 242 N.C. at 65, 86 S.E.2d at 778. Culpable or criminal negligence, as defined by our Supreme Court, is “such recklessness or carelessness, proximately resulting in injury or

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death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933). Significantly,

[t]he violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, . . . [it] must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others.

State v. Hancock, 248 N.C. 432, 435, 103 S.E.2d 491, 494 (1958).

Under the preceding rules, the evidence sufficiently indicates that the defendant drove in a culpably or criminally negligent manner. However, under jurisprudence set by our Supreme Court, the speeding driver in our hypothetical could also be found to have driven in a culpably or criminally negligent manner.

For example, in *State v. Wilson*, 218 N.C. 769, 12 S.E.2d 654 (1941), our Supreme Court upheld the defendant's conviction for reckless driving⁶ when the State's evidence tended to show that he was exceeding the speed limit by driving sixty miles-per-hour and, as a result thereof, he crashed into the rear of a car being driven in the same direction. On this evidence alone, the Court upheld the defendant's conviction. *Id.*

Similarly, in *State v. Steelman*, 228 N.C. 634, 46 S.E.2d 845 (1948), our Supreme Court affirmed the defendant's reckless-driving conviction when the evidence showed that he drove at an excess rate of speed and thereafter ran into the rear end of a car traveling in the same direction. The only evidence in that case was that the extent of resultant damage to both vehicles indicated "excessive speed and the absence of proper regard for the rights and safety of others." *Id.* at 636, 46 S.E.2d at 846.

These cases demonstrate instances whereby an individual may be found culpably or criminally negligent for doing little more than traveling at an excessive rate of speed. *See also Swicegood v. Cooper*, 341

6. As previously stated, although *Wilson* and *Steeleman* involve persons convicted of reckless driving, they are equally applicable to our analysis given that "[t]he language in each section of the reckless driving statute defines culpable negligence." *Ingle*, 271 N.C. at 284, 156 S.E.2d at 271. (citations omitted).

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N.C. 178, 181, 459 S.E.2d 206, 208 (1995) (stating that “[w]hether a driver exceeds the [speed] limit by fifteen miles per hour in a thirty-five mile per hour zone or a fifty mile per hour zone, he endangers those around him”); *Ingle*, 271 N.C. at 284, 156 S.E.2d at 272 (stating that failing to keep reasonable lookout coupled with dangerous speed equates to reckless driving); *Grissom*, 17 N.C. App. at 375, 194 S.E.2d at 228 (holding that excessive speed can constitute reckless driving); *State v. Floyd*, 15 N.C. App. 438, 440, 190 S.E.2d 353, 355 (affirming reckless driving conviction when defendant drove sixty to seventy miles-per-hour in a forty-five mile-per-hour zone and swerved), *disc. rev. denied*, 281 N.C. 760, 191 S.E.2d 363 (1972).

Under the preceding cases, both the defendant and the speeding grandmother from our hypothetical were driving in a culpably or criminally negligent manner. Accordingly, because a driver need only be found culpably or criminally negligent to sustain an assault with a deadly weapon charge, both the defendant and the speeding grandmother could properly be convicted of that crime. Therefore, following the majority’s holding that assault with a deadly weapon inflicting serious injury, when the deadly weapon is a motor vehicle, is an enumerated felony under our felony-murder rule, both the defendant and the speeding grandmother could properly be charged with felony murder. Surely, the speeding grandmother in the hypothetical did not have fair notice that by violating a traffic regulation she would be subjecting herself to the felony-murder rule and the death penalty.

Although the defendant’s conduct is more egregious than the speeding grandmother’s, the egregiousness of that conduct did not provide the defendant with any more notice than the grandmother that the felony-murder rule applies to a culpably negligent driver who seriously injures at least one person and kills another. Moreover, while it may appear distinguishing to point out that the defendant had more notice than the speeding grandmother because he knew or should have known that by driving after drinking and taking narcotics he was subjecting himself to harsh penalties; legally, the defendant’s impaired state was not material to his conviction because the underlying felony supporting his felony-murder conviction was assault with a deadly weapon inflicting serious injury, not felonious driving while impaired. Thus, as to the defendant’s felony-murder conviction, he would be in the same tenuous legal position regardless of whether he was impaired.

I find further support for my conclusion that the defendant was not provided with fair notice by looking to the history of our felony-

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murder rule. Our felony-murder rule was codified by the General Assembly in 1893 and our Supreme Court first characterized a motor vehicle as a deadly weapon in 1922. *See generally State v. Streeton*, 231 N.C. 301, 305, 56 S.E.2d 649, 652 (1949). Despite this long-standing jurisprudence, neither this State, nor any other state, has ever applied the felony-murder rule to a culpably negligent driver. Thus, despite over seventy-five years of applying and interpreting our felony-murder rule, no driver has ever been prosecuted in this manner, nor has there been even the slightest foreshadowing of such use. Indeed, the fact that our felony-murder rule has never been used in this manner illustrates that the only notice the State provided the defendant regarding the application of the felony-murder rule to a culpably negligent driver is that it would *not* be used in this manner. *See e.g. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (finding defendant guilty of second-degree murder, not felony murder, when his reckless and impaired driving caused three deaths).

In sum, I would hold that the State violated the defendant's due process rights. Specifically, the defendant was not provided fair notice that his conduct would subject him to the felony-murder rule and possible capital punishment. I undertook this extensive analysis to demonstrate that this Court should not allow the egregious facts of this case to guide its decision. Should we let the particular facts of this case be our sole guide, we would be letting bad facts make bad law. Moreover, we would be setting a dangerous precedent that could lead to even more egregious injustices, especially since those injustices will be sanctioned by this Court and this State. As stated by Justice Jackson in his dissent in *Korematsu v. United States*, 323 U.S. 214, 246, 89 L. Ed. 194, 214 (1944), "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle."

II.

Assuming *arguendo* that the State may constitutionally apply the felony-murder rule to the defendant in this case, I nonetheless would hold that the defendant's first-degree murder conviction must be vacated because the State's use of the felony-murder rule in this manner was neither contemplated nor intended by our General Assembly.

At the outset, I address the majority's contention that the defendant failed to present this issue in his brief and therefore abandoned

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his right to have this Court consider it on appeal. Admittedly, the defendant failed to precisely label any of his arguments as relating to legislative intent. Nonetheless, the defendant argued with respect to legislative intent within his contention that the term “deadly weapon” is unconstitutionally vague. Specifically, the defendant cited to *State v. Beale*, 324 N.C. 87, 371 S.E.2d 1 (1989), to illustrate the proposition that we must endeavor to discern legislative intent when determining whether a felony was intended by our General Assembly to sustain a charge of felony murder. Immediately thereafter, the defendant argued that “[h]ad the legislature intended to include [vehicular homicide based upon culpable negligence] within the purview of the felony murder rule in section 14-17, it could have done so explicitly.” This argument, albeit improperly labeled, undoubtedly pertains to the legislative intent behind the felony-murder rule. It follows that the defendant properly preserved this argument on appeal. Therefore, this Court should examine whether the State’s novel application of the felony-murder rule comports with the General Assembly’s intent in codifying and amending our felony-murder rule.

As stated, the felony-murder rule has always been a part of our common law and was codified by our General Assembly in 1893. *See Streeton*, 231 N.C. at 305, 56 S.E.2d at 652. There are three main justifications for the rule’s existence: (1) it deters negligent and accidental killings during the commission of felonies; (2) it deters the commission of the dangerous felonies themselves; and (3) an individual who commits or attempts to commit a felony has the necessary culpability to be found guilty of murder. Roth and Sundby, *The Felony murder Rule: A Doctrine At Constitutional Crossroads*, 70 Cornell L. Rev. 446, 450 (1985).

Our Supreme Court has stated that the rationale behind the felony-murder rule is

that one who commits a felony is a *bad person with a bad state of mind*, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended.

State v. Richardson, 341 N.C. 658, 666-67, 462 S.E.2d 492, 498 (1995) (quoting *State v. Wall*, 304 N.C. 609, 626, 286 S.E.2d 68, 78 (1982) (Copeland, J., dissenting)). (Emphasis added.)

Despite the long-standing use of the felony-murder rule in this State, in 1977 the General Assembly amended the rule to both limit

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and expand its coverage. Prior to 1977, felony murder was defined as a killing “committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or *other felony*.” 1949 N.C. Sess. Laws Ch. 299 § 1. (Emphasis added.) Currently, felony murder is defined as a killing “committed in the perpetration or attempted perpetration of any arson, rape, robbery, kidnapping, burglary, or *other felony committed or attempted with the use of a deadly weapon*.” N.C. Gen. Stat. § 14-17. (Emphasis added.)

Our current definition of felony murder is more expansive than the previous one because it contains more enumerated felonies. Specifically, while our earlier definition listed “arson, rape, robbery, [and] burglary” as enumerated felonies, our current definition not only enumerates those felonies, but also enumerates any rape, sex offense, or kidnapping.

At the same time, our current definition is less expansive because the earlier definition contained vague “other felony” language. This vague “other felony” language was interpreted by our Supreme Court to refer to any felony which “creates any substantial foreseeable human risk and actually results in the loss of life.” *State v. Thompson*, 280 N.C. 202, 211, 185 S.E.2d 666, 672 (1972). Accordingly, by changing the statutory language from “other felonies” to those “committed or attempted with the use of a deadly weapon,” our General Assembly has limited the “other felonies” which would support a felony-murder charge. *See Wall*, 304 at 614, 286 at 72. This latter change is of particular import to the case *sub judice*.

By limiting the coverage of the “other felony” language of the felony-murder rule, our General Assembly must have intended to limit the coverage of the felony-murder rule itself. Logically, the amendment limited the “other felonies” which could form the basis of a felony-murder charge from those which “create[] substantial foreseeable human risk and actually result[] in the loss of life” to only those felonies which involve the “use of a deadly weapon.” Clearly, by limiting the number of felonies that support a felony-murder conviction, the General Assembly must have intended to reign in the felony-murder rule’s expansion.

At first glance, it appears that although the General Assembly limited the felonies which could be used to form the basis of a felony-murder charge, it nonetheless intended to include assault with a deadly weapon within the group of enumerated felonies as demonstrated by the plain language of the amended statute. While the plain

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language of the statute ostensibly mandates this conclusion, it persuasively appears that the General Assembly did not contemplate the State's novel application of that language in this case.

"When a literal interpretation of the statutory language yields absurd results . . . or contravenes clearly expressed legislative intent, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Charlotte Housing Auth. v. Patterson*, 120 N.C. App. 552, 556, 464 S.E.2d 68, 71 (1995). Further, the General Assembly is not presumed to intend innovations upon the common law and accordingly innovations not within the Assembly's intentions shall not be carried into effect. *See Buck v. U.S. Fidelity & Guaranty Co.*, 265 N.C. 285, 290, 144 S.E.2d 34, 37 (1965); *Price v. Edwards*, 178 N.C. 493, 101 S.E. 33 (1919). As recently stated by another court, "[w]hile inventive and clever applications of statutes may have their place in some legal settings, they have no place in an indictment charging someone with [a] serious felon[y] . . ." *United States v. Hsia*, 24 F. Supp. 2d 33, 54 (D.D.C. 1998).

In the case *sub judice*, although the plain language of N.C. Gen. Stat. § 14-17 includes as an enumerated felony one which is committed with the use of a deadly weapon, the history of this legislation indicates the General Assembly did not intend to include within the ambit of N.C. Gen. Stat. § 14-17 a culpably negligent driver whose conduct results in at least one injury and one death. First, as stated, the General Assembly has taken action to limit rather than expand the coverage of the felony-murder rule. This limiting trend indicates that the General Assembly did not intend to enumerate a crime that in many circumstances involves an individual wholly lacking in intent and malice. Such circumstances exist in cases like that posed by our earlier hypothetical, *Wilson*, and *Steelman*.

Further, as stated, the primary rationale for our felony-murder rule is that "one who commits a felony is a *bad person with a bad state of mind*, . . . so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended." *Richardson*, 341 N.C. at 666-67, 462 S.E.2d at 498. Although this rationale may apply to the case *sub judice*, it does not necessarily apply to the average person who drives in excess of the posted-speed limit or in some other manner which may be considered culpably negligent.

Again, my hypothetical, along with the *Smith* and *Wilson* cases, demonstrate situations where a person can be found guilty of assault

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with a deadly weapon even if he is not a "bad person with a bad state of mind." In these situations, the rationale behind the felony-murder rule does not apply. Nonetheless, under the majority opinion, those individuals would be subject to the felony-murder rule and possibly capital punishment.

I find further support for my conclusion that our General Assembly did not intend to include these situations within the ambit of the felony-murder rule by looking to the punishments the felony-murder rule proscribes. Under N.C. Gen. Stat. § 14-17, if a person is found guilty of felony murder, the jury must decide between two punishments, death or life imprisonment. N.C. Gen. Stat. § 14-17. Reconsidering my hypothetical, should the State decide to prosecute the speeding driver for felony murder, the trier of fact upon a finding of guilt would be forced to either sentence the driver to death, to life imprisonment, or use its inherent power of jury nullification and acquit. Accordingly, the jury would be facing a Hobson's choice. I do not believe our General Assembly would intend such a result.

Perhaps more distressing is that under the State's syllogistic argument, it can prosecute any individual for felony murder if that person's reckless driving results in at least one serious injury and one death. Significantly, once the State has demonstrated culpable or criminal negligence, the individual is guilty of assault with a deadly weapon inflicting serious injury and therefore guilty of an enumerated felony. Thus, under the State's argument, the jury is forced to convict the individual of felony murder based on the plain language of the statute. Thereafter, the jury is forced to sentence the individual to life imprisonment or death.

Precedent established by our Supreme Court further supports my conclusion. In *State v. Beale*, 324 N.C. 87, 376 S.E.2d 1 (1989), the Supreme Court of North Carolina was asked to determine whether the unlawful, willful and felonious killing of a viable but unborn child constituted felony murder under N.C. Gen. Stat. § 14-17. In deciding this issue, the Court had to determine whether the term "murder," as utilized in that statute, included the killing of a viable but unborn child. *Id.* After using the rule of lenity and analyzing the legislative intent behind the felony-murder rule, the Court concluded that such a killing was not within the purview of the felony-murder rule. *Id.* at 93, 376 S.E.2d at 4. The Court supported its conclusion by stating that the legislature did not intend the intentional destroying of a fetus to be within the felony-murder rule by pointing to N.C. Gen. Stat. § 14-44 through 14-46 which deal with the crimes of abortion and

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kindred offenses. *Id.* at 92, 376 S.E.2d at 4. According to the Court, “[t]he legislature has considered the question of intentionally destroying a fetus and determined the punishment therefor.” *Id.* That is, the aforementioned specific statutes demonstrated to the Court that the legislature intended these crimes to be handled in a manner separate and distinct from felony murder.

Similarly, in this case, there are specific statutes, felonious and misdemeanor death by vehicle, dealing with the specific criminal acts undertaken by the defendant. *See* N.C. Gen. Stat. § 20-141.4. Significantly, these statutes were cited by the Court in *Beale* to illustrate other crimes that are not within the purview of the felony-murder rule. *See Beale*, 324 N.C. at 92, 376 S.E.2d at 4. This explicit recognition is of such import that I recite the entire paragraph below:

The creation and expansion of criminal offenses is the prerogative of the legislative branch of the government. The legislature has considered the question of intentionally destroying a fetus and determined the punishment therefor. (Citations omitted). It has adopted legislation dealing generally with the crimes of abortion and kindred offenses. (Citations omitted). *It has also created the new offenses of felony and misdemeanor death by vehicle.* (Citations omitted.) It has amended N.C. Gen. Stat. § 14-44 and N.C. Gen. Stat. § 14-17 on more than one occasion. Nothing in any of the statutes or amendments shows a clear legislative intent to change the common law rule

Id. (Emphasis added.)

Like *Beale*, the Court in the instant case is asked to determine whether the legislature intended a certain criminal act to be within the purview of the felony-murder rule. This Court may not depart from our Supreme Court’s reasoning in *Beale*. That is, both the felony in this case and the felony in *Beale* were not considered adequate bases for application of the felony-murder rule at common law. Moreover, in both cases the underlying felony had never before been used as the underlying felony for application of the felony-murder rule—despite their long-standing recognition as a crime. Lastly, in both cases the General Assembly had considered the exact conduct at issue and decided to apply a unique set of rules and punishments applicable to that conduct.

In summation, the State has failed to recognize that our General Assembly never contemplated nor intended the felony-murder rule to

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be used as a means of prosecuting a culpably negligent driver. Rather, the State decided to use statutory gymnastics to judicially legislate a law that bears harshly upon every citizen of this State. Justice Scalia most recently condemned such judicial legislation when he stated “[i]f to state this case is not to decide it, the law has departed further from the meaning of the language than is appropriate for a government that is supposed to rule (and to be restrained) through the written word.” *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239, 1245 (1999) (Scalia, J., dissenting).

III. CONCLUSION

Initially, I would affirm the defendant’s conviction for assault with a deadly weapon inflicting serious injury with respect to Aline J. Iodice, Melinda P. Warren, and Lea Temple Billmeyer. Moreover, I would affirm the defendant’s conviction for assault with a deadly weapon upon Margaret Fiona Penney and his conviction for driving while impaired.

However, I would vacate the defendant’s first-degree murder conviction because the State violated the defendant’s due process rights by applying the felony-murder rule in a novel manner that failed to accord him a fair notice. Further, I would hold that even without the constitutional infirmities surrounding this case, the defendant’s first-degree murder conviction must be vacated because our General Assembly neither contemplated nor intended the felony-murder rule to apply to a culpably negligent driver whose conduct results in at least one injury and one death.

Importantly, it should be noted that the State could have charged the defendant with a plethora of other offenses including felonious death by vehicle, involuntary manslaughter, and second-degree murder. *See* N.C. Gen. Stat. § 14-17; N.C. Gen. Stat. § 20-141.4; *Rich*, 1999 WL 100916 (1999) (affirming second-degree murder conviction for driver who was speeding and veered out of his lane of travel); *Snyder*, 311 N.C. 391, 317 S.E.2d 394 (affirming second-degree murder conviction in facts substantially similar to those in the case *sub judice*). Moreover, under structured sentencing, if the State had charged the defendant with second-degree murder and he was convicted thereof, the trial court, if it found aggravating circumstances, could have sentenced the defendant to two consecutive sentences of life imprisonment. *See* N.C. Gen. Stat. § 15A-1340.16(b) (Supp. 1996); *State v. Dickens*, 346 N.C. 26, 45, 484 S.E.2d 553, 563 (1997) (affirming sentence of life imprisonment when defendant was convicted of a

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class C felony with aggravating circumstances). Indeed, I am profoundly concerned with this country's drunk driving epidemic and believe that individuals like the defendant deserve and ultimately should bear harsh sanction for their actions. Accordingly, my decision would not ameliorate the potential to appropriately punish the defendant for his unlawful conduct, but rather would have set forth a constitutionally sound manner of doing so.

I would hold:

NO ERROR, REMAND FOR SENTENCING, 96 CRS 36858, assault with a deadly weapon inflicting serious injury upon Aline J. Iodice.

NO ERROR, REMAND FOR SENTENCING, 96 CRS 36861, assault with a deadly weapon inflicting serious injury upon Melinda P. Warren.

NO ERROR, 96 CRS 36862, assault with a deadly weapon upon Margaret Fiona Penney.

NO ERROR, REMAND FOR SENTENCING, 97 CRS 07301, assault with a deadly weapon inflicting serious injury upon Lea Temple Billmeyer.

NO ERROR, 97 CRS 07301, driving while impaired.

VACATE, 96 CRS 34278, first-degree murder of Julie Marie Hansen.

VACATE, 96 CRS 34279, first-degree murder of Maia Witzl.

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WALTER L. HOISINGTON, AS GUARDIAN AD LITEM FOR JILL LEE MARKER, AN INCOMPETENT, PLAINTIFF V. ZT-WINSTON-SALEM ASSOCIATES, ZAREMBA ASSOCIATES LIMITED PARTNERSHIP, ZAREMBA REALTY CORPORATION, TOYS "R" US, INC., TOYS "R" US-DELAWARE, INC., WINSTON-SALEM RETAIL ASSOCIATES LIMITED PARTNERSHIP, CENTERPOINT SOUTHERN, INC., AND THE WACKENHUT CORPORATION, DEFENDANTS, AND ZT-WINSTON-SALEM ASSOCIATES, ZAREMBA ASSOCIATES LIMITED PARTNERSHIP, ZAREMBA REALTY CORPORATION, TOYS "R" US, INC., TOYS "R" US-DELAWARE, INC., WINSTON-SALEM RETAIL ASSOCIATES LIMITED PARTNERSHIP, AND CENTERPOINT SOUTHERN, INC., DEFENDANTS/THIRD-PARTY PLAINTIFFS V. THE TREE FACTORY, INC., D/B/A THE SILK PLANT FOREST, THIRD-PARTY DEFENDANT

No. COA98-1211

(Filed 15 June 1999)

1. Negligence— security guard—no duty to store clerk

The trial court did not err by granting summary judgment for a security company on a negligence claim arising from an attack upon a store employee in a shopping center where the documents filed in the trial court revealed no duty owed the employee by virtue of the contract between the security company and the owner of the shopping center.

2. Contracts— security services at shopping center—store employee not third-party beneficiary

The trial court properly granted summary judgment for defendant-security company in an action arising from an assault upon a store employee at a shopping center where plaintiff-employee contended that she was a third-party beneficiary to the contract between the security company and the shopping center owner. Although complaints from employees may have been the catalyst for a contract revision, that revision provided only increased security for the owner and, to the extent that the employee was benefited by the contract, that benefit was incidental and does not entitle plaintiff to enforce a contract on her own behalf.

3. Contracts— indemnity—settlement

The trial court did not err by granting summary judgment for a security company on a cross claim by a shopping center owner under an indemnity clause in an action arising from an assault on a store employee. The plain language of the indemnity clause calls for indemnification only if the shopping center owner were found liable for actions or omissions of the security company;

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there was no evidence that the security company was negligent and damages caused by any negligence by the security company could not be imputed to the owner because the security company is an independent contractor.

4. Appeal and Error— appealability—party aggrieved

An appeal by a store was dismissed where an action against the store, the shopping center owner, and a security company arose from an assault on plaintiff store employee but all claims against the store were dismissed and the store brought no claims itself. The store was not a party aggrieved.

Appeal by plaintiff; defendants and third-party plaintiffs Zaremba Group Incorporated, ZT-Winston-Salem Associates, Zaremba Associates Limited Partnership, Zaremba Realty Corporation, Toys "R" Us-Delaware, Inc., and Winston-Salem Retail Associates Limited Partnership; and third-party defendant The Tree Factory, Inc., d/b/a The Silk Plant Forest, from summary judgment entered 16 April 1998 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 13 May 1999.

Maready Comerford & Britt, L.L.P., by W. Thompson Comerford, Jr., Clifford Britt, and Martha Marie Eastman, for plaintiff-appellant Walter L. Hoisington, as Guardian Ad Litem for Jill Lee Marker.

Moss & Mason, by Joseph W. Moss and Matthew L. Mason, for defendants/third-party plaintiffs-appellants Zaremba Group Incorporated, ZT-Winston-Salem Associates, Zaremba Associates Limited Partnership, Zaremba Realty Corporation, Toys "R" Us-Delaware, Inc., and Winston-Salem Retail Associates Limited Partnership.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence, for third-party defendant-appellant The Tree Factory, Inc., d/b/a The Silk Plant Forest.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Allan R. Gitter, Richard T. Rice, and Jack M. Strauch, for defendant-appellee The Wackenhut Corporation.

EDMUNDS, Judge.

This case arose out of a brutal assault that took place on 9 December 1995 at Silas Creek Crossing Shopping Center (Silas

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Creek), a strip shopping center located in Winston-Salem. Plaintiff Hoisington's ward, Jill Marker, was working at The Tree Factory, Inc., d/b/a The Silk Plant Forest (The Tree Factory), a retail store located in Silas Creek. Shortly before 9:00 p.m., while in her store, she was severely beaten, receiving permanent injuries. The perpetrator was apprehended and convicted in Forsyth County Superior Court.

Defendant/Third-Party Plaintiff ZT-Winston-Salem Associates (ZT-WSA) owns Silas Creek. On 21 September 1994, ZT-WSA, through its agent, Defendant Zaremba Group Incorporated, entered into a services contract with Defendant Wackenhut Corporation (Wackenhut), under which Wackenhut was to provide security guard services at the shopping center. The contract provided the "Scope of Work" to be as follows:

Vehicular and foot patrol of property maintaining high visibility. (Vehicle shall display Wackenhut Security Corporation sign.) Performing watchclock rounds after midnight to end of shift. Completion of daily reports with copy to client. Act as a deterrent against theft, vandalism and criminal activities. Hours of security coverage shall be from 8:00 p.m. to 4:00 a.m.

Wackenhut assigned employee Brian McKnight to patrol Silas Creek on the night of the attack on Ms. Marker. He arrived on duty at 8:00 p.m., approximately one hour before the assault. According to his deposition, he first drove behind the stores of Silas Creek, then logged in. He was operating his own 1985 Ford Escort Wagon, which had magnetic signs identifying the vehicle as "Wackenhut Security" affixed to its sides. After logging in, McKnight continued driving around Silas Creek for approximately forty-five minutes. During this time he also walked to the CD Superstore and wrote tickets for vehicles parked illegally in handicapped spaces near Blockbuster Video. He testified that the parking lot at Silas Creek was densely crowded that evening with holiday shoppers. At approximately 8:40-8:45 p.m., after completing two rounds of Silas Creek in his car, McKnight parked at a spot where he judged he could maintain surveillance over most of the center. At the time of the assault on Ms. Marker, which occurred between 8:50 and 9:00 p.m., McKnight was in his parked car. He learned of the assault over the police scanner in his vehicle.

Ms. Marker's guardian filed an amended complaint on 8 September 1997 against multiple defendants, including Defendants-Appellants ZT-WSA, Zaremba Associates Limited Partnership, Zaremba Realty Corporation, Toys "R" Us-Delaware, Inc., and

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Winston-Salem Retail Associates Limited Partnership (collectively, Zaremba), and against Defendant-Appellee Wackenhut, asserting claims arising out of injuries sustained by Ms. Marker. Thereafter, Zaremba filed both a crossclaim against Wackenhut, seeking indemnity from plaintiff's claims pursuant to the services contract existing between Zaremba and Wackenhut at the time of the assault, and a third-party claim against The Tree Factory. On 21 July 1997, Wackenhut moved for summary judgment as to all claims against it. After hearing arguments on the motion, the trial court allowed Wackenhut's motion on 16 April 1998. Plaintiff then dismissed his claims against the remaining defendants on 27 July 1998, and Zaremba dismissed its third-party claim against The Tree Factory on 6 August 1998. As a result of the various dismissals, the issues before us arise out of the appeals of plaintiff and of Zaremba from the trial court's grant of Wackenhut's motion for summary judgment. The Tree Factory also appeals the trial court's grant of summary judgment in favor of Wackenhut, even though all claims against it were dismissed.

PLAINTIFF'S APPEAL

In his opposition to the court's grant of summary judgment for Wackenhut, plaintiff asserts both that Wackenhut was negligent and that Ms. Marker was a third-party beneficiary to the contract between Zaremba and Wackenhut. We will address these claims in order.

I. Negligence

[1] Although negligence actions are rarely susceptible to summary judgment, *see Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983), if it is shown the defendant had no duty of care to the plaintiff, summary judgment is appropriate, *see Newsom v. Byrnes*, 114 N.C. App. 787, 790, 443 S.E.2d 365, 368 (1994). "Actionable negligence is established by showing: (1) a failure to exercise due care in the performance of a legal duty owed to the plaintiff under the circumstances and (2) a negligent breach of such duty proximately causing the plaintiff's injury." *Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 68, 502 S.E.2d 404, 407 (citing *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988)), *disc. review denied*, 349 N.C. 355, — S.E.2d — (1998). In a case where actionable negligence is pled, summary judgment is appropriate only 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 the moving party is entitled to judgment as a matter of law." *Davidson and Jones, Inc.*

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v. County of New Hanover, 41 N.C. App. 661, 668, 255 S.E.2d 580, 585, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979). Plaintiff argues that “[p]ursuant to the specific duties articulated in its contract with Zaremba, Wackenhut had a duty to Jill Marker—the duty to deter criminal activities by maintaining high visibility security at the shopping center through vehicular and foot patrols.”

We begin our analysis with a review of *Cassell v. Collins*, 344 N.C. 160, 472 S.E.2d 770 (1996), where the plaintiff was attacked while visiting a tenant at an apartment complex. The apartment management had employed defendant security company (ASI) to guard the property. The unarmed security guard on duty witnessed the attack, but failed to come to the aid of the victim-plaintiff. The plaintiff contended that ASI had breached its duty to her by not intervening during the attack. Our Supreme Court disagreed, finding that “the extent of ASI’s duty to plaintiff, if any, is governed by the contract between ASI and [the property owner].” *Id.* at 163, 472 S.E.2d at 772. The contract between the apartment management and defendant ASI provided for a security patrol. A supplemental memorandum from the apartment management to ASI specified only that the guard was “to be visible both as a deterrent to potential vandals as well as a sense of security for residents” and included no language requiring the guard to protect the tenants or their guests from attack. Our Supreme Court held that these documents did not impose on ASI a duty to the plaintiff to protect her from attack and declined to adopt the position that “the mere act of providing a security guard imposed upon ASI any greater duties than those delineated under its contract to provide security services. . . . [W]e cannot conclude that the mere act of providing a security guard imposed upon ASI any duty to prevent Collins from criminally assaulting plaintiff.” *Id.* at 164-65, 472 S.E.2d at 773.

In paragraph 26 of his amended complaint, plaintiff alleged that “defendant Wackenhut owed a duty of reasonable care to persons such as Jill Marker to take reasonable steps to protect them from the reasonably foreseeable tortious acts of third persons.” He therefore raised almost precisely the issue decided by the *Cassell* Court. In accordance with that decision, we look to the contract between Zaremba and Wackenhut. That contract imposed on Wackenhut a duty to “[a]ct as a deterrent against theft, vandalism and criminal activities” by “maintaining high visibility.” This language closely parallels that found in the memorandum in *Cassell*. The instant contract established no duty to “protect” those employed by the tenant businesses at Silas Creek.

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Plaintiff now contends that Wackenhut violated the contract by failing to maintain a visible presence in the shopping center because its officer conducted most of his patrol while in his inconspicuous vehicle and spent portions of his time on duty parked some distance from most of the stores. This theory was raised for the first time in plaintiff's appellate brief and pursued at oral argument. We may only consider the pleadings and other filings that were before the trial court. Plaintiff is not permitted on appeal to advance new theories or raise new issues in support of his opposition to the motion. *See Baker v. Rushing*, 104 N.C. App. 240, 246, 409 S.E.2d 108, 111 (1991). Although *Baker* refers to the party moving for summary judgment, we hold that the rule applies equally to both parties. *See Mendelson v. Ben A. Borenstein & Co.*, 608 N.E.2d 187 (Ill. App. 1992); *Unified Industries, Inc. v. Easley*, 961 P.2d 100 (Mont. 1998). Therefore, we may not consider plaintiff's argument based upon the theory that a contract violation occurred through Wackenhut's alleged failure to maintain a sufficient presence. Because we are bound by the documents filed with the trial court below, and because these documents reveal as a matter of law that there was no duty owed Ms. Marker by virtue of the contract between Wackenhut and Zaremba, this assignment of error is overruled.

II. Third-Party Beneficiary

[2] Plaintiff's next contention is that "plaintiff produced sufficient evidence for a jury to find that Jill Marker was a third-party beneficiary to the contract," and that summary judgment was therefore improperly granted. The status of a tenant's employee as a third-party beneficiary to a security contract is a matter of first impression in North Carolina. "It is well-settled a claimant is a third-party beneficiary if he can establish, '(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; [and] (3) that the contract was entered into for his direct, and not incidental, benefit.'" *State ex rel. Long v. Interstate Casualty Ins. Co.*, 120 N.C. App. 743, 747, 464 S.E.2d 73, 75-76 (1995) (alteration in original) (citations omitted). There is no question that the first two conditions have been met here; the issue before us is Ms. Marker's status as beneficiary to the contract. Our Supreme Court in 1970 adopted the then-current analysis of third-party beneficiaries established by the Restatement of Contracts.

Third party beneficiaries are divided into three groups: *donee* beneficiaries, where it appears that the "purpose of the promisee in obtaining the promise of all or part of the performance thereof

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is to make a gift to the beneficiary”; *creditor* beneficiaries, where “no purpose to make a gift appears” and “performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary”; and *incidental* beneficiaries, where the facts do not appear to support inclusion in either of the above categories.

Vogel v. Reed Supply Co. and Supply Co. v. Developers, Inc., 277 N.C. 119, 127, 177 S.E.2d 273, 278 (1970) (quoting Restatement of Contracts § 133 (1932)). While donee and creditor beneficiaries to a contract may recover, “[a]n incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.” *Id.* (quoting Restatement of Contracts § 147). The Restatement has since been updated, and now recognizes only “intended and incidental” beneficiaries. See *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 652, 407 S.E.2d 178, 182 (1991). This revision of the Restatement does not affect the issue before us, which turns on whether or not there was any intent by the parties to the contract to benefit plaintiff’s ward (or, more accurately, those tenant employees who were similarly situated as Ms. Marker). If so, she is an intended beneficiary; if not, she is but an incidental beneficiary and may not recover under the contract.

In determining the parties’ intentions, the court “should consider circumstances surrounding the transaction as well as the actual language of the contract.” *Id.*; see also *Lane v. Surety Co.*, 48 N.C. App. 634, 639, 269 S.E.2d 711, 714-15 (1980) (stating that the parties’ intentions “must be determined by construction of the ‘terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish’”), *disc. review denied*, 302 N.C. 219, 276 S.E.2d 916 (1981). Additionally, “ “[w]hen a third party seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.” ’ ” *Raritan River Steel Co.*, 329 N.C. at 652, 407 S.E.2d at 182 (alteration in original) (citations omitted).

Keeping these principles in mind, we turn first to the language of the contract itself, which states that Wackenhut “is not an insurer of property or persons guarded” and that “[t]he furnishing of the services provided for hereunder shall not be construed as a guarantee of protection against any or all contingencies or occurrences which may arise out of, or be connected with, the furnishing of such services.” The “Scope of Work” provision states that Wackenhut’s duties

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include: "Vehicular and foot patrol of property maintaining high visibility. . . . Performing watchclock rounds after midnight to end of shift. . . . Act as a deterrent against theft, vandalism and criminal activities." Looking next to the circumstances surrounding the transaction, we see that the original contract between Zarembo and Wackenhut only provided for an unarmed security guard with a pager. This contract was renegotiated in 1994, at least in part as a result of tenant complaints about lack of presence of security officers and possible assaults on those working at Silas Creek. The new contract provided that the security guard would be armed and added the language quoted above to the effect that the guard would provide deterrence against illegal acts. We must now determine whether these factors result in more than an incidental benefit to Ms. Marker.

Because this is an issue of first impression, we survey analogous decisions from other states to assist our analysis. In *Gardner v. Vinson Guard Service, Inc.*, 538 So. 2d 13, 14 (Ala. 1988), factually similar to the case at bar, the defendant security company was hired by the plaintiff's employer "to provide protection for vehicles in the parking lot . . . and to protect employees traveling to and from their vehicles. A secondary responsibility of the security guards was to patrol the perimeter around the facility and to make their presence evident." Specific instructions given to the guards required that they meet employees arriving at work to ensure they reached their building safely. On the day in question, the defendant's security officer told the plaintiff-employee upon her arrival at work that a burglary had taken place in her store, but that the burglar had fled and it was safe to enter the building. Once inside, however, the plaintiff was assaulted by a second burglar. The plaintiff sued the security company, alleging, *inter alia*, that she was a third-party beneficiary to the contract between her employer and the security company. The court held that under these facts the plaintiff was not a third-party beneficiary to the contract between the security company and her employer.

Likewise, New York courts have held an injured employee to be only an incidental beneficiary to a contract between his employer and a security company. In *Bernal v. Pinkerton's, Inc.*, 382 N.Y.S.2d 769 (N.Y. Sup. Ct. 1976), *aff'd*, 394 N.Y.S.2d 638 (N.Y. 1977), the plaintiff-employee was shot by an intruder who entered through a gate left unguarded by the defendant security company. The contract between the employer and the security company provided that the latter would "[f]urnish uniformed guards for the proper protection of

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[New York Telephone] Company facilities and buildings . . . [p]rotection to include prevention and detection of theft, fire, safety hazards and the screening of personnel entering and leaving . . .” *Id.* at 770 (first two alterations in original). The plaintiff claimed to be a third-party beneficiary to that contract. The court dismissed the claim, finding it did not appear from the contract that the parties to the contract intended

to protect [the plaintiff] from physical injury It cannot be said as a matter of law that it was the intention of the parties under this contract to provide for the protection of plaintiff The defendant was hired to protect the New York Telephone Company’s facilities and buildings, not to protect plaintiff from physical injury.

Id. (citations omitted).

An instructive counter-example is found in *Cooper v. IBI Security Service of Florida, Inc.*, 281 So. 2d 524 (Fla. Ct. App.), *cert. denied*, 287 So. 2d 95 (Fla. 1973), where the defendant security agency was hired by Interstate Life Insurance Company for the express purpose of providing armed guards to protect Interstate’s agents against assaults as they made cash collections in areas of known danger. The court noted that the agreement stated that the defendant security agency and the plaintiff’s employer contracted for the purpose of providing protection for the employees. Because the express terms of the contract manifested the parties’ intentions to benefit those in the plaintiff’s situation, the court found that the plaintiff was a third-party beneficiary to the contract.

The holdings in these cases are consistent with our Supreme Court’s observation in *Raritan River Steel Co.* that a contract will be strictly construed against a party seeking enforcement as a third-party beneficiary. Only in *Cooper*, where the intent to protect the employees was written into the contract, was a plaintiff found to be a third-party beneficiary; otherwise, courts have been reluctant to extend third-party beneficiary status to employees. Here, the contract between Wackenhut and Zaremba did not set out any responsibility of Wackenhut or its security officers toward employees of tenants, nor did the contract name or even mention the employee-tenants. *See Interstate Casualty Ins. Co.*, 120 N.C. App. at 748, 464 S.E.2d at 76. Although the contract was renegotiated in 1994 to include the requirement that the guard be armed, the deposition of Robin Plummer, Wackenhut’s Operations Manager and Area

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Supervisor at the time of the assault, reveals that the security officers were not armed for the purpose of protecting the tenant's employees, and that, if an assault on such an employee were observed, under no circumstances would the officer go to the aid of the victim. Instead, the officer would use his or her pager (which security officers were required to carry under both the old and the new contracts) to notify police. Defendant's guards, in other words, were expected to respond essentially as had the guard in *Cassell*. Further, the attack on Ms. Marker took place inside The Tree Factory. The wording of the contract does not indicate that Wackenhut's guards were to patrol within the stores of Silas Creek. Finally, the contract required that Wackenhut provide security between 8:00 p.m. and 4:00 a.m., even though the stores at Silas Creek closed at 9:00 p.m. That no employees of tenants would be on the premises during most of the time that the security officer was on duty provides a strong indication that the parties did not enter the contract for the purpose of providing security for employees of tenants.

Construing the contract strictly against the party seeking enforcement as we must, these factors convince us that Wackenhut had no contractual duty to protect Ms. Marker and others similarly situated. Although complaints from employees may have been the catalyst for the revised 1994 contract, that revision provided only increased security for Zaremba. To the extent Ms. Marker was benefited by the contract, that benefit was incidental and does not entitle her to enforce the contract on her own behalf. This assignment of error is overruled.

ZAREMBA'S APPEAL

[3] We next turn to Zaremba's crossclaim, in which Zaremba seeks indemnification from Wackenhut "with regard to any amounts recovered by the plaintiffs against [Zaremba]." The indemnity language in the Services Contract states that Wackenhut

shall indemnify and hold harmless Client from and against all liability, damage, loss, claims, demands, and actions of any nature whatsoever, including personal injury, death, or property damage, arising out of any acts or omissions of employees of [Wackenhut] while engaged in the services described in this Contract.

Courts strictly construe an indemnity clause against the party asserting it. See *City of Wilmington v. N.C. Natural Gas Corp.*, 117

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N.C. App. 244, 450 S.E.2d 573 (1994). Because Zaremba, which drafted the indemnity clause and required its insertion into the contract, is now asserting indemnification, the language of the contract is to be construed against it. In so doing, the court's function is "to ascertain and give effect to the intention of the parties, and the ordinary rules of contract construction apply." *Kirkpatrick & Assoc. v. Wickes Corp.*, 53 N.C. App 306, 308, 280 S.E.2d 632, 634 (1981). However, "[i]ndemnity against negligence must be made unequivocally clear in the contract, particularly in a situation where the parties have presumably dealt at arm's length." *Candid Camera Video v. Mathews*, 76 N.C. App. 634, 636, 334 S.E.2d 94, 96 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 879 (1986).

It is not immediately evident what is to be indemnified. There is no assertion in the record that there have been settlements, although the voluntary dismissals with prejudice of some parties are suggestive; moreover, counsel at oral argument advised this Court that there had been settlements. We proceed in reliance on that information. The plain language of the indemnity clause in the contract calls for indemnification of Zaremba only if Zaremba were found liable for actions or omissions of Wackenhut and its employees; the contract does not purport to indemnify Zaremba from its own negligence. Finding liability would therefore require (1) proof that Wackenhut was actually negligent and (2) imputed liability to Zaremba. Zaremba's argument fails on both grounds. First, as we held above, there is no evidence that Wackenhut was negligent. Second, damages caused by any negligence on Wackenhut's part could not be imputed to Zaremba, because Wackenhut is an independent contractor, as is specified by the contract between the parties. It has long been the law in this state that "one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991); *see also Rivenbark v. Construction Co.*, 14 N.C. App. 609, 188 S.E.2d 747, *cert. denied*, 281 N.C. 623, 190 S.E.2d 471 (1972). There is no evidence that Zaremba had such control over Wackenhut's employees. This assignment of error is overruled.

THE TREE FACTORY'S APPEAL

[4] As a final matter, we turn to the appeal of third-party defendant-appellant The Tree Factory, which filed a Notice of Appeal in this

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action “on the basis of potential *res judicata* effect of the Trial Court’s decision on Tree Factory’s pursuit of its own action against The Wackenhut Corporation.” The Tree Factory brought no claims below, and all claims against it were voluntarily dismissed. Only a “party aggrieved” may appeal from a trial court’s order. See N.C. Gen. Stat. § 1-271 (1996). A “party aggrieved” is one whose rights have been directly and injuriously affected by the judgment entered in the superior court. See *Culton v. Culton*, 327 N.C. 624, 398 S.E.2d 323 (1990); *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 484 S.E.2d 443 (1997). Where a party is not aggrieved, his appeal will be dismissed. See *Boone v. Boone*, 27 N.C. App. 153, 218 S.E.2d 221 (1975). The Tree Factory, having brought no claims and having no claims pending against it, is not a party aggrieved. The appeal brought by The Tree Factory is therefore dismissed.

We affirm the trial court’s grant of summary judgment in favor of Wackenhut. We dismiss the appeal of The Tree Factory.

Affirmed in part, dismissed in part.

Judges WALKER and MCGEE concur.

STATE OF NORTH CAROLINA v. LYNETTE MAC CARDWELL

No. COA98-997

(Filed 15 June 1999)

1. Evidence— driving while impaired—blood plasma alcohol testing—results admissible

The trial court did not abuse its discretion in a driving while impaired prosecution by admitting into evidence the results from a blood plasma alcohol test performed using an ACA Star Analyzer. The court’s findings reveal its consideration of the Analyzer’s general acceptance in both the medical and forensic fields, the fact that the Analyzer is an established technique for measuring alcohol concentration, the professional backgrounds of the individuals who operate and/or rely on the Analyzer, and defendant’s particular circumstances.

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2. Motor Vehicles— driving while impaired—blood plasma alcohol level— conversion ratio—reliable

The trial court did not abuse its discretion in a driving while impaired prosecution by finding that a ratio of 1 to 1.18 was reliable to convert plasma-alcohol concentration to its blood-alcohol equivalent. The court received evidence that 1 to 1.18 is the generally accepted conversion ratio, that numerous studies have found that ratios between 1 to 1.15 and 1 to 1.21 to be accurate, and the court's findings reveal consideration of the professional background of the expert employing the 1 to 1.18 ratio. Furthermore, defendant's blood-alcohol level was above the legal limit even using the highest conversion ratio.

3. Evidence— driving while impaired—blood plasma alcohol level—not unduly prejudicial

The trial court did not abuse its discretion in a driving while impaired prosecution by determining that the probative value of the results of a blood plasma alcohol test was not substantially outweighed by the risk of prejudice. The test results were highly probative of whether defendant was driving while impaired, the court determined that the Analyzer results were reliable, the test results lacked emotional content, and both sides were allowed to present explanatory expert testimony to reduce the risk of misleading the jury.

4. Evidence— character for truthfulness impugned—no prejudice

There was no prejudicial error in a prosecution for driving while impaired where a trooper testified that defendant had told him that she had drunk a little Schnapps and the State was allowed to elicit testimony from the same trooper that he later heard defendant state that she had drunk nothing. Although defendant's character for truthfulness was not pertinent to the charge of driving while impaired, the State's elicitation of this testimony did not present any information to the jury which defendant did not present herself through her own witnesses.

5. Sentencing— driving while impaired—probation—longer than statutory period—no findings

The trial court erred when sentencing defendant for driving while impaired by sentencing her to a longer probation period than provided in N.C.G.S. § 15A-1343.2 without making the required finding.

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Appeal by defendant from judgment dated 19 February 1998 by Judge Melzer A. Morgan, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 27 April 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Marjorie S. Canaday, for defendant-appellant.

GREENE, Judge.

Lynette Mac Cardwell (Defendant) appeals from her driving while impaired and reckless driving convictions.

On 26 April 1997 at approximately 7:00 p.m., Defendant was involved in a two-vehicle collision. Following the collision, Defendant was taken to Moses Cone Memorial Hospital (Moses Cone) in Greensboro, North Carolina, for treatment. Defendant's treating physician at Moses Cone ordered testing of Defendant's blood for its alcohol concentration. Defendant's test results were subsequently made available to the State by the trial court upon a determination that it was necessary to the proper administration of justice.¹ On 18 December 1997, Defendant moved to suppress the results of her alcohol testing on the grounds that both the DuPont ACA Star Analyzer (Analyzer) utilized by Moses Cone to determine Defendant's plasma-alcohol concentration and the ratio used to convert her plasma-alcohol concentration to the equivalent blood-alcohol concentration are unreliable.

At the hearing on Defendant's motion, testimony was presented as to the chain of custody of Defendant's blood samples.² Bryan Dellinger (Dellinger), the Moses Cone medical technologist who tested Defendant's blood samples, testified as to his training and as to the proper operation of the Analyzer. Dellinger further testified that he removed Defendant's plasma from her whole blood in a centrifuge, and then tested her plasma in the Analyzer to determine its alcohol content. Defendant's plasma-alcohol concentration, according to the Analyzer, was 127 milligrams per deciliter.

Robert Milton Gay, M.D. (Dr. Gay), chief of pathology and clinical laboratory services at Moses Cone, testified during the hearing that

1. Defendant does not contest the trial court's decision to make her test results available to the State.

2. Defendant does not contest chain of custody.

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he was familiar with the Analyzer, and that it has been in use at Moses Cone for “probably 20 years.” Dr. Gay testified that the Analyzer is reliable, and that “[a] lot of hospitals use it for specific things. I would think that it would be relatively common in tertiary care medicine.” Dr. Gay further testified that a combination of elevated lactic dehydrogenase (LDH) levels and other factors could cause a false high alcohol reading on the Analyzer. Dr. Gay testified he was convinced, from a review of Defendant’s medical records, that although Defendant had elevated LDH levels due to liver damage caused by the accident, no other factors were present which, combined with Defendant’s elevated LDH levels, could cause a false reading. “As I mentioned, another factor is required for [a false reading] to happen, and that’s an increase in lactate or lactic acid, and while there is no direct measurement of lactic acid here, there is evidence that [Defendant’s] lactic acid was not increased.” Dr. Gay summed up his testimony by stating that, in his opinion, nothing in Defendant’s medical record caused him to doubt the accuracy of the Analyzer’s results in this case. On cross-examination, Dr. Gay stated unequivocally that transfusions of saline, which had been administered to Defendant prior to the withdrawal of her blood samples, would not have affected the Analyzer’s results.

Richard W. Waggoner, Jr., Ph.D. (Dr. Waggoner), a forensic chemist with the North Carolina State Bureau of Investigation (SBI), was permitted to testify as an expert in forensic chemistry. Dr. Waggoner explained that testing plasma for alcohol concentration results in higher readings than the testing of whole blood for alcohol concentration, and, accordingly, plasma-alcohol content must be converted to its equivalent blood-alcohol content to ascertain whether the alcohol concentration of an individual’s blood is over the legal limit of 0.08. Dr. Waggoner testified that the SBI uses a ratio of 1 to 1.18 to convert the alcohol concentration of plasma into “whole blood results,” and has used this ratio for over ten years. Dr. Waggoner stated that a 1 to 1.18 ratio is considered scientifically reliable by other experts in the field of forensics. Approximately 90 percent of the published studies in journals and texts report accurate conversion ratios ranging from 1 to 1.15 through 1 to 1.21, although Dr. Waggoner was aware of one study which found one individual to have a conversion ratio of 1 to 1.59, and of one study which found one individual to have a conversion ratio of 1 to 1.35. Dr. Waggoner believed these figures to be unreliable “outliers” based on his review of numerous studies, encompassing a total of approximately one thousand individuals. Using the SBI’s conversion ratio of 1 to 1.18 to

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convert Defendant's plasma-alcohol concentration of 127 milligrams per deciliter, Dr. Waggoner testified that Defendant's blood-alcohol concentration would be equivalent to 0.107. Using a conversion ratio of 1 to 1.21, the highest ratio Dr. Waggoner considered to be reliable, Defendant's blood-alcohol concentration would be equivalent to 0.105. Even using a conversion ratio of 1 to 1.35, a ratio Dr. Waggoner considered unreliable, Defendant's blood-alcohol concentration would be equivalent to 0.094.

James Woodford, Ph.D. (Dr. Woodford), a chemist, testified for Defendant as an expert in "medicinal and forensic chemistry." In Dr. Woodford's opinion, the Analyzer is not a reliable method of determining blood-alcohol concentration. Dr. Woodford testified that, in his experience with drug-testing for federal employment, alcohol concentration results obtained from enzyme tests such as the Analyzer may not serve as the basis for hiring or firing decisions unless the results are verified by gas chromatography testing. Dr. Woodford also believed the Analyzer to be unreliable because it tests for a reaction which can be caused by alcohol, but which can also be caused by other factors, including enzymes. Dr. Woodford opined that the damage to Defendant's liver could have released enzymes which would affect the Analyzer's reading. In addition, Dr. Woodford believed the Analyzer's results were unreliable in this case because Defendant had been given at least two units of saline solution, which is mostly water, prior to having her blood taken. Dr. Woodford testified that alcohol is attracted to water, and the water in the saline solution would have absorbed alcohol stored in Defendant's muscle tissue, resulting in higher levels of alcohol in Defendant's bloodstream. Dr. Woodford disputed the 1 to 1.18 conversion ratio utilized by the SBI, stressing that most published studies setting a ratio to convert plasma-alcohol content to blood-alcohol content apparently test healthy individuals (although he conceded that at least one of the relied-upon studies tested blood received from emergency room patients). Accordingly, Dr. Woodford felt that the conversion ratio of individuals in the studies could not accurately be applied to individuals, like Defendant, suffering from trauma.

Following the presentation of testimony, the trial court heard arguments from Defendant and from the State, noting that "[t]he State has the burden" of showing that the Analyzer is a reliable mechanism for testing alcohol concentration and that 1 to 1.18 is a reliable conversion ratio. The trial court subsequently made the following pertinent findings of fact as to the reliability of the Analyzer and the 1 to 1.18 conversion ratio:

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6. . . . The [Analyzer] is of very good reliability. Similar instruments have been in use for over 20 years. This model is in common use in tertiary care hospitals throughout the United States [and] . . . has gained general acceptance among metropolitan [sic] hospitals in North Carolina and hospitals throughout the United States. The principles underlying this instrument are scientifically valid. It is a reliable scientific instrument. . . .

. . . .

12. . . . It is generally recognized and accepted that an alcohol reading in plasma is higher than an alcohol reading in whole blood, so the reading must be converted to whole blood alcohol level for court purposes. The ratio used by the SBI is a conservative ratio. The ratio is 1 to 1.18. It has been used for at least 11 years by the North Carolina State Bureau of Investigation forensic laboratory. The ratio chosen by the SBI laboratory is a conservative ratio, at the mid-point in values in the recognized scientific and technical literature. This ratio is based on the published findings. . . . The 1 to 1.18 ratio is a reliable ratio. The 1 to 1.18 ratio is generally accepted in the field of forensic chemistry. The 1 to 1.18 ratio is considered sufficiently reliable by other experts in the field of forensic chemistry. The ratio is an established and respected ratio in the forensic community [and] is scientifically valid. . . . A plasma alcohol concentration here of 127 milligrams per deciliter, when the 1 to 1.18 ratio is used, gives a whole blood alcohol concentration reading of .10[7] per one hundred milliliters of blood. . . . Using 1 to 1.35, the result would be .094. Dr. Waggoner's education and experience well fit him for explaining the conversion factor and the result to the trial jury.

Considering factors specific to Defendant which could have affected the reliability of her Analyzer results, the trial court found:

7. . . . An elevated LDH reading standing by itself, as a single factor, would not result in a false high reading. Other body chemistry readings did not indicate that elevated LDH would give a false positive reading. . . . [T]here was no credible evidence that elevated LDH skewed the result of the plasma alcohol test. . . .

8. . . . Here there were body chemistry readings which indicate that lactic acid was not increased (high). . . .

9. . . . [T]he State's medical expert, Pathologist Dr. Gay, was aware that the [D]efendant received two units of saline solution.

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This fact did not cause him to be suspicious of the test result. The Court does not find it persuasive that the [D]efendant's plasma alcohol concentration would be increased because the [D]efendant was given saline solution before blood was drawn.

Finally, balancing the probative value of Defendant's Analyzer test results against the prejudicial effect of this evidence, the trial court found:

15. Engaging in the balancing involved under Rule 403 of the North Carolina Evidence Code, the Court determines that the probative value of the figure arrived at by converting plasma blood alcohol to whole blood alcohol concentration is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or any other matter of concern under Rule 403.

Based on these findings, the trial court denied Defendant's motion to suppress the Analyzer test results.

At trial, the three individuals who had witnessed the accident testified for the State. Jessica Elizabeth Sola (Sola) testified that Defendant's vehicle "crosse[d] in my lane traveling in the other lane, and as I was slowing down I started to pull off the side of the road and she come over into my lane and hit me." Brenda Brown (Brown) and her son, Joshua Horn (Horn), were a few car-lengths ahead of Sola's vehicle in the same lane of travel. Brown testified:

[Defendant's vehicle] run off on the curve, and when it came back on [the road] it came over into our lane of traffic and kind of like zig-zagged back and forth after that, and I told my son [who was driving Brown's vehicle] to pull the car over. I said, "I think she is going to wreck." And then I said, "She may hit us," and we pulled over.

Brown watched as Defendant's vehicle crossed into Sola's lane of travel and hit Sola's vehicle. Horn testified:

[Defendant's vehicle] had come around the curve and I noticed it hit the—it went off the road toward the right-hand side and threw up a cloud of dust . . . then the car was out of control, and as it come closer to us it zig-zagged like in and out. It come in our lane of travel and went back in its lane past us. Once it passed us, it zig-zagged back into Ms. Sola's lane and then they collided.

Horn went to Defendant's vehicle to check on her, and smelled an odor of alcohol about Defendant's person.

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After the accident occurred, Benjamin Franklin Archer, IV (Archer), an emergency medical technician, arrived at the scene. He climbed into the back seat of Defendant's vehicle to attempt to stabilize Defendant's head and neck. Archer testified that he smelled a moderate odor of alcohol coming from Defendant's breath.

When Defendant arrived at Moses Cone following the accident, Jamie Blue (Blue), an emergency room staff nurse, Joseph Perez (Perez), a registered nurse, and DeAudra Belizone, a clinical laboratory technician, were in Defendant's presence for an extended period while performing their duties. Each testified that they detected an odor of alcohol coming from Defendant's breath. In addition, Blue and Perez testified that Defendant stated she "had been drinking at the lake."

Trooper Mike Murphy (Trooper Murphy) of the North Carolina Highway Patrol also spoke with Defendant that evening at Moses Cone, and noticed "a moderate odor of alcohol" coming from Defendant's breath. Trooper Murphy testified that when he returned to Moses Cone two days later, "[Defendant] just made a voluntary statement to me that she didn't feel like she was impaired, that she had drank some Schnapps at Dr. Mitch Bloom's residence at Belews Creek; however, it wasn't that much." Trooper Murphy was then allowed to testify, over Defendant's objection, that he had subsequently heard Defendant state she "had drank nothing" prior to the wreck.

After Dellinger and Dr. Waggoner offered substantially the same testimony as they had offered during the pretrial hearing on Defendant's motion to suppress, the State rested its case-in-chief.

Defendant did not testify in her own behalf. Four friends and/or acquaintances of Defendant each testified that they had engaged in brief conversations with Defendant around 5:00 p.m.; none noticed an odor of alcohol. Carolyn Cardwell (Cardwell), Defendant's mother, testified that she and Defendant spoke briefly "near seven o'clock" before Defendant left to attend a banquet. Cardwell noticed no odor of alcohol on Defendant's breath. Amy Baitz (Baitz), one of the first passers-by following the accident, applied a towel to the laceration on Defendant's forehead until medical personnel arrived, and noticed no odor of alcohol. Jodie Allen Shelton (Shelton) rode at Defendant's feet in the ambulance to Moses Cone and did not smell any odor of alcohol about Defendant. Cuff Watson Hopper (Hopper), a county rescue squad volunteer and friend of Defendant, also rode with

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Defendant in the ambulance. Hopper testified that he did not notice any odor of alcohol. After Dr. Woodford offered substantially the same testimony as he had offered during the pretrial hearing on Defendant's motion to suppress, the defense rested.

On rebuttal, Ronald C. Hill, Jr. (Hill), a paramedic, testified for the State. Due to his sinus condition, Hill could not smell anything on 26 April 1997. While riding in the ambulance with Defendant on the way to Moses Cone, Hill asked Hopper if he smelled any odor of alcohol about Defendant's person, and Hopper nodded affirmatively. Phil Mizelle (Mizelle), also a paramedic, saw Hopper the day after the accident. Mizelle was allowed to testify, solely for the purpose of impeaching Hopper, that Hopper told him alcohol had been involved in the wreck and Defendant had been drinking. Dr. Gay also testified on rebuttal, offering substantially the same testimony as he had offered during the pretrial hearing on Defendant's motion to suppress.

After closing arguments, the trial court instructed the jury that it could find Defendant guilty of driving while impaired if it found beyond a reasonable doubt that she was driving a vehicle on a highway in this State and "that at the time the [D]efendant was driving that vehicle she either (a) was under the influence of an impairing substance . . . [or (b)] had an alcohol concentration of .08 or more grams of alcohol per 100 milliliters of blood." The jury returned verdicts of guilty of driving while impaired and reckless driving. For the driving while impaired conviction, the trial court sentenced Defendant to a twelve-month suspended sentence. Defendant was placed on supervised probation for one year and unsupervised probation for four years, and was required to serve an active sentence of sixty days as a condition of her probation. For the reckless driving conviction, the trial court entered an additional thirty-day suspended sentence. For that conviction, Defendant was placed on supervised probation for twelve months and unsupervised probation for forty-eight months.

The issues are whether: (I) the Analyzer constituted reliable scientific evidence in this case; (II) the State improperly elicited testimony as to Defendant's character for truthfulness; and (III) the trial court failed to make sufficient findings at Defendant's sentencing.

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I

[1] Expert testimony based on a scientific method of proof is generally admissible if the expert's "scientific, technical or other specialized knowledge will assist the trier of fact." N.C.G.S. § 8C-1, Rule 702(a) (Supp. 1998). In determining whether a scientific method of proof will assist the trier of fact in a given case, the trial court must determine whether the method is reliable. *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990). The trial court may take judicial notice that a scientific method of proof is reliable; however, in cases where the scientific method of proof at issue is a relatively new one, reliability "is usually established by expert testimony." *Id.*; *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984); 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 113 (5th ed. 1998) [hereinafter *Brandis & Broun on Evidence*]. The general acceptance of a particular method by the scientific community may be one indicator of its reliability; however, a lack of general acceptance is not dispositive. *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852; *Bullard*, 312 N.C. at 145, 322 S.E.2d at 379. Other factors the trial court may consider in determining the reliability of an expert's scientific method of proof include: (1) the expert's professional background; (2) independent research conducted by the expert; (3) the use of established techniques; and (4) explanatory testimony (including, for example, the "use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith' "). *Pennington*, 327 N.C. at 98, 393 S.E.2d at 853 (quoting *Bullard*, 312 N.C. at 151, 322 S.E.2d at 382); *cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 125 L. Ed. 2d 469, 482-83 (1993) (noting that some of the "[m]any" possible factors for consideration include empirical testing of the new scientific technique, peer review and publication, the known or potential rate of error, and general acceptance by the scientific community). We review the trial court's reliability determination under an abuse of discretion standard. *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); *cf. Kumho Tire Co., Ltd. v. Carmichael*, — U.S. —, — L. Ed. 2d —, 67 U.S.L.W. 4179 (1999) (noting that federal rule 702, which is, in relevant part, identical to our Rule 702, vests "discretionary authority, reviewable for its abuse," in the trial court). Accordingly, we will reverse the trial court's determination on this issue "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *See State v. Cagle*, 346 N.C. 497, 506-07, 488 S.E.2d 535, 542, *cert. denied*, — U.S. —, 139 L. Ed. 2d 614 (1997).

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In this case, the trial court's findings reveal its consideration of the Analyzer's general acceptance in both the medical and forensic fields, the fact that the Analyzer is an established technique for measuring alcohol concentration, and the professional backgrounds of the individuals who operate and/or rely on the Analyzer. Accordingly, as the trial court's findings reflect its consideration of relevant factors for determining the admissibility of scientific evidence and are reasonably supported by the evidence presented, the trial court did not abuse its discretion in determining that the Analyzer is a reliable scientific method of proof. *See State v. Drdak*, 330 N.C. 587, 592, 411 S.E.2d 604, 607 (1992) (noting that N.C.G.S. § 20-139.1(a), which provides for one method of blood-alcohol content analysis, allows for the admission of other competent evidence, including other chemical tests, to show a defendant's blood-alcohol level).

Furthermore, the trial court's findings reveal its consideration of whether the Analyzer results, although generally reliable, were inadmissible due to Defendant's particular circumstances. *See Pennington*, 327 N.C. at 101, 393 S.E.2d at 854 ("The evidence [obtained from a reliable scientific method of proof] may be found to be so tainted that it is totally unreliable and, therefore, must be excluded."). The trial court found there was "no credible evidence that [Defendant's] elevated LDH skewed the result of the plasma alcohol test"; elevated LDH alone would not cause "a false positive reading"; there "were body chemistry readings which indicate that [Defendant's] lactic acid was not increased"; and the "saline solution administered to [Defendant] . . . did not so effect the chemistry in [Defendant's] blood plasma as to make the blood plasma alcohol reading here so unreliable as to be inadmissible." The trial court's findings reveal that its determination that Defendant's results were not so tainted as to be totally unreliable was the result of a reasoned decision; accordingly, the trial court did not abuse its discretion.

[2] Defendant also challenges the reliability of the conversion ratio used to convert her plasma-alcohol concentration to its blood-alcohol concentration equivalent. The trial court received evidence that 1 to 1.18 is the generally accepted conversion ratio in the forensic field and that numerous studies have found ratios between 1 to 1.15 and 1 to 1.21 to be accurate for the overwhelming majority of participants. The trial court's findings also reveal its consideration of the professional background of the expert employing the 1 to 1.18 ratio. Based on this evidence, the trial court found a conversion ratio of 1 to 1.18 to be reliable, and we see no abuse of discretion in this

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determination based on the evidence presented in this case. In any event, even using a conversion ratio of 1 to 1.21, the highest conversion ratio deemed reliable by Dr. Waggoner based on his review of numerous studies, Defendant's blood-alcohol concentration was above the legal limit.

[3] Defendant additionally contends the results of the Analyzer should have been excluded pursuant to Rule 403 of the North Carolina Rules of Evidence. Again, we disagree. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." N.C.G.S. § 8C-1, Rule 403 (1992). "Unfair prejudice is defined as 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.'" *State v. Ferguson*, 105 N.C. App. 692, 695, 414 S.E.2d 769, 771 (1992) (quoting N.C.G.S. § 8C-1, Rule 403, official commentary). Whether to exclude evidence pursuant to Rule 403 is within the sound discretion of the trial court. *Cagle*, 346 N.C. at 506-07, 488 S.E.2d at 542.

In this case, Defendant's Analyzer results, obtained approximately an hour after her accident, are highly probative of whether she was driving while impaired. The evidence obtained and/or derived from the Analyzer, although obviously prejudicial to Defendant, is not unfairly prejudicial. The trial court determined that the Analyzer results were reliable in this case; the Analyzer test results lack emotional content; and both sides were allowed to present explanatory expert testimony to reduce the risk of misleading the jury. It follows that a decision based on these results would not have been on any improper basis. The trial court therefore did not abuse its discretion in determining that the probative value of Defendant's Analyzer results was not substantially outweighed by the danger of unfair prejudice or jury confusion.

Finally, we note that, although the trial court determined the reliability of Defendant's Analyzer test results and the 1 to 1.18 conversion ratio for admissibility purposes, it properly allowed Defendant and the State to present evidence to the jury respectively attacking and supporting the reliability of the Analyzer itself, Defendant's results on the Analyzer, and the conversion ratio utilized to determine Defendant's blood-alcohol content. *See Pennington*, 327 N.C. at 101, 393 S.E.2d at 854. The jury therefore was able to determine the appropriate weight to assign to this evidence.

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II

[4] Trooper Murphy testified that, on 30 April 1997, Defendant told him she “had drunk a little Schnapps” prior to the accident. Then, over Defendant’s objection, the trial court allowed the State to elicit testimony from Trooper Murphy that he later heard Defendant state she “had drunk nothing” prior to the accident. Defendant contends this testimony was inadmissible character evidence elicited for the purpose of attacking her character for truthfulness. We agree, from a review of the transcript, that the State’s only purpose in eliciting the latter statement was to impugn Defendant’s credibility. The State contends this evidence was relevant and therefore admissible. Relevance is only one test for admissibility, however, and does not end the inquiry. *See, e.g.*, N.C.G.S. § 8C-1, Rule 403 (providing that relevant evidence may be excluded where it is unfairly prejudicial).

Generally, the State may not elicit evidence of the defendant’s character in a criminal prosecution unless the evidence is relevant for some purpose other than proving character. *See* N.C.G.S. § 8C-1, Rule 404 (Supp. 1998); *State v. Sanders*, 295 N.C. 361, 373, 245 S.E.2d 674, 682 (1978) (“Where a defendant has neither testified as a witness nor introduced evidence of his good character, the State may not present evidence of his bad character”); 1 *Brandis & Brown on Evidence* § 88. The State is allowed, however, to rebut evidence of a pertinent character trait offered by the defendant, *see* N.C.G.S. § 8C-1, Rule 404(a)(1), and to impeach the defendant’s credibility with specific instances of conduct that are probative of credibility on cross-examination of the defendant or of a witness who has testified as to the defendant’s character, *see* N.C.G.S. § 8C-1, Rule 608(b) (1992).

In this case, Defendant’s character for truthfulness was not pertinent to the charge of driving while impaired, *see State v. Sexton*, 336 N.C. 321, 359, 444 S.E.2d 879, 901 (defining “pertinent” in the Rule 404 context), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994), Defendant did not testify and thus did not subject herself to impeachment, and, at that point in the proceedings, Defendant had not yet elicited testimony from other witnesses which would tend to show her good character. Accordingly, the trial court erred in allowing the State to elicit Trooper Murphy’s testimony concerning Defendant’s conflicting statement.

Error alone, however, does not result in a new trial. The defendant has the burden of showing there exists a “reasonable possibility

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that, had the error in question not been committed, a different result would have been reached at the trial.” N.C.G.S. § 15A-1443(a) (1997). In this case, Defendant pleaded not guilty, and each of Defendant’s witnesses testified they had noticed no odor of alcohol on Defendant’s breath. Trooper Murphy’s objectionable testimony that Defendant stated she “had drank nothing” therefore supports her defense. The State’s elicitation of this testimony did not present any information to the jury which Defendant herself did not present through her own witnesses. Accordingly, we are not persuaded a reasonable possibility exists that the jury would have returned a different verdict absent this error.

III

[5] Lastly, Defendant contends the trial court erred in sentencing her to twelve months supervised and forty-eight months unsupervised probation on her reckless driving conviction without finding that this extended period of probation was necessary.

Section 15A-1343.2 specifies the “length of the original period of probation for offenders sentenced under Article 81B.” N.C.G.S. § 15A-1343.2(d) (1997). The trial court may sentence offenders to longer or shorter periods of probation, however, if it “makes specific findings that longer or shorter periods of probation are necessary.” *Id.*

In this case, the State concedes the trial court sentenced Defendant to a longer period than that provided in section 15A-1343.2 without making the required finding. Accordingly, we remand Defendant’s reckless driving conviction for resentencing. The trial court may either reduce Defendant’s probation to the statutory period or may enter a finding that the longer period is necessary.

Driving While Impaired: No error.

Reckless Driving: Trial—No error; Sentencing—Remand.

Judges MARTIN and McGEE concur.

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SYLVIA ANN PATTERSON, PLAINTIFF v. DENNIS STRICKLAND, JR., DEFENDANT

No. COA97-1583

(Filed 15 June 1999)

1. Appeal and Error— record—motion to dismiss denied

A motion to dismiss based upon an alleged failure to serve a proposed record on appeal or to agree with defendant as to the procedure for preparing the record was denied where a record was submitted with a stipulated agreement as to the settlement of the record.

2. Statute of Limitations— instructions—interest in real property—fiduciary relationship

The trial court did not err in an action arising from the purchase of property by an unmarried couple in its instructions on the statute of limitations where defendant contended that the court erred by instructing that the statute began to run when defendant disavowed plaintiff's interest in the property, but the statute of limitations does not begin to run until a demand and refusal where a fiduciary relation exists.

3. Trials— instructions—no objection—finding deemed in accord with judgment

There was no error in an action arising from the purchase of property by an unmarried couple where defendant contended that the issues found by the jury did not support the judgment requiring transfer of a half interest in the property from defendant to plaintiff. Defendant did not object to the instructions before the jury retired and the court is deemed to have made a finding in accord with the judgment entered.

4. Evidence— fiduciaries—unmarried “husband-wife” relationship—admissible

The trial court did not err in an action arising from the purchase of property by an unmarried couple by admitting evidence of the parties' behavior as husband and wife to rebut defendant's claims of a mere landlord-tenant relationship. Although plaintiff argued that the testimony was relevant to demonstrate a fiduciary relationship and the jury determined that the parties were fiduciaries, that finding was limited to the facts and circumstances of this case; merely living together should not generally be enough to give rise to a fiduciary relationship.

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5. Statute of Frauds— ownership of property—unmarried couple

The trial court erred by denying defendant's motion for a directed verdict based upon the statute of frauds in an action arising from the purchase of property by an unmarried couple. The only possible contract that could have existed involved the sale or conveyance of land or an interest in or concerning land, defendant properly pled the statute of frauds, and this oral contract cannot be specifically enforced against him.

6. Trusts— purchase money resulting—summary judgment

The trial court erred by granting defendant's motion for summary judgment on plaintiff's claim for a purchase money resulting trust arising from the purchase of land by plaintiff and defendant as an unmarried couple. If the facts alleged by plaintiff are true, a finder of fact could reasonably determine that plaintiff and defendant had an agreement to purchase the property together and that plaintiff was entitled to some share of the property. The statute of frauds does not apply to resulting trusts.

7. Trusts— constructive—no presumption of confidential relationship

In an action remanded on other grounds, the parties were not entitled upon the evidence presented to a presumption of a confidential relationship, as is usually involved in a constructive trust, but an instruction on constructive trusts might be appropriate on remand if plaintiff can provide evidence of a confidential relationship and fraud.

8. Unjust Enrichment— purchase of land by unmarried couple

A cross-assignment of error raising the issue of unjust enrichment in an action arising from the purchase of land by an unmarried couple was overruled where the jury did not reach that issue due to its answers on earlier issues. The issue should not arise on remand since both resulting and constructive trusts may be imposed to prevent unjust enrichment.

Appeal by plaintiff from order granting partial summary judgment filed 18 November 1996 by Judge Charles C. Lamm, Jr., in Mecklenburg County Superior Court. Appeal by defendant from judgment filed 5 December 1996 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 1998.

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Casstevens, Hanner, Gunter & Conrad, P.A., by Robert P. Hanner, II, and Mark D.N. Riopel, for plaintiff.

Law Offices of Raymond Mason Taylor, by Raymond M. Taylor and Amanda Spence, for defendant.

LEWIS, Judge.

Plaintiff and defendant met in 1962 and began an intimate relationship in 1963, although plaintiff was married to another man until 1969. In 1975, defendant moved into plaintiff's mobile home with her, and in the spring of 1976 the couple moved into a house on 4.4 acres of land on Arrowood Road in Charlotte ("the Arrowood property"). It is the ownership of this property that lies at the center of the parties' present dispute.

Defendant purchased the Arrowood property on 12 December 1975 by making a down payment of \$8,781.09 from his own funds and signing a promissory note and deed of trust obligating himself to pay a total of an additional \$30,747.60 over ten years at \$256.23 per month. The deed was made to defendant alone, and plaintiff did not attend the closing or ask defendant how title to the land was taken. Plaintiff did, however, contribute \$160.00 per month, and she continued to make payments in that amount even after the mortgage was satisfied on 2 January 1986. She testified at trial that her understanding about the purchase of the property was "[t]hat we would buy the property together and we would live there as a family with the children. It would be our—our home."

In 1987, the word "rent" began appearing in the memo portion of some of plaintiff's checks. When plaintiff co-signed a mortgage for her son in 1990, she signed a financial disclosure form stating that she rented the Arrowood property from defendant. Defendant completed a portion of that form as "landlord/creditor," marking this a "rental account" and noting that plaintiff had paid \$160.00 per month in rent since 1975. In a 1996 deposition, plaintiff explained her decision to complete the form in this manner by stating, "[T]he title was not in my name."

Following the death of his parents in early 1985, defendant began spending an increasing amount of time at his family's farm in Maxton. In 1990 plaintiff confronted her niece in Maxton regarding the niece's relationship with defendant, marking the last time that plaintiff saw defendant. Defendant married plaintiff's niece in March

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of 1995, and plaintiff was asked to vacate the Arrowood property later that month.

Plaintiff filed suit on 19 April 1995, claiming an interest in the property and citing four different causes of action that would entitle her to recover: purchase money resulting trust, constructive trust, quantum meruit—quasi contract, and unjust enrichment. Defendant moved for summary judgment as to each of these issues, and the trial court granted this motion as to the first issue only. From the grant of summary judgment as to the resulting trust claim, plaintiff appeals to this Court. The case went to trial, where plaintiff's equitable claims appear to have been transformed into a contract case. In the charge conference, the trial judge stated that this was "just a contract case" and told counsel for plaintiff, "To the extent that you're requesting instructions on constructive trust, I will non-suit you, on that issue." Defendant's motion for summary judgment on plaintiff's resulting trust claim already having been granted, there were no trust issues submitted to the jury. Instead, the following issues were submitted to and answered by the jury at the close of all the evidence:

ISSUE 1: Before acquiring the property, did the Defendant agree, by contract, with the Plaintiff, that the Plaintiff would be a one-half owner of the property?

ISSUE 2: At the time C.C. Thomas deeded the property to the Defendant, did a fiduciary relationship exist between the Plaintiff and the Defendant?

ISSUE 3: Did the Plaintiff commence this action before the expiration of the three-year statute of limitations?

When the jury answered all three questions affirmatively, the trial court made conclusions of law granting plaintiff a one-half undivided interest in the Arrowood property. From that judgment, defendant appeals.

[1] Defendant filed a motion to dismiss plaintiff's appeal on 6 April 1998, and the matter has been referred to this panel. Defendant asserts that plaintiff "did not serve a proposed Record on Appeal, attempt to agree with Defendant as to the procedure for preparing the record on appeal, or file a motion to extend her time to do so within the 35 days mandated by Rule 11 . . ." Rule 11(d) of the North Carolina Rules of Appellate Procedure requires that there "be but one record on appeal," and the record submitted in this action contains a stipulated agreement as to the settlement of the record on appeal. We

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are able to address the appeals of both parties from the record as filed 23 December 1997. Therefore, defendant's motion to dismiss plaintiff's appeal is denied.

I. Defendant's Appeal

A. *Statute of Limitations*

[2] As appellant, defendant first argues that the trial court's instructions on the statute of limitations were given in error. After stating to the jury that the statute of limitations for this action was three years, the court continued,

The time at which the statute of limitations for the plaintiff's claim begins to run is the time the defendant's disavow [sic] of the plaintiff's interest in the property was discovered by the plaintiff; or, ought reasonably to have been discovered by the plaintiff; whichever occurred first.

Defendant contends that these instructions blurred the elements of a constructive trust with contract issues by requiring a disavowal, which is required for a constructive trust but is not required to recover in contract. *Compare Cline v. Cline*, 297 N.C. 336, 348, 255 S.E.2d 399, 407 (1979) (stating that in a constructive trust action, "[t]he statute [of limitations] begins to run only from the time the trustee disavows the trust and knowledge of his disavowal is brought home to the *cestui que trust*, who will then be barred at the end of the statutory period."); *Wilson v. Development Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970) (stating that in a contract action, "[t]he cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed.")

However, as plaintiff notes, the trial court's instructions were not erroneous in this regard if the parties were fiduciaries. "It is well settled that where a fiduciary relation exists between the parties . . . the statute of limitations does not begin to run until a demand and refusal." *Efird v. Sikes*, 206 N.C. 560, 562, 174 S.E. 513, 513-14 (1934). The existence of a fiduciary relationship, being a question of fact, *Crew v. Crew*, 236 N.C. 528, 530, 73 S.E.2d 309, 311 (1952), was submitted to the jury in Issue 2. The jury found that, at the time C.C. Thomas deeded the property to defendant, plaintiff and defendant were in a fiduciary relationship. Neither party argues that this finding constituted error, so we do not review it.

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Since the parties were found to be fiduciaries at the time the contract was entered, plaintiff could not sue on the contract until defendant disavowed her interest in it. *Efird*, 206 N.C. at 562, 174 S.E. at 513-14. Although plaintiff's own testimony indicated that she knew or should have known that the Arrowood property was not in her name since at least 1990, the formal disavowal did not occur until defendant demanded she vacate the property in March of 1995. By filing this suit in April of 1995, plaintiff's claim was not barred by the statute of limitations.

B. *Sufficiency of facts to support the verdict*

[3] Defendant's second argument as appellant is that the three issues found by the jury do not support a judgment requiring defendant to transfer a one-half interest in the Arrowood property to plaintiff. Defendant contends in his brief, "The jury did not find that Defendant breached the contract, nor did it find that Plaintiff upheld her end of the bargain. Without such findings, the verdict is meaningless." The jury was not asked to determine these factual issues, and defendant does not explain why he did not request their submission to the jury.

If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

N.C. Gen. Stat. § 1A-1, Rule 49(c) (1990). Defendant did not formally object to the instructions as given before the jury retired. As such, the trial court is "deemed to have made a finding in accord with the judgment entered." *Id.*

C. *"Husband-Wife" Relationship*

[4] Defendant's third argument as appellant is that the trial court erred in admitting evidence that suggested the parties had a "husband and wife" relationship. Defendant made a motion in limine to suppress evidence of the "husband-wife" relationship or any evidence of a common law marriage, arguing that it was irrelevant to proving or disproving the existence of a contract between the parties on 12 December 1975 and that it was unfairly prejudicial to defendant. The trial court ruled that evidence of a lawful, common law marriage

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would be inadmissible, but permitted the introduction of “testimony, descriptive in nature, that it was as husband and wife, but not as legal husband and wife.” The court went on to note that “just using the term [‘]living together as husband and wife[‘] does not necessarily connote that we are alleging that we are legal husband and wife.”

Plaintiff’s brother and a friend each testified at trial on the appearance of this relationship as one of husband and wife, but defendant entered no objection at the time. After plaintiff herself testified that during the six months she and defendant lived in the mobile home, they “lived as husband and wife,” counsel for defendant then requested and was granted “a continuing objection for the record concerning husband and wife.” Testimony was later admitted concerning the existence of a “husband and wife” relationship during the years the parties lived together on the Arrowood property.

Plaintiff argues that this evidence was relevant not only to impeach defendant’s deposition testimony that the relationship was merely one of landlord and tenant, but to demonstrate the existence of a fiduciary relationship. We are extremely reluctant to recognize a fiduciary relationship between unmarried roommates, but we are also cognizant of courts’ longstanding reluctance to define a fiduciary relationship.

The courts generally have declined to define the term “fiduciary relation” and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or property of either. In this, the courts have acted upon the same principle and for the same reason as that assigned for declining to define the term “fraud.” The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence “[I]t extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.”

Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (citations omitted)). Because the existence of a fiduciary relationship is a question of fact, *Crew*, 236 N.C. at 530, 73 S.E.2d at 311, and because there is no argument supporting the assignment of error that the trial court’s actual instruc-

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tions to the jury on the definition of a fiduciary were incorrect, we are bound by the jury's determination that under these facts and circumstances the parties were fiduciaries. These findings should be limited to the facts and circumstances of this case and we emphasize that merely living together should not, generally, be enough to give rise to a fiduciary relationship. The descriptive evidence of the parties' behavior as husband and wife was relevant here to rebut defendant's claims of a mere landlord-tenant relationship, and defendant's assignments of error on this point are overruled.

D. Statute of Frauds

[5] Defendant's final argument as appellant is that the trial court erred in denying his motion for a directed verdict because plaintiff's claim of an oral contract is barred by the statute of frauds. According to our statutes,

All contracts to sell or convey any lands, . . . or any interest in or concerning them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N. C. Gen. Stat. § 22-2 (1986). Plaintiff claims that a contract concerning the ownership of land is not automatically governed by the statute of frauds, citing only *Potter v. Homestead Preservation Assn.*, 330 N.C. 569, 412 S.E.2d 1 (1992). Plaintiff notes that *Potter* made a distinction to the rule regarding "a parol partnership agreement or joint enterprise entered into by two or more persons for the express purpose of carrying on the business of purchasing and selling real estate, or interests therein, for speculation, the profits to be divided among the parties . . ." *Id.* at 577, 412 S.E.2d at 6. The relationship between plaintiff and defendant may have been many things, but the evidence does not indicate that it was a partnership of real estate speculators.

Plaintiff argues in her brief as appellee that, prior to the actual transfer, she contracted to be a joint owner of the disputed property but that "[t]his agreement did not specify that the land would be partially conveyed to her by deed when the house is paid off." This is a different story than was proposed in her complaint, which alleged, among other things:

36) At the time Plaintiff was providing funds to Defendant for the purchase of her one-half interest in the [Arrowood property],

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Plaintiff expected to receive payment in the form of the conveyance of a one-half interest in the aforesaid real property to Plaintiff.

37) Plaintiff's expectation of the aforesaid payment is reasonable.

38) Defendant received Plaintiff's service in the form of funds to help purchase the subject real property with the knowledge or a reason to know that *Plaintiff expected to be paid in kind with the conveyance of a one-half interest in the [Arrowood property]*.

(emphasis added). According to our Supreme Court,

Since the contract upon which the plaintiff's alleged cause of action is bottomed rests solely in parol, and since the said contract is one to sell and convey lands and no memorandum thereof has been put in writing and signed by the party charged therewith, or by any person by him thereto lawfully authorized, it cannot, under the statute, be enforced.

Chason v. Marley, 224 N.C. 844, 845, 32 S.E.2d 652, 653 (1945).

Plaintiff now argues that the trial court, viewing the evidence in the light most favorable to the plaintiff upon defendant's motion for directed verdict, determined "that the contract was not one concerning the conveyance or transfer of land, but rather that the property taken by Defendant-Appellant [was] for both of them." Citing no authority, plaintiff concludes, "Therefore the Statute of Frauds is inapplicable." We disagree.

The only possible contract that could have existed was one involving the sale or conveyance of land or an interest in or concerning land; the subject matter of the alleged contract was nothing if it was not the agreement to buy the Arrowood property. Defendant properly pled the statute of frauds in his motion for a directed verdict, and as such this oral contract cannot be specifically enforced against him. *See, e.g., Pickelsimer v. Pickelsimer*, 257 N.C. 696, 698, 127 S.E.2d 557, 560 (1962). The trial court committed reversible error in denying defendant's motion for a directed verdict on this point, and the judgment awarding plaintiff a one-half interest in the Arrowood property on a contract theory is reversed. As will be set out below, though, plaintiff is not without remedies on remand.

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II. Plaintiff's Appeal

A. Purchase-Money Resulting Trust

[6] As appellant, plaintiff argues that the trial court should not have granted defendant's motion for summary judgment as to plaintiff's claims that a purchase-money resulting trust arose between the parties. Plaintiff asserts that a factual dispute exists concerning whether it was the parties' intention that they share a one-half interest in the Arrowood property, and claims to have made out a *prima facie* case for the existence of a resulting trust. Both parties cite *Mims v. Mims*, 305 N.C. 41, 46, 286 S.E.2d 779, 783 (1982) to define a resulting trust.

A resulting trust arises "when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another."

Id. (quoting *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938)).

Regarding purchase-money resulting trusts, *Mims* quotes *Cline v. Cline*, 297 N.C. 336, 255 S.E.2d 399 (1979), for the proposition that "[t]he general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes." *Mims*, 305 N.C. at 47, 286 S.E.2d at 784 (quoting *Cline*, 297 N.C. at 344, 255 S.E.2d at 399). Plaintiff directs our attention, however, to another quote from *Cline*: "There is no difference in principle between paying money toward the purchase price at the time of the delivery of a deed and contracting at that time to pay the same sum later and then paying it as promised." *Cline*, 297 N.C. at 346, 255 S.E.2d at 406.

There seem to be two possible ways to form a resulting trust based on the time at which consideration is paid, according to *Mims* and *Cline*. Either the consideration is paid before or at the time legal title passes, *see Mims*, or it is paid after such time pursuant to an earlier agreement between the parties, *see Cline*. In either case, plaintiff's money must have actually been used toward the purchase of the property. *See Bingham v. Lee*, 266 N.C. 173, 179, 146 S.E.2d 19, 23

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(1966) (stating that “it is essential to the creation of such a trust that the money or assets furnished by or for the person claiming the benefit of the trust should enter into the purchase price of the property at or before the time of purchase.” (quoting *Vinson v. Smith*, 259 N.C. 95, 98, 130 S.E.2d 45, 48 (1963))). If plaintiff were required to make her payment before or at the time of the delivery of the deed, her resulting trust claim would fail because the down payment came entirely from defendant’s funds.

That leaves plaintiff needing to allege that she and defendant had an agreement at the time the property was purchased that plaintiff would make payments over time toward the purchase price. This she did in her verified complaint:

9) Plaintiff and Defendant went to view the Arrowood . . . property and decided to make an offer to purchase said real estate. The parties discussed the fact that the property would be “theirs” and that they each would share an equal interest in said property.

10) Plaintiff and Defendant agreed that they would present an offer to Mr. Thomas wherein they would make a down payment on said residence and then offer to finance the purchase of the property with Mr. Thomas over a ten year period at the cost of \$260.00 per month. As part of the decision to make such an offer to Mr. Thomas, Defendant agreed to make the down payment and Plaintiff promised to pay to Defendant \$160.00 per month towards the \$260.00 per month ten-year obligation.

If these facts were taken as true, a finder of fact could reasonably determine that plaintiff and defendant had an agreement to purchase the property together and that plaintiff was entitled to some share of the property. Summary judgment would then be inappropriate. “Summary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no recovery.” *Hudson v. All Star Mills*, 68 N.C. App. 447, 450, 315 S.E.2d 514, 516, *disc. review denied*, 311 N.C. 755, 321 S.E.2d 134 (1984).

The statute of frauds, as set out in G.S. § 22-2, is no bar to plaintiff’s recovery under a resulting trust claim. It has long been established that the statute of frauds does not apply to resulting trusts. *See, e.g., Hoffman v. Mozeley*, 247 N.C. 121, 123-24, 100 S.E.2d 243, 245-46 (1957) (citing *Greensboro Bank & Trust Co. v. Scott*, 184 N.C. 312, 114 S.E. 475 (1922)). As such, the trial court’s grant of summary

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judgment on plaintiff's resulting trust claim must be reversed and the case remanded for a new trial to determine whether an agreement existed under which plaintiff's monthly payments were actually used toward the purchase of the Arrowood property.

B. Constructive Trust

[7] As appellee, plaintiff addresses in a cross-assignment of error the trial court's failure to present the issue of constructive trust to the jury. Unlike a resulting trust, a constructive trust "arises when one obtains the legal title to property in violation of a duty he owes to another. Constructive trusts ordinarily arise from actual or presumptive fraud and usually involve the breach of a confidential relationship." *Fulp v. Fulp*, 264 N.C. 20, 22, 140 S.E.2d 708, 711 (1965). Plaintiff herself notes that the parties are entitled to no presumption of a confidential relationship upon the evidence presented. If, however, plaintiff can provide evidence of a confidential relationship and fraud, a jury instruction on remand regarding constructive trusts might be appropriate.

C. Unjust Enrichment / Quantum Meruit

[8] Finally, plaintiff raises the issue of unjust enrichment in her only remaining cross-assignment of error argued in her brief as appellee. Plaintiff notes that "[t]he trial court presented the issue of restitution to the jury in issues 4 and 5" and that "[t]he instructions the judge gave the jury regarding restitution are similar to those needed to make a finding of unjust enrichment or quantum meruit" The jury did not reach these issues because it was not required to after answering in the affirmative to the first three issues proposed; as such, plaintiff was not prejudiced on this point at trial. Plaintiff's cross-assignment of error on this point is overruled. At the new trial, this issue should not arise since both resulting and constructive trusts may be imposed to prevent unjust enrichment.

In summary, the result reached by the trial court awarding plaintiff a one-half share in the Arrowood property may have been correct and may be the result reached at a new trial. It cannot now stand on the contract theory on which it was based because the alleged contract violates the statute of frauds. Plaintiff brought her case on equitable theories and, having no remedies at law, it should be tried on those theories where appropriate. As such, we reverse and remand for a new trial consistent with this opinion.

ENERGY INVESTORS FUND, L.P. v. METRIC CONSTRUCTORS, INC.

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Reversed and remanded.

Chief Judge EAGLES and Judge HUNTER concur.

ENERGY INVESTORS FUND, L.P., PLAINTIFF v. METRIC CONSTRUCTORS, INC.,
KVAERNER ASA, KVAERNER ENVIRONMENTAL TECHNOLOGIES, INC.,
METRIC/KVAERNER FAYETTEVILLE, J.V., J.A. JONES, INC., AND LOCKWOOD
GREENE ENGINEERS, INC., DEFENDANTS

No. COA98-962

(Filed 15 June 1999)

Jurisdiction—standing—action by limited partner for injuries to partnership

The trial court correctly dismissed plaintiff's claims for negligence, negligent misrepresentation, and breach of warranty for lack of standing where plaintiff, one of several limited partners, alleged that it had relied on representations by defendants in investing in the limited partnership and that defendants caused the project to fail and plaintiff to lose its investment. The proper analysis of plaintiff's standing requires analogy to the law of shareholders, which allows the special duty and unique injury exceptions to the general rule that a shareholder cannot sue a third party for causing harm to the corporation. The complaint, taken as true, did not allege facts from which one might reasonably infer a special duty between defendants and this particular limited partner, and the damages of which plaintiff complains are common to all of the partners.

Judge HORTON dissenting.

Appeal by plaintiff from order entered 10 February 1998 by Judge Knox V. Jenkins in Cumberland County Superior Court. Heard in the Court of Appeals 31 March 1999.

Adams Kleemeier Hagan Hannah & Fouts, by W. Winburne King, III, and R. Harper Heckman; and Gadsby & Hannah LLP, Boston, Massachusetts, by Richard K. Allen and Michael B. Donahue, for plaintiff-appellant.

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Moore & Van Allen, PLLC, by Gregory J. Murphy and Alan W. Pope; and Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by H. Gerald Beaver, for defendant-appellees Metric Constructors, Inc., Kvaerner ASA, Kvaerner Environmental Technologies, Inc., Metric/Kvaerner Fayetteville, J.V., and J.A. Jones, Inc.

Murray, Craven, Inman & McCauley, L.L.P., by Richard T. Craven; and Gibbes, Gallivan, White & Boyd, P.A., Greenville, South Carolina, by Frank H. Gibbes, III, and Stephanie H. Burton, for defendant-appellee Lockwood Greene Engineers, Inc.

LEWIS, Judge.

Plaintiff Energy Investors Fund, L.P. (“EIF”), is a limited partner in BCH Energy Limited Partnership (“BCH”), a Delaware limited partnership organized to develop “waste-to-energy” projects in North Carolina. During 1992 and 1993, BCH was planning to construct and operate a project in Cumberland and Bladen counties that would receive waste from several counties, incinerate it, and thereby generate steam and electricity. Plaintiff alleges that several times in 1992 and 1993 defendants represented to plaintiff and others that defendants had knowledge and experience to allow them to design and construct the facility to meet performance criteria. These representations allegedly were made after the formation of BCH, but before plaintiff had invested funds in the project. Plaintiff claims that it relied on these representations, which allegedly were made to induce investment in the project, and invested over \$16 million in the project. Plaintiff further contends that defendants did not in fact have such expertise or ability and that defendants designed and constructed the facility in a negligent fashion. Plaintiff alleges that defendants caused the project to fail to meet performance criteria and plaintiff to lose its investment.

Plaintiff asserted claims against defendants for negligence, negligent misrepresentation, and breach of warranty. The trial court dismissed all claims after determining that plaintiff “lack[ed] standing to assert claims against the Defendants” and that plaintiff failed to state a claim upon which relief might be granted. Plaintiff appeals from the order of dismissal, and we affirm.

Plaintiff is one of several limited partners in a limited partnership. We believe that the proper analysis of plaintiff’s standing in this

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case requires analogy to our law of shareholders. Our Supreme Court recently outlined the circumstances under which a shareholder may sue for injuries to his corporation. The Court adopted two exceptions to the general rule that a shareholder cannot sue a third party for causing harm to the corporation and held:

[A] shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself.

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 658-59, 488 S.E.2d 215, 219 (1997).

To proceed under the special duty exception, a plaintiff “must allege facts from which it may be inferred that defendants owed plaintiff[] a special duty.” *Id.* at 659, 488 S.E.2d at 220. The special duty must be one owed to the shareholder, separate and distinct from any duty owed to the corporation. *See id.* Special duties have been found when, for instance, a third party advised shareholders separately from the corporation, a third party induced the shareholder to buy stock in the first place, and a third party violated its fiduciary duty to the shareholder. *See id.*, (citing *Bankruptcy Estate of Rochester v. Campbell*, 910 S.W.2d 647, 652 (Tex. Ct. App. 1995), *aff’d in part, rev’d in part sub nom. Murphy v. Campbell*, 964 S.W.2d 265 (Tex. 1997); *Howell v. Fisher*, 49 N.C. App. 488, 498, 272 S.E.2d 19, 26 (1980), *disc. review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981); and *FTD Corp. v. Banker’s Trust Co.*, 954 F.Supp. 106, 109 (S.D.N.Y. 1997)). In *Barger*, the plaintiff shareholders personally guaranteed corporate loans after asking an accounting firm whether the corporation was financially solvent and being assured that it was. When the corporation thereafter went bankrupt, the shareholders sued the accounting firm, both for the diminished value of their investment as shareholders and for their losses as guarantors of the loans. The Court held that the plaintiffs had alleged no special duty as shareholders because “[a]ll of the allegations indicate that any duty defendants owed plaintiffs was purely derivative of defendants’ duty to provide non-negligent services to [the corporation].” *Id.* at 660, 488 S.E.2d at 220. However, as in *Howell*, the plaintiffs as guarantors could sue the accounting firm since the plaintiffs alleged they were

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induced, separately from any duty defendants owed the corporation, to guarantee the loans. *See id.* at 662, 488 S.E.2d at 222.

To proceed under the distinct injury exception, a plaintiff must allege an injury that is “peculiar or personal to the shareholder.” *Id.* at 659, 488 S.E.2d at 220. A plaintiff must allege “an individual loss, separate and distinct from any damage suffered by the corporation.” *Howell*, 49 N.C. App. at 492, 272 S.E.2d at 23. In *Barger*, the plaintiffs as shareholders suffered “precisely the injury suffered by the corporation” and so were precluded from recovering their lost investment. *See Barger*, 346 N.C. at 659, 488 S.E.2d at 220.

Because this case comes to us as a result of a motion to dismiss, we must view the facts alleged in the complaint as true. *See McAllister v. Ha*, 347 N.C. 638, 640, 496 S.E.2d 577, 579-80 (1998). Plaintiff here alleges that defendants negligently performed their engineering duties, negligently misrepresented their ability to build the project, and breached warranties regarding the project. Plaintiff was a limited partner in a limited partnership formed to build and operate the project and already was a partner at the time of each of the alleged bad acts of defendants. The complaint alleges defendants “communicated with, *among others*, representatives of EIF,”; “intended EIF, *among others*, to rely on such representations,”; and made representations “intended for the Project’s investors, *including but not limited to EIF*” (emphasis added).

However, nowhere does the complaint allege facts from which one might reasonably infer a special duty existed between defendants and this particular limited partner. To the contrary, the complaint alleges representations made to plaintiff and others, after plaintiff was a partner. None of the types of special duty noted by the *Barger* court are indicated by the facts as pled. *See Barger*, 346 N.C. at 659, 488 S.E.2d at 220. Furthermore, the damages—loss of its investment—of which plaintiff complains, are common to all of the partners. That different partners invested different amounts does not qualify as a unique injury; to hold otherwise would eviscerate the general rule in all cases except those where partners or shareholders invest exactly equal amounts. Because plaintiff fails to allege facts sufficient to infer either exception under *Barger*, plaintiff has no standing to bring this action.

Plaintiff’s reliance on *Howell* is misplaced. In *Howell*, a geologist hired by a mining corporation told plaintiffs before they were shareholders that land the corporation intended to mine was favorable for

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mining. *See Howell*, 49 N.C. App. at 489-90, 272 S.E.2d at 21. The complaint in *Howell* alleged that the defendant geologist told plaintiffs, “[A]n investment in the capital stock of Howell would be a good investment and would return a substantial profit to the investor.” *Id.* at 490, 272 S.E.2d at 21. Plaintiffs thereafter bought stock. In holding that the corporation was not a necessary party in an action between plaintiffs and the geologist, we concluded that plaintiffs stated an individual claim in negligence against the geologist. *See id.* at 498, 272 S.E.2d at 26. We noted that a derivative action was not possible because when the alleged negligence occurred, plaintiffs were not yet shareholders. *See id.* We held that the corporation was not a necessary party when plaintiff shareholders allege misrepresentation “before they were stockholders for the purpose of inducing their investment.” *Id.* (emphasis added). Plaintiff here, however, was already a partner when each of defendants’ alleged bad acts occurred.

Plaintiff also points to *Browning v. Levien & Co.*, 44 N.C. App. 701, 262 S.E.2d 355, *disc. review denied*, 300 N.C. 371, 267 S.E.2d 673 (1980), pulling sentences from separate paragraphs to support its position that plaintiff here has standing. In *Browning*, limited partners in a partnership formed to build an apartment complex sued an architect for negligence in overcertifying work by the contractor. They sued “on their own behalf and in the alternative, derivatively on behalf of the Partnership.” *Id.* at 703, 262 S.E.2d at 357. At the time of the suit, both general partners were bankrupt, and the partnership had been dissolved. *See id.* at 704, 262 S.E.2d at 357. We first held that the limited partners’ right to a dissolution did not include a right to sue on behalf of the limited partnership. *See id.* We noted that the limited partners were suing for damages to their own interest, so they had no real need to sue on behalf of a defunct entity. *See id.* We next held that the defendant architect could have reasonably foreseen that the individual plaintiffs would rely on the certifications. *See id.* at 705, 262 S.E.2d at 358. Although not expressly stated, this holding is tantamount to a determination that defendant had a special duty to the plaintiffs. Therefore, we said, “The plaintiffs have standing to bring this action.” *Id.*

Browning’s facts differ greatly from the facts of this case, as the partnership in *Browning* had been dissolved prior to the lawsuit. There was no risk of double recovery to the plaintiff partners in *Browning* as there is under the facts of this case. We believe the *Barger* exceptions are limited in scope to allow a shareholder to

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recover for unique injuries, whether unique in how they occurred or unique in type. The exceptions prevent, however, a shareholder or limited partner from recovering twice for the same injury—once as a shareholder or partner and once individually—when the injury suffered is of the same type and suffered in the same manner as the injury to all other shareholders or partners. This philosophy was served in *Browning* as it is by our holding here.

Plaintiff fails to set forth any allegations which, even taken as true, support a special duty between it and defendants or support an injury unique compared to the injury suffered by other limited partners. Plaintiff does not allege it was induced to become a partner by defendants, *see Howell*, nor does it allege a contract between defendants and plaintiff, nor does it allege defendants advised plaintiff separately from the partnership as a whole or its other members. *See Barger*, 346 N.C. at 659, 488 S.E.2d at 220. Plaintiff alleges an injury common to all limited partners but alleges no special duty. Plaintiff therefore lacks standing to sue the third party on its own behalf. *Accord, Kenworthy v. Hargrove*, 855 F. Supp. 101, 106 (E.D. Pa. 1994) (approving cases from New York requiring a limited partner who alleges acts against the limited partnership that diminished the value of his interest to sue derivatively).

Because plaintiff lacks standing to assert individual claims against defendants, we need not reach the other assignments of error.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge HORTON dissents.

Judge HORTON dissenting.

The focal point of this appeal is whether plaintiff, one of a number of limited partners in a Delaware limited partnership, has standing to assert claims for its allegedly individual injuries. I agree with the majority that it is appropriate to refer to North Carolina case law concerning the standing of shareholders in a corporation to bring individual claims arising from corporate losses. As a general rule, a stockholder may not sue for injuries to his corporation nor may a limited partner sue for injuries to its general partner which results in

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diminution or destruction of the value of its investment. *Jordan v. Hartness*, 230 N.C. 718, 719, 55 S.E.2d 484, 485 (1949). Our Supreme Court has, however, recently reaffirmed two broad exceptions to the general rule:

There are two major, often overlapping, exceptions to the general rule that a shareholder cannot sue for injuries to his corporation: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders. We adopt these exceptions to the general rule and hold that a shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself.

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 658-59, 488 S.E.2d 215, 220 (1997) (citations omitted). The two exceptions are stated in the disjunctive, so that if plaintiff proves that defendants owe it a "special duty," it is not necessary that plaintiff also prove that its injury is distinct from the injury sustained by other shareholders or by the corporation.

This appeal is not before us in a summary judgment or trial context, but on a motion to dismiss. This Court has frequently stated the appellate standard of review of a grant of a motion to dismiss as follows:

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim. In ruling upon a Rule 12(b)(6) motion, *the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim.*

Arroyo v. Scottie's Professional Window Cleaning, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995) (citations omitted) (emphasis

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added), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996).

Here, plaintiff alleged that defendants owed it a “special duty” because defendants induced plaintiff’s \$16 million investment in the project by misrepresenting their expertise and experience in planning and constructing similar projects to plaintiff, and by assuring plaintiff that the plant would be constructed to meet designated performance criteria, when in fact defendants did not have such specialized ability and experience. Plaintiff further alleged that defendants’ misrepresentations were made to induce plaintiff to invest in the project, that plaintiff relied on defendants’ misrepresentations, and did invest heavily in the project. Treating those allegations as true, as we must, plaintiff has clearly alleged sufficient facts to demonstrate that defendants owed it a special duty. Certainly, we cannot say “to a certainty” that plaintiff is entitled to no relief based on its allegations.

The majority seem to say that there is no “special duty” owed plaintiff by defendants because plaintiff was already a member of BCH, the limited partnership, when it invested in the project in question. However, plaintiff’s claim is not based upon misrepresentations which caused it to become a partner in BCH, but upon misrepresentations which caused it to invest an additional \$16 million in this energy conversion project. In *Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1980), *disc. review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981), we held in part that “a corporation is not a necessary party when stockholders seek damages in their own right for negligent misrepresentations made to them before they were stockholders for the purpose of inducing their investment.” *Id.* at 498, 272 S.E.2d at 26. While the *Howell* plaintiffs were not shareholders before the misrepresentations of those defendants, I see no logical distinction between the misrepresentations which induced them to purchase stock in an existing corporation and those which induced plaintiff in the case before us to make an additional substantial investment in the limited partnership to fund defendants’ energy conversion project.

In further support of its position that it may bring a separate action in its own behalf, plaintiff relies on *Browning v. Levien & Co.*, 44 N.C. App. 701, 262 S.E.2d 355, *disc. reviews denied*, 300 N.C. 371, 267 S.E.2d 673 (1980). *Browning* was an action by limited partners in a development consortium who sued an architect and other defendants to recover their lost investment. The *Browning* plaintiffs brought suit on behalf of themselves and on behalf of the limited part-

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nership. This Court held that the limited partners had no standing to sue in the name of the limited partnership because N.C. Gen. Stat. § 59-26 as then written prevented limited partners from instituting an action on behalf of the limited partnership of which they were members. *Id.* at 703, 262 S.E.2d at 357. However, the limited partners could maintain the action to recover their individual investments:

In this case the plaintiffs are suing for damages to *their interest in the partnership* based on the negligence of the defendants. There is no necessity that they be allowed to sue on behalf of the limited partnership.

Id. at 704, 262 S.E.2d at 357 (emphasis added). N.C. Gen. Stat. § 59-26 has since been repealed, and limited partners can now bring a derivative action on behalf of the limited partnership under certain limited circumstances. *See* N.C. Gen. Stat. § 59-1001 (1989).

In addition, N.C. Gen. Stat. § 59-1006 also seems to recognize that limited partners have rights individual to them in addition to the right to bring derivative actions. It provides that “[t]he provisions of this Article shall not be construed to deprive a partner of whatever rights of action he may possess *in his individual capacity.*” *Id.* (emphasis added). We further note that *Browning* was decided in 1980, and that the General Assembly has not seen fit to change its result by statutory amendment. The Revised Uniform Limited Partnership Act was enacted by the 1985 Session Laws (Regular Session 1986), but did not change the *Browning* result. *See generally*, N.C. Gen. Stat. § 59-101, *et. seq.* (1989).

Finally, the majority are also concerned that plaintiff might receive a double recovery if allowed to bring a separate action. Initially, defendants moved to dismiss the complaint in this matter pursuant to Rules 12(b)(7), 17, and 19 on the grounds that plaintiff failed to join BCH as a necessary party and that plaintiff is not the real party in interest, in addition to the Rule 12(b)(6) grounds of failure to state a claim. Defendants further argued that the action should be abated because substantially similar actions involving the same parties, issues, and relief sought in this case are pending in a court of competent jurisdiction. The trial court, however, did not rule on defendants’ contentions that BCH should have been joined as a necessary party and that plaintiff is not the real party in interest or defendants’ contention that this action should be abated because of prior pending actions. Unfortunately, those issues are not properly before us, and we may not consider them.

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Although the majority do not reach the issue, I have carefully considered the allegations of the complaint, and conclude that plaintiff alleged sufficient facts to state claims against defendants for negligence, negligent misrepresentation, and breach of warranty. I respectfully dissent, therefore, from the holding of the majority that plaintiff has not alleged sufficient facts to demonstrate that it has standing to pursue its claims. I vote to reverse the decision of the trial court and to remand the matter to the trial court with directions to rule on defendants' remaining motions.

STATE OF NORTH CAROLINA v. JEFFREY CLIFTON CAMPBELL

No. COA98-654

(Filed 15 June 1999)

1. Indictment and Information— date of offense—correction

The trial court did not err in a prosecution for a first-degree burglary and first-degree statutory rape by granting the prosecution's motion to correct the date of the offenses. Time is not an essential element of these crimes, defendant was obviously aware that the date on the indictment was incorrect, defendant was neither misled nor surprised as to the nature of the charges, and there was no evidence of an alibi or any other defense wherein time would be material.

2. Confessions and Incriminating Statements— defendant not in custody—Miranda warnings not required

A defendant in a burglary and statutory rape prosecution was not in custody and Miranda warnings were not required where defendant took affirmative steps to contact the police after they contacted him and made an appointment to meet at the police station at a time convenient to him; defendant arrived at the station under his own volition and agreed to speak with the officers; at no time was he searched, handcuffed, or restricted in his movement; officers told him he was free to leave before questioning began; he was told on at least four occasions during questioning that he was free to leave and asked whether he understood; he replied in the affirmative each time; these exchanges occurred before defendant spoke with the officers, before he incriminated himself, and before he wrote the confes-

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sion; and defendant left the station alone at the end of the interview. Finding that defendant was not in custody is independent of finding that he voluntarily gave his statement.

3. Confessions and Incriminating Statements— confession—voluntary

A defendant's confession to first-degree burglary and first-degree rape was voluntary where defendant voluntarily went to the police station; he was neither deceived nor held incommunicado, nor were there oral or physical threats or shows of violence against him; officers told defendant that it would "be best if he cooperated," but no promises were made; while one detective was larger than defendant, that factor does not indicate that defendant would be threatened; the choice of a detective of the same sex and race as defendant to interrogate him may have been "manipulative," but defendant did not show that this had any bearing on inculcating hope or fear in defendant; and there was no indication that defendant was under the influence of impairing substances or that his mental capacity was debilitated.

4. Criminal Law— prosecutor's argument—defendant as "sexual predator"

There was no error in a prosecution for first-degree burglary and first-degree statutory rape where the prosecutor in closing arguments labeled defendant a "sexual predator." The use of the term was slight and was confined to one paragraph of the argument; given the abundance of evidence indicating guilt, including defendant's confession, there is no reasonable possibility that this characterization of defendant may have affected the verdict.

5. Evidence— prior crime or act—prior burglaries—rape victim's demeanor—admissible

The trial court did not err in a prosecution for first-degree burglary and first-degree statutory rape by allowing testimony regarding previous burglaries to the home and the victim's demeanor after the rape. The testimony of the victim's mother about her suspicion that defendant was involved in recent burglaries at her home, and a detective's repetition of the statements, were admissible to show opportunity, preparation, knowledge, identity, and absence of mistake, entrapment, or accident. The statements regarding the victim's demeanor after the rape are directly relevant as to whether the rape occurred.

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6. Burglary and Unlawful Breaking or Entering— misdemeanor breaking or entering as lesser included offense— instruction refused

The trial court did not err in a prosecution for first-degree burglary by refusing to instruct on the lesser include offense of misdemeanor breaking or entering where the State clearly established each of the elements of first-degree burglary and there was no evidence showing the commission of a lesser included offense.

7. Discovery— prosecution's failure to disclose exculpatory evidence—no prejudice

There was no prejudicial error in a prosecution for first-degree burglary and first-degree rape from the State's failure to disclose hair samples taken from the crime scene and photographs of the victim's bathroom window. The district attorney did not have DNA analysis performed on the hair samples, so that their inculpatory or exculpatory nature is unknown and the information that the bathroom window was possibly the point of entry, which contradicts defendant's confession, was in evidence through other testimony. Moreover, defendant's confession and the overwhelming evidence against him vastly diminish the effect of the photographs and hair samples.

8. Sentencing— structured—presumptive range—evidence of mitigating factors—no evidence of aggravating factors

The trial court did not abuse its discretion by sentencing defendant within the Structured Sentencing presumptive range where there was evidence of several mitigating factors, but no aggravating factors. A trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation.

Appeal by defendant from judgment entered 12 December 1997 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 24 February 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Amy R. Gillespie, for the State.

William H. Leslie for defendant-appellant.

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HUNTER, Judge.

Defendant was convicted of first-degree burglary and first-degree statutory rape of a fifteen-year-old female ("victim").

The State's evidence at trial indicated that late on the night of 27 May 1997, the victim awoke to find a male assailant in her bed attempting to strangle her. The victim begged for the assailant to let her go, whereupon the assailant covered her mouth, instructed her not to talk, and raped her. He then told the victim that he would kill her and her mother if she told her mother about the incident. The assailant left the room, but returned soon afterwards, looking for his belt. The assailant failed to retrieve his belt and then left the victim's bedroom. Afterwards, the victim went to her mother's bedroom and awakened her.

The victim's mother, Jane Hurrell ("Hurrell"), took the victim to a friend's house and then went to the police station and reported the crime. The next morning, Asheville Police Detective Dawn Dowdle and other officers went to the Hurrell home, where Hurrell showed them the belt she had found in the victim's bedroom. Detective Dowdle learned that Hurrell suspected defendant of the crimes.

Detective Dowdle telephoned defendant's home several times and talked to his mother. She told his mother that she wanted to talk with defendant about a case she was investigating. Detective Dowdle left a message for defendant to call her back. Defendant returned the call, and he and Detective Dowdle scheduled an appointment after she advised him about the case she was investigating.

On 2 June 1997, defendant came to the Asheville Police Station via his own transportation. He arrived early and was escorted to the interview room. Defendant was joined by Detective Dowdle and Detective Forrest Weaver, who were both in plain clothes. When they entered the room, Detective Weaver told defendant that he was free to go, he was not under arrest, and that he could leave at any time. Detective Dowdle explained why she had asked defendant to be interviewed. At some point during the interview, Detective Weaver again told defendant that he was free to go, he was not under arrest, and that he could leave at any time.

During the course of defendant's interview with Detectives Dowdle and Weaver, he claimed to have had a preexisting consensual, sexual relationship with the fifteen-year-old victim. In response, Detective Dowdle told him, "I think you're lying." At that point,

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Detective Weaver asked Detective Dowdle to step out of the room. At trial, Detective Weaver testified that he believed defendant wished to speak to him alone.

After Detective Dowdle left the room, Detective Weaver told defendant again that he was not under arrest and that he was free to go. He asked defendant if he could understand this. Defendant responded in the affirmative. Defendant then began to make a statement concerning the rape of the victim. Detective Weaver stopped him, and asked, "Now, you understand that you are not under arrest, you're free to go?" Defendant again responded in the affirmative. The detective then said, "Go ahead with your statement." Defendant continued to make a verbal confession of the crimes occurring the night of 27 May 1997. Detective Weaver once again asked defendant if he understood that he was not under arrest and that he was free to go. Defendant stated that he understood, and then proceeded to write a statement confessing to the crimes. Detective Weaver did not make defendant any promises about what would happen if he were to confess.

After defendant finished his statement, he left the police station. The entire meeting had lasted approximately thirty minutes. Warrants for defendant's arrest were issued the next day. Defendant was subsequently tried and convicted at the 8 December 1997 session of criminal superior court in Buncombe County. He was sentenced to 103 to 133 months on the charges of first-degree burglary and 336 to 413 months on the charge of first-degree statutory rape, said sentences to run consecutively.

[1] Defendant first assigns error to the trial court's granting the prosecution's motion to correct the date of the offense listed on the indictments from 2 June 1997 to 27 May 1997.

N.C. Gen. Stat. § 15A-923(e) (1997) provides that "[a] bill of indictment may not be amended;" however, "amendment" in this context has been interpreted to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). Where time is not an essential element of the crime, an amendment in the indictment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment. *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994) (*citing Price*, 310 N.C. at 598-99, 313 S.E.2d at 559). A change in an indictment does not constitute an amendment where the vari-

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ance was inadvertant and defendant was neither misled nor surprised as to the nature of the charges. *State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990). In the present case, time is not an essential element of the crime. Defendant was obviously aware that the 2 June 1997 date on the indictment was incorrect for defendant made the appointment to meet with the police, and met with them, on 2 June 1997. Defendant was neither misled nor surprised as to the nature of the charges. While a variance as to time does become material and of essence when it deprives a defendant of an opportunity to adequately present his defense, see *Price*; *State v. Kamtsiklis*, 94 N.C. App. 250, 380 S.E.2d 400, *disc. review denied*, 325 N.C. 711, 388 S.E.2d 466 (1989), the record in the present case indicates that there was no evidence of an alibi defense or any other defense wherein time would be material. We conclude that the change of date in this indictment was not an amendment proscribed by N.C. Gen. Stat. § 15A-923(e). Accordingly, we overrule this assignment of error.

[2] Secondly, defendant contends the trial court erred in admitting his confession on the basis that it was involuntary and the unlawful product of a custodial interrogation, violating *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

The requirement that a suspect be given *Miranda* warnings is triggered when the suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 44, 16 L. Ed. 2d at 706. The United States Supreme Court has recognized that *Miranda* warnings are not required simply because the questioning takes place in the police station or other "coercive environment" or because the questioned person is one whom the police suspect of criminal activity. *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam). The United States Supreme Court has held that an appellate court should consider the totality of the circumstances surrounding the interrogation to determine if a suspect was "in custody;" however, "the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) (citing *Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293 (1994) (per curiam)). For *Miranda* purposes, the test for whether a person is in custody is whether a reasonable person in the suspect's position would feel free to leave or compelled to stay. *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994).

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In the present case, defendant took affirmative steps to contact the police after they contacted him regarding the rape of the victim. He made an appointment to meet Detectives Dowdle and Weaver at the police station at a time convenient to him. He arrived at the station under his own volition and agreed to speak with the police officers. At no time was he searched, handcuffed, or restricted in his movement. Before the officers began questioning defendant, they told him he was free to leave. During the course of questioning, Detective Weaver told defendant that he was free to leave on at least four occasions, and asked him each time whether he understood what he meant. Defendant replied in the affirmative each time. These exchanges occurred before defendant spoke with the officers, before he incriminated himself verbally, and just before he wrote the confession. At the end of the interview, defendant left the station alone.

Defendant relies on the holding in *State v. Harvey*, 78 N.C. App. 235, 336 S.E.2d 857 (1985), where this Court held that a juvenile defendant was in custody when he was questioned by two officers in a closed office; however, the Court also considered the additional factors that defendant was taken far from his home by police officers, subjected to lengthy questioning, was never expressly told that he was not under arrest or that he was free to leave and could end the questioning at anytime, and was seventeen years old with an IQ of 78. *Id.* The additional factors which the Court relied on in *Harvey* are not present in the case *sub judice*. Defendant volunteered to be interviewed, traveled to the police station of his own volition, and was informed on various occasions that he was free to go. No evidence indicated that defendant misunderstood or was unable to understand these statements. Based on the totality of the circumstances, we conclude that a reasonable person in defendant's position would have felt free to leave the police station as explained in *State v. Rose*. Therefore, defendant was not "in custody" and *Miranda* warnings by the police officers were not required; however, this factor is independent of a finding that defendant voluntarily gave his statement.

[3] The Fourteenth Amendment requires that a statement be voluntary in order to be admissible, whether or not *Miranda* warnings are required or given . . . and the State has the burden of proving, by a preponderance of the evidence and examined in context with the totality of the circumstances, that the statement was voluntary. *State v. Corbett*, 339 N.C. 313, 451 S.E.2d 252 (1994). Incriminating statements obtained by the influence of hope or fear are involuntary and thus inadmissible. *See State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92

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(1975); *State v. Roberts*, 12 N.C. 259 (1827) (a confession cannot be received into evidence where defendant has been influenced by any threat or promise). Factors to be considered in a determination of voluntariness are

whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hardy, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (citations omitted). In the present case, the evidence indicates that defendant voluntarily went to the police station and, as previously determined, was not in custody and therefore *Miranda* warnings were not required. He was neither deceived, held incommunicado, nor were there oral or physical threats or shows of violence made against him. While the officers did tell defendant that it would “be best if he cooperated,” no promises were made to obtain his confession. While Detective Weaver’s size was larger than that of defendant, this factor does not indicate that defendant would be threatened by Detective Weaver. Similarly, the choice of Detective Weaver to interrogate defendant because he was of the same sex and race as defendant may have been “manipulative,” but defendant has not shown that this fact had any bearing on inculcating hope or fear to defendant. There was no indication that defendant was under the influence of impairing substances or that his mental capacity was debilitated. Therefore, based on the totality of the circumstances, we hold that defendant’s confession was voluntary and the trial court did not commit error in admitting the confession into evidence.

[4] Defendant also assigns error to the trial court’s overruling his objection to the prosecution labeling him a “sexual predator” in closing arguments. A new trial is required if there is a “reasonable possibility” that the inflammatory or prejudicial characterization may have affected the jury’s verdict. *See State v. Gardner*, 316 N.C. 605, 342 S.E.2d 872 (1986).

Prejudice to the accused can occur when “improper suggestions” and “insinuations” by the prosecutor combine with a case that “may properly be characterized as weak.” *Berger v. United States*, 295 U.S. 78, 89, 79 L. Ed. 1314, 1321 (1935). On the other hand, *Berger* held “[i]f

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the case against [defendant] had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might [have been] reached." *Id.* The Court in *Berger* held: "[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Id.* *Berger* has been adopted and expounded by the North Carolina Supreme Court. See *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

In the present case, the prosecutor's use of the term "sexual predator" was slight, and was confined to one paragraph of the closing argument. Given the abundance of evidence indicating defendant's guilt, most importantly, his confession, we find that there is no reasonable possibility that this lone instance of prejudicial characterization of defendant may have affected the jury's verdict. Accordingly, we find no error.

[5] Next, defendant contends that the trial court erred by allowing testimony by Hurrell and Detective Dowdle regarding previous burglaries to the Hurrell home, and testimony by Hurrell regarding her daughter's demeanor after the alleged rape. Defendant argues that admittance of this evidence was in error, as it was irrelevant and prejudicial.

Rule 404(b) provides:

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. Gen. Stat. § 8C-1, Rule 404(b) (1992). "This rule is a general rule of inclusion of such evidence, subject to an exception if its only probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991).

Hurrell testified that defendant visited her home on several occasions, and that he made the remark that he could possibly retrieve items that had been stolen from her home because he knew people who had "influence" in the area. Hurrell's testimony as to her suspi-

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cion that defendant was involved in recent burglaries at her home, and Detective Dowdle's repetition of those statements were admissible to show proof of opportunity, preparation, knowledge, identity, and absence of mistake, entrapment, or accident. The testimony not only indicated that defendant was familiar with the victim's home, but that he was also familiar with the conduct and schedules of the victim and her mother. The conduct of which Hurrell suspected defendant was essentially the same as that for which he was charged: breaking and entering with the intent to commit a crime. Furthermore, the events were close in time. It is not clear exactly when the burglaries happened, but it is not disputed that the Hurrells had not lived in the house very long before the rape occurred. When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar in nature and close in time to the instant charges. *West*, 103 N.C. App. 1, 404 S.E.2d 191. Detective Dowdle's repetition of Hurrell's statements was simply by way of explaining what Hurrell had told her the day after the crime, and the same 404(b) exception applies. Hurrell's statements regarding her daughter's demeanor after the rape are directly relevant as to whether the rape occurred, and as such, are admissible. Finally, even if any of the statements under defendant's fourth assignment of error were inadmissible, admitting them would have been harmless error. Defendant correctly notes that evidentiary errors are harmless unless defendant proves that absent the error, a different result would have been reached. In light of the other evidence in this case, including defendant's confession, no such finding is available here.

[6] Defendant next contends that the trial court erred by refusing to instruct the jury on the lesser included offense of misdemeanor breaking or entering.

It is not error for the judge to refuse to instruct on the lesser offense "when the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense." *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985). When there was evidence of defendant's intent to commit a felony, and there was no evidence that defendant broke and entered for some other reason, the trial court is correct to refuse to submit the misdemeanor breaking and entering charge to the jury. *State v. Patton*, 80 N.C. App. 302, 341 S.E.2d 744 (1986). In the present case, the State's evidence clearly satisfied each of the elements of first-degree burglary and first-degree

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statutory rape as set out in N.C. Gen. Stat. § 14-51 (1993) and N.C. Gen. Stat. § 14-27.7A(a) (Supp. 1998), respectively. At the same time, there was no evidence showing the commission of a lesser included offense. Defendant argues that there was evidence of a lesser included offense because defendant's intent was simply to have consensual sex with the victim's mother. However, there was no testimony or other evidence that defendant and Hurrell had a positive relationship, let alone a consensual, sexual one. To the contrary, Hurrell testified that defendant made her uncomfortable. Because no substantial evidence of misdemeanor breaking or entering was presented, we find no error.

[7] In his sixth assignment of error, defendant contends that the prosecution failed to disclose potentially exculpatory evidence in violation of the mandate of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). *Brady* stands for the proposition that a defendant's due process rights are violated when the prosecution fails to disclose evidence which may favor defendant, either by tending to show his innocence, or by tending to show mitigating factors that would ameliorate his punishment. *Id.* However, failure to give evidence to the defense violates defendant's right to due process only if the evidence was "material" to the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481 (1985). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682, 87 L. Ed. 2d at 494.

In the present case, neither hair samples taken from the crime scene nor photographs of the victim's bathroom window were turned over to defendant by the prosecution. The district attorney did not have DNA analysis performed on the hair samples. Therefore, their inculpatory or exculpatory nature is unknown. The existence of the hairs, alone, does not directly bear on the question of innocence for assuming *arguendo* that the hair samples came from an individual other than defendant, so this fact merely provides some support for the theoretical possibility that another individual was in the victim's room and was the perpetrator of the crime. While it is the better practice for the prosecution to disclose potentially exculpatory evidence, we find that the hair samples in this case do not rise to the level of materiality defined in *United States v. Bagley*, especially in light of defendant's confession and overwhelming evidence establishing his guilt. Likewise, the photographs show that the perpetrator's point of entry possibly was the bathroom window, which contradicts defend-

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ant's confession wherein he stated he entered the dwelling through the front door. While these photographs may have been exculpatory, the record reveals that this specific information regarding the bathroom window was in evidence through testimony and was therefore available for the jury's consideration. Based on the foregoing, we find that the photographs also do not meet the test of materiality, as defendant has not shown that their disclosure to him would result in a reasonable probability that the outcome of the trial would have been different. As with the hair samples, defendant's confession and overwhelming evidence against him vastly diminish the effect, if any, of these photographs. Therefore, we find no error.

[8] Finally, defendant contends that the court abused its discretion in sentencing defendant within the statutory presumptive range, given that evidence of several mitigating, but no aggravating, factors were presented to the court.

Defendant's sentences were in the presumptive range prescribed by the Structured Sentencing Act, which states, in part:

The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences

N.C. Gen. Stat. § 15A-1340.16(c) (1997). This Court has held that the plain language of the Structured Sentencing Act shows that the "legislature intended the trial court to take into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing." *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997) (emphasis in original). Therefore, a trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation. Because the trial court in the case *sub judice* sentenced defendant within the presumptive range, we find no abuse of discretion.

No error.

Judges MARTIN and TIMMONS-GOODSON concur.

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STATE OF NORTH CAROLINA v. CRYSTAL PENNINGTON OWEN

No. COA98-413

(Filed 15 June 1999)

1. Criminal Law— defenses—spousal coercion—valid

The defense of spousal coercion, though created at a time when women could not testify for themselves and now outdated, has not been abolished by the North Carolina Supreme Court and remains a valid defense.

2. Jury— defenses—spousal coercion—prospective jurors—instruction not given—no prejudice

There was no prejudice in a prosecution for first-degree statutory rape and other offenses when the trial court refused to inform prospective jurors of defendant's affirmative defense of spousal coercion where defendant was able to testify about her fear of her husband and that her husband forced her to participate, the court informed the jury of the presumption of spousal coercion at the close of the trial, and the court instructed the jury on the presumption of spousal coercion twice more during deliberations. N.C.G.S § 15A-1213.

3. Evidence— expert testimony—excluded—no error

The trial court did not abuse its discretion in a prosecution for first-degree statutory rape and other offenses by excluding as too prejudicial the testimony of two defense experts where one had never met defendant and had no knowledge of the events on the day of the rape and the other, called for corroborative purposes, did little to corroborate defendant's claims of physical and sexual abuse or threats of abuse by her husband.

4. Evidence— corroborative testimony—excluded—prejudicial and cumulative

The trial court did not abuse its discretion in a prosecution for first-degree statutory rape and other offenses by excluding corroborative testimony by three defense witnesses regarding defendant's claim of misogynistic behavior and domestic violence by her husband where the trial court conducted a voir dire hearing, suggesting that it carefully weighed the probative value of the evidence against the danger of unfair prejudice, defendant did not mention any physical coercion by her husband when she spoke with the sheriff's department on the day of the rape,

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defendant was able to testify about her fear that her husband would hurt her, and that testimony was corroborated.

5. Rape— accessory—multiple attempts—double jeopardy

The trial court did not err by denying defendant's motion to dismiss on double jeopardy grounds two of three counts of statutory rape. Although defendant argued that the two instances in which defendant's husband attempted to penetrate the eleven-year-old victim and the one incident where he was successful constituted one single continuous incident merging into one criminal act, the victim testified that defendant's husband penetrated her to some degree on three distinct occasions. The slightest penetration constitutes intercourse and the evidence as to each separate act was thus complete and sufficient to sustain three indictments for first-degree rape.

6. Criminal Law— prosecutor's argument—jury nullification—mistrial denied

The trial court did not err in a prosecution for statutory rape and other offenses in which defendant was charged as an accessory to her husband by denying defendant's motion for a mistrial following a closing argument in which the district attorney asked the jury to disregard the common law presumption of spousal coercion. The trial court sustained defendant's objection and gave a curative instruction.

7. Rape— sufficiency of evidence—woman as aider and abettor

The trial court did not err by denying defendant's motion to dismiss charges of first-degree statutory rape against a woman who acted as an aider and abettor to her husband. Even though a woman is physically incapable of committing rape upon another woman, she may still be convicted of rape if she aids and abets a male assailant and, viewing the evidence in the light most favorable to be State, defendant was an active participant in the rape by her husband of this victim.

8. Appeal and Error— defective indictment—no assignment of error—not considered

An argument that an indictment was defective was deemed abandoned because it was not set out in an assignment of error.

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Appeal by defendant from judgments entered 8 October 1997 by Judge Julius A. Rousseau in Ashe County Superior Court. Heard in the Court of Appeals 6 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Karen E. Long, for the State.

Don Willey for defendant-appellant.

TIMMONS-GOODSON, Judge.

Crystal Pennington Owen (“defendant”) appeals from judgments imposed upon conviction by a jury of one count of first degree statutory rape, two counts of attempted first degree statutory rape, one count of first degree sexual offense and one count of indecent liberties with a minor.

At trial, the State’s evidence tended to show that R.D. (“victim”), an eleven-year old child, was at her grandmother’s house helping pick and sort grapes the morning of 15 September 1996. The grandmother, defendant, defendant’s husband Barry Artie Owen (“husband”), and the couple’s two young children were also present. Defendant was the victim’s step-sister and the husband was the victim’s uncle.

After picking the grapes, defendant told the victim that if she wanted to play with the baby, she should come into the bedroom where the baby, defendant and the husband were located. Once in the bedroom, the victim testified that defendant pulled down her husband’s pants and made the victim touch his penis. When the husband wanted the victim to kiss his penis, she refused and went back to the living room. A short time later, defendant called to the victim to descend into the basement. The victim testified that defendant walked behind her and provided little pushes as they descended the basement stairs.

Once in the basement, the husband put his finger in the victim’s vagina. Then defendant and the husband made the victim lean on a dryer while the husband tried to penetrate her with his penis. The victim went over to a bed in the basement and the husband again attempted to insert his penis into the victim’s vagina to the extent that the victim felt pain. Afterwards, defendant and the victim went upstairs. While the victim went to the bathroom, defendant got some lotion.

Defendant again made the victim go to the basement by “nudging” her down the stairs. The victim then saw the husband sitting on

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a blue chair in the basement. The victim resisted going over to him, but testified that defendant made her go to the husband. Defendant told the victim to pull down her pants and then rubbed lotion on both the victim and the husband. The victim testified that defendant and the husband then sat her on the husband's lap. The victim testified that defendant held her hand over her mouth while the husband penetrated her. At this point, the victim felt a great deal of pain, her belly hurt and she felt like she had gone to the bathroom.

When the victim went upstairs to the bathroom, defendant followed her and both saw a great deal of blood in the victim's pants. Defendant took the victim to her trailer and told the victim's mother that she was having her menstrual period. The victim's mother and defendant helped the victim clean herself up. Defendant took the victim's bloody clothing out of the bathroom and ran them next door to the grandmother's house, but quickly returned.

The victim laid on her bed and bled so profusely that she left blood stains on the bed. She changed clothes again. Her mother and defendant went over to the grandmother's house to call the hospital. While they were gone, the victim told her father what had happened. He took her to the car where they met her mother coming back from the grandmother's house. They got in the car and as they were driving, the father told the mother what happened. When the mother asked the victim why she had not called out, the victim told her that defendant had held her hand over her mouth. The victim's parents stopped first at the sheriff's department to report the rape and then went to Ashe Memorial Hospital.

At the hospital the victim was seen by an emergency room doctor and a detective who had arrived from the sheriff's department. The emergency room doctor testified that on physical examination, the victim was too physically immature to have had her menstrual period. Because the bleeding was uncontrolled and the victim was traumatized, she was sent to the Watauga Medical Center ("WMC") where she immediately underwent surgery to repair the trauma. The treating surgeon at WMC testified that he estimated that the victim lost 20-25% of her blood volume before he repaired the tears to her body which had ruptured several blood vessels.

The victim's mother and two sheriff's detectives corroborated the victim's testimony. The second sheriff's detective testified that he had recovered bloody clothing and taken pictures of the bed and the blue chair in the grandmother's basement and had taken pictures of blood

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at the grandmother's house. These pictures were admitted into evidence. He also testified that defendant had given him a statement early the next morning after the rape in which she basically corroborated the victim's testimony. Defendant stipulated that the victim's blood was found on the husband's jeans.

Defendant's trial testimony was consistent with her initial statement to the investigating detective except for one major difference. Defendant testified that she assisted her husband because she was afraid he would hurt both her and the victim more than he was already hurting them. In her statement made the night and early morning after the rape, she said nothing about being afraid of her husband. At trial, defendant's mother also testified that defendant had told her that the husband had forced her to help rape the victim.

On 15 September 1996, defendant and her husband were charged with raping the victim. The prosecutor moved to join for trial the cases involving defendant and her husband. On 12 March 1997 defendant filed pre-trial motions for a severance of the cases, a complete recordation of the proceedings, jury instruction on the common law presumption of spousal coercion and dismissal of the charges on constitutional, statutory and common law grounds. The trial court granted defendant's motions for complete recordation and severance of her trial from the trial of her husband.

On 6 October 1997, the case was tried with a jury. Defendant was convicted and sentenced to 240 to 297 months for the first degree rape conviction, 135 to 171 months for the attempted rapes, 240 to 297 months for the sexual offense and 16 to 20 months for indecent liberties with a child. Defendant appeals the convictions.

[1] Defendant first contends that the trial court erred in refusing to advise prospective jurors of defendant's common law affirmative defense of spousal coercion. The State counters that the trial court did not err, because spousal coercion is no longer a valid affirmative defense in this State.

The presumption of spousal coercion is a common law principle which states that "when a wife commits certain crimes in the presence of her husband, it is presumed, in the absence of evidence to the contrary, that she did so under his coercion." *State v. Smith*, 33 N.C. App. 511, 517, 235 S.E.2d 860, 864 (1977). This presumption is a judicially created rule of evidence established by the courts to protect married women at a time when they could not testify for themselves.

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See id. at 519, 235 S.E.2d at 866; *State v. Seahorn*, 166 N.C. 373, 81 S.E. 687 (1914). However, this presumption came under intense scrutiny and criticism as the fight for women's rights have expanded and gained significant ground. *Id.* at 518, 235 S.E.2d at 865.

As a result of the advancements in the rights of women, in *Smith*, this Court suggested that North Carolina abolish the presumption of spousal coercion because it had long outlived its necessity and usefulness. “[W]hen it is shown that a married woman commits a crime in the presence of her husband, she should no longer be entitled to a presumption in her favor that she was compelled to so act.” *Id.* This view was espoused by Chief Justice Walter Clark as early as 1914 in *Seahorn*. In his concurring opinion, Chief Justice Clark wrote, “[a]t common law there was a presumption that when a crime was committed by the wife in the presence of her husband, she acted under compulsion; but that presumption does not comport with Twentieth Century conditions. The contention that a wife has no more intelligence or responsibility than a child is now out of date.” *Seahorn*, 166 N.C. at 378, 81 S.E. at 689.

Justice Clark's view is undoubtedly relevant today. We share his opinion that the presumption of spousal coercion is outdated. While we are not holding that a wife may never be coerced by her husband to commit an illegal act, we believe that no presumption of coercion should exist and that she must demonstrate, as others would be required, that the crime was committed under duress. However, our Supreme Court has not abolished the presumption of spousal coercion and it is beyond our authority to do so. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). Therefore, we must hold that the affirmative defense of spousal coercion remains a valid defense.

[2] As we conclude that the presumption of spousal coercion remains a valid affirmative defense, we must now address the issue of whether the trial court erred in failing to advise prospective jurors of defendant's claim to this defense. Defendant contends that the presumption exists as a matter of law and the trial court's refusal to so advise the prospective jurors was prejudicial error because it left the jury unaware of the defense's position and theory of the case. Although we agree with defendant that the trial court should have advised the jurors of defendant's defense of spousal coercion, the trial court's refusal to do so did not amount to prejudicial error.

North Carolina General Statutes section 15A-1213 requires the trial judge, prior to the selection of jurors, to inform the prospective

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jurors of “any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice.” N.C. Gen. Stat. § 15A-1213 (1997). The record shows that more than six months prior to trial, defendant filed a pre-trial motion asserting the common law affirmative defense of spousal coercion. In the pre-trial motion defendant requested that the trial court instruct the jury on the presumption that a wife who commits certain crimes in her husband’s presence does so under his coercion and that the State bears the burden of rebutting this presumption. The trial court declined to inform the prospective jurors of the presumption of spousal coercion as an affirmative defense. Therefore, the trial court committed error.

In order for a new trial to be granted, the burden is on the defendant to not only show error but to also show that the error was so prejudicial that without the error it is likely that a different result would have been reached. *State v. Davis*, 110 N.C. App. 272, 277, 429 S.E.2d 403, 406 (1993). In the instant case, the trial court took many curative steps to ameliorate any prejudice defendant may have suffered.

First, defendant was able to testify about how she feared her husband. Defendant was also able to testify that her husband forced her to participate and her fear of her husband made her unable to stop the rape. Second, at the close of the trial, the trial court informed the jury about the presumption of spousal coercion. Lastly, during deliberations, the judge instructed the jury on the presumption of spousal coercion two more times. Based on these curative actions by the trial court, any error committed was sufficiently cured. This assignment of error is overruled.

[3] Defendant next contends that the trial court committed prejudicial error by excluding the testimony of expert witnesses Jennifer Herman and Dr. Ron R. Hood.

According to Rule 702 of the North Carolina Rules of Evidence, expert witness testimony is admissible if it will appreciably help the jury. *State v. Robertson*, 115 N.C. App. 249, 261, 444 S.E.2d 643, 649 (1994). While applying this test, the trial court must balance the probative value of the testimony against its potential for prejudice, confusion, or delay. *Id.* The trial court has wide discretion in determining whether expert testimony is admissible. *Id.* “[A] trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Barts*, 316 N.C. 666, 679, 343 S.E.2d 828, 839 (1986).

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Jennifer Herman, the Executive Director of a non-profit domestic violence corporation, was called by the defense to offer expert testimony concerning the profile evidence or the characteristics of domestic violence victims and predators. Ms. Herman had never met defendant and defendant had never used the domestic violence facilities operated by Ms. Herman. The trial court excluded this evidence, ruling that under Rule 403 the evidence's probative value was outweighed by the possibility of undue prejudice and confusion of the issues. The facts indicate that the trial court properly excluded this evidence since the testimony would have been prejudicial and done little to appreciably help the jury. Ms. Herman did not know defendant and had no knowledge of the events that occurred on the day of the rape.

Dr. Hood, a psychologist hired by the defense, gave defendant a psychological evaluation to measure her intellectual cognitive functioning and her emotional adjustment. Dr. Hood was called to offer expert testimony for corroborative purposes concerning defendant's passive role during the rape of the victim. After a *voir dire* hearing, the trial court ruled that the testimony was too prejudicial and likely to result in a confusion of the issues. While Dr. Hood testified that defendant told him of sexual abuse, he admitted that his research failed to find a specific domestic violence profile. Furthermore, when asked if defendant reported any physical coercion on the part of her husband on the day of the rape, Dr. Hood replied that he did not recall any physical coercion at that time. This testimony does little to corroborate defendant's claims of physical and sexual abuse or threats of abuse at the hands of her husband. Therefore, it was not an abuse of discretion for the trial court to exclude this evidence.

[4] Defendant next contends that the trial court committed reversible error by excluding corroborative testimony of her three witnesses, Polly Pennington Gilbert, Patsy Davis and Angela Pennington, regarding defendant's claims of a history of domestic violence and misogynistic behavior by her husband.

Even when corroborative testimony is admissible, the trial court still must determine whether its probative value outweighs the danger of unfair prejudice to the defendant. *State v. Coffey*, 345 N.C. 389, 404, 480 S.E.2d 664, 673 (1997). Whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge. *Id.* The record reveals that the trial court conducted a *voir dire* hearing suggesting that it carefully weighed the probative value

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of the evidence against the danger of unfair prejudice to defendant. See *State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576, 587 (1997). Additionally, when defendant spoke with the sheriff's department on the day of the rape she never mentioned any physical coercion by her husband. Lastly, defendant was able to testify about her fear that her husband would hurt her on the day of the rape. This testimony was corroborated by Polly Pennington Gilbert during her trial testimony. Any other testimony on this matter would have been purely cumulative and the trial court, in its discretion, could properly decide to exclude all other evidence. Based on these facts, we conclude that the trial court did not abuse its discretion by excluding the testimony with respect to the history of domestic violence and misogynistic behavior by defendant's husband. This argument is overruled.

[5] Defendant next contends that the trial court committed reversible error in denying defendant's motion to dismiss counts two and three of the indictments for first degree statutory rape on double jeopardy grounds. Defendant argues that the two instances that the husband attempted to penetrate the victim and the one incident where the husband successfully penetrated the victim constituted one single continuous incident merging into one criminal act. Thus, her conviction for two counts of attempted rape and one count of rape on a theory of aiding and abetting her husband in a single act of vaginal intercourse is a violation of the provisions of the North Carolina and United States Constitutions. This argument lacks merit.

Upon a motion to dismiss, the evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference that can be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Contradictions and inconsistencies in the evidence are to be resolved in favor of the State. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984). First degree rape is "vaginal intercourse [w]ith 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. Gen. Stat. § 14-27.2(a)(1) (1993). The force necessary to constitute an element of the crime of rape need not be actual physical force. The use of force may be established by evidence that submission was induced by fear, duress or coercion. *State v. Midyette*, 87 N.C. App. 199, 201, 360 S.E.2d 507, 508 (1987). "Evidence of the slightest penetration of the female sex organ by the male sex organ is sufficient for vaginal intercourse and the emission of semen need not be shown." *Id.* Each

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act of forcible vaginal intercourse constitutes a separate rape. *Id.* at 202, 360 S.E.2d at 508 (quoting *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985). “[G]enerally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense.” *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987) (quoting 75 C.J.S. *Rape* § 4).

In the instant case, the victim testified that defendant’s husband penetrated her vagina, to some degree, with his penis on three distinct occasions. Even though defendant’s husband did not fully penetrate the victim until his third attempt, the slightest penetration would still constitute vaginal intercourse. Thus, the evidence as to each separate act of intercourse with a minor was complete and sufficient to sustain three indictments for first degree rape. Therefore, under *Midyette*, each of the three acts of vaginal intercourse with the victim was a separate rape and defendant was properly indicted for all three offenses. Defendant’s motion to dismiss counts two and three of the indictments for first degree rape were properly denied.

[6] Defendant next contends that the trial court committed prejudicial error in denying defendant’s motion for mistrial following the State’s closing argument requesting jury nullification. During closing arguments, the district attorney for the State asked the jury to disregard the common law presumption of spousal coercion because the law was antiquated. The defense objected to the State’s argument to ignore the law. The trial court sustained the objection and gave a curative instruction to the jury. The defense then moved for a mistrial. The trial court denied the motion. This assignment of error is rejected as the trial court’s instruction to the jury cured any prejudice to defendant.

[7] Finally, defendant contends that the trial court erred in denying defendant’s motion to dismiss because the State has failed to meet the necessary elements to support a first degree rape charge. Specifically, defendant contends that a female, under the statutorily defined crime of first degree rape, cannot rape another female. The State counters that defendant, as an aider and abettor to the rape, was equally as guilty as the actual perpetrator. We agree with the State.

An aider or abettor is defined as a “person who is actually or constructively present at the scene of the crime and who aids, advises,

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counsels, instigates or encourages another to commit the offense.” *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). A person who is present, aiding and abetting in a rape actually perpetrated by another is equally guilty with the actual perpetrator of the crime. *State v. Martin*, 17 N.C. App. 317, 318, 194 S.E.2d 60, 61 (1973). Even though a woman is physically incapable of committing rape upon another woman, she may still be convicted of rape if she aids and abets a male assailant in the rape of another woman. *Id.*

Viewing the evidence in the light most favorable to the State, the evidence shows that defendant was an active participant in the rape by her husband of the victim. Defendant pushed the victim down the stairs into the basement. Defendant forced the victim to go to the husband. Defendant ordered the victim to take off her clothes. Defendant, along with her husband, placed the victim on the husband’s lap and held her hand over the victim’s mouth while the husband penetrated the victim. The trial court properly denied the motion to dismiss.

[8] We decline to examine defendant’s argument that the indictment was defective, because the scope of appellate review is limited to a consideration of those assignments of error set out in the record. Defendant has no assignment of error relating to a defective indictment, therefore, this argument is deemed abandoned. N.C.R. App. P. 10(a).

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

No error.

Judges LEWIS and WALKER concur.

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EARL RAY CAMP, AND WIFE JOYCE DIANNE CAMP, PLAINTIFFS V. MITCHELL H. LEONARD, AND WIFE, KIMBERLY B. LEONARD, D/B/A MITCH LEONARD CONSTRUCTION, AND INDUSTRIAL FEDERAL SAVINGS BANK, DEFENDANTS

No. COA98-588

(Filed 15 June 1999)

1. Appeal and Error— appealability—interlocutory order— judgment for fewer than all defendants

An appeal from a summary judgment for some of the defendants in an action arising from the construction of a house was interlocutory but appealable where the same factual issues applied to all claims against the various defendants; many of the elements and the amount of damages alleged are identical in all counts against all parties; and several different proceedings may bring about inconsistent verdicts relating to the cause of plaintiffs' injuries.

2. Construction Claims— contractor's wife—no benefits received—summary judgment

The trial court did not err by granting summary judgment for defendant Mrs. Leonard on causes of action for breach of contract to sell land, unfair trade practices, breach of contract to build a dwelling house, and other claims arising from the construction of a house where Mrs. Leonard signed the warranty deed but only met plaintiffs briefly at the closing, did not sign the sales contract or construction contract, no evidence indicated that she was involved in her husband's construction business, she was not a partner or joint venturer, all the evidence shows that any funds from the lot sale or building contract went exclusively to her husband, and plaintiffs presented no evidence that defendant Mrs. Leonard received money or any other benefit from either contract.

3. Construction Claims— lender—no duty to inspect progress

The trial court did not err by granting summary judgment for defendant Industrial Federal Savings Bank on claims for breach of contract, breach of a duty of good faith, negligence, conspiracy, unfair trade practices, and willful and wanton conduct arising from the construction of a house where plaintiffs conceded on appeal that their claim must fail unless Industrial, the construction lender, owed a duty to inspect for plaintiffs' benefit. The Agreement here did not expressly provide an affirmative

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duty by Industrial to inspect the construction progress of plaintiffs' home for plaintiffs' benefit, and, while Industrial may have assured plaintiffs that the defendant Mr. Leonard could be trusted with advances from the construction loan account, such assurances do not indicate that Industrial took on the duty of monitoring construction for plaintiffs' benefit or any other fiduciary duty.

Appeal by plaintiffs from judgments entered 28 January 1998 and 2 February 1998 by Judge Jerry Cash Martin in Rowan County Superior Court. Heard in the Court of Appeals 26 January 1999.

W. L. Stafford, Jr. for plaintiff-appellants.

Richard R. Reamer for defendant-appellee Kimberly B. Leonard; Stoner, Bowers & Gray, P.A., by Bob W. Bowers, and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and Erin L. Roberts for defendant-appellee Industrial Federal Savings Bank.

HUNTER, Judge.

Plaintiffs appeal summary judgment in favor of defendant Kimberly B. Leonard by order of 28 January 1998, and defendant Industrial Federal Savings Bank by order of 2 February 1998.

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved. *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993). It may be sustained only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). In passing upon 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, 449 S.E.2d 240 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995).

Viewing the evidence in the light most favorable to the plaintiffs, it shows that Earl Ray Camp ("Mr. Camp") and wife Joyce Dianne Camp ("Mrs. Camp") entered into a written contract on or about 15 May 1995 to purchase lot thirty-seven ("lot 37") at Pebble Point Subdivision in Rowan County from defendants Mitchell H. Leonard

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("Mr. Leonard") and Kimberly B. Leonard ("Mrs. Leonard") for the sum of \$55,000.00. Plaintiffs entered into a written contract on 13 October 1995 with defendant Mitch Leonard Construction for the construction of a house on lot 37, along with a pier and dredging necessary to obtain a permit for a pier, for the sum of \$126,000.00. The construction contract provided, among other things, that the plaintiffs agreed "to make payments on account hereof upon presentation of proper lien waivers, as the work progresses and as follows: 1 draw on the [tenth] of each month after construction begins." Prior to 22 November 1995, plaintiffs applied to defendant Industrial Federal Savings Bank ("Industrial") for a construction loan on lot 37 and the house to be built thereon by defendant Mitch Leonard Construction.

On 22 November 1995, plaintiffs met at Industrial's office for the purposes of closing the purchase of lot 37 from defendants Leonard and closing the purchase/construction loan of \$135,000.00 from Industrial. At the same closing, plaintiffs and defendant Mitchell H. Leonard, as contractor, executed a construction loan agreement making certain covenants with defendant Industrial, which provided in part, that Industrial is authorized to disburse funds in the construction loan account "only in proportion to its inspector's report of progress, or by Architect's or Superintendent's Certificate accompanied by a proper affidavit from the contractor." Using \$9,000.00 advanced from the construction loan towards the purchase price of lot 37 from defendants Leonard, plaintiffs had \$126,000.00 left in the construction loan account with Industrial.

Within one or two days after the closing at Industrial, construction began on plaintiffs' house on lot 37. Plaintiffs presented evidence that when Mr. Camp went to Industrial's office for the first advance, the amount was left blank because, according to Industrial employee William C. Rains, Jr., they "did not know how much money [Mr.] Leonard would need," but that Mr. Camp should not worry about it because "[Mr.] Leonard was good for it." Plaintiffs also presented evidence that defendant Industrial informed them that defendant Mr. Leonard was a "good contractor," and that plaintiffs need not worry about the money aspects of the construction.

On 13 December 1995, Mr. Leonard obtained an advance from plaintiffs' construction loan account with Industrial in the amount of \$43,000.00. On 12 January 1996, he obtained a second advance in the amount of \$40,000.00. Mr. Leonard received a third advance for \$17,800.00 on 14 February 1996, and a fourth advance for \$14,000.00

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on 13 March 1996. All of the advances made to Mr. Leonard were made with the authorization and signature of Mr. Camp. Plaintiffs presented evidence that as to the second and third advances, Industrial told Mr. Camp that it was not necessary for him to come to the office, because Industrial would make the disbursements and mail him the documentation for advances. While this procedure was employed for the second advance, Mr. Camp went to Industrial's offices for the third advance, expressing concern about the large amount of the advances to Mr. Leonard. Industrial employee Rains informed Mr. Camp that \$17,800.00 was probably more than Mr. Leonard was entitled to at the time, and that Mr. Leonard was probably only entitled to eleven or twelve thousand dollars, but "I went ahead and let him have some extra, but he's good for it."

Sometime in late April 1996, Mr. Camp had a disagreement with Mr. Leonard over the specifications concerning a heat pump for the house, and Mr. Leonard quit construction on the house due to the disagreement. At the time, various items were left unfinished in the construction of the house, and the pier was never built. Plaintiffs contend the costs for the unfinished items is \$32,101.48; however, only \$9,713.76 remained in their construction loan account with defendant Industrial after the aforementioned advances to Mr. Leonard.

Plaintiffs instituted suit on 17 April 1997 against defendants Leonard for breach of contract to sell land and breach of contract to build a dwelling house; against defendant Industrial for breach of contract, breach of duty of good faith, and negligence; and against all defendants for conspiracy, unfair trade practices, and willful and wanton conduct.

[1] Plaintiffs first argue that their appeal is not interlocutory, and is immediately appealable since failure to allow such an appeal would impair their substantial rights. Entry of judgment for fewer than all the defendants is not a final judgment and may not be appealed in the absence of certification pursuant to Rule 54(b) unless the entry of summary judgment affects a substantial right. *See* N.C. Gen. Stat. § 1-277 (1996); N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); N.C. Gen. Stat. § 7A-27(d) (1995). Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is "the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries" *Bernick v. Jurden*, 306 N.C. 435, 439, 293

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S.E.2d 405, 409 (1982). This Court has created a two-part test to show that a substantial right is affected, requiring a party to show “(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exist.” *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995).

In the present case, the same factual issues apply to all claims against the various defendants, and many of the elements and amount of damages alleged are identical in all counts against all parties. Because several different proceedings may bring about inconsistent verdicts relating to the cause of plaintiffs’ injuries, we find that plaintiffs have a substantial right to have the liability of all defendants determined in one proceeding, and therefore we address their appeal.

[2] The trial court granted summary judgment for defendant Mrs. Leonard on causes of action for breach of contract to sell land, unfair trade practices as to sales contract, breach of contract to build dwelling house, unfair trade practices as to construction, conspiracy, and willful and wanton conduct. The causes of action relating to the sales contract are based on the assertion that defendants Leonard falsely informed plaintiffs during negotiation that a pier could be built on lot 37, which is a waterfront lot. All other causes of action concern the construction of plaintiffs’ home on lot 37.

Viewing the evidence in the light most favorable to plaintiffs, it indicates that Mrs. Leonard did sign the warranty deed conveying lot 37 to the plaintiffs; however, she only met the plaintiffs briefly at the real estate closing. The evidence indicates that Mrs. Leonard did not sign the sales contract or construction contract. No evidence indicated that she was actively involved in her husband’s construction business and all of the evidence shows that she was not a partner or joint venturer. The fact that Mrs. Leonard signed the deed conveying the subject property to the plaintiffs does not indicate that she was party to or received benefits from the sales contract or construction contract. A wife’s retention of benefits from a contract negotiated by the husband is a factual circumstance giving rise to an inference that the husband was authorized to act for her under the contract. *Passmore v. Woodard*, 37 N.C. App. 535, 246 S.E.2d 795 (1978); *Douglas v. Doub*, 95 N.C. App. 505, 383 S.E.2d 423 (1989). In *Douglas*, this Court held that while defendant wife did not receive money from the sale of the condominium, she nevertheless did receive a benefit from the sales contract when plaintiff assumed the note and deed of

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trust, relieving her from a \$39,950.00 obligation. *Id.* at 513-14, 383 S.E.2d at 427-28. In the case *sub judice*, all the evidence shows that any funds from the lot sale or building contract went exclusively to Mr. Leonard. Plaintiffs have presented no evidence that Mrs. Leonard received money, or any other benefit, from either contract. It is the party moving for summary judgment who has the burden of establishing the lack of any triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). Mrs. Leonard has shown lack of triable issue of fact, and we therefore sustain the summary judgment in her favor as to all claims.

[3] Plaintiffs brought claims against defendant Industrial for breach of contract, breach of duty of good faith, negligence, conspiracy, unfair trade practices, and willful and wanton conduct. Plaintiffs concede that all claims against Industrial must fail unless this Court finds that, as a matter of law, Industrial owed the plaintiffs a duty to inspect the construction of their home for *plaintiffs' benefit*. Due to plaintiffs' concession, we will focus our inquiry on the issue of defendant Industrial's duty to inspect construction of the plaintiffs' home for plaintiffs' benefit. However, we note that we do not necessarily agree with, but will abide by, plaintiffs' concession that all causes of action in their complaint necessarily depend on a determination of this issue.

Defendant Industrial argues that courts have generally held that liability for construction defects "will be imposed on construction lenders only where contractual provisions or lender assurances justify purchaser reliance on inspections for purchaser's benefit." See Jeffrey T. Walter, *Financing Agency's Liability to Purchaser of New Home or Structure for Consequences of Construction Defects*, 20 A.L.R. 5th 499, 508 (1994). Other courts have also held the relationship between borrower and lender is not a confidential one. *Federal Land Bank of Baltimore v. Fetner*, 410 A.2d 344 (Pa. Super. 1979), *cert. denied*, 446 U.S. 918, 64 L. Ed 2d 273 (1980). Unless a further obligation is assumed by the lender, its inspection of the premises to be mortgaged is made only to determine whether the property has sufficient value to secure the loan, and is for the benefit of the lender only. *Id.* Plaintiffs do not allege a confidential relationship between themselves and Industrial, and concede that in the absence of some contractual provisions or lender assurances justifying reliance, banks generally are not responsible for inspecting mortgaged property for the borrowers. Existing precedent in North Carolina supports plaintiffs' concession.

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In *Carlson v. Branch Banking and Trust Co.*, 123 N.C. App. 306, 473 S.E.2d 631 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 162 (1997), guarantor plaintiffs sued defendant lender for failure to monitor loan proceeds to see that the borrower used loan proceeds for the agreed upon purpose of acquisition of a mutual fund company. This Court noted that while a construction loan may more easily permit monitoring through on-site inspections, "the existence of an implied duty on the part of a lender to a guarantor to monitor the borrower's use of loan proceeds is far from universally recognized." *Id.* at 314, 473 S.E.2d at 636. The Court concluded that any duty on the part of a commercial lender to a guarantor to monitor the use of loan funds must arise through the contract itself. *Id.* at 315, 473 S.E.2d at 637.

In a case concerning a construction contract, *Perry v. Carolina Builders Corp.*, 128 N.C. App. 143, 493 S.E.2d 814 (1997), plaintiffs sold three real estate lots to Everlast Builders, Inc. ("Everlast"). The sales were financed as follows: defendant Carolina Builders Corporation ("CBC") obtained a first lien through a construction loan deed of trust and plaintiffs were accorded a second deed of trust on the property securing a purchase money promissory note from Everlast. The loan documents expressly stated that funds advanced were "for the purpose of constructing dwellings on the properties in question." *Id.* at 145, 493 S.E.2d at 815. A substantial amount of the funds advanced were not used for construction, and plaintiffs filed a breach of fiduciary duty against CBC on the basis that it "fail[ed] to take reasonable steps to ascertain that the proceeds it advanced . . . were actually being used for the purpose of constructing improvements on the property." *Id.* at 149, 493 S.E.2d at 817. This Court held that absent the allegation of an express contractual provision requiring the lender to ensure application of the loan funds to an agreed purpose, plaintiffs were owed no such legal duty. *Id.* at 150, 493 S.E.2d at 818.

While *Carlson* and *Perry* involved claims by third-parties, the holding in these two cases nevertheless dictates that a lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party. A review of the loan agreement ("Agreement") at issue in this case indicates that "Section I" concerns those acts and things which Camp, as "owner," and Leonard, as "contractor" agree "to do and perform." "Section II" contains the provision at issue, and is prefaced with the phrase "[i]t is further understood . . ." Sub-section one (1) of Section II states:

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[Industrial] is authorized to disburse funds under its control in said construction loan account, together with the net proceeds of the loan, only in proportion to its inspector's report of progress, or by Architect's or Superintendent's Certificate accompanied by a proper affidavit from the contractor.

The other sub-sections in Section II state, in part, that the proceeds of the loan are to be used for payment of construction of "said building;" that Industrial may, without consent of Camp or Leonard, pay bills or complete construction; that expenses for appraisals, title insurance, etc., will be paid by owner and contractor; and, that Industrial may refuse to proceed with the loan if the owner and contractor have failed to comply with certain provisions of the agreement. Finally, sub-section six (6) provides:

The owner has accepted, and hereby accepts the sole responsibility for the selection of his own contractor and contractors, all materials, supplies, and equipment to be used in the construction, and [Industrial] assumes no responsibility for the completion of said building, or buildings, according to the plans and specifications and for the contract price. In the event that the funds on hand are found to be insufficient to erect the building and complete the same in accordance with the plans and specifications and any agreed extras, the owner shall place and hereby agrees to place such additional funds in his construction loan account as may be necessary to complete the building or buildings, according to such plans and specifications

The closing provision of the loan agreement states that "the above promises and agreements are made for the purpose of inducing the Industrial Federal Savings Bank . . . to make a loan upon the [following described property]."

An agreement should be interpreted as a whole, and not from particular words, phrases, or clauses, and the meaning gathered from the entire contract." *Starling v. Still*, 126 N.C. App. 278, 281, 485 S.E.2d 74, 76 (1997). While sub-section one (1) of Section II indicates that defendant Industrial may only disburse funds in proportion to a report of construction progress, it does not *require* Industrial to monitor construction progress for plaintiff's benefit. To the contrary, the agreement specifically provides that Industrial has no responsibility for the completion of the building according to plans and at the contract price. Taken as a whole, it is apparent that the provision plaintiffs recite was included in order to protect Industrial from being

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required to make disbursements which would compromise its security interest in the subject property. As stated by Industrial employee Rains in his affidavit: “[T]he services Affiant performs in making periodic inspections in the case of construction loans are done for the benefit of Industrial to the end that the value of collateral held by Industrial will at all times equal or be greater than the balance then owing Industrial.” Pursuant to the Agreement, Industrial is not expressly required to “do and perform” any specific duties besides advance loan funds for the purpose of construction of plaintiffs’ home. Purpose statements are permissive and merely describe what the borrower may do with the money rather than giving rise to a lender’s affirmative duty. *Carlson*, 123 N.C. App. at 314, 473 S.E.2d at 636. While ambiguities in written instruments are to be strictly construed against the drafting party, *Jones v. Palace Realty Co.*, 226 N.C. 303, 37 S.E.2d 906 (1946), there is no ambiguity in the present contract as to any duties required of Industrial and to whose benefit the provision in question is intended. Based on the foregoing, we hold that the Agreement did not expressly provide, and therefore Industrial did not have, the affirmative duty to inspect construction progress of plaintiffs’ home for *plaintiffs’ benefit*.

Plaintiffs also contend that Industrial took on additional duties by oral modification of the construction loan agreement. “The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived, . . . [t]his principle has been sustained even where the instrument provides for any modification of the contract to be in writing.” *Childress v. Trading Post*, 247 N.C. 150, 154, 100 S.E.2d 391, 394 (1957) (citations omitted). While Industrial may have assured plaintiffs that the defendant Mr. Leonard could be trusted with the advances from the account, such assurances do not indicate that Industrial took on the duty of monitoring construction for the plaintiffs’ benefit or any other fiduciary duty. Mr. Camp authorized each advance from the construction loan account despite his authority to restrict them. In his deposition, Mr. Camp testified that he had been involved in construction of at least three other houses, and had been present on the subject property “practically” every day during construction. Mr. Camp’s actions do not indicate that he relied upon Industrial to monitor construction progress for his benefit. Plaintiffs have shown no evidence of any oral modifications by Industrial wherein it took on such duties.

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Plaintiffs present no additional assignments of error. Therefore, because plaintiffs conceded all their claims are dependent on a finding that Industrial owed plaintiffs the duty to inspect construction for plaintiffs' benefit, we find no error. Summary judgment in favor of Industrial is affirmed.

Affirmed.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. JARVIS S. HASTY AND HARVEY LEE STEWART

No. COA98-1098

(Filed 15 June 1999)

1. Criminal Law— instructions—acting in concert

There was no plain error in a prosecution of two defendants for armed robbery and attempted armed robbery where the State's evidence tended to show that defendants were acting in concert and each defendant contends that the instructions would allow the jury to convict both defendants if either committed the robbery. It is unlikely that the trial transcript accurately reports the statement made by the court, particularly because the court gave counsel an opportunity to object or offer corrections shortly after making the statement in question and all the attorneys answered in the negative. Furthermore, taking the entire initial charge and the restatement after a question as a whole, a rational juror would not have been misled.

2. Sentencing— structured—prior conviction—offense committed while on probation

The trial court did not err when sentencing defendant Hasty for armed robbery and attempted armed robbery by considering him to have a prior conviction for possession of cocaine with intent to sell or deliver where defendant was on probation under N.C.G.S. § 90-96(a), which provides that proceedings against the defendant will be dismissed and not considered a conviction upon the fulfillment of terms and conditions. Defendant's entry of a guilty plea to possession of cocaine followed by probation was

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a conviction for purposes of the Structured Sentencing Act and defendant's contention that the result is contrary to the purpose of N.C.G.S. § 90-96 is unpersuasive; within a few months of being placed on probation, defendant violated its terms by commission of these felonies.

Appeal by defendants from judgments entered 23 March 1998 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 April 1999.

On the evening of 7 September 1997, Thomas Downs (Downs), Shawn Keeler (Keeler), and David Addeo (Addeo) were walking home from a party when they were accosted by three men who demanded their money. At gunpoint, the men took Downs' wallet (which held his student ID, his driver's license, and his credit cards), \$16.00 in cash, and some change. During the encounter, Addeo threw his credit cardholder on the ground. The robbers then ran away from the scene. The victims reported the incident to police and gave statements to the investigating officers.

Jarvis S. Hasty and Harvey Lee Stewart (defendants) were indicted for the armed robbery of Downs and the attempted armed robbery of Keeler and Addeo. At trial, the three victims identified defendant Stewart as the man who made the initial demand for their money, and defendant Hasty as the man who held the gun to Downs' head while taking his property. A jury found both defendants guilty on all counts, the trial court sentenced them within the presumptive range of punishment, and both appealed to this Court.

Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant appellant Jarvis S. Hasty.

Grant Smithson for defendant appellant Harvey Lee Stewart.

HORTON, Judge.

The issues in this case are whether: (I) the trial court committed plain error in its charge to the jury for (A) robbery with a firearm, and (B) attempted robbery with a firearm; and (II) the trial court committed plain error in determining defendant Hasty's sentencing level.

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I. Jury Instructions

[1] We note initially that neither defendant objected at trial to any portion of the instructions to the jury as required by Rule 10(b)(2) of the Rules of Appellate Procedure. We are asked by defendants to consider whether the trial court committed “plain error” in its jury instructions. In adopting the plain error rule, our Supreme Court defined plain error as an error so prejudicial that it amounts to a denial of a fair trial to the defendant. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In *Odom*, however, the Supreme Court also pointed out that:

The adoption of the “plain error” rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant’s failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the “plain error” rule. The purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the “plain error” rule is applied, “[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.”

Id. at 660-61, 300 S.E.2d at 378 (citations omitted).

In this case, the State’s evidence tended to show that defendants were acting in concert to commit, or attempt to commit, robbery while each of the defendants offered evidence of an alibi, and denied any complicity in the incident. Each defendant now contends that the charge of the trial court would allow the jury (A) to convict both defendants of the armed robbery of Downs if the jury found that either committed the armed robbery, and (B) to convict both defendants of the attempted armed robbery of Keeler and Addeo if the jury found that either of them attempted to commit armed robbery. We disagree for the reasons set out below.

A. Jury Charge as to Armed Robbery

On the charge of armed robbery, the trial court initially charged the jury as follows:

The Defendants have been accused of robbery with a firearm, which is the taking and carrying away the personal property of

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another from his person or in his presence without his consent, by endangering or threatening a person's life with a firearm, the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently.

Now, I charge that for you to find the Defendant guilty of robbery with a firearm, the State must prove seven things beyond a reasonable doubt:

First, that the Defendants took property from the person of another in his presence.

Second, that the Defendants carried away the property.

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that the Defendant knew he was not entitled to take the property.

Fifth, that at the time of the taking, the Defendants intended [*sic*] to deprive that person of its use permanently.

Sixth, that the Defendants had a firearm in their possession at the time they obtained the property.

And seventh, that the Defendant obtained the property by endangering or threatening the life of that person with a firearm.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, either Defendant, acting either by himself or acting together with the other Defendant, had in their possession a firearm, and took and carried away the property from the person or presence of a person without his voluntary consent by endangering or threatening his life with the use or threatened use of a firearm, the Defendant or each of them knowing that he was not entitled to take the property and intending to deprive the person of its use permanently, it would be your duty to return a verdict of guilty of robbery with a firearm.

However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

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After the jury retired to deliberate on the charges, it submitted three questions in writing to the trial court:

What does the law about the two being together mean? Are they being tried jointly or separately? Can you find one guilty and the other not guilty?

The following colloquy then occurred between the trial court and counsel for the State and defendants before the jury returned to the courtroom:

THE COURT: Looks to me like I need to tell them that each Defendant, even though they're being tried together, the Jury can find either one guilty of any charge or not guilty of any charge.

I also think I need to read them the "acting in concert," the "robbery with firearm," and the "general attempt" charge together again and just let that be it.

What do you all have to say?

MR. FRAZIER: Yes, sir. I would concur Your Honor.

MS. THOMAS: I would concur.

MS. MITCHELL: State agrees.

THE COURT: I don't think I need to give the whole—what they're asking for is "acting in concert." So I'll read the "acting in concert," the "robbery with firearm," and the "attempt" charges again.

MR. FRAZIER: And you will explain, Your Honor, they can—

THE COURT: I will tell them that the—the two are on trial together, but that each person is facing three charges each. They can be found guilty of any charge or not guilty of any charge.

Is there anything else that I need to say about that?

MR. FRAZIER: No, sir.

MS. THOMAS: No, Your Honor.

THE COURT: Miss Mitchell, what do you say?

MS. MITCHELL: Your Honor, I think your approach is about as proper as you can get in light of the questions being asked. I don't think there's really anything else that can be said to the Jury.

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THE COURT: Well, I don't want to say any more than I have to, but I've got to answer the question.

Bring them in.

In answering the three questions presented by the jury, the trial court stated the following:

You have six verdict forms that were sent back to you. Each of the two Defendants are being tried for three offenses each, one count of robbery and two counts of attempted robbery. You can find either of the two Defendants either/or not guilty of any charge. Any of the charges.

Now, I want to read a portion of the charge that I previously gave you. And I would ask you to listen up as well as you can.

For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty of the crime of robbery with a firearm or attempted robbery with a firearm if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance [*sic*] of a common purpose to commit robbery with a firearm or attempted robbery with a firearm or a natural or probable consequence thereof.

The Defendants have been accused of robbery with a firearm, which is taking and carrying away the personal property of another from his person or in his presence without his consent, by endangering or threatening a person's life with a firearm, the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently.

Now, I charge that for you to find the Defendants guilty—or either Defendant guilty of robbery with a firearm, the State must prove seven things beyond a reasonable doubt:

First, that the Defendant took property from the person of another or in his presence.

Second, that the Defendant carried away the property.

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

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Fourth, that the Defendant knew he was not entitled to take the property.

Fifth, that at the time of the taking, the Defendant intended to deprive that person of its use permanently.

Sixth, that the Defendant had a firearm in his possession at the time he obtained the property.

And seventh, that the Defendant obtained the property by endangering or threatening the life of that person by a firearm.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, either the Defendant, acting either by himself or acting together with the other Defendant, had in his possession a firearm, and took and carried away property from the person or presence of a person without his voluntary consent, by endangering or threatening his life with the use or threatened use of a firearm, the Defendant knowing that he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty of robbery with a firearm.

However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The jury retired to resume its deliberations, and eventually returned verdicts of guilty as to each defendant on the charge of armed robbery of Downs. Defendants argue that the trial court did not cure its original misleading and erroneous instruction as its second instruction was also confused. Defendants specifically point to the trial court's statement that, "You can find either of the two Defendants either/or not guilty of any charge. Any of the charges." Indeed, the quoted portion of the charge is not artfully stated, but the State suggests that either it is a *lapsus linguae* on the part of the trial court, or an erroneous transcription by the court reporter.

We agree with the State that it is unlikely that the trial transcript accurately reports the statement made by the able trial court, particularly because shortly after making the statement in question, the trial court again gave counsel an opportunity to object or offer corrections to his restatement of the charge. All the attorneys answered in the negative when asked if they had corrections or objections.

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Furthermore, the statement in question must be read in the context of the entire initial charge and the restatement by the trial court. When both the charge and restatement are taken as a whole, we do not believe that any rational juror could have been misled. The restatement made it clear that in order to convict each defendant it had to find that the defendant either committed armed robbery on his own, or that the defendant acted in concert with the other defendant to commit armed robbery. Indeed, the trial court's instruction to the jury on acting in concert makes the point abundantly clear.

B. Jury Charge as to Attempted Armed Robbery

As to the jury instructions on the charges of attempted armed robbery, we have much the same situation. The trial court initially gave the jury the following mandate on the charges:

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, either Defendant, acting either by himself or acting together with the other Defendant, intended to commit robbery with a firearm and performed an act or acts which were designed to bring this about, but which fell short of the completed offense, it would be your duty to return a verdict of guilty of attempted—attempted robbery with a firearm *as to that Defendant*.

(Emphasis added.)

After the jury returned with the questions set out above, the trial court restated the charge as to attempted armed robbery as set forth above. Read fairly, the charge makes it clear that the jury may return a verdict of guilty as to either of the defendants only if it finds beyond a reasonable doubt that the defendant either acted by himself to attempt to rob the victims, or that the defendant acted in concert with the other defendant. That is a correct and adequate statement of the applicable law, particularly when read together with the trial court's instruction on acting in concert. The assignments of error of each defendant as to the jury instructions are overruled.

II. Sentencing Factors

[2] Defendant Hasty next argues that the trial court erred in considering him to have a prior conviction of possessing cocaine with the intent to sell or deliver it. At the time of the offenses which are the subject of this appeal, defendant Hasty was on probation

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under the provisions of N.C. Gen. Stat. § 90-96(a) (1997). That statute provides in pertinent part as follows:

Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. . . . Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions under this Article.

Id.

At the time of defendant Hasty's conviction and sentencing on the charges involved herein, he was still on probation under § 90-96, and thus argues he had not been "convicted" for the purposes of the Structured Sentencing Act. The Structured Sentencing Act defines "prior conviction" as follows:

A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime[.]

N.C. Gen. Stat. § 15A-1340.11(7) (1997). N.C. Gen. Stat. § 15A-1331(b) provides that "[f]or the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty *or has entered a plea of guilty or no contest.*" (Emphasis added.)

We believe that the statute is clear when it states that "conviction" includes the entry of a plea of guilty. "It is settled law in this

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State that a plea of guilty, freely, understandingly, and voluntarily entered, is equivalent to a conviction of the offense charged.” *State v. Watkins*, 283 N.C. 17, 27, 194 S.E.2d 800, 808, *cert. denied*, 414 U.S. 1000, 38 L. Ed. 2d 235 (1973). Defendant Hasty’s plea to the cocaine charge in question is included in the record on appeal, and reflects that he pled guilty to the charge on 25 June 1997 “freely, voluntarily, and understandingly” and was placed on “90-96” probation on certain conditions. Our Supreme Court has also held that an entry of “prayer for judgment continued” following a plea of guilty by a criminal defendant may amount to a “conviction.” *State v. Sidberry*, 337 N.C. 779, 782, 448 S.E.2d 798, 800-01 (1994). *See also, Britt v. North Carolina Sheriffs’ Educ. And Training Stds. Comm’n*, 348 N.C. 573, 576-77, 501 S.E.2d 75, 77 (1998) (holding that plea of no contest followed by issuance of a prayer for judgment was a “conviction” for purposes of provisions of the North Carolina Administrative Code governing the certification of police officers). Based on the plain language of the statute, and the holdings of our Supreme Court in *Sidberry* and *Watkins*, we conclude that defendant Hasty’s entry of a plea of guilty to possession of cocaine followed by probation under the provisions of N.C. Gen. Stat. § 90-96 was a “conviction” for the purposes of the Structured Sentencing Act.

We do not believe this result is unjust. A defendant who is placed on probation pursuant to the provisions of N.C. Gen. Stat. § 90-96 is given the opportunity to comply with the conditions and have the charges against him dismissed. “Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section . . .” N.C. Gen. Stat. § 90-96. Unfortunately for defendant Hasty, within a few months of being placed on probation, he violated its terms by commission of the felonies involved herein, thereby violating the express condition that he “commit no criminal offense in any jurisdiction.”

Defendant’s contention that the result of assessing a point against him for the cocaine charge is contrary to the stated purpose and intent of N.C. Gen. Stat. § 90-96 because the charge might later be discharged and dismissed by the trial court, and thus he would not have a “conviction” for the cocaine offense, is unpersuasive. Under these circumstances, we do not agree that the legislative intent apparent in the enactment of N.C. Gen. Stat. § 90-96 is thwarted. This assignment of error, therefore, is overruled.

There being no prejudicial error in the trial of either defendant, their convictions are affirmed.

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No error.

Judges LEWIS and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ALLEN TERRELL ANTHONY

No. COA98-1102

(Filed 15 June 1999)

1. Rape— statutory—consent not a defense

There was no plain error in a prosecution for statutory rape in violation of N.C.G.S. § 14-27.7A(b) where the jury was instructed that consent is not an defense. The statutes dealing with rape or other sexual offenses are bifurcated, with one prong containing a “statutory” violation committed when the victim is either underage or in some way incapacitated. As there is no requirement therein that the act be against the will of the victim, the victim’s consent cannot negate the offense. The statute does not contain any ambiguities requiring application of the rule of lenity and, although defendant argues an implied legislative intent to permit a defense of consent from reading other statutes in Article 7A in *pari materia*, the unique treatment of consent in N.C.G.S. § 14-27.7 is appropriate due to the dissimilarity between that statute and others in Article 7A.

2. Constitutional Law—State— statutory rape—disparate sentences

N.C.G.S. § 14-27.7A does not violate the Law of the Land or Cruel and Unusual Punishment Clauses of the North Carolina Constitution because the statutory scheme calibrating sentence severity to the gravity of the offense reflects a rational legislative policy and is not disproportionate to the crime.

3. Rape— statutory—mistake of age—not a defense

There was no plain error in a statutory rape prosecution where the court did not instruct that mistake of age was a defense. In undertaking to have sex with the victim, defendant assumed the risk that she was under legal age.

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4. Evidence— statutory rape—previous rape

There was no prejudicial error in a statutory rape prosecution where the court admitted testimony of a previous rape as evidence of a pattern. Assuming testimony of the other wrong was not admissible, defendant admitted having sexual intercourse with the victim, and the disputed issue of consent did not determine defendant's guilt or innocence under N.C.G.S. § 14-27.7A.

5. Criminal Law— instructions—reference to "victim"

There was no plain error in a statutory rape prosecution where the court referred to "the victim." Although an instruction using the term "victim" may be error under certain circumstances, the defendant here admitted committing a strict liability crime.

Appeal by defendant from judgment entered 4 March 1998 by Judge Lester P. Martin, Jr., in Davie County Superior Court. Heard in the Court of Appeals 19 April 1999.

Michael F. Easley, Attorney General, by Elizabeth L. Oxley, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery and Bobbi Jo Markert, Assistant Appellate Defenders, for defendant-appellant.

EDMUNDS, Judge.

On 6 January 1997, defendant spent the evening with the victim, her boyfriend, and a female friend at the home of the victim's boyfriend. Defendant later drove the others home. After he dropped off the victim's boyfriend and the female friend, only the victim remained with him in his car. On the way to the victim's house, defendant pulled behind a trailer and, according to the victim, forced her to have sexual intercourse. He then drove the victim to her home, where she immediately told her mother that she had said "No" to defendant's advances. The victim's mother took the victim to a hospital where a nurse examined her and collected evidence. After being arrested, defendant made a statement in which he admitted having sexual intercourse with the victim but claimed that she was a willing participant.

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At the time this incident occurred, defendant's age was twenty (20) years, one (1) month, while the victim's age was fourteen (14) years, nine (9) months. On 27 May 1997, the grand jury returned a true bill charging defendant with "Statutory Rape," in violation of N.C. Gen. Stat. § 14-27.7A(b) (Cum. Supp. 1998). The indictment specified that defendant engaged in vaginal intercourse with a victim who was fourteen years old, while the defendant was more than four, but less than six, years older than the victim. On 4 March 1998, a jury found defendant guilty, and the trial court imposed a sentence of fifty-eight (58) to seventy-nine (79) months. Defendant appeals.

[1] Defendant first contends the trial court committed plain error by instructing the jury that consent is not a defense to the offense with which he was charged. Before we can address the instruction, however, we must first determine, as a matter of law, whether consent is a defense to the crime codified by section 14-27.7A. Because this is an issue of first impression, we begin with a review of similar statutes and interpretive case law. Both parties' briefs, well-researched and well-written, are of much assistance in our analysis.

Although section 14-27.7A is silent with respect to the effect of consent, this section is nested in Article 7A of Chapter 14, "Rape and Other Sex Offenses." N.C. Gen. Stat. §§ 14-27.1 to -27.10 (1993 & Cum. Supp. 1998). Section 14-27.2 defines first-degree rape and establishes the penalty for its violation. N.C. Gen. Stat. § 14-27.2 (Cum. Supp. 1998). Similarly, sections 14-27.3, -27.4, and -27.5 define and give the penalties for second-degree rape, first-degree sex offense, and second-degree sex offense, respectively. N.C. Gen. Stat. §§ 14-27.3 to -27.5 (1993 & Cum. Supp. 1998). Each of these four statutes is bifurcated, setting out two alternative ways in which the offense may be committed. Pursuant to one prong, the statute is violated when the act is undertaken "by force and against the will" of the victim. For these crimes, consent of the victim logically nullifies the element that the act be against the victim's will. Consequently, consent is a defense to a charge brought under this portion of these four statutes. However, each statute also contains a second prong defining a "statutory" violation, which is committed when the victim is either underage or in some way incapacitated. For such a violation, there is no requirement that the act be perpetrated against the will of the victim; the victim's consent, therefore, cannot negate the offense. While statutes governing rape and similar crimes have changed in form and detail over the years, our courts consistently have held that consent is not a defense to a "statutory" sex offense.

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In *State v. Johnston*, 76 N.C. 209 (1877), the defendant was charged under a statute that made it a crime to have carnal knowledge of a female over the age of ten by force and against her will or a female under the age of ten. Our Supreme Court held that a female under ten years of age was incapable of consenting to the act as a matter of law. Decades later, although the minimum age of the victim had changed, the law concerning consent had not. In *State v. Temple*, 269 N.C. 57, 152 S.E.2d 206 (1967), our Supreme Court again held that consent was no defense where the defendant was charged under a statute forbidding carnal knowledge of a female under the age of twelve. As our Supreme Court stated:

Unlike the provision of the first-degree rape statute that applies if the victim is an adult, G.S. 14-27.2(a)(2), the forbidden conduct under the statutory rape provision, G.S. 14-27.2(a)(1), is the act of intercourse itself; any force used in the act, any injury inflicted in the course of the act, or the apparent lack of consent of the child are *not* essential elements. This is so because the statutory rape law, G.S. 14-27.2(a)(1), was designed to protect children under twelve from sexual acts.

State v. Weaver, 306 N.C. 629, 637, 295 S.E.2d 375, 380 (1982), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). In *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981), reviewing a first-degree sex offense prosecution, our Supreme Court noted, “[I]n Article 7A prosecutions . . . the gravamen of the sexual offense itself is that it is committed by force and against the will of the victim or upon a victim who *because of age* or other incapacity is incapable of consenting.” *Id.* at 673, 281 S.E.2d at 163 (emphasis added); *see also State v. Zuniga*, 320 N.C. 233, 260, 357 S.E.2d 898, 915, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987); *State v. Cox*, 280 N.C. 689, 695, 187 S.E.2d 1, 5 (1972); *State v. Temple*, 269 N.C. 57, 68, 152 S.E.2d 206, 214 (1967); *State v. Browder*, 252 N.C. 35, 36, 112 S.E.2d 728, 729 (1960). Thus, we see a consistent policy of protecting the young against sexual acts. Further, we see that section 14-27.7A fits within the conceptual framework of the other “statutory” offenses in Article 7A.

To support his theory that consent is a defense to the offense for which he was convicted, defendant first argues that ambiguity in section 14-27.7A requires us to apply the rule of lenity, construing the statute narrowly against the State. We disagree. The language of section 14-27.7A is explicit and absolute, defining with clarity the pro-

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hibited act. It sets out a single defense—marriage. The General Assembly's recognition of that defense indicates that it chose not to allow other defenses. This statute does not contain any ambiguities requiring application of the rule of lenity.

Defendant next focuses on section 14-27.7, which makes it a crime for a custodian of a victim of any age or a person assuming the position of a parent in the home of a minor victim to engage in vaginal intercourse or a sexual act with the victim. Key to defendant's argument is the last sentence of section 14-27.7, which states, "Consent is not a defense to a charge under this section." N.C. Gen. Stat. § 14-27.7 (1993). Defendant contends that when other statutes of Article 7A are read *in pari materia*, the express exclusion in section 14-27.7 implies that the legislature's silence in section 14-27.7A permits consent as a defense. He reasons that our legislature had the opportunity to proscribe a consent defense when it enacted section 14-27.7A in 1995 but chose not to do so. We find defendant's reasoning unpersuasive.

First, there is no need to consider section 14-27.7 in construing section 14-27.7A. As noted above, section 14-27.7A recognizes the single defense of marriage, thereby implicitly rejecting other defenses. Moreover, sections 14-27.7 and 14-27.7A address different policy concerns. The pertinent portion of section 14-27.7 prevents abuse of a minor by a *quasi*-parent/custodian. Alone among the statutes in Article 7A, section 14-27.7 focuses on the relationship between perpetrator and victim. Section 14-27.7 defines the offender in specific terms, where in other statutes, the offender merely need be "[a] person," N.C. Gen. Stat. §§ 14-27.2 to -27.5 (1993 & Cum. Supp. 1998), or "[a] defendant," N.C. Gen. Stat. § 14-27.7A (Cum. Supp. 1998). The terms "rape" or "sex offense" are absent from the language of section 14-27.7, and punishment for its violation is less severe than other sex offense statutes. These factors indicate that section 14-27.7 is *sui generis*. The unique treatment of consent in that statute was therefore appropriate due to the dissimilarity between that statute with others in Article 7A.

If defendant's contention were followed to its logical conclusion, consent would be a defense to all statutory rape provisions *except* section 14-27.7. Article 7A of Chapter 14 was enacted in 1979. Section 14-27.7 at that time contained the proviso that consent was not a defense. *See* Act of May 29, 1979, ch. 682, § 1, 1979 N.C. Sess. Laws 725, 726 (clarifying and consolidating the law of sex offenses). If

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defendant's argument were correct, the presence of that proviso in section 14-27.7 would imply that the General Assembly's decision not to include similar language in the other statutes thereupon created a consent defense to the "statutory" provisions of sections 14-27.2 to -27.5. Such a holding would be contrary to long-settled law. Even recently, our Supreme Court cited statutory rape as an example of a strict-liability crime requiring nothing more than commission of the act prohibited. *See Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 674, 509 S.E.2d 165, 177 (1998) (citing *State v. Murry*, 277 N.C. 197, 203, 176 S.E.2d 738, 742 (1970)). We do not believe that the General Assembly intended such a result and hold that the language of section 14-27.7 does not imply that consent is a defense to an offense under section 14-27.7A.

[2] Defendant next argues that, unless consent is a defense, section 14-27.7A violates the Law of the Land and Cruel and Unusual Punishment clauses of our Constitution. *See* N.C. Const. art. I, §§ 19, 27. As an illustration, he points out that a predatory custodian or quasi-parent who violates section 14-27.7 by having sex with a minor faces only a class E felony, while consensual sex between a fifteen year old female and a nineteen year old male is a class C felony under section 14-27.7A(b). While this comparison may appear to yield a harsh result, we do not find a constitutional violation. The General Assembly established a statutory scheme to protect young females from older males. Section 14-27.7A defines two offenses in subsections (a) and (b), with a greater penalty corresponding to a greater age differential between the parties. Where the female is even younger, section 14-27.2 provides a penalty yet more severe than that found in section 14-27.7A. This statutory scheme, calibrating sentence severity to the gravity of the offense, reflects a rational legislative policy and is not disproportionate to the crime. *See State v. Green*, 348 N.C. 588, 609, 502 S.E.2d 819, 829 (1998), *cert. denied*, — U.S. —, 142 L. Ed. 2d 783 (1999). This sentencing scheme does not violate the North Carolina Constitution.

Finally, we note that the title of N.C. Gen. Stat. § 14-27.7A (Cum. Supp. 1998), is "Statutory rape or sexual offense of a person who is 13, 14, or 15 years old." Act of June 19, 1995, ch. 281, §§ 1, 2, 1995 N.C. Sess. Laws 565, 565-66. Although the title of a statute is not compelling evidence, we may consider it. *See, e.g., State v. Flowers*, 318 N.C. 208, 215, 347 S.E.2d 773, 778 (1986). The General Assembly's use of the term "Statutory rape" is further indication that it intended this statute to be interpreted consistently with the other pre-existing

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“statutory” rape and sex offense statutes. We therefore conclude that, as a matter of law, consent is not a defense to a violation of section 14-27.7A. Because consent is not a defense, the trial court did not err in its instructions to the jury. This assignment of error is overruled.

[3] Defendant contends that the court committed plain error by failing to instruct that mistake of age was a defense to the offense charged. We disagree. Just as consent is not a defense, for the same reasons, mistake of age is not a defense. In undertaking to have sex with the victim, defendant assumed the risk that she was under legal age. *See State v. Rose*, 312 N.C. 441, 445, 323 S.E.2d 339, 342 (1984); *State v. Wade*, 224 N.C. 760, 761-62, 32 S.E.2d 314, 315 (1944); *State v. Ainsworth*, 109 N.C. App. 136, 145, 426 S.E.2d 410, 416 (1993). This assignment of error is overruled.

[4] Defendant next argues the trial court erred by admitting testimony that he had previously raped defendant's female friend. After a *voir dire*, the trial court admitted the evidence, finding that it showed a pattern. Defendant contends that, should this Court find (as we have) that section 14-27.7A is a strict liability statute, the purposes for which this testimony is admissible under Rule 404(b) are irrelevant where the defendant has admitted the prohibited act. We hold that while the evidence may have been irrelevant, its admission was harmless. Rule 404(b) is a general rule of inclusion. *See State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). The party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission. *See State v. Atkinson*, 298 N.C. 673, 683, 259 S.E.2d 858, 864 (1979). Assuming *arguendo* that defendant met his burden of showing that evidence of the other wrong was not admissible under Rule 404(b), he is still required to show that its admission prejudiced the fairness of the trial. Defendant admitted having sexual intercourse with the victim, claiming that she was a willing participant. Although the victim denied giving consent, that disputed issue did not determine defendant's guilt or innocence under section 14-27.7A. Because the victim's lack of consent did not have to be proved, defendant's admission was effectively a confession. He had no defense, and testimony about a prior act was not legally prejudicial. Therefore, admission of that testimony was, at worst, harmless error.

[5] Finally, defendant argues that the trial court's references to “the victim” in its instructions were erroneous. Because defendant did not object to these instructions, we review for plain error. *See* N.C. R. App. P. 10(c)(4). Defendant must show “(i) that a different result

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probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Although we discern from the language of our Supreme Court in *State v. McCarroll*, 336 N.C. 559, 565-66, 445 S.E.2d 18, 22 (1994), that an instruction using the term "victim" may be error under certain circumstances, we find no plain error here, where the offense is a strict liability crime to which defendant admitted committing. This assignment of error is overruled.

The defendant received a fair trial, free of prejudicial error.

No error.

Chief Judge EAGLES and Judge JOHN concur.

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AND THOMAS K. MANNING, DEFENDANTS, AND BRANCH BANKING AND TRUST
COMPANY, THIRD-PARTY PLAINTIFF v. MYRON LENOIR MOORE, EXECUTOR OF THE
ESTATE OF STEVEN C. WALKER, THIRD-PARTY DEFENDANT

No. COA98-894

(Filed 15 June 1999)

**Unfair Trade Practices— attempt to collect under guaranty—
summary judgment for defendants**

The trial court did not err by denying summary judgment for plaintiff on his unfair trade practices claim or by granting summary judgment for defendants on plaintiff's other claims where plaintiff's son operated a golf course built by plaintiff, the son's company borrowed from defendant-bank, plaintiff was informed after the death of his son that he was responsible for the debt under a guaranty agreement, and plaintiff denied signing any such agreement. It was not an unfair trade practice for defendants to try to collect from plaintiff the remaining balance on the note in question in the face of plaintiff's denial of liability because the only collection action was a demand letter, which was not publicized, defendant's son had represented that the signature was that of his father and it was not unreasonable for defendants to secure the opinion of their own handwriting

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expert, the counterclaim filed by defendants to collect on the note was compulsory, and defendants promptly moved to dismiss the counterclaim after their expert verified the plaintiff had not signed the guaranty agreement. Moreover, plaintiff failed to show how defendants' conduct proximately caused actual injury to plaintiff or his business, and the actions of defendants do not support plaintiff's claims for compensatory, punitive, and treble damages. There was no forecast of evidence of rudeness, oppression, or a reckless and wanton disregard of plaintiff's rights.

Appeal by plaintiff Walker from judgment entered 30 April 1998 by Judge Henry W. Hight, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 10 May 1999.

Charles Calvin Walker (plaintiff) and a local architect developed Shamrock Golf Course in the early 1950s, and did so without the benefit of institutional financing. In the early 1970s, plaintiff purchased the architect's interest and turned over management of the golf course to his son, Steven "Steve" C. Walker. Steve Walker operated the golf course through his wholly owned corporation, Shamrock Golf Course, Inc. (Shamrock). Between 1 August 1994 and 3 October 1994, Branch Banking and Trust Company (BB&T) loaned Shamrock approximately \$150,000.00; the loan was evidenced by a promissory note dated 3 October 1994 in the amount of \$149,420.00. In order for Shamrock to obtain the loan, BB&T and its Senior Vice President, Thomas K. Manning (collectively "defendants"), required that both Steve Walker and plaintiff sign guaranty agreements. An "unlimited" guaranty agreement dated 1 August 1994, guaranteeing payment of Shamrock's debt, bears what appears to be the signature of Calvin C. Walker. Another guaranty agreement bearing the same date was executed by Steve Walker. Shamrock Golf Course, Inc., made payments on the debt until the death of Steve Walker on 22 November 1996. Two days thereafter, upon defendants' request, plaintiff met with defendant Manning. Manning informed plaintiff that he was responsible pursuant to the guaranty agreement for the remainder of Shamrock's debt. Plaintiff denied that he had ever seen or signed the 1 August 1994 guaranty agreement. On 16 December 1996, plaintiff received a letter from defendants demanding immediate payment of the \$118,339.56 balance due on the note, plus accumulated interest of \$2,350.91, late fees of \$300.00, and attorney's fees if all sums due were not paid within 5 days of the date the demand letter was mailed. Plaintiff retained counsel, and on 27 December 1996 filed a complaint

against defendants alleging that the note was a forgery, and that defendants' efforts to collect the note were an unfair trade practice. Plaintiff also asked for compensatory, treble, and punitive damages, and for injunctive relief, both temporary and permanent. In support of his motion for a temporary restraining order (TRO), plaintiff submitted an affidavit dated 24 December 1996 from James R. Durham, an expert in handwriting analysis. It was Durham's opinion that the signature on the guaranty agreement was a forgery and was not the signature of plaintiff. Plaintiff also requested a preliminary injunction to enjoin BB&T from attempting to collect on the note pending the outcome of trial. On 27 December 1996, the TRO was granted; the motion for preliminary injunction was denied on 16 January 1997 because the court found that plaintiff had an adequate remedy at law.

On 26 February 1997, defendants filed a counterclaim asserting plaintiff's liability pursuant to the guaranty agreement. On 4 April 1997, defendants made a motion to amend their answer by striking their counterclaim against plaintiff, and "pleading additional theories and causes of action in support of its collection on the Promissory Note and Guaranty." On 29 July 1997, the trial court granted defendants' motion to dismiss their counterclaim against plaintiff, and held open for twenty days the defendants' motion to amend their pleadings and add a third-party defendant. On 18 August 1997, BB&T filed a third-party complaint against Myron Lenoir Moore, Executor of the estate of Steve Walker, seeking to collect the balance due on the promissory note in the sum of \$123,041.67, together with interest, costs, and attorney fees. Defendants also sought to be indemnified by the third-party defendant to the extent it was found to be liable to plaintiff. On 3 November 1997, the trial court granted defendants' written and oral motions to correct its amended answer, motion and third-party complaint, and to add the Executrix of Steve Walker's Estate as a third-party defendant. On 18 December 1997, BB&T made a motion for an entry of default against third-party defendant, which motion was granted the same day.

Plaintiff filed two motions for partial summary judgment: the first, filed on 11 July 1997, to have the guaranty agreement declared null and void; the second, filed on 16 February 1998, prayed that the trial court determine the conduct of defendants to constitute an unfair trade practice pursuant to N.C. Gen. Stat. § 75-1.1. On 3 March 1998, defendants moved for summary judgment as to all of plaintiff's claims. On 30 April 1998, the court granted plaintiff's motion for par-

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tial summary judgment on the guaranty agreement, declaring it null and void; denied plaintiff's motion for partial summary judgment on his claim that defendants' conduct constituted an unfair trade practice; and granted defendants' motion as to all of plaintiff's claims. From the denial of plaintiff's partial summary judgment motion on his unfair trade practice claim and the granting of defendants' summary judgment motion, plaintiff appeals.

Latham & Wood, L.L.P., by James F. Latham, for plaintiff appellant.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Mark A. Jones, for defendant and third-party plaintiff appellee.

HORTON, Judge.

Plaintiff assigned error to the trial court's denial of his motion for partial summary judgment on his claim against defendants for unfair trade practices, and the trial court's grant of summary judgment for defendants on all of plaintiff's claims.

To prevail on a claim based on an alleged unfair trade practice,

a plaintiff must show (1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff or his business. A practice is deceptive if it has the capacity or tendency to deceive the average consumer, but proof of actual deception is not required. Whether the practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. The plaintiff need not show fraud, bad faith, deliberate acts of deception or actual deception, but must show that the acts had a tendency or capacity to mislead or created the likelihood of deception.

Spartan Leasing v. Pollard, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991) (citations omitted); see N.C. Gen. Stat §§ 75-1.1, 75-16 (1994). "A practice is unfair when it offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 301, 435 S.E.2d 537, 542 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994). Plaintiff contended that defendants' conduct in this case was, as a matter of law, an unfair trade practice and moved for summary judgment.

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Summary judgment is the device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56; see 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2711 (1973). The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of material fact by the record properly before the court.

Johnson v. Insurance Co., 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980) (citations omitted).

We conclude that the evidence forecast by plaintiff is insufficient as a matter of law to show that the actions of defendants constituted an unfair trade practice. Plaintiff's primary argument is that it was an unfair trade practice for the Bank to try to collect from plaintiff the remaining balance on the promissory note here in question, in the face of plaintiff's denial of liability and claim that his signature on the guaranty was a forgery. The evidence reveals that for a number of reasons the defendants' actions were not immoral, unethical, unscrupulous, nor offensive to public policy. First, defendants did not institute this action in an effort to collect the substantial amounts due them on the promissory note—plaintiff brought the action. The only collection effort made by defendants was to send a letter demanding payment to plaintiff. Defendants did not publicize their demand letter, nor plaintiff's alleged delinquency; plaintiff made the matter public by filing this action. It was not unreasonable to make a demand for payment of the promissory note against plaintiff, because the guaranty agreement provided, among other things, that "[t]his obligation and liability on the part of the undersigned [guarantor] shall be . . . payable immediately upon demand without recourse first having been had by Bank against the Borrower [Steve Walker]"

Second, plaintiff's own son represented to defendants that the signature on the guaranty agreement was the signature of his father, the plaintiff. We do not find the desire of defendants to secure the opinion of their own handwriting expert to be unreasonable under these circumstances. Defendants had little opportunity, however, to verify the authenticity of plaintiff's alleged signature as plaintiff filed this action only 11 days after receiving defendants' letter demanding payment of the balance due on the note. Third, although plaintiff suggests it was unfair and oppressive for defendants to file a counter-

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claim seeking to collect on the promissory note in his action against them for an unfair trade practice, a counterclaim by defendants was compulsory under the circumstances. "According to Rule 13(a) of the N.C. Rules of Civil Procedure, a counterclaim is compulsory if it 'arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . .'" *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 785, 437 S.E.2d 383, 385 (1993); *see also*, N.C. Gen. Stat. § 1A-1, Rule 13(a) (1990). Failure to assert a compulsory counterclaim ordinarily bars future action on the claim. *Id.* Here, defendants' claim was based on the execution of the guaranty agreement, a transaction which also served as the basis for plaintiff's claim. If defendants had not filed their claim immediately in response to plaintiff's claim, they would have been barred from bringing it in the future. It was not unreasonable under these circumstances for defendants to file a compulsory counterclaim as a protective measure while they were completing their investigation of the genuineness of plaintiff's signature on the guaranty agreement. Fourth, defendants promptly moved that the trial court allow them to dismiss their counterclaim against plaintiff after defendants' expert verified that plaintiff did not sign the guaranty agreement. Defendants' 4 April 1997 motion to amend their answer by dismissing their counterclaim against plaintiff was filed only 37 days after their counterclaim was filed on 26 February 1997.

Finally, even assuming *arguendo* that defendants engaged in an unfair trade practice, plaintiff has failed to show how defendants' conduct proximately caused actual injury to plaintiff or his business. As part of an unfair trade practice claim, a plaintiff must prove not only that defendants have violated N.C. Gen. Stat. § 75-1.1 in some respect, but that plaintiff has suffered actual injury as a proximate result of defendants' conduct. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980); N.C. Gen. Stat. § 75-16 (1994). Plaintiff alleged that he suffered injury in the form of public ridicule and humiliation, that his affairs and livelihood were placed in jeopardy, that he incurred attorney fees, and would experience increased difficulty in obtaining financing to preserve and maintain his golf course. Yet plaintiff was unable to identify more specifically any such ridicule or humiliation, or how his livelihood has been placed in jeopardy. Plaintiff stated in an affidavit, "[w]ith this claim of the Bank against me, it will not be possible for me to get the financing that I need to save the golf course." It appears from the record that plaintiff has merely speculated that he will be harmed by the actions of the defendants, and—other than his unsupported alle-

gations—has not forecast enough evidence to show the likelihood or extent of such injury.

Plaintiff argues that his attorney fees are actual damages caused by the conduct of defendants. Plaintiff has not incurred attorney fees in defending an unjust action brought by defendants, however, but in initiating this action himself. We have held previously that

G.S. 75-16.1 allows the trial court to assess a reasonable attorneys' fee against the losing party. The trial court may award attorneys' fees in its discretion upon a finding that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

Torrance v. AS & L Motors, 119 N.C. App. 552, 556, 459 S.E.2d 67, 70, *disc. review denied*, 341 N.C. 424, 461 S.E.2d 768 (1995); N.C. Gen. Stat. § 75-16.1 (1994). Here, defendants have not committed acts which amount to an unfair trade practice. Further, defendants attempted to resolve promptly the dispute with plaintiff over the guaranty agreement by moving to amend its answer by striking its counterclaim against plaintiff. Although plaintiff's motion for partial summary judgment sought to have the guaranty agreement declared null and void, defendants had already withdrawn their counterclaim against plaintiff in which they sought to recover on the guaranty agreement.

In summary, plaintiff's forecast of evidence is insufficient as a matter of law to show that defendants' actions constitute an unfair trade practice, and is also insufficient to show that plaintiff has been actually damaged by the actions of defendants. The trial court did not err in denying plaintiff's motion for partial summary judgment on his unfair trade practice claim.

We also conclude, for the reasons set out above, that the trial court properly granted defendants' motion for summary judgment on all of plaintiff's claims against them. The actions of defendants do not support plaintiff's claims for compensatory, punitive, and treble damages. "Punitive damages may be awarded only where the wrong is

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done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights." *Hardy v. Toler*, 288 N.C. 303, 306-07, 218 S.E.2d 342, 345 (1975). Treble damages are assessed automatically upon a violation of N.C. Gen. Stat. § 75-1.1. *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 61, 338 S.E.2d 918, 924, *disc. review denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

Here, there is no forecast of evidence of rudeness, oppression, or a reckless and wanton disregard of plaintiff's rights, which could support a demand for punitive damages. Nor, as we have seen, is there evidence which would raise a question of material fact on any of the other issues raised by plaintiff. The facts of this case are largely undisputed, and simply do not support a finding that defendants have violated N.C. Gen. Stat. § 75-1.1, nor that they have caused actual damage to the plaintiff. Plaintiff's assignments of error are overruled.

Affirmed.

Chief Judge EAGLES and Judge WALKER concur.

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 SYSTEM DIVISIONS AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); 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 INDIVIDUAL AND OFFICIAL CAPACITIES); AND STATE OF NORTH CAROLINA, DEFENDANTS

WILLIAM H. WOODARD, AND RAYMOND E. AVERETTE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER FOR 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 LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); STATE OF NORTH CAROLINA, DEFENDANTS

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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 SYSTEM DIVISIONS
 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 SYSTEM
 DIVISIONS 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 THE STATE OF NORTH
 CAROLINA, DEFENDANTS

No. COA98-874

(Filed 15 June 1999)

1. Pensions and Retirement— benefits—retroactive— interest

The interest calculation approved by the trial court for the retroactive payment of State disability and service retirement benefits was erroneous. To be consistent with the purpose of N.C.G.S. § 135-1(19), N.C.G.S. § 128-21(18) and the principles of the common law, the statutes must be read to require that any underpayments accrue interest from the date they become due, with payments due and payable on a monthly basis.

2. Statutes— interpretation—construction of those adminis- tering—direct conflict with purpose of act

The interpretation of N.C.G.S. § 135-1(19) and N.C.G.S. § 128-21(18) by the Teachers' and State Employees' Retirement System did not influence the Court of Appeals in a decision involving disability and retirement benefits where that interpretation was not consistent with the intent and purpose of the legislature, despite the tenet of statutory construction that the construction of a statute by those vested with the authority to administer law is entitled to great consideration.

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3. Pensions and Retirement— benefits—retroactive—compounding of interest

The method mandated by the trial court for compounding the interest on underpayment of disability and retirement benefits was erroneous because it failed to recognize that each underpayment was due monthly and that the annual period giving rise to compounding runs from the due date of each underpayment.

Appeal by plaintiffs Dorothy M. Faulkenbury, *et al.*, William H. Woodard, *et al.*, Bonnie G. Peele, *et al.*, and Ralph R. Hailey, Jr., *et al.* from order dated 22 April 1998 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 30 March 1999.

Womble Carlyle Sandridge & Rice, PLLC, by G. Eugene Boyce and Marvin Schiller, for plaintiff-appellants.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Edwin M. Speas, Jr., and Special Deputy Attorneys General Norma S. Harrell and Alexander McC. Peters, for the State.

GREENE, Judge.

Dorothy M. Faulkenbury, *et al.*, William H. Woodard, *et al.*, Bonnie G. Peele, *et al.*, and Ralph R. Hailey, Jr., *et al.* (collectively, Plaintiffs) appeal from the trial court's Order on Calculation of Interest allowing the Teachers' and State Employees' Retirement System of North Carolina, *et al.* and the North Carolina Local Governmental Employees' Retirement System, *et al.* (collectively, Defendants) to calculate "back benefits or underpayments due [Plaintiffs] in the same manner in which [Defendants have] traditionally."

This appeal is the seventh in a long progeny of appeals between the parties, and therefore, a full recitation of the facts is not necessary since they have been set out in great detail in those opinions.¹ Accordingly, we only will discuss the facts pertinent to this appeal.

1. The preceding appeals are: *Faulkenbury v. Teachers' and State Employees' Retirement System*, 108 N.C. App. 357, 424 S.E.2d 420, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993); *Woodard v. Local Governmental Employees' Retirement System*, 108 N.C. App. 378, 424 S.E.2d 431, *aff'd per curiam*, 335 N.C. 161, 435 S.E.2d 770 (1993); *Faulkenbury v. Teachers' and State Employees' Retirement Sys.*, 110 N.C.

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This case surrounds the underpayment of certain disability and service retirement payments due to Plaintiffs through their participation in the North Carolina governmental retirement plans. On 1 July 1982, the method in which disability benefits were calculated was changed by the General Assembly, and as a result, Plaintiffs received less money in pension payments than they would have if they had retired for disability prior to the date of the change.²

Plaintiffs initially brought suit on 5 November 1990, and on 21 July 1995, the trial court concluded that "Plaintiffs [were] entitled to interest and the actuarial equivalent of their underpayments in accordance with N.C. Gen. Stat. § 135-10 and § 128-32 . . . from 3 years prior to the date each action was filed and hereafter." In 1997, our Supreme Court held that the General Assembly's change in the disability pension statutes violated the Contract Clause of the United States Constitution, and affirmed the decision of the trial court and remanded the case for further proceedings. *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997). In affirming the trial court, the Supreme Court specifically noted that plaintiffs were entitled to "regular interest" on the underpayments because "regular interest" is a necessary component of the actuarial value.

On remand, the trial court concluded that Defendants "should calculate the 4% 'regular interest' provided by [N.C. Gen. Stat. § 135-1(19)] and apply it to the back benefits or underpayments due [Plaintiffs] in the same manner in which [Defendants have] traditionally computed and applied interest in the calculation of the statutory 'regular interest.'" Although the trial court did not explain the "traditional" method used by Defendants for calculating "regular interest," it did use the following example:

Ms. Faulkenbury's retroactive benefits or underpayments . . . totaled \$176.72 for 1987. No interest was added for 1987. Additional underpayments of \$1,085.82 were added for 1988. Also, for 1988, interest in the amount of \$7.07 on the underpay

App. 97, 428 S.E.2d 851 (1993); *Woodard v. Local Governmental Employees' Retirement Sys.*, 110 N.C. App. 83, 428 S.E.2d 849 (1993); *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997); and *Faulkenbury v. Teachers' and State Employees' Retirement Sys.*, 132 N.C. App. 137, 510 S.E.2d 675 (1999).

2. Plaintiffs were all employed by the State for more than five years before the date of the change, possessed fully vested retirement and disability benefits on the date of the change, and became disabled after the date of the change.

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ments through the end of 1987 were added to the total. At the end of 1989, additional interest was added on the total of underpayments and interest that existed at the end of 1988, so that \$50.78 in interest at the rate of 4% of the total of \$1,269.61 of interest and underpayments at the end of 1988 was added to the balance for 1989. For 1990, \$98.47 in interest was added at the rate of 4% on the total of \$2,461.71 in underpayments and interest through 1989.

The dispositive issue is whether the “traditional” method used by Defendants for calculating interest on disability and service retirement underpayments is consistent with the statutory definition of “regular interest.”

“Regular interest” is defined statutorily as “interest compounded annually at such a rate as shall be determined by the Board of Trustees [Teachers’ and State Employees’ Retirement System].” N.C.G.S. § 135-1(19) (Supp. 1998); *see also* N.C.G.S. § 128-21(18) (1999). The parties agree that the Board of Trustees has established an interest rate of 4 percent. The parties do not agree on the method of accruing and compounding the interest.

Interest Accrual

[1] It is Defendants’ position that under sections 135-1(19) and 128-21(18) interest accrues *annually*. In other words, interest is due only on funds that have been owed for a year. It thus follows, Defendants contend, that Ms. Faulkenbury was not entitled to any interest credit at the end of 1987 “because she had no sums that had been due for a year.” We disagree.

Although sections 135-1(19) and 128-21(18), defining “regular interest,” are specific in stating that the interest is to be “compounded annually,” they are completely silent as to when the interest is to accrue. In other words, is the interest earned daily, monthly, quarterly, or annually? In the absence of a specific directive from the legislature, this Court must determine the intent of that body, *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 194-95 (1975), and in doing so, we also must accept that the legislature was aware of the principles of the common law in place at the time of the statute’s enactment, 73 Am. Jur. 2d *Statutes* § 184 (1974). A basic principle of the common law is that if money is wrongfully withheld, “interest begins to run . . . from the time of [the] wrongful withholding.” 47 C.J.S. *Interest & Usury* § 45, at 109 (1982), *see* N.C.G.S. § 24-5(a) (1991)

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(interest on breach of contract award runs from “date of breach”). The construction of a statute also should be made with reference to the purpose of that statute so a construction is adopted that serves to promote the legislative goal. *See Hart*, 287 N.C. at 80, 213 S.E.2d at 294-95.

In this case, the legislative purpose is clear: fully reimburse those beneficiaries who have received less than their rightful entitlements. N.C.G.S. § 135-1(2) (underpaid employees must receive payment of “equal value”). To be consistent with the purpose of sections 135-1(19) and 128-21(18) and the principles of the common law, these statutes must be read to require that any underpayments accrue interest from the date they become due.³ In other words, the beneficiaries are entitled to daily interest on the underpayments. Any other construction would deny the beneficiaries full restitution for their loss.⁴ The payments in this case are due and payable on a monthly basis,⁵ N.C.G.S. § 135-1 (all pensions and annuities “shall be payable in equal monthly installments”), and Plaintiffs therefore are entitled to an accrual of interest from that date. Accordingly, the method of interest calculation approved by the trial court was in error and must be reversed.

Interest Compounding

[3] There can be no dispute that sections 135-1(19) and 128-21(18) require that the interest be “compounded annually.” In more simple terms, the statutes entitle the beneficiaries to interest, not only on the principle (underpayments) due, but on the accrued or earned interest. The interest on the accrued interest (compound interest) is

[2] 3. In so holding, we reject the position of Defendants that we are bound by their interpretation of these statutes. We are mindful of the tenet of statutory construction holding that construction of a statute by those vested with the authority to administer the law in question is entitled to “great consideration.” *Duggins v. Board of Examiners*, 25 N.C. App. 131, 137, 212 S.E.2d 657, 662 (1975), *aff’d*, 294 N.C. 120, 240 S.E.2d 406 (1978). That same tenet of construction, however, also holds that “[u]nder no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration.” *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952). As we have determined Defendants’ interpretation in this case is not consistent with the intent and purpose of the legislature, we are not influenced by their construction.

4. For example, if we construe the statute as to require that interest accrue annually (no interest credited until the expiration of twelve months), as Defendants contend, Defendants could pay Plaintiffs eleven months after the underpayment was due, and not owe Plaintiffs any interest because no interest would have accrued.

5. Both parties stipulated to this fact before this Court.

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earned annually. An example of interest compounded annually: the deposit of \$100.00 in a bank account at 10 percent will earn the depositor \$10.00 at the end of the first year, for a total credit of \$110.00. At the end of the second year, the depositor earns \$10.00 on the original \$100.00 deposit and \$1.00 on the \$10.00 interest previously credited to his account. At the end of the second year, therefore, the depositor has \$121.00 in his account. See *Dictionary of Finance and Investment Terms* 72 (1987).

In this case, the interest earned each day following the date of the underpayment (accrued interest), must be compounded once a year beginning at the end of the first year from the day the interest was earned.⁶ The method of compounding the interest as mandated by the trial court in this case erroneously permits the totaling of the underpayments for a twelve-month period and treats those underpayments as one. This method fails to recognize that each of the underpayments is due monthly and the annual period (giving rise to compounding) runs from the due date of each underpayment.

In summary, Defendants "traditional" method does not comport with the statutory requirement for "regular interest," and we, therefore, reverse the order of the trial court and remand for the entry of an order requiring the computation of interest as herein prescribed.

Reversed and remanded.

Judges MARTIN and McGEE concur.

6. For example: if the State underpaid Ms. Faulkenbury \$176.72 for 1987, and assuming \$88.36 was due 1 November 1987, that \$88.36 would accrue interest on a daily basis in the amount of \$.009 per day (4 percent per annum). Interest on this \$.009 would not be earned or credited to Ms. Faulkenbury until 2 November of 1988, at which time Ms. Faulkenbury would be entitled to 4 percent interest on the \$.009.

ATLANTIC VENEER CORPORATION, PLAINTIFF v. NATALIE K. ROBBINS, DEFENDANT

No. COA98-1224

(Filed 15 June 1999)

1. Discovery— failure to comply—sanctions

The trial court did not abuse its discretion by dismissing defendant's answer for failing to comply with discovery orders where there was no showing that defendant was ordered to provide information which she could not reasonably produce; defendant continued to provide evasive and incomplete answers, despite orders compelling discovery and continuances granted to enable her to comply; and the court indicated in its order that it had considered less severe sanctions. N.C.G.S. § 1A-1, Rule 37(d).

2. Damages— judgment—supported by evidence

There was no error in an action to recover money embezzled where the answer was stricken for discovery violations, the court awarded damages in the amount of \$250,000, and defendant contended that the amount was not supported by the evidence. The answer having been stricken, the allegations of the complaint are deemed to have been admitted and plaintiff's evidence, the admitted allegations, and defendant's failure to testify or offer other evidence combined to support the court's findings. Defendant will not be heard to argue on appeal that plaintiff's evidence was insufficient, having failed to produce evidence to the contrary at trial or in response to discovery orders.

3. Appeal and Error— facts not in record—arguments not supported by authority

Arguments which were based upon facts not contained in the record or which were unsupported by authority were overruled. Appellate review is limited to those things which appear in the record on appeal and assignments of error in support of which no reason or argument is stated or authority cited are deemed abandoned.

4. Appeal and Error— cross-assignment of error—not an alternative legal ground

Cross-assignments of error relating to the amount of damages awarded by the trial court were not considered where plaintiff sought to increase the damage awards rather than

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provide an alternative legal ground supporting the judgment. N.C. R. App. P. 10(d).

Appeal by defendant from judgment entered 8 June 1998 by Judge Russell J. Lanier, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 18 May 1999.

Mason & Mason, P.A., by L. Patten Mason, for plaintiff-appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, III, for defendant-appellant.

MARTIN, Judge.

This case is before this Court for the third time. Plaintiff, Atlantic Veneer Corp., brought this action on 2 February 1995 to recover money allegedly embezzled from it by defendant's husband, a former employee, and subsequently fraudulently transferred to defendant. Judge Ragan denied defendant's motion to dismiss; upon defendant's appeal to this Court, the order denying the motion to dismiss was affirmed. *Atlantic Veneer Corp. v. Robbins*, COA95-906 (21 May 1996) (unpublished).

Plaintiff subsequently moved for an order compelling defendant to respond to previously served interrogatories and requests for production of documents. By order dated 30 September 1996, Judge Ragan granted plaintiff's motion, finding, *inter alia*:

11. The Court, having reviewed the interrogatories and request for production of documents and the defendant's response thereto, finds in fact that the defendant's answers are incomplete, evasive, and evidence a disregard for the obligations required by the North Carolina Rules of Civil Procedure as the same relates to answering interrogatories and producing documents.

Defendant was ordered to fully comply with discovery within thirty days and was ordered to pay plaintiff's attorney's fees. Upon defendant's failure to comply with the discovery order, plaintiff moved for sanctions pursuant to G.S. § 1A-1, Rule 37(b)(2), requesting that the court strike the answer for the continued failure to completely answer the discovery requests.

Judge Cobb heard the motions for sanctions at the 28 April 1997 session, found that defendant's responses to discovery did not

comply with the previous discovery order, and entered an order providing:

The Court further determines that the answers which have now been provided are still evasive, incomplete, and the defendant has not produced the documents required. The Court further determines, in its discretion, that the appropriate sanction to be applied for the defendant's failure to comply is an order striking out the defendant's answer and rendering judgment by default against the defendant.

The Court further in its discretion delays implementation of this order until the 23rd day of June, 1997, at which time this Order shall become final unless defendant shall have provided the plaintiff the following discovery:

Judge Cobb enumerated nine specific discovery requests to which defendant was required to fully respond.

Defendant thereafter requested, and was granted, two continuances in order to have additional time to comply with the discovery orders. The matter was next heard on 18 August 1997 by Judge DeRamus, who found that defendant still had not produced the documents or completely answered the interrogatories. Judge DeRamus noted that "the defendant has filed no motion for protective order and has not produced or provided any evidence from which the Court can determine that the defendant's failure to comply with Judge Ragan and Judge Cobb's orders has been justified." In an order dated 21 August 1997, Judge DeRamus concluded that:

2. The defendant's failure to comply with the orders of Judge Ragan and Judge Cobb shows a willful, intentional and egregious abuse of the orders of this Court without any justification being provided by defendant for her conduct.
3. Judge Cobb, in his previous order had indicated that it was his intention to strike the defendant's answer and to enter judgment by default.
4. The Court has considered lesser sanctions but does not deem them appropriate in this case.
5. The Court, having reviewed the entire file and heard the arguments of counsel, is of the opinion that it is appropriate in this case to enter sanctions which strike the defendant's answer and to enter default as to the defendant

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Defendant again appealed to this Court, challenging the order striking her answer and entering default. By order dated 26 February 1998, her appeal was dismissed as interlocutory and she was ordered to pay plaintiff's attorney's fees and the costs of the appeal.

The matter was remanded to the superior court for a determination of attorney's fees. Judge Ragan entered an order on 24 March 1998 requiring defendant to pay \$1,100 in attorney's fees for the improper appeal.

On 8 June 1998, Judge Lanier entered a final judgment against defendant in the amount of \$250,000. The judgment stated:

2. By entry of a default in this matter, the Defendant has admitted the allegations as contained in the complaint.
3. The failure of the defendant to take the stand to testify as to facts particularly within her knowledge and directly affecting her is a "pregnant circumstance" from which this court may consider such failure as a basis for the conclusion that the Defendant knowingly received money from her husband which she knew he had embezzled from Atlantic Veneer Corporation.
4. The Defendant's failure to produce documents and evidence showing the source of her funds is likewise considered by the court as evidence of the fact that the Defendant knowingly received money from her husband which she knew he had embezzled from Atlantic Veneer Corporation.

Defendant again appeals, asserting the trial court erred by striking her answer and by entering a judgment against her in the amount of \$250,000.

I.

Plaintiff has moved to dismiss the appeal on the grounds defendant has failed to pay the \$1,100 attorney's fee imposed as a sanction by this Court for the previous frivolous appeal. A failure to comply with prior orders of this Court subjects defendant's current appeal to dismissal. Plaintiff also suggests that we dismiss defendant's current appeal as frivolous pursuant to N.C.R. App. P. 34.

In addition, defendant's appellate brief violates Rules 26(g) and 28(b)(2) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 26(g), as interpreted by *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996), requires a font size

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of 65 characters per line. Defendant's brief contains a compressed font size, ranging from 76-80 characters per line. Rule 28(b)(2) requires a separate statement of the "Questions Presented." Defendant has violated this rule by including in this section only one of the several questions presented in her brief. The appellate courts of this State have long and consistently held that the Rules of Appellate Procedure are mandatory and that failure to follow these rules will subject an appeal to dismissal. *See Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999). Nevertheless, we exercise the discretion granted us by N.C.R. App. P. 2 and consider defendant's appeal on the merits.

II.

[1] In the context of discovery, Rule 37(d) provides that sanctions may be imposed if a party fails "to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories or . . . to serve a written response to a request for inspection [of documents] submitted under Rule 34." N.C. Gen. Stat. § 1A-1, Rule 37(d) (1998); *Cheek v. Poole*, 121 N.C. App. 370, 465 S.E.2d 561, *cert. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). However, if a party is unable to answer discovery requests because of circumstances beyond its control, an answer cannot be compelled. *Benfield v. Benfield*, 89 N.C. App. 415, 366 S.E.2d 500 (1988); *Laing v. Liberty Loan Co.*, 46 N.C. App. 67, 264 S.E.2d 381, *disc. review denied*, 300 N.C. 557, 270 S.E.2d 109 (1980). A "good faith effort at compliance" with the court order is required of the deponent. *Benfield* at 421, 366 S.E.2d at 504. "The choice of sanctions under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Vick v. Davis*, 77 N.C. App. 359, 361, 335 S.E.2d 197, 199 (1985), *affirmed*, 317 N.C. 328, 345 S.E.2d 217 (1986) (quoting *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984)). In addition to striking the disobedient party's pleadings and entering a default, the court is authorized, among other sanctions, to "require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(e); *Vick, supra*.

Here, there is no showing in the record that defendant was ordered to provide information which she could not reasonably produce. Moreover, rather than demonstrating a good faith effort at compliance, defendant continued to provide evasive and incomplete

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answers, despite orders compelling discovery and continuances granted to enable her to comply, establishing a pattern of evasion. Under these circumstances, we cannot say that the decision of the trial court to dismiss the answer was manifestly unsupported by reason. This Court has repeatedly refused to reverse dismissals entered under similar circumstances. *Cheek v. Poole, supra*; *Silverthorne v. Coastal Land Co.*, 42 N.C. App. 134, 256 S.E.2d 397, *disc. review denied*, 298 N.C. 300, 259 S.E.2d 302 (1979); *Hammer v. Allison*, 20 N.C. App. 623, 202 S.E.2d 307, *cert. denied*, 285 N.C. 233, 204 S.E.2d 23 (1974); *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 362 S.E.2d 868 (1987). Moreover, the trial court indicated in its order, as it must, that it considered less severe sanctions. *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992). The decision of the trial court to strike defendant's answer and enter default is therefore affirmed.

III.

[2] Next, defendant contends the amount of the judgment is not supported by the evidence. We disagree.

When a trial court sits as the trier of fact, the court's findings and judgment will not be disturbed on the theory that the evidence does not support the findings of fact if there is any evidence to support the judgment, even though there may be evidence to the contrary. *See Wachovia Bank of North Carolina, N.A. v. Bob Dunn Jaguar, Inc.*, 117 N.C. App. 165, 450 S.E.2d 527 (1994). In addition, the failure of a party in a civil case to take the stand and contradict evidence affecting him may be considered a "pregnant circumstance" to consider when making an award against that party. *Jacobs v. Locklear*, 65 N.C. App. 147, 150, 308 S.E.2d 748, 750 (1983), *affirmed*, 310 N.C. 735, 314 S.E.2d 544 (1984) ("That he failed to go upon the stand [in a *civil* case] and contradict evidence affecting him so nearly was a pregnant circumstance which the jury might well consider, and which counsel, within proper limits, might call to their attention." (quoting *Hudson v. Jordan*, 108 N.C. 10, 12-13, 12 S.E. 1029, 1030 (1891))).

In the present case, since defendant's answer was stricken, the allegations of plaintiff's complaint, including those with respect to damages, are deemed to have been admitted. "Such judicial admissions have 'the same effect as a jury finding and [are] conclusive upon the parties and the trial judge.'" *Webster Enterprises, Inc. v. Selective Ins. Co. of the Southeast*, 125 N.C. App. 36, 41, 479 S.E.2d 243, 247 (1997) (quoting *Buie v. High Point Associates Ltd. Partnership*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215 (1995)). In

addition, defendant offered documents and exhibits demonstrating that defendant received over \$250,000 which was embezzled by her husband. Plaintiff's evidence, the admitted allegations of plaintiff's complaint, and defendant's failure to testify or offer other evidence combine to support the trial court's findings regarding plaintiff's damages. Defendant, having failed to produce evidence to the contrary, either at trial or in response to discovery orders, will not be now heard to argue on appeal that plaintiff's evidence was insufficient. This assignment of error is overruled.

IV.

[3] The remaining arguments in defendant's brief rely upon facts not contained in the record or are unsupported by any authority. Appellate review is limited to those things which appear in the record on appeal, N.C.R. App. P. 9(a); assignments of error in support of which no reason or argument is stated or authority cited, are deemed abandoned, N.C.R. App. P. 28(b)(5). Defendant's remaining assignments of error are, therefore, overruled.

V.

[4] In its brief, plaintiff has attempted to argue two cross-assignments of error relating to the amount of damages awarded by the trial court. N.C.R. App. P. 10(d) permits an appellee, without taking an appeal, to cross-assign as error an act or omission of the trial court which deprives the appellee of an alternative legal ground for supporting the judgment in its favor. *Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982). Plaintiff's cross-assignments of error do not provide an alternative legal ground supporting the judgment; rather plaintiff seeks to increase the damages awarded in the judgment.

In their cross-assignment of error, plaintiffs do not present an alternative basis in law for supporting the judgment. Instead, plaintiffs contend that the trial court erred in refusing to set aside the jury verdict as too small. Therefore, the plaintiffs' contention is not properly before this Court. The proper method to have preserved this issue for review would have been a cross-appeal.

Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 588, 397 S.E.2d 358, 361 (1990). Thus, plaintiff's contentions have not been preserved for review and we decline to consider them.

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Affirmed.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. JAMES NATHANIEL LITTLE, JR.

No. COA98-873

(Filed 15 June 1999)

1. Confessions and Incriminating Statements— request for attorney—reading of rights—contact not re-initiated

The trial court properly held that a robbery and kidnapping defendant had waived his right to counsel and refused to suppress defendant's incriminating statements where the court found that defendant had informed an unidentified officer that he wanted an attorney; a detective without knowledge of that request met with defendant and read defendant his Miranda rights; when the detective came to the question concerning the right to talk to a lawyer, defendant said that he had told another officer that he wanted an attorney, but that he now wanted to talk about the charges; defendant executed a waiver of rights form; and defendant recited a three-page statement, signing each page. The detective was without knowledge of the earlier request for an attorney and was following police procedure; the reading of a person's rights is a normal result of an arrest and custody and does not fall under the definition of interrogation or re-initiation set out by the United States Supreme Court.

2. Kidnapping— sufficiency of evidence—aspotation

The trial court did not err by denying defendant's motion to dismiss a kidnapping charge where, after taking the victim's money and forcing the victim to withdraw more from a teller machine, the victim was moved more than 200 feet across a parking lot, onto a street, and down a hill into a cul-de-sac. The aspotation was obviously unnecessary to extract more money from the victim.

Appeal by defendant from judgment entered 9 March 1998 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 10 May 1999.

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[133 N.C. App. 601 (1999)]

On 19 April 1997 Russell Wallace was robbed while using an ATM machine in Greensboro, North Carolina. Wallace had just withdrawn \$50.00 from the teller machine when a person, allegedly the defendant, James Nathaniel Little, Jr., approached holding a handgun and wearing a mask. Little raised the gun and directed Wallace to give him the money he had just withdrawn and directed him to take out more money. Wallace withdrew another \$100 and gave it to Little. Little then told Wallace to get back into his car. Little got into the back seat of Wallace's car while a second man appeared and got into the front seat with Wallace. Wallace was able to see the second man's face and later identified him as Carl Brian Stephens. The two men directed Wallace to drive to a cul-de-sac near the bank. Little took Wallace's billfold, which contained a credit card and the ATM card, and demanded Wallace's ATM access code. Little then walked back to the ATM machine where he unsuccessfully attempted to withdraw more money. Little then returned to the car. Soon thereafter, the police arrived and the defendant fled on foot.

Responding to an officer's call that robbery suspects were leaving the area of the bank, Officer J. A. Fulmore went toward an apartment complex where the suspects had reportedly fled. Soon after arriving, Officer Fulmore saw the defendant walking in his direction. When Officer Fulmore stopped the defendant and identified himself as a police officer, defendant told him that he was on the way back from his aunt's house. When Officer Fulmore asked defendant to return to his aunt's house for the purpose of verifying the story, defendant ran. Defendant was captured a few minutes later. A set of car keys was found in defendant's possession.

Meanwhile, Officer J.R. Franks found Stephens hiding in an automobile near the scene of the robbery. The automobile belonged to defendant's mother and defendant's wallet was found in the car. The keys found in defendant's possession fit the car in which Stephens was found. About 45 minutes later, Officer D.M. Combs brought Stephens back to the scene of the robbery where Wallace identified him as one of the persons who had robbed him. Wallace was unable to identify defendant.

Defendant was arrested and charged with one count of robbery with a dangerous weapon and one count of second degree kidnapping. On 7 July 1997, a Guilford County Grand Jury indicted defendant on both counts. Defendant was tried on 2 March 1998 in Guilford County Superior Court and plead not guilty to the charges.

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Prior to the start of defendant's trial, the trial court held an evidentiary hearing on defendant's motion to suppress a statement made to officers of the Greensboro Police Department after he was arrested. According to defendant, after his arrest he informed police officers that he wanted an attorney. Defendant was then placed in an interview room at the Greensboro Police Department. Soon after, Detective Sam Jones of the Greensboro Police Department entered and began to read defendant his rights. Defendant testified that he asked Detective Jones for an attorney, but Detective Jones continued with the interview. Defendant testified that he did not give a statement to Jones, nor did he read the statement prepared by Jones that he signed.

Detective Jones testified he entered the interview room where defendant was held and advised defendant of his *Miranda* rights. According to Jones, defendant interrupted while Jones was reading defendant's *Miranda* rights. Defendant told Jones that he had told an officer previously that he wanted an attorney, but had since changed his mind and wanted to talk. Jones testified that he had no prior knowledge that defendant had requested an attorney. Jones testified that he asked defendant to write out the statement, but defendant declined and asked Jones to write the statement instead. Jones testified that at no time did defendant request an attorney. It was not until after Jones had read defendant his rights and a waiver statement and defendant indicated he understood both and signed the waiver, that Jones asked for defendant's statement.

The trial court denied the motion to suppress and entered a written order. On 4 March 1998, the jury found defendant guilty of robbery with a dangerous weapon and second degree kidnaping. The trial court made no findings of aggravating or mitigating factors and defendant was sentenced in the presumptive range. Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General James Peeler Smith, for the State.

Clifford Clendenin O'Hale & Jones, LLP, by Walter L. Jones, for defendant-appellant.

EAGLES, Chief Judge.

[1] First we consider whether the trial court erred by denying defendant's motion to suppress his statement to Detective Jones of

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the Greensboro Police Department. Defendant argues that he requested counsel and that Detective Jones re-initiated contact with him in violation of his fifth amendment right to counsel by entering the interview room and reading him his rights. After careful review, we disagree.

The fifth amendment, applicable to the states through the fourteenth amendment, *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed. 2d 653 (1964), is a protection against self-incrimination. In *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), the United States Supreme Court held that this fifth amendment right is the source of the right to the presence of counsel during custodial interrogation. "Interrogation," for fifth amendment purposes, refers not only to express questioning of a suspect by the police, but also to questioning or actions that police "should know are reasonably likely to elicit an incriminating response from a suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed. 2d 297, 308 (1980). Absent initiation by the defendant, if he invokes his right to the presence of counsel during interrogation, police may not "interrogate" the defendant further until he has been afforded the opportunity to consult with counsel. *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981).

State v. Nations, 319 N.C. 329, 330, 354 S.E.2d 516, 517 (1987).

While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*.

State v. Williams, 314 N.C. 337, 349, 333 S.E.2d 708, 716-17 (1985) (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 77 L. Ed. 2d 405, 412 (1983)). The United States Supreme Court stated that "interrogation" under *Miranda* refers to express questioning as well as any words or actions on the part of the police, "other than those normally

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attendant to arrest and custody,” that the police should know are reasonably likely to elicit incriminating responses from the suspect. *State v. Jones*, 112 N.C. App. 337, 342, 435 S.E.2d 574, 577-78 (1993). After the trial court establishes that the defendant re-initiated contact with police, the trial court must further make findings and conclusions that defendant waived his right to counsel under the totality of the circumstances. *State v. Jenkins*, 311 N.C. 194, 199, 317 S.E.2d 345, 348 (1984).

Here Detective Jones testified and the trial court found that Detective Jones was informing defendant of his *Miranda* rights, which Detective Jones was required to do, when defendant told Detective Jones that he wanted to talk about the charges. Detective Jones testified that defendant stated that he had told officers earlier that he wanted an attorney but that he had changed his mind and was ready to talk about the charges. Detective Jones had no prior knowledge of the defendant’s earlier request for counsel and had not begun questioning defendant when defendant waived his right to counsel. The trial judge made the following pertinent findings of fact:

3. That prior to the defendant’s meeting with Detective Jones, the defendant had previously informed an unidentified Greensboro police officer that he wanted an attorney.
4. That Detective Jones had no knowledge of this request.
5. That upon meeting with Detective Jones, the defendant was read his *Miranda* Rights.
6. That when the Detective got to the third question on the rights form, “you have the right to talk to a lawyer and to have a lawyer present with you while you are being questioned,” the defendant told Detective Jones that although he had told another officer that he wanted an attorney, he had changed his mind and now wanted to talk about the charges.
7. That the defendant executed a waiver of rights form.
8. That the defendant then recited a three page statement to Detective Jones, wherein he signed each page.

From these facts, the trial court concluded that as a matter of law, defendant’s statement that he had changed his mind while Detective Jones was reading defendant his *Miranda* rights was a re-initiation by defendant. Detective Jones, without knowledge of defendant’s earlier request for an attorney, simply was following police procedure

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and read defendant his rights. Before Detective Jones could even get through the normal arrest procedure of reading the suspect his rights, defendant stated that he had changed his mind and now wanted to talk to officers about the charges. The reading of a person's rights is a normal result of an arrest and custody and thus does not fall under the definition of "interrogation" or "re-initiation" as set out by the United States Supreme Court. See *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.E. 2d 297, 308 (1980); *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 77 L.E. 2d 405, 412 (1983). See also *State v. Underwood*, 84 N.C. App. 408, 411, 352 S.E.2d 898, 900 (1987) (holding that an officer's delivery and reading of arrest warrants to defendant while he was in custody and after defendant's request for an attorney constituted a routine incident of the custodial relationship and was not an improper initiation of questioning by the officer), *overruled on other grounds*, *State v. Thompson*, 328 N.C. 477, 494, 402 S.E.2d 386, 395 (1991). Accordingly, the trial court properly held that defendant waived his right to counsel and did not suppress defendant's statements to Detective Jones. This assignment of error is overruled.

[2] Finally, we consider whether the trial court erred by denying defendant's motion to dismiss the charge of kidnaping at the close of the evidence. Defendant argues that the State's evidence shows only that the defendant, during the course of the robbery, escorted the victim from the teller machine to the victim's car where they both traveled a matter of feet before the robbery was entirely consummated. Defendant contends that the restraint and asportation were not discernible beyond the steps necessary to complete the robbery and that the trial court erred in denying the defendant's motion to dismiss because the evidence did not comport with the elements of kidnaping. We disagree.

In determining whether a kidnaping occurred, the pertinent issue is whether the removal involved is integral to the commission of the underlying offense. *State v. Joyce*, 104 N.C. App. 558, 567, 410 S.E.2d 516, 521 (1991), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992). The North Carolina Supreme Court has rejected the notion that the "removal" as used in G.S. § 14-39 requires a movement "for a substantial distance." *State v. Surrett*, 109 N.C. App. 344, 349, 427 S.E.2d 124, 127 (1993) (quoting *State v. Fulcher*, 294 S.E.2d 503, 522, 243 S.E.2d 338, 351 (1978)).

Here, the asportation was not "minor" or "merely technical in nature." The victim of the robbery was moved a distance of "more than 200 feet—across a parking lot, out onto a street, and down a hill

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into a cul-de-sac.” Here, the defendant forced the victim away from the teller machine after having already taken the victim’s money and after having forced the victim to withdraw even more money from the teller machine. The asportation was therefore obviously unnecessary to extract more money from the victim. Accordingly, the trial court did not err in denying defendant’s motion to dismiss the charge of kidnaping. This assignment of error is overruled.

No error.

Judges LEWIS and HORTON concur.



STATE OF NORTH CAROLINA v. MICHAEL RANKINS

No. COA98-718

(Filed 15 June 1999)

1. Evidence— bias of witness—evidence excluded

The trial court erred in an armed robbery prosecution by precluding defendant from introducing evidence concerning the bias of a State’s witness where the witness testified that there was no deal to allow him to plead guilty to a reduced charge in exchange for his testimony and the court would not allow defendant to present testimony by an inmate that the witness had stated in jail that he had made a deal with the State. Since this was the only witness directly tying defendant to the crime, this constituted reversible error.

2. Evidence— offer of proof—absence not fatal

The absence of an offer of proof to the exclusion of testimony concerning the bias of a State’s witness was not fatal to defendant’s argument where the court had specifically informed defense counsel that the record already included the basis of the anticipated testimony. It has been held that failure to make offers of proof is not necessarily fatal if the essential content of the excluded testimony and its significance are obvious from the record.

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3. Evidence— offer of proof—absence fatal

An assignment of error to the exclusion of testimony concerning the bias of the investigating offer was overruled where the record was not clear as to the anticipated testimony and both the officer and defendant were extensively questioned concerning an alleged history of ill-will.

4. Evidence— identification—photographic lineup—failure to object when identification made before jury

There was no error in an armed robbery prosecution in allowing testimony concerning a photographic identification of defendant where all of the photographs were of black men, facial hair varied, and the witness was not told that a suspect was in any of the groups. Moreover, assuming that the procedure was impermissibly suggestive, defendant waived the error by failing to object when the witness later identified him before the jury.

5. Grand Juries— copy of proceedings—denied

The trial court did not err in an armed robbery prosecution by denying defendant's motion for a copy of the grand jury proceedings in the case.

6. Sentencing— allocution—after sentence entered—denied

The trial court did not err when sentencing defendant for armed robbery by denying him the opportunity to speak in his own behalf when defendant made his request after the court had imposed sentence. The purpose of allocution is to afford defendant the chance to state any further information which the court might consider when determining sentence; in this case the request came too late to inform the court of mitigating factors relevant to sentencing or to plead for leniency. The court had asked whether defense counsel had anything else to say prior to sentencing and is not required to personally address defendant and ask if he wishes to make a statement. N.C.G.S. § 15A-1334(b).

Appeal by defendant from judgment entered 5 November 1997 by Judge Clifton W. Everett, Jr. in Chowan County Superior Court. Heard in the Court of Appeals 17 March 1999.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Benjamin Sendor, for defendant-appellant.

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HUNTER, Judge.

At trial, the State's evidence tended to show that at 2:30 p.m. on 14 March 1997, two men wearing ski masks entered the Royalty Finance ("Royalty") office in Edenton, North Carolina. One of the men was carrying a revolver. They told the people in the office to get on the floor and took approximately \$1,400.00 from one of the front cash registers. No one in the office could identify either of the two men.

Bishop Ali, who runs BJ's Coffee Shop two doors down from Royalty, testified he observed two men pacing in front of his shop between 2:00 and 2:30 p.m. on the day in question. Mr. Ali identified one of the men as the defendant, Michael Rankins.

Melanie Young, defendant's probation officer on 14 March 1997, testified that defendant appeared in her office across the street from Royalty on that date asking if he had an appointment. When she responded that he did not, defendant appeared confused and suggested maybe the appointment he had in mind was with his attorney, W. Hackney High, Jr.

Cleaven White, defendant's accomplice, testified that, on 14 March 1997, defendant asked him if he wanted to make some money by robbing Royalty. They walked behind a building and cut holes in their toboggans. After stalling for awhile, Mr. White felt defendant stick a gun in his back and force him inside the office. Once inside Royalty, the two men told everyone it was a "stick-up," robbed everyone and left the premises. Defendant took the money but later gave Mr. White \$250.00. Mr. White saw Captain Bonner of the Edenton Police Department a few weeks after the robbery and gave a statement, implicating defendant in the crime. He further testified he was not promised a deal for his testimony but admitted he hoped it would help him obtain a lesser sentence on an unrelated breaking and entering charge. The parties stipulated that Mr. White had prior convictions for felony larceny, felony possession of stolen goods, misdemeanor larceny, and one parole violation.

Captain Bonner was off-duty on 14 March 1997. He was called in at approximately 2:50 p.m. to respond to a 911 call received at 2:42 p.m. from Royalty. He talked with the victims and Mr. Ali and then proceeded to Mr. High's office where he saw defendant. Upon Mr. Ali's description of the two men, Captain Bonner requested a group of photographs to be delivered to him from the Chowan County

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Detention Center. From the photographs, Mr. Ali formally identified defendant as one of the two men previously standing in front of BJ's. On 8 April 1997, upon the request of Mr. White, Captain Bonner went to the Detention Center to discuss the robbery. After reading Mr. White his rights, Captain Bonner took his statement which implicated defendant. Upon cross-examination, Captain Bonner responded that he remembered having arrested defendant on at least two other occasions for armed robbery but did not recall having been involved in any personal altercations with defendant. The State rested.

Defendant testified that he was at his girlfriend's home on the afternoon of 14 March 1997 and did not go to downtown Edenton on that day before 3:00 p.m. Defendant stated that after he had visited both his probation officer and his attorney, he walked to the Stop and Shop where he talked to Captain Bonner at 3:30 p.m. Captain Bonner told him about the robbery, patted him down and asked him to go with him. Defendant testified that he refused and returned to his attorney's office. On cross-examination, defendant admitted he had been convicted for armed robbery once but could not recall any other convictions.

Defendant was indicted on 12 May 1997 and was tried in Chowan County Superior Court beginning on 3 November 1997. He was convicted of one count of robbery with a firearm and sentenced to 167 to 210 months imprisonment. Defendant appeals that conviction.

[1] In his first assignment of error, defendant contends the trial court erred in precluding defendant from introducing evidence concerning bias of a prosecution witness, Cleaven White. During the State's case, defense counsel asked Mr. White, during cross-examination, whether he had discussed a deal with the State which would allow him to plead guilty to a reduced charge in exchange for his testimony against defendant. He responded that there was no deal. Defendant argues that the court's failure to allow him to present testimony by Michael White, a jail inmate, who wished to state that Cleaven White had told him in jail that he had made a deal with the State (one year in prison for all his pending charges—this armed robbery, a breaking and entering charge, and a parole violation), constituted reversible error. Defendant asserts that had the jury been allowed to hear Michael White's testimony, it might have doubted Cleaven White's credibility and discounted his entire testimony. Since Cleaven White was the only witness directly tying defendant to the crime, the jury could have found defendant not guilty. We agree with defendant's argument.

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In a similar case, *State v. Murray*, 27 N.C. App. 130, 218 S.E.2d 189 (1975), the State's witness denied, on cross-examination, that he had been offered any promises by the State for his testimony against defendant. The trial court refused, following *voir dire*, to allow defendant to present testimony of a witness who claimed the State's witness told him on the morning of the trial that "if he did not testify for the State that they would see to it that he did pull the maximum for his sentence." This Court held that:

the question put to [State's witness] on cross-examination was clearly as to a matter tending to show his motive and interest in testifying against the defendant. Therefore, defendant was not bound by [State's witness's] answer but was entitled to prove the matter by other witnesses. The State's entire case depended solely upon [State's witness's] testimony. No other evidence connected defendant in any way with the crime charged. [State's witness's] credibility was thus the paramount matter for the jury to determine, and when the court excluded [defendant's witness's] testimony from the jury's consideration . . . , defendant suffered prejudicial error for which he is entitled to a new trial. (Citations omitted.)

Murray, 27 N.C. App. at 133, 218 S.E.2d at 191. We agree with the holding in *Murray*.

[2] Furthermore, we do not deem it fatal to defendant's argument that defense counsel failed to make specific offers of proof at trial. First, since the trial court specifically informed defense counsel that the record already included the basis of Michael White's anticipated testimony, it would be unfair to preclude defendant from raising the exclusion of the proffered testimony on appeal. Secondly, our Supreme Court has held that failure to make offers of proof is not necessarily fatal if "the 'essential content' of the excluded testimony and its significance are obvious" from the record. *State v. Hester*, 330 N.C. 547, 555, 411 S.E.2d 610, 615 (1992) (citing *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)). For the foregoing reasons, we remand this case for a new trial.

[3] Even though we are remanding this case to the Chowan County Superior Court for a new trial on the issue set forth above, we have elected to address defendant's remaining assignments of error since they could each readily occur in the new trial.

Defendant contends the trial court erred in excluding the testimony of defendant's sister, Connie Sawyer, concerning the alleged

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bias of Captain Bonner against defendant. Here, unlike the previous situation, the record is not clear as to the anticipated testimony of Ms. Sawyer, arguably another biased witness. "Ordinarily, where the evidence is excluded, the record must show the essential content or substance of the witness's testimony before we can determine whether the exclusion prejudiced defendant." *Hester*, 330 N.C. at 555, 411 S.E.2d at 615 (citations omitted). Captain Bonner and defendant both were questioned extensively concerning an alleged history of ill-will between the two men. We elect not to speculate as to the basis of Ms. Sawyer's testimony or whether its exclusion prejudiced defendant. This assignment of error is overruled.

[4] In his next assignment of error, defendant contends the trial court erred in denying his motion to suppress the photographic identification of defendant. The *voir dire* testimony of Captain Bonner indicates that he showed Mr. Ali three photographic lineups twenty to thirty minutes following the robbery. Each lineup contained six photographs of black men. Photographs of some men appeared in two of the three lineups; defendant's photograph appeared in all three. Defendant's photograph appeared in the same position in two of the three lineups—the top left corner.

Assuming *arguendo* that the procedure was impermissibly suggestive, "defendant waived that error by failing to object when the witness later identified him before the jury as the man he had picked out of the lineup." *State v. Hunt*, 324 N.C. 343, 355, 378 S.E.2d 754, 761 (1989). "Failure to object when identification is made before the jury is a waiver of the right to have the propriety of that identification considered by the appellate court." *Id.* However, pursuant to N.C. Gen. Stat. § 15A-1446(b) (1997), this Court may review the alleged error "affecting substantial rights in the interest of justice if it determines it appropriate to do so."

In *State v. Leggett*, 305 N.C. 213, 287 S.E.2d 832 (1982), defendant was the only person whose photograph was in both groups of photographs shown to the victim. The Supreme Court found that this, standing alone, was insufficient to show that the pretrial photographic identification was impermissibly suggestive and indicated that the courts should look at the "totality of the procedures employed." *Id.* at 222, 287 S.E.2d at 838. Here, as in *Leggett*, all the photographs in the groupings were of black men. In one grouping, all the men had facial hair; in the other two, it varied. Captain Bonner testified he did not tell Mr. Ali that a suspect was in any of the groups.

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Based on the totality of these procedures, we conclude that the trial court committed no error in allowing testimony from Mr. Ali and Captain Bonner concerning the photographic identification of defendant by Mr. Ali.

[5] Next, defendant contends the trial court erred in denying his motion to obtain a copy of the grand jury proceedings in this case. N.C. Gen. Stat. § 15A-622 specifically states in part, “The contents of the petition and the affidavit shall not be disclosed.” N.C. Gen. Stat. § 15A-622(h) (1997). “An accused in this jurisdiction has no right to obtain a transcript of the grand jury proceedings against him.” *State v. Porter*, 303 N.C. 680, 689, 281 S.E.2d 377, 384 (1981). “Defendant is adequately protected by his right to object to improper evidence and cross-examine the witnesses presented against him at trial.” *Id.* This assignment of error is also without merit.

[6] Finally, defendant contends the trial court erred in sentencing him without first affording him the opportunity to speak on his own behalf. The transcript reveals that after the jury had announced its verdict and the court had sentenced defendant, defendant asked if he could address the court. The court denied this request and defendant contends this refusal violated his statutory and constitutional right to allocution. N.C. Gen. Stat. § 15A-1334(b) (1997). We disagree.

The purpose of allocution is to afford defendant an opportunity to state any further information which the trial court might consider when determining the sentence to be imposed. N.C. Gen. Stat. § 15A-1334(b) expressly gives a non-capital defendant the right to “make a statement in his own behalf” at his sentencing hearing. However, “[i]t is clear that G.S. 15A-1334, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf.” *State v. McRae*, 70 N.C. App. 779, 781, 320 S.E.2d 914, 915 (1984), *disc. review denied*, 313 N.C. 175, 326 S.E.2d 35 (1985) (*citing State v. Poole*, 305 N.C. 308, 289 S.E.2d 335 (1982)). *See also State v. Griffin*, 57 N.C. App. 684, 292 S.E.2d 156, *cert. denied*, 306 N.C. 560, 295 S.E.2d 477 (1982); *State v. Martin*, 53 N.C. App. 297, 280 S.E.2d 775 (1981). Here, the transcript reveals that, prior to sentencing defendant, the trial court addressed defense counsel and inquired: “Anything else you would like to say, Mr. High?” Mr. High responded, “No, Your Honor.” Based on this response, the court pronounced sentence accordingly.

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After the sentence had been entered, defendant vocalized his desire to address the court. Since the jury had already rendered its verdict and the court had already imposed sentence, the opportunity to "speak in his own behalf" had passed. At this point, it was too late in the proceedings to inform the court of mitigating factors relevant to sentencing or to plead for leniency. This assignment of error is overruled.

New trial.

Judges MARTIN and TIMMONS-GOODSON concur.

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STATE OF NORTH CAROLINA v. DONNIE COATS LEE

No. COA98-951

(Filed 15 June 1999)

Jury— selection—prejudicial statements—entire panel not dismissed—peremptory challenges not fully restored

There was prejudicial error in a prosecution for multiple offenses arising from a home invasion where 5 jurors were seated; a prospective juror stated that she knew one defendant from having been a Durham County detention officer and that another defendant looked familiar; that prospective juror was dismissed; nine jurors were selected by the end of the day; and a defense counsel brought to the attention of the court his concern over the statements. After an extended discussion, the court concluded that the jury was tainted, excused eight of the jurors but retained the ninth, who became the foreman, and restored only some of the peremptory challenges. When inappropriate answers are given or comments made by a prospective juror during the jury selection process, the trial court should make an inquiry of all jurors, both accepted and prospective, to determine whether they heard the statements, the effect of the statements on them, and whether they could disabuse their minds of the harmful effects of the comments. Moreover, the trial court here ordered that counsel for the three defendants not consult with one another in the courtroom during the jury selection process;

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although not assigned as error, such an order should be used only if necessary to maintain courtroom order during the proceedings and a record should be made of the reasons for the implementation of such a procedure.

Appeal by defendant Adrian Bruce Howard from judgments entered 17 November 1997 by Judge Henry V. Barnette in Durham County Superior Court, and by defendant Donnie Coats Lee from judgments entered 20 November 1997 by Judge Henry V. Barnette in Durham County Superior Court. Heard in the Court of Appeals 17 May 1999.

On 13 June 1996, the home of Joe McGhee in Durham was invaded by three armed men. The invaders robbed, threatened, and assaulted many of the guests in the home. Adrian Bruce Howard (defendant Howard), Donnie Coats Lee (defendant Lee), and Abdul Rashid (defendant Rashid) were indicted on numerous charges arising out of the incident. Each of the defendants was charged with two counts of assault with a deadly weapon with intent to kill inflicting serious injury; two counts of first-degree sexual offense; first-degree burglary; robbery with a dangerous weapon; second-degree kidnaping; and first-degree kidnaping. Defendant Howard was also charged with being an habitual felon. All three defendants were jointly tried at the 27 October 1997 Regular Criminal Session of Durham County Superior Court.

The parties accepted and seated five jurors during the first day of jury selection. During the morning of the second day of jury selection, a prospective juror, Ms. Mills, stated that she had been a Durham County detention officer and that she knew defendant Howard "from there." Ms. Mills also stated that defendant Lee looked familiar. She was later excused by counsel for defendant Rashid. At the end of the second day of jury selection, nine jurors had been selected. Counsel for defendant Howard then brought to the attention of the trial court his concern over the statements made by Ms. Mills in the presence of the other members of the jury panel.

When the trial reconvened the following morning, counsel and the trial court engaged in an extended colloquy over whether the jury was tainted by the statements of Ms. Mills, and what the remedy should be. The trial court concluded that the jury was tainted and that the affected jurors should be dismissed, and some of their peremptory challenges restored to defendants. Defendants moved

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that all nine seated jurors be dismissed, and that the jury selection process begin all over. The trial court declined to do so, dismissed the first eight jurors, restored some of their peremptory challenges to defendants, and retained the ninth juror, Mr. Burrage. Mr. Burrage later became the jury foreman. Defendants objected to the trial court's procedure.

A jury was eventually seated. Defendant Rashid was acquitted of all charges, but defendants Howard and Lee were convicted on all charges, although the two assault charges against defendant Lee were reduced to assault with a deadly weapon with intent to kill, and one of the assault charges against defendant Howard was reduced to assault with a deadly weapon with intent to kill. Defendant Lee was sentenced to a minimum of 912 months and a maximum of 1,160 months. Defendant Howard was sentenced to a minimum of 1,021 months and a maximum of 1,291 months. The State elected not to proceed on the habitual felon charge against defendant Howard. Defendants Howard and Lee appealed, assigning errors.

Attorney General Michael F. Easley, by Associate Attorney General Thomas J. Pitman, for the State.

Mark J. Simeon for defendant-appellant Adrian Bruce Howard.

Mark E. Edwards; and William C. Fleming, Jr., for defendant-appellant Donnie Coats Lee.

HORTON, Judge.

The issue before us is whether the trial court erred in failing to dismiss the entire jury panel, restore all peremptory challenges to defendants, and begin the process of jury selection from the beginning when statements prejudicial to some or all of defendants were made in the presence of the seated jurors by a prospective member of the panel. We hold that the procedure followed by the trial court in this case was prejudicially erroneous to defendants, and grant them a new trial.

Our decision in *State v. Mobley*, 86 N.C. App. 528, 358 S.E.2d 689 (1987), sets out the preferred procedure for the trial court to follow when a prospective juror answers a question with information obviously prejudicial to a criminal defendant. In *Mobley*, a prospective juror stated that he was a police officer, and that he "had dealings with the defendant on similar charges." *Id.* at 532, 358 S.E.2d at 691. The trial court then excused the juror for cause, and instructed the

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jury to strike from their minds any reference the prospective juror made to defendant. *Id.* at 533, 358 S.E.2d at 691. Defense counsel moved that the trial court dismiss the jurors based on the statement, and the trial court denied the motion to dismiss. *Id.* at 533, 358 S.E.2d at 691-92. On appeal, this Court held that:

A statement by a police officer-juror that he knows the defendant from “similar charges” is likely to have a substantial effect on other jurors. The potential prejudice to the defendant is obvious. On the defendant’s motion to dismiss the other jurors, the trial court, at the least, should have made inquiry of the other jurors as to the effect of the statement. *The more prudent option for the trial court would have been to dismiss the jurors who heard the statement and start over with jury selection.* In any event, the attempted curative instruction was simply not sufficient.

Id. at 533-34, 358 S.E.2d at 692 (emphasis added).

In the case before us, the trial court recognized the obvious prejudice to defendants of the statements made by the prospective juror, and elected to follow the “more prudent option” of *Mobley* and “start over with jury selection.” The trial court elected, however, the unusual option of retaining the ninth juror, Mr. Burrage, whom the trial court stated was not in the courtroom when the statements in question were made, and then restoring only a portion of the peremptory challenges previously expended by defendants. In explaining its reasoning, the trial court stated:

The peremptory challenges used Monday by everybody was before Ms. Mills spoke. And what I’m inclined to do, as you can tell, is to allow those peremptories to stay used. And the peremptories that were used on the new group that didn’t hear the taint, those staying used. But allow the peremptories that were used at the time of the taint or that were used after the taint occurred to be restored prior to the new jurors coming into the courtroom.

Now, as I indicated, it’s going to take some time, I guess, for us to determine which jurors were challenged. We know who two of them were. Which jurors were challenged and who challenged them.

MR. RIGSBEE: May I make inquiry?

THE COURT: Yes, sir.

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MR. RIGSBEE: Is it your proposal then, that the jurors—that the challenges that we used prior to Ms. Mills’ statement from the jury box, that we’re still charged with the use of those challenges?

THE COURT: Yes.

MR. RIGSBEE: Even though none of those jurors that we would use to—used those challenges to select will remain?

THE COURT: That’s correct.

After an extended discussion, and a lengthy recess during which the court reporter reconstructed the use of peremptory challenges by counsel, both before and after the statements by Ms. Mills, the trial court dismissed the first eight jurors, retained the ninth (Mr. Burrage), restored three peremptory challenges to the State, and restored two challenges to each of the defendants. Thus, with eleven jurors remaining to be selected, defendants Howard and Rashid had three peremptory challenges remaining, and defendant Lee had four remaining peremptory challenges. All defendants objected to the procedure used by the trial court, arguing that they were prejudiced because it changed their entire jury selection strategy. Defendants exhausted their peremptory challenges during the remainder of the jury selection process, the trial court denied their requests for additional peremptory challenges, and defendants attempted to challenge jurors after their challenges were exhausted. Thus, defendants have properly preserved their objections to the procedure implemented by the trial court.

We agree with the arguments advanced by defendants. Although the trial court chose the second option discussed in *Mobley* and dismissed the jurors who heard the statement by Ms. Mills, it did not then “start over with jury selection.” We think the plain meaning of that language would be that the trial court would dismiss the jury panel, restore all peremptory challenges to the parties, and resume the jury selection process. While there is some indication in the record that Mr. Burrage was not in the courtroom when the prejudicial remarks were made by Ms. Mills, no formal inquiry was made to determine this as a fact. Further, there was no inquiry as to whether Mr. Burrage and the eight excused jurors discussed the situation during the extended period they were closeted together awaiting the trial court’s decision on defendants’ motion to dismiss them. We do not perceive any sound reason to distinguish the situation in the case

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before us from that in *Mobley*, so as to permit the procedure followed by the trial court. We do not disagree with the opinion expressed by the trial court that defendants are not entitled to a jury of their choice, but to an impartial jury to hear their cases. However, the innovative procedure followed by the trial court in this case completely changed defendants' strategy of jury selection by leaving them with a reduced number of peremptory challenges with which to select eleven jurors.

As a result, we hold that where inappropriate answers are given or comments made by a prospective juror during the jury selection process, the trial court should make an inquiry of all jurors, both accepted and prospective, to determine whether they heard the statements, the effect of such statements on them, and whether they could disabuse their minds of the harmful effects of the prejudicial comments. Unless the trial court determines that the statements were so minimally prejudicial that the members of the jury might reasonably be expected to disregard them and render a fair and impartial verdict without regard to such statements, the far more prudent course is to dismiss the panel, restore all peremptory challenges to all parties, and begin the process of jury selection anew. The right to trial by jury in criminal cases is such a fundamental part of our criminal justice system that it must be jealously guarded, even at the cost of delay and inconvenience in the trial court. Although we understand the desire of the trial court in this case to "fashion a remedy," judicial economy is not served by the necessity for a new trial of the charges against these defendants.

We further note that at the beginning of the jury selection process, the trial court ordered that trial counsel for the three defendants not consult with one another in the courtroom during the jury selection process. The trial court apparently felt that such consultations would be disruptive. It then renewed its order even after counsel suggested that they might move their chairs close to one another so as to avoid any disruption of the proceedings. We recognize and reaffirm the right of the trial court to preserve order and decorum in its courtroom. However, we perceive no reason from this record in this case for the particular procedure in this case, which effectively prohibited co-counsel from coordinating jury selection strategy. Although defendants did not assign that order of the trial court as error, we emphasize that such an order should be used only if necessary to maintain courtroom order during the proceedings, and that a record should be made of the reasons for implementation of

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such a procedure by the trial court. This Court would then be able to review the record and confirm that the rights of codefendants to choose an impartial jury were not prejudicially compromised.

In light of our decision, we need not address the other assignments of error brought forward by defendants.

New trial.

Chief Judge EAGLES and Judge LEWIS concur.

ALBERT ODELL PERKINS, PLAINTIFF V. JULIAN C. HELMS, D/B/A AUTO GALLERY OF GASTONIA AND HARTFORD CASUALTY INSURANCE COMPANY, DEFENDANTS AND THIRD PARTY PLAINTIFFS V. TIMOTHY W. MELTON AND WILLIAM INGRAM, D/B/A SOUTHERN IMPORTS, THIRD PARTY DEFENDANTS V. JULIAN C. HELMS, D/B/A AUTO GALLERY OF CHARLOTTE; AND AUTO GALLERY OF CHARLOTTE, INC., ADDITIONAL THIRD PARTY DEFENDANTS

No. COA98-453

(Filed 15 June 1999)

1. Appeal and Error— preservation of issues—assignment of error— not to order appealed from

Contentions concerning the denial of motions to intervene by other parties were not properly before the Court of Appeals where the notice of appeal was only from another order, which did not include findings or conclusions relating to the denial of the motion to intervene.

2. Sureties— motor vehicle dealer bond—effective years

The trial court did not err in its calculation of the effective years of a motor vehicle dealer surety bond where, read in conjunction with the language of N.C.G.S. § 20-288, the wording of the bond indicates that the bond was effective for three license years with an aggregate limit of liability of \$25,000 for each license year rather than a total aggregate liability of \$25,000.

3. Sureties— motor vehicle dealer bond—aggrieved purchaser under bond

The trial court correctly held that Ingram purchased a car from Helms and was entitled to recover under an appli-

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cable surety bond issued by Hartford, where Ingram did in fact purchase the car from Helms, even though it had already contracted to resell the vehicle and did resell it immediately. N.C.G.S. § 20-288(e).

Appeal by defendant/third-party plaintiff, Hartford Casualty Insurance Company, from order entered 12 December 1997 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 17 February 1999.

Corry, Cerwin & Luptak, by Todd R. Cerwin, for plaintiff-appellee.

DeVore Acton & Stafford, P.A., by William D. Acton, Jr., for third-party defendant-appellee William Ingram.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence and Holly L. Saunders, for defendant/third-party plaintiff-appellant Hartford.

HUNTER, Judge.

Briefly, the facts as stipulated to by the parties show that William Ingram d/b/a Southern Imports ("Ingram") contracted with Julian C. Helms d/b/a Auto Gallery of Charlotte ("Helms") on 18 March 1994 to purchase a 1993 Mercedes 500SEL for \$63,500.00. Ingram immediately sold the car to an out-of-state dealer for \$66,400.00. When it was discovered that the Mercedes was stolen, the out-of-state dealer filed a claim with its carrier for \$57,000.00 and the carrier then settled its claim against Ingram for \$40,000.00. Pursuant to N.C. Gen. Stat. § 20-288 (Supp. 1998), Ingram then filed a claim against Helms.

On 29 December 1994, Timothy W. Melton ("Melton") purchased a 1991 Mercedes 300E from Helms for \$24,765.00 but was unable to obtain legal title due to an outstanding lien held by Chase Manhattan Bank. Eventually, Helms paid the lien but failed to perfect title for Melton and Melton filed suit for his costs in securing the license and title to the vehicle, paying the taxes on the vehicle and for his lost wages. Melton obtained a default judgment against Helms in the amount of \$12,382.13, which included attorney fees and trebled damages.

On 25 July 1995, Albert Odell Perkins ("Perkins") purchased a 1993 Toyota 4Runner from Helms for \$21,431.00. Before Perkins was

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able to obtain legal title, it was learned that the vehicle was stolen and had an altered serial number. The North Carolina Department of Motor Vehicles (“DMV”) seized the vehicle and Perkins obtained a default judgment against Helms in the amount of \$16,731.00, which includes attorney fees and trebled damages. Hartford Casualty Insurance Company (“Hartford”), who had provided a motor vehicle surety bond for Helms pursuant to statutory requirements, was also a named defendant and responded timely by filing the third-party interpleader complaint seeking declaratory judgment on the surety bond at issue here. Melton and Ingram were named as third-party defendants.

On 14 January 1995, Kimberly Phillips (“Phillips”) purchased a 1994 Mitsubishi Montero from Helms for \$22,875.00. This vehicle was also determined to be stolen and was seized by DMV. Phillips and Allstate Insurance Company (“Allstate”) attempted to intervene in the declaratory judgment action but the trial court denied their motion.

In an order dated 12 December 1997, the court found that Hartford’s surety bond was effective for three separate license years and that Perkins, Melton and Ingram were entitled to recover \$16,731.00, \$2,930.50 and \$25,000.00, respectively. Hartford appeals this ruling.

[1] In its first assignment of error, Hartford contends the trial court erred in its order filed 3 November 1997 denying the motion of Phillips and Allstate to intervene. However, this issue is not properly before this Court. Hartford filed notice of appeal to this Court only from the order entered by Judge Patti on 12 December 1997. Our review of the 12 December 1997 order reveals no findings of fact or conclusions of law relating to the denial of the motion by Phillips and Allstate to intervene in this action. As a result, we need not determine whether Hartford was an aggrieved party to the prior order and had standing to appeal on behalf of Phillips and Allstate, neither of whom appealed the denial of their motion to intervene. This argument is without merit.

[2] Next, Hartford argues that the trial court erred in its determination and calculation of the effective years of its motor vehicle dealer surety bond issued to Helms. The trial court found that the bond covered three separate license years and provided for an aggregate liability of \$25,000.00 for each effective license year. Hartford contends this conclusion conflicts with the statute and the stipulations of the parties.

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N.C. Gen. Stat. § 20-288 requires all motor vehicle dealers to be licensed by DMV prior to conducting business in this state. All licenses that are granted shall expire, unless sooner revoked or suspended, on 30 June of the year following the date of issue. Each licensee shall maintain a corporate surety bond in the amount of \$25,000.00 conditioned on the basis that the licensee will faithfully conform to the provisions of Articles 12 (Motor Vehicle Dealers and Manufacturers Licensing Law) and 15 (Vehicle Mileage Act). Finally, N.C. Gen. Stat. § 20-288 provides that anyone who purchases a vehicle and who has suffered any loss or damage by any act of a licensee which violates Article 12 or 15 may seek to recover under this section against the licensee and the surety.

Hartford relies on a South Carolina case as authority for its position that its total aggregate liability under the surety bond is \$25,000.00. *National Grange Mut. Ins. Co. v. Prioleau*, 269 S.C. 161, 236 S.E.2d 808 (1977). Believing as we do that the language of the bond is instrumental to our determination and having not seen the language of the bond in the South Carolina case, we cannot evaluate its significance. However, in the case *sub judice*, Helms obtained a corporate surety bond from Hartford, effective 5 January 1994, which provided that Hartford, as surety, will “indemnify any person who may be aggrieved by fraud, fraudulent representation or violation by said Principal . . . provided that the aggregate liability under this bond shall not exceed twenty-five Thousand Dollars (\$25,000) **for each license year for which the bond is effective.**” (Emphasis added). The bond was canceled by Hartford on 6 September 1995, effective 6 October 1995.

According to the statute, each license year expires on 30 June of the year following the date of issue. When read in conjunction with the language of the statute, the wording of the bond indicates that the bond was effective for three license years.

1st year	5 January 1994	30 June 1994
2nd year	1 July 1994	30 June 1995
3rd year	1 July 1995	6 October 1995

The trial court correctly calculated that the surety bond provided by Hartford covered three separate license years. The plain language of the bond states that the aggregate limit of liability is \$25,000.00 for each license year, not for all claims for all license years for which the bond was effective. This assignment of error is overruled.

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[3] Finally, Hartford contends the trial court erred in determining that Ingram qualified as an aggrieved purchaser under the motor vehicle dealer surety bond, thus improperly entitling him to recover under the bond. Again, we disagree. N.C. Gen. Stat. § 20-288(e) (Supp. 1998) requires a motor vehicle dealer to post a bond in the principal sum of \$25,000.00. The statute provides, in pertinent part, that “[a]ny purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a license holder . . . shall have the right to institute an action to recover against the license holder and the surety.” N.C. Gen. Stat. § 20-288(e) (emphasis added). “The two hurdles that need to be overcome within this statute are 1) the dealer’s violation of either article 12 or article 15 of chapter 20 of the General Statutes of North Carolina and 2) the suffering of damages or losses by the consumer.” *Tomlinson v. Camel City Motors*, 330 N.C. 76, 79, 408 S.E.2d 853, 855 (1991). In the case *sub judice*, Hartford does not argue that the dealer did not violate the statute or that damages were not incurred. Rather, Hartford, relying on several cases construing these sections, argues that Ingram does not qualify under the statute as a purchaser. *Taylor v. Johnson*, 84 N.C. App. 116, 351 S.E.2d 831 (1987); *Fink v. Stallings 601 Sales*, 64 N.C. App. 604, 307 S.E.2d 829 (1983); *Triplett v. James*, 45 N.C. App. 96, 262 S.E.2d 374, *disc. review denied*, 300 N.C. 202, 269 S.E.2d 621 (1980). We disagree.

“It is clear that only purchasers of motor vehicles may recover under a motor vehicle surety bond.” *Fink*, 64 N.C. App. at 605, 307 S.E.2d at 831. “Furthermore, where words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is indicated.” *Id.* “The common meaning of ‘purchaser,’ as defined in Webster’s Third New International Dictionary (1968), is ‘one that acquires property for a consideration (as of money).’” *Fink* at 605, 307 S.E.2d at 831. Although Ingram had already contracted to resell the vehicle in question prior to its purchase and did resell the vehicle immediately, we conclude that, pursuant to the sales contract executed on 18 March 1994, Ingram did in fact purchase the car from Helms for \$63,500.00. As a purchaser, Ingram is entitled to recover under the surety bond.

The holdings in the cases cited by Hartford are readily distinguishable. In *Fink*, this Court held that the alleged purchaser held only a security interest in the motor home in question and never actually acquired the vehicle. In *Triplett*, the plaintiff was the seller and not the purchaser. The Court noted that “it is clear that G.S.

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§ 20-288(e) grants only to *purchasers* the right to recover on the bond." *Triplett*, 45 N.C. App. at 99, 262 S.E.2d at 375. Finally, in *Taylor*, the plaintiff and defendant had entered into a joint venture agreement whereby the defendant borrowed money from a bank to buy cars and plaintiff guaranteed the loan payments. They repaired the cars, sold them and then split the profits. On one such deal, plaintiff loaned money to defendant to pay the bank loan and defendant gave plaintiff title to the car. When the car was discovered to be stolen, plaintiff sued to recover on defendant's motor vehicle dealer's bond. This Court affirmed the trial court's dismissal of the case because the parties were primarily joint venturers, not seller and purchaser. The two parties were "engaged in a short-term business deal for joint profit, with contributions of effort from each and risks taken by each. As a joint venturer, Taylor is not a purchaser 'under the ordinary meaning of the word' and therefore cannot recover on the bond secured to comply with G.S. 20-288." *Taylor*, 84 N.C. App. at 120, 351 S.E.2d at 834 (citation omitted). None of these factual situations are similar to the one before us.

The trial court correctly held that Ingram purchased the car from Helms and, thus, is entitled to recover under the applicable surety bond. This assignment of error is overruled.

Affirmed.

Judges TIMMONS-GOODSON and SMITH concur.

ROY J. WILLIAMS, EMPLOYEE, PLAINTIFF-APPELLEE v. ARL, INCORPORATED,
NON-INSURED, EMPLOYER, DEFENDANT-APPELLANT

No. COA98-1011

(Filed 15 June 1999)

**Workers' Compensation— employer-employee relationship—
jurisdiction**

A Workers' Compensation award was reversed where plaintiff was a truck driver who suffered frostbite while unloading a truck and the Industrial Commission found that he had sustained an injury by accident arising out of and in the course of his employment. The company for which plaintiff worked, B.J.

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Transportation, had contracted with defendant, and, assuming that plaintiff could be considered an employee of defendant as well as of B.J. Transportation, there was no record evidence from which to find that defendant regularly employed three or more employees, so as to be subject to the provisions of the Workers' Compensation Act. As to the "statutory employer" provisions of N.C.G.S. § 97-19, the greater weight of the evidence discloses that B.J. Transportation retained the right to control the manner in which it performed the work for defendant as an independent contractor; N.C.G.S. § 97-19 therefore does not apply to bring defendant within the jurisdiction of the Workers' Compensation Act.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission entered 8 April 1998. Heard in the Court of Appeals 20 April 1999.

Robert L. White for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Scott J. Lasso and Jaye E. Bingham, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from an opinion and award of the North Carolina Industrial Commission awarding plaintiff compensation for temporary total disability, permanent partial disability, and medical expenses for frostbite injuries to both hands. Defendant challenges the Commission's jurisdictional findings and conclusions that an employment relationship within the meaning of the Workers' Compensation Act existed between plaintiff and defendant, as well as the Commission's conclusion that plaintiff sustained an injury by accident arising out of his employment.

As pertinent to the issues raised by this appeal, the evidence before the Commission showed that at the time of his injury on 1 February 1993, plaintiff worked as a long-haul truck driver for B.J. Transportation, a freight hauling business. B.J. Transportation had a contract with defendant, ARL, Inc., to haul freight. Under the terms of the contract, B.J. Transportation was an independent contractor, and ARL, Inc., was a "carrier" under Interstate Commerce regulations, leasing trucks from B.J. Transportation which were then operated under defendant's ICC certification. The contract required that B.J. Transportation provide drivers for its trucks, who were to be

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considered employees of B.J. Transportation; that B.J. Transportation would provide workers' compensation insurance for its employees; and that defendant would have no responsibility for B.J. Transportation's liability under workers' compensation laws. Plaintiff was compensated on a rate per mile basis by B.J. Transportation, which issued his paychecks, withheld social security, federal and state taxes from his pay, and provided him with a W-2 wage and tax statement.

Though an appendix to the contract provided that defendant was to "have the exclusive possession, control and use of the equipment," the contract provided that defendant would have no direction or control over B.J. Transportation's drivers; that B.J. Transportation would have the right to refuse any load of freight tendered by defendant; and that B.J. Transportation would determine how the freight was loaded, hauled, and unloaded, subject only to the shipper's requirements and pick-up and delivery timetables. Plaintiff was permitted to choose the route which he would take, as well as his stops, and was required only to submit a daily log to defendant.

Plaintiff hauled a load of lumber to Lowville, N.Y. for defendant on 31 January 1993. He was injured when he suffered frostbite while unloading the lumber in extremely cold conditions on 1 February 1993. He remained out of work until 9 June 1993.

The Commission found and concluded that plaintiff had sustained an injury by accident arising out of and in the course of his employment, for which he was entitled to compensation for temporary total disability as well as for a 5% permanent partial impairment of his left hand, and a 17% permanent partial impairment of his right hand. The Commission also found and concluded that plaintiff was an employee of defendant ARL, Inc., while operating the truck and unloading the lumber, and that defendant was also liable for compensation under G.S. § 97-19 because it had not obtained a certificate from B.J. Transportation showing proof of workers' compensation insurance coverage on its drivers, including plaintiff.

We consider first the jurisdictional question of whether an employer-employee relationship within the meaning of the Workers' Compensation Act, G.S. §§ 97-1 *et seq.* ("the Act"), existed between plaintiff and defendant, ARL, Inc., at the time of the injury. An injured person is entitled to workers' compensation benefits under the Act only if he is an employee of the party from whom compensation is sought. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E.2d 645

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(1965); *Boone v. Vinson*, 127 N.C. App. 604, 492 S.E.2d 356 (1997), *disc. review denied*, 347 N.C. 573, 498 S.E.2d 377 (1998). Thus, the issue of plaintiff's employment status in relation to defendant is a jurisdictional issue; the Commission has no jurisdiction to apply the Act to a party who is not subject to its provisions. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 364 S.E.2d 433 (1988). When issues of jurisdiction arise, "the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court," and we are required to make independent findings with respect to jurisdictional facts. *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990) (citing *Youngblood, supra*).

The Commission first found that while plaintiff was operating the truck and performing other duties incidental thereto, including unloading the freight, he was defendant's employee. The Commission relied, *inter alia*, upon *Brown v. L.H. Bottoms Truck Lines*, 227 N.C. 299, 42 S.E.2d 71 (1947), which established that owner-drivers who operate in interstate commerce under the license tags and authority granted to a franchise carrier by the ICC are deemed employees of the carrier for the duration of the trip. *See Parker v. Erixon*, 123 N.C. App. 383, 473 S.E.2d 421 (1996). Here the evidence showed that defendant provided the ICC certification necessary for B.J. Transportation to operate in interstate commerce.

However, for an employer be bound by the Act, the employer must regularly employ an established number of employees as set by the Act. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982); *Cousins v. Hood*, 8 N.C. App. 309, 174 S.E.2d 297 (1970). G.S. § 97-2(1) defines the parameters of "employment" as including all "private employments in which three or more employees are regularly employed in the same business or establishment." N.C. Gen. Stat. § 97-2(1). The question of whether plaintiff was in the employment of an entity employing three or more regular employees is a jurisdictional issue as to which this Court must make an independent determination. *Cain v. Guyton*, 79 N.C. App. 696, 340 S.E.2d 501, *affirmed*, 318 N.C. 410, 348 S.E.2d 595 (1986); *Wiggins v. Rufus Tart Trucking Co.*, 63 N.C. App. 542, 305 S.E.2d 749 (1983). Assuming, *arguendo*, that the rule in *Brown* applies so that plaintiff could be considered an employee of defendant ARL, Inc., as well as B.J. Transportation, there is no evidence in the record from which this Court can find that defendant ARL, Inc., regularly employs three or more employees so as to be subject to the provisions of the Act.

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The Commission also applied G.S. § 97-19, the “statutory employer” provision of the Act, to find that defendant is within the jurisdiction of the Act for the purposes of plaintiff’s claim. G.S. § 97-19, as in effect at the time of plaintiff’s injury, provides in pertinent part:

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers’ compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of . . . any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

N.C. Gen. Stat. § 97-19. The statute is an exception to the general definitions of “employment” and “employee” set forth in G.S. § 97-2, and provides that a principal contractor, intermediate contractor, or subcontractor may be held liable as a statutory employer where two conditions are met: (1) “the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor,” and (2) “the subcontractor does not have workers’ compensation insurance coverage covering the injured employee.” *Rich v. R.L. Casey, Inc.*, 118 N.C. App. 156, 159, 454 S.E.2d 666, 667, *disc. review denied*, 340 N.C. 360, 458 S.E.2d 190 (1995). This statutory exception “is not applicable to an independent contractor as distinguished from a subcontractor of the class designated by the statute.” *Mayhew v. Howell*, 102 N.C. App. 269, 272, 401 S.E.2d 831, 833, *affirmed*, 330 N.C. 113, 408 S.E.2d 853 (1991) (quoting *Greene v. Spivey*, 236 N.C. 435, 444, 73 S.E.2d 488, 494 (1952)).

Here, the contract between B.J. Transportation and defendant expressly provided that B.J. Transportation was an “independent contractor.” Notwithstanding, however, how the parties may have designated their relationship, the actual relationship created by the agreement is a legal question. *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944); *Robinson v. Whitley*

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Moving & Storage, Inc., 37 N.C. App. 638, 246 S.E.2d 839 (1978). The question of whether a relationship is one of employer-employee or independent contractor turns upon "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." *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 79, 511 S.E.2d 9, 13 (1999) (citing *Hayes, supra*). There are generally eight factors to be considered in determining the degree of control exercised by the hiring party, including whether the 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 77, 511 S.E.2d at 12. No one factor is determinative. *Id.*

In the present case, B.J. Transportation is engaged in the independent business of freight-hauling. Under its contract with defendant, B.J. Transportation was responsible for hiring, training, and compensating its truck drivers, and defendant was afforded no direction or control over the drivers except in the result to be obtained. Plaintiff, a B.J. Transportation employee, had discretion to choose his delivery routes and to make as many stops as he desired. B.J. Transportation had the right to refuse any load of freight it did not wish to haul for defendant, and, with respect to those loads which it hauled, had discretion as to how the freight was loaded, hauled, and unloaded, subject only to delivery and pick-up timetables. The contract provided for defendant to compensate B.J. Transportation on a quantitative basis. The greater weight of the evidence discloses that B.J. Transportation retained the right to control the manner in which it performed the work for which it contracted with defendant and, thus, B.J. Transportation was an independent contractor to defendant. G.S. § 97-19 therefore does not apply to bring defendant within the jurisdiction of the Workers' Compensation Act, *see Mayhew, supra*, and the Commission had no jurisdiction to enter an award against defendant. Accordingly, the Commission's opinion and award in this case must be reversed.

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In view of our decision, it is unnecessary to address the issues raised by defendant's remaining assignments of error.

Reversed.

Judges GREENE and MCGEE concur.

PATTY T. COPPLEY, EMPLOYEE, PLAINTIFF v. PPG INDUSTRIES, INC., SELF-INSURED,
EMPLOYER, DEFENDANT

No. COA98-1166

(Filed 15 June 1999)

Workers' Compensation— disability benefits—burden of proof—Hilliard factors

The Industrial Commission in a workers' compensation case involving disability benefits erroneously placed the initial burden on defendant to prove the absence of the second Hilliard factor (incapacity to earn pre-injury wages in any other employment) before plaintiff had met her initial burden. In workers' compensation cases, the initial burden has always been on the plaintiff to produce competent evidence of all three of the factors in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, before the burden shifts to defendant to rebut plaintiff's evidence.

Appeal by defendant from opinion and award entered by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 May 1999.

This case arises from an award of worker's compensation benefits by the Industrial Commission after a hearing before deputy commissioner George T. Glenn, Jr. and a review by the Full Commission. On 9 March 1995, plaintiff filed a worker's compensation claim, alleging that on 6 January 1995 she sustained a hip injury while transporting a package from a conveyor belt to a handtruck at defendant's plant. A hearing was held on 26 February 1996 and deputy commissioner Glenn awarded temporary total disability benefits to plaintiff on 23 July 1997. On 16 July 1998, the Full Commission affirmed with one member dissenting. The Commission made the following findings:

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FINDINGS OF FACT

1. Plaintiff was fifty-two years old at the time of this hearing with her date of birth being 2 September 1943. She had completed high school.
2. Plaintiff began working for defendant-employer on 6 September 1994, and on 6 January 1995, she worked as a relief conveyor tuber. Her job as a tuber was to take tubes off the conveyor belt and place them onto a handtruck. The handtruck had posts onto which the tubes were placed, and the post[s] ranged in height from 1.5 feet off the floor to over shoulder height.
3. On 6 January 1995, plaintiff had taken a 25-pound fiberglass tube off the conveyor belt and was placing it onto the handtruck. Plaintiff was placing the tube onto a post that was approximately 1.5 feet off the floor. She had to bend down and as she began placing the tube onto the post the handtruck moved. She was holding the tube in her left hand and she grabbed the handtruck with her right hand to stop it and as she did she felt a pull in her goin [sic] and hip.
4. Shortly after this incident plaintiff went on break, when she returned from break she did not lift any heavy object and this meant that she did not remove all of the tubes from the belt.
5. Plaintiff returned to work the next day and when she attempted to do her job she was in pain and she informed her supervisor that she had injured herself the day before. Plaintiff did not report the incident on 6 January 1995, because she thought that she had just pulled a muscle and that it would be alright.
6. Plaintiff's supervisor placed her on light duty until she was able to see the plant nurse. When she saw the plant nurse she was continued on light duty until such time as she was able to see Dr. Hunter G. Strader.
7. Plaintiff was seen by Dr. Strader on 10 January 1995. Dr. Strader thought that plaintiff was suffering from a pulled goin [sic] muscle but when she did not respond to his course of treatment he referred [her] to Dr. Riggan who then referred plaintiff to Johnson Neurological Clinic.
8. Plaintiff was seen by Dr. Gregory Dean Mieden at the Johnson Neurological Clinic. Dr. Mieden diagnosed plaintiff's condition as

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a left hand side bulging disc at L5-S1. Dr. Mieden felt that this diagnosis fit with the complaints plaintiff had described to him and that her injury was the result of the incident plaintiff described happening on 6 January 1995, while she was in the course and scope of her employment with defendant-employer. Dr. Mieden did not feel that plaintiff's condition was one which warranted surgery. He treated her condition with medication and physical therapy.

9. Plaintiff was released on 20 August 1995, to return to work with the restrictions as set out in her Functional Capacity Evaluation.

10. Defendant did not have a position that was within the restrictions that had been placed upon her by Dr. Mieden.

11. Plaintiff is still under the treatment of her family doctor and psychiatrist.

12. Defendant has not shown that plaintiff is now presently capable of performing any job and if she is that there is a position in her community that she could obtain given her age, education and physical limitation caused by her injury.

13. Plaintiff has not reached maximum medical improvement and she may need vocational rehabilitation to assist her in obtaining other employment.

Based on the findings of fact, the Commission made the following conclusions of law:

1. Plaintiff sustained an injury by accident or specific traumatic incident on 6 January 1995, while in the course and scope of her employment with defendant and said accidental injury either caused a new injury or aggravated her pre-existing condition.

2. As a result of the injury by accident plaintiff was temporarily totally disabled from 31 January 1995 through the date of this hearing and continuing until such time as she has returned to work in a position earning the same or greater wages than she was earning at the time of this accident.

2. [Sic] Plaintiff's average weekly wages at the time of the accident were \$396.14, yielding a compensation rate of \$264.09.

3. Defendants are obligated to pay all medical expenses incurred or which will be incurred as a result of plaintiff's com-

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pensable injury that may cure or give relief or tend to lessen plaintiff's disability.

Based on the findings of fact and conclusions of law, the Commission awarded to plaintiff temporary total disability benefits at the rate of \$264.09 per week for the period from 31 January 1995 "through the date of this hearing and continuing until such time as plaintiff has returned to work earning the same or greater wages than she was earning at the time of her injury or further orders of the Industrial Commission." Defendant appeals.

O'Briant, Bunch, Robins & Stubblefield, by Julie H. Stubblefield, for plaintiff-appellee.

Brinkley Walser, PLLC, by G. Thompson Miller, for defendant-appellant.

EAGLES, Chief Judge.

Here we consider whether the Commission misapplied the law by erroneously placing the initial burden on defendant to prove that plaintiff was capable of earning pre-injury wages in other employment without first requiring plaintiff to meet her initial burden of proving all three *Hilliard* "disability" factors. In worker's compensation cases, plaintiff has the initial burden of proving that he suffers from a disability as a result of a work-related injury. *Harrington v. Adams-Robinson Enterprises*, 128 N.C. App. 496, 498, 495 S.E.2d 377, 379, *rev'd on other grounds*, 349 N.C. 218, 504 S.E.2d 786 (1998). "Disability" is a technical term, meaning that because of a workplace injury the employee suffers from an "incapacity . . . to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." G.S. 97-2(9). To support a conclusion of disability, the Commission must find facts indicating that plaintiff has met her initial burden of proving that: (1) she was incapable of earning pre-injury wages in the same employment, (2) she was incapable of earning pre-injury wages in any other employment, and (3) the incapacity to earn pre-injury wages in either the same or other employment was caused by plaintiff's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). To prove disability, the employee need not prove she unsuccessfully sought employment if the employee proves that, because of her age, work experience, training, education, or any other factor, seeking employment at pre-injury wages would be futile. *Grantham v. R. G. Barry Corp.*, 115 N.C. App. 293, 300, 444 S.E.2d 659, 663 (1994). Once the

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employee has met her initial burden of proving “disability,” the burden then shifts to the employer to produce evidence that suitable jobs are available for the employee and that the employee is capable of obtaining a job at pre-injury wages. *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). However, in worker’s compensation cases the *initial* burden has always been on the plaintiff to produce competent evidence of all three *Hilliard* factors before the burden shifts to defendant to rebut plaintiff’s evidence. Were this not so, worker’s compensation cases would commence with a presumption of disability, which is clearly not the law in North Carolina. Furthermore, to ensure effective appellate review, the Commission’s findings must sufficiently reflect that plaintiff produced evidence to prove all three *Hilliard* factors.

The Industrial Commission must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend. If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the cause must be remanded to the Commission for proper findings of fact.

Hansel v. Sherman Textiles, 304 N.C. 44, 59, 283 S.E.2d 101, 109-10 (1981) (citations omitted).

Here, the Commission stated in finding of fact #12 that defendant failed to produce evidence that plaintiff was capable of earning pre-injury wages in any other employment. In other words, the Commission found that defendant failed to prove the *absence* of the second *Hilliard* factor. However, the opinion and award contains no findings indicating whether plaintiff first met her initial burden of proving the *existence* of the second *Hilliard* factor—that she was incapable of earning pre-injury wages in any other employment. The findings do not indicate whether plaintiff offered any evidence that she either unsuccessfully sought other employment offering pre-injury wages or that, given her age, experience, training, education, and any other factors, seeking employment at pre-injury wages would have been futile. Although the Commission did make findings regarding plaintiff’s age and work experience, the findings do not indicate whether the Commission considered to what extent, if any, those factors affected plaintiff’s ability to earn wages after her injury. *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 89, 349 S.E.2d 70, 75 (1986). We conclude that the Commission did not make findings sufficient to

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show whether plaintiff produced evidence of all three *Hilliard* factors before shifting the burden to defendant to rebut plaintiff's evidence. Accordingly, we conclude that the Commission erroneously placed the initial burden on defendant to prove the *absence* of the second *Hilliard* factor before plaintiff had met her initial burden. We therefore reverse and remand to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

Judges LEWIS and HORTON concur.

CAROLYN FAYE WEBB AND PHILLIP EDWARD WEBB, PLAINTIFFS v. NASH HOSPITALS, INC. D/B/A NASH GENERAL HOSPITAL OR NASH GENERAL HOSPITAL, INC.; SOUTHEASTERN ACUTE CARE SPECIALISTS, P.A.; CHARLES E. WILLIAMSON, M.D. AND ROCKY MOUNT OB-GYN ASSOCIATES, P.A., DEFENDANTS

No. COA98-1050

(Filed 15 June 1999)

1. Jurisdiction— order extending time to file complaint—entry

The trial court had jurisdiction to order that time for filing a complaint be extended in accordance with N.C.G.S. § 1A-1, Rule 9(j), even though defendants argued that there was no motion pending when the order was signed, because the record clearly shows that the motion was filed and entered on 19 September and the order filed and entered on 1 October. A judgment is entered when it is reduced to writing, signed by a judge, and filed with the clerk of court.

2. Statute of Limitations— medical malpractice—extension of time to file complaint—all parties not named and served

The trial court erred by dismissing plaintiff's medical malpractice complaint for violation of the statute of limitations. Under *Timour v. Pitt County Mem. Hosp.*, 131 N.C.App. 548, defendants' due process rights to notice were not violated where a motion to extend the time for filing the complaint was granted under N.C.G.S. § 1A-1, Rule 9(j), all of the parties were not named

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in the motion, and all were not served with notice of the time extension.

3. Statute of Limitations— loss of consortium—underlying claim not barred

A loss of consortium claim was improperly dismissed for violation of the statute of limitations where the underlying medical malpractice claim should not have been dismissed.

4. Medical Malpractice— on-call physician—no physician-patient relationship

The trial court correctly dismissed a claim against an on-call physician and his employer for failure to state a claim upon which relief could be granted where there was no allegation of a physician-patient relationship or allegations about the subject matter of another doctor's discussion with the on-call physician.

Appeal by plaintiffs from judgment entered 24 June 1998 by Judge George L. Wainwright, Jr., in Nash County Superior Court. Heard in the Court of Appeals 17 May 1999.

Blanchard, Jenkins & Miller, P.A., by Robert O. Jenkins and Philip R. Miller, III, for plaintiff appellants.

Yates, McLamb & Weyher, L.L.P., by Michael C. Hurley, for defendant appellee Rocky Mount OB-GYN Associates, P.A.

Cranfill, Sumner & Hartzog, L.L.P., by Kari R. Johnson and Edward C. LeCarpentier III, for defendant appellee Nash Hospitals, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, Michael W. Mitchell, and James Y. Kerr, II, for defendant appellees Charles E. Williamson, M.D., and Southeastern Acute Care Specialists, P.A.

HORTON, Judge.

This is an action for medical malpractice, in which plaintiff Carolyn Faye Webb (Mrs. Webb) alleges that Nash General Hospital, Southeastern Acute Care Specialists, P.A., Charles E. Williamson, M.D., and Rocky Mount OB-GYN Associates, P.A. (collectively, defendants), provided substandard medical care to her in October 1994. Her husband, Phillip Edward Webb (Mr. Webb), seeks to recover for loss of consortium.

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Pursuant to the provisions of Rule 9(j) of the North Carolina Rules of Civil Procedure, Mrs. Webb filed a motion prior to the expiration of the three-year statute of limitations, to extend the time within which to file her complaint. N.C. Gen. Stat. § 1A-1, Rule 9(j) (Cum. Supp. 1998). The motion was filed in Nash County Superior Court on 19 September 1997. A Nash County Resident Superior Court Judge granted the motion by order dated 12 September 1997, which order was filed on 1 October 1997. As permitted by Rule 9(j), the order granted Mrs. Webb an additional 120 days within which to file her action, through and including 5 February 1998. Plaintiffs then filed this complaint on 4 February 1998.

Defendants moved to dismiss the complaint pursuant to Rules 12(b)(6) and 41(b), contending that it appeared on the face of the complaint that the statute of limitations had expired. Rocky Mount OB-GYN Associates, P.A., also contended that the complaint did not state a claim for medical malpractice against it. The trial court granted all motions to dismiss, concluding that “[p]laintiffs failed to serve the motion for extension upon any defendant in compliance with Rule 5, that the order of the Court purporting to extend the statute of limitations has no application to those parties not served with the motion, and that [p]laintiffs’ claims against [d]efendants are accordingly barred by the expiration of the three-year limitations period.” The trial court further concluded that the complaint did not state a valid claim upon which relief could be granted against Rocky Mount OB-GYN Associates, P.A. Plaintiffs appealed.

The issues are: (I) Does a Rule 9(j) order extending the time to file a medical malpractice action toll the statute of limitations as to defendants who are not named in the motion requesting the extension of time, as well as all defendants who are not served with notice of the extension; (II) Does a Rule 9(j) extension obtained by Mrs. Webb to file her medical malpractice claim also toll the statute of limitations as to Mr. Webb’s claim for loss of consortium; and (III) Did plaintiffs state a claim for which relief could be granted against Rocky Mount OB-GYN.

[1] We initially note that defendants also argued that the trial court was without jurisdiction when it ordered that the time for filing the complaint in accordance with Rule 9(j) be extended by 120 days because there was no motion pending for the extension of time when the order was signed. This argument is unpersuasive, however, because the record clearly shows that the motion was filed and

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entered on 19 September 1997 and the order allowing the motion was filed and “entered” on 1 October 1997. Rule 58 of the North Carolina Rules of Civil Procedure states that “a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.” N.C. Gen. Stat. § 1A-1, Rule 58 (Cum. Supp. 1998). Therefore, the mere signature on a judgment that has not been entered is an incomplete judgment. See *Worsham v. Richbourg’s Sales and Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996).

I

[2] Defendants argue that by not naming all of the parties in the motion to extend the time for filing the complaint and not serving any of them with notice of the time extension, their due process right to notice was violated. We disagree.

Rule 9(j) states that:

Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j). Rule 5 provides that service is required for “[e]very order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders . . . [and] every written motion other than one which may be heard ex parte” N.C. Gen. Stat. § 1A-1, Rule 5 (Cum. Supp. 1998).

In *Timour v. Pitt County Mem. Hosp.*, 131 N.C. App. 548, 508 S.E.2d 329, 330 (1998), *disc. review allowed*, 350 N.C. 107, — S.E.2d — (1999), this Court held that the order granting a Rule 9(j) time extension was not required to be served on the other party because a complaint had not been filed. Moreover, because the motion to extend the time to file the complaint may be heard ex parte, it falls within the Rule 5 exception to the service requirement. *Id.* Indeed, the very purpose of the Rule 9(j) extension is to allow a plaintiff additional time in order to meet the requirements of the rule in filing a medical malpractice complaint. The requirements are intended, in part, to protect defendants from having to defend frivolous medical malpractice actions by ensuring that before a complaint for medical

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malpractice is filed, a competent medical professional has reviewed the conduct of the defendants and concluded that the conduct did not meet the applicable standard of care. Although our Supreme Court has granted defendants' petition for discretionary review in *Timour*, that Court has not yet ruled on the merits of the petition. Therefore, despite the serious questions raised herein, we are bound by the ruling of this Court in *Timour. In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

II

[3] Plaintiffs argue that the trial court erred in dismissing Mr. Webb's loss of consortium claim. We agree.

N.C. Gen. Stat. § 1-52(5) requires that a loss of consortium claim be brought within three years from the time that the cause of action accrues. N.C. Gen. Stat. § 1-52(5) (Cum. Supp. 1998); *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 40, 493 S.E.2d 460, 462 (1997). In North Carolina, "a spouse's claim for loss of consortium must be joined with the other spouse's claim for personal injury." *Sloan*, 128 N.C. App. at 40, 493 S.E.2d at 462. The loss of consortium cause of action is "not barred by the statute of limitations so long as the original negligence claim of the injured spouse is not so barred." *Id.* Because we have held that Mrs. Webb's medical malpractice claim should not have been dismissed, the trial court likewise erred in dismissing the loss of consortium claim.

III

[4] In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the reviewing court determines whether the pleadings, when taken as true, are legally sufficient to satisfy the elements of a valid legal claim. *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996). In order to establish negligence, a plaintiff must allege (1) a legal duty, (2) breach of that duty, (3) injury caused by a breach of that duty, and (4) damages. *Mozingo v. Pitt County Memorial Hospital*, 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992).

In this case, Mrs. Webb failed to allege in her complaint any duty or breach on the part of Neal Adkins, Jr., M.D., the physician on call for Rocky Mount OB-GYN. Indeed, the only fact alleged in the complaint was that Charles E. Williamson, M.D. "discussed Mrs. Webb's condition with the OB-GYN on call—Neal A. Adkins, Jr., M.D., an

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employee and/or agent of Defendant Rocky Mount OB-GYN Associates, P.A.” There is no allegation that a physician-patient relationship existed between Dr. Adkins and Mrs. Webb, nor are there any allegations about the subject matter of Dr. Williamson’s discussion with Dr. Adkins. Although Mrs. Webb cites *Mozingo* as authority that an on-call physician may be held liable if he gives negligent advice or negligently supervises another physician, there are no facts alleged in this case which would support any negligence on the part of Dr. Adkins and Rocky Mount OB-GYN. The trial court, therefore, was correct in dismissing the claims against Rocky Mount OB-GYN.

Affirmed in part, reversed and remanded in part.

Chief Judge EAGLES and Judge LEWIS concur.



STATE OF NORTH CAROLINA v. LEANDRUS HARKNESS, AMERICAN BANKERS
INSURANCE CO. & BENNY WEST, SURETIES

No. COA98-1281

(Filed 15 June 1999)

**Bail and Pretrial Release— petition for partial remission of
bail bond—applicable standard**

The denial of a petition for partial remission of a bail bond was reversed where the trial court erred by applying N.C.G.S. § 1-52, rather than the “extraordinary cause” standard under N.C.G.S. §15A-544 (h). N.C.G.S. § 15A-544(e) creates the right to seek remission within ninety days after entry of judgment on an appearance bond; after that time has passed, remission may be granted only when, in the discretion of the trial court, the requirement of N.C.G.S. § 15A-544 (h) for a showing of “extraordinary cause” is met.

Appeal by petitioner-sureties from judgment entered 17 July 1998 by Judge Thomas W. Ross in Forsyth County Superior Court. Heard in the Court of Appeals 20 May 1999.

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Douglas S. Punger for appellee Winston-Salem/Forsyth County Board of Education.

James S. Pfaff for petitioner-surety-appellants.

McGEE, Judge.

American Bankers Insurance Company/City Bonding Company, through its agent Benny West (petitioners), appeal a judgment denying a petition for remission of bond filed 4 May 1998. Leandrus Harkness (Harkness) was arrested 9 April 1992 on a charge of conspiracy to traffic in cocaine, and his bond was set at \$50,000. Petitioners posted two bonds for Harkness, one in the amount of \$25,000 and a second for \$20,000. Harkness failed to appear on his court date. An order for arrest was issued and orders of forfeiture were entered 5 August 1993.

Harkness had been arrested for armed robbery and other felonies in Florida on 7 July 1993. Judgment absolute was entered in Forsyth County against petitioners on 18 November 1993 in the amount of \$45,000, the total amount of the bonds posted. Petitioners filed a petition for remission of bond 11 April 1994. Remission was granted on 19 May 1994 to petitioners in the amount of \$15,000 with respect to the \$20,000 bond; remission was denied as to the \$25,000 bond.

Petitioners obtained custody of Harkness on 1 December 1997 upon his release from the Florida Department of Corrections. Petitioners transported him to North Carolina and surrendered him to the Sheriff of Forsyth County. Harkness pled guilty on 1 July 1998 to the felonious possession of cocaine with the intent to sell or deliver.

Petitioners filed a petition seeking further remission of the bonds on 21 April 1998, "pursuant to N.C.G.S. § 15A-544(h) . . . for extraordinary cause shown." The Winston-Salem/Forsyth County Board of Education filed a motion to dismiss petitioners' request for remission, asserting that the petition was barred by the statute of limitations.

In its judgment denying petitioners' remission petition, the trial court made the following findings of fact and conclusion of law:

12. The pending Petition was filed four years and five months after the entry of Judgment Absolute and three years and eleven months after the judgment of remission.

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13. North Carolina General Statute § 1-52, together with North Carolina General Statute § 1-46, state that the period for commencement of an action involving bail is limited to three (3) years.

...

Based upon the foregoing findings of fact, the Court concludes as a matter of law that the pending petition was filed outside of the time period allowed by statute and is therefore barred.

From this judgment petitioners appeal.

Petitioners argue that “[t]he trial court erred in ruling that N.C. Gen. Stat. §§ 1-52 and 1-46 establish a statute of limitations of three years for an action involving bail . . . and in applying that statute of limitation to the present case[.]” We agree.

N.C. Gen. Stat. § 1-46 (1996) states that “[t]he periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article.” N.C. Gen. Stat. § 1-52 (Cum. Supp. 1998) lists causes of action which must be brought within three years. N.C. Gen. Stat. § 1-52(7) addresses actions “[a]gainst bail.” It states:

Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

Black’s Law Dictionary defines “bail” as follows: “The surety or sureties who procure the release of a person under arrest, by becoming responsible for his appearance at the time and place designated.” Black’s Law Dictionary 140 (6th ed. 1990). A plain reading of the statute indicates that N.C. Gen. Stat. § 1-52 applies to actions against the surety, as evidenced by the words “against bail.” In the case before us, the action was not against the surety. Rather, petitioners were seeking remission of bond after delivering Harkness to the Sheriff’s in Forsyth County.

N.C. Gen. Stat. § 15A-544 (Cum. Supp. 1998) sets forth two ways a surety on a bond in a criminal case may apply to the court for remission of the bond after forfeiture. N.C. Gen. Stat. § 15A-544(e) states:

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At any time within 90 days after entry of the judgment against a principal or surety, the principal or surety, by verified written petition, may request that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment.

N.C. Gen. Stat. § 15A-544(h) provides that:

For extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate.

See State v. Moore, 64 N.C. App. 516, 520, 307 S.E.2d 834, 836 (1983), *disc. review denied*, 310 N.C. 628, 315 S.E.2d 694 (1984) (affirming trial court's conclusion that surety had shown extraordinary cause pursuant to N.C. Gen. Stat. § 15A-544(h)).

Petitioners argue that when an order of remission is entered more than ninety days after entry of judgment upon a forfeiture of an appearance bond, the judgment can be set aside if "extraordinary cause" is shown pursuant to N.C. Gen. Stat. § 15A-544(h). *Moore* at 519, 307 S.E.2d at 835; *State v. Vikre*, 86 N.C. App. 196, 198, 356 S.E.2d 802, 804, *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987); *State v. Fonville*, 72 N.C. App. 527, 529, 325 S.E.2d 258, 259 (1985). Since N.C. Gen. Stat. §§ 15A-544(e) and 15A-544(h) say " 'may' remit, the decision to do so or not is a discretionary one[,] and [w]e review only for an abuse of discretion." *State v. Horne*, 68 N.C. App. 480, 483, 315 S.E.2d 321, 323 (1984).

N.C. Gen. Stat. § 15A-544(e) creates the right to seek remission within ninety days after entry of judgment on an appearance bond; after that time has passed, remission may be granted only when, in the discretion of the trial court, the requirement of N.C. Gen. Stat. § 15A-544(h) for a showing of "extraordinary cause" is met. These rules advance the purpose of the bond system to ensure the production of the defendant for trial. *See State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979) ("[t]he goal of the bonding system is the production of the defendant, not increased revenues for the county school fund"); *State v. Pelley*, 222 N.C. 684, 688, 24 S.E.2d 635, 638 (1943) ("[t]he very purpose of the bond was not to enrich the treasury of [the] County, but to make the sureties responsible for the appearance of the defendant at the proper time").

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Our Court addressed the “extraordinary cause” test of N.C. Gen. Stat. § 15A-544(h) in *State v. Lanier*, 93 N.C. App. 779, 379 S.E.2d 109 (1989). In *Lanier*, the surety signed a \$10,000 appearance bond for defendant in October 1986 and defendant failed to appear for trial. A judgment of forfeiture was entered against the bond. The judgment of \$10,000 was remitted in the amount of \$5,000 in August 1987 pursuant to N.C. Gen. Stat. § 15A-544(e). Defendant was arrested by the surety in February 1988 and was surrendered to law enforcement in Wayne County. The surety filed a petition for remission of the judgment of forfeiture pursuant to N.C. Gen. Stat. § 15A-544(h). The trial court denied any remission, stating that “the school board needs this money more than the [s]urety[.]” *Id.* at 781, 379 S.E.2d at 110. Our Court reversed and remanded, stating that the “required test” under N.C. Gen. Stat. § 15A-544(h) was whether “extraordinary cause” had been shown, and that this required test had not been applied. *Id.* at 781, 379 S.E.2d at 110-11. Our Court instructed the trial court upon remand to “make appropriate findings of fact and conclusions of law, and to enter an order supported by the conclusions of law[.]” under the proper test of “extraordinary cause” shown. *Id.* at 781, 379 S.E.2d at 111.

In the case before us, the trial court erred by applying N.C. Gen. Stat. § 1-52, rather than the “extraordinary cause” standard under N.C. Gen. Stat. § 15A-544(h). We reverse and remand this case for the trial court to make appropriate findings of fact and conclusions of law consistent with the requirements of N.C. Gen. Stat. § 15A-544(h). For this reason we need not consider petitioners’ other arguments.

Reversed and remanded.

Judges WALKER and EDMUNDS concur.

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STATE OF NORTH CAROLINA v. DONALD EDGARE BASS

No. COA98-1163

(Filed 15 June 1999)

Criminal Law— guilty plea—voluntary—motion for appropriate relief denied

A motion for appropriate relief to a prior guilty plea to an impaired driving charge was properly denied where defendant contended that he had been without counsel and was not informed of his rights against self-incrimination, but there was competent evidence to support the trial court's finding that defendant had not met his burden of proof. The plea will not be disturbed if the evidence supports the trial court's finding that defendant freely, understandably, and voluntarily pled guilty. Furthermore, this motion was made to invalidate a prior conviction which subsequently led to a conviction for habitual impaired driving and the United States Supreme Court has held that a presumption of regularity applies to cases where a final judgment has been reached and that, in cases such as this where the transcript is available, this presumption must be overcome by defendant.

Appeal by defendant from an order signed 5 June 1998 by Judge Thomas G. Foster, Jr. and filed 25 June 1998 in Guilford County District Court. Heard in the Court of Appeals 29 April 1999.

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

W. Steven Allen; and William G. Causey, Jr., for defendant-appellant.

WALKER, Judge.

On 17 March 1991, defendant was charged with driving while impaired in Guilford County. On 18 April 1991, he appeared in district court and requested that an attorney be appointed for him. Defendant's request was denied because it was determined that it was unlikely that defendant would be imprisoned if convicted of the crime. On 28 October 1991, defendant pled guilty to driving while impaired and was given a suspended sentence by Judge Benjamin

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Haines. On the judgment, Judge Haines noted that defendant “freely, voluntarily, and understandingly pled guilty.”

On 30 April 1998, defendant filed a motion for appropriate relief alleging that, at the time his guilty plea was accepted, he was without counsel and that he was not informed of his rights against self-incrimination, to a jury trial, and to confront his accusers as required by *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969). The trial court held an evidentiary hearing on 22 May 1998, during which it heard evidence from the defendant and from three attorneys who practiced in district court during the year that defendant pled guilty. Defendant testified that he was not informed of the *Boykin* rights at the time he entered his guilty plea. On 5 June 1998, the trial court denied defendant’s motion for appropriate relief and made the following findings and conclusions:

3. The defendant, appearing without counsel, was convicted of driving while impaired in the above-captioned case on October 28, 1991, the Honorable Ben Haines, judge presiding.
4. A copy of the judgment was entered into evidence in this matter and it showed that Judge Haines made a finding that the defendant “appeared in open court and freely, voluntarily and understandingly pled guilty” to the offense of driving while impaired.
5. The defendant was subsequently convicted of habitual impaired driving, partly as a result of the conviction in this matter.
6. The defendant now stands accused of capital murder, partly as a result of the conviction in this matter.
7. The defendant has filed a Motion for Appropriate Relief, alleging that the defendant was deprived of constitutional rights in that the State did not inform him of the so-called “Boykin rights.”
8. The defendant testified that he did not recall being informed of these rights. Further, on cross-examination, he testified that he did not recall what the judge said on that day.
9. The defendant put on three members of the defense bar who testified that they never saw defendants being advised of the so-called “Boykin rights” in district court during the time period of the matter captioned above.

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10. The burden of proof by the preponderance of evidence is on the defendant in this matter.
11. The defendant has not shown to the court that any appellate courts have extended the requirement of advising defendant's [sic] of the so-called "Boykin rights" to the district courts in misdemeanor cases.
12. The State has introduced cases which seem to suggest that courts have specifically not extended that requirement to the district courts in misdemeanor cases.
13. The presiding judge in the original case made a specific finding that the plea was entered "freely, voluntarily and understandingly."
14. This court is not obligated, under law, to allow the "Boykin" motion made by defendant Bass.
15. Upon consideration of the information and arguments of counsel before the court, the motion under consideration should be denied.

Defendant contends that the trial court erred in denying his motion for appropriate relief and argues that *Boykin* requires that his conviction be vacated because there is no evidence on the record that Judge Haines advised him of his constitutional rights.

When accepting a plea of guilty, a trial court must "make sure [that the defendant] has a full understanding of what the plea connotes and of its consequence." *State v. Dammons*, 128 N.C. App. 16, 22, 493 S.E.2d 480, 484 (1997) (quoting *Boykin*, 395 U.S. at 244, 23 L. Ed. 2d at 280). The record must show that the plea was voluntary and that it was intelligently and understandingly given. *Id.* However, if evidence supports a finding of the trial court that the defendant freely, understandingly, and voluntarily pled guilty, the plea will not be disturbed. *State v. Ellis*, 13 N.C. App. 163, 165, 185 S.E.2d 40, 42 (1971).

When reviewing a motion for appropriate relief, the trial court's findings are binding on appeal if they are supported by competent evidence and may not be disturbed unless there is a manifest abuse of discretion. *State v. Wilkins*, 131 N.C. App. 220, 506 S.E.2d 274 (1998). A defendant bears the burden of proof in the trial court to show by the preponderance of evidence every fact in support of his

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motion for appropriate relief. *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984).

In this case, defendant testified that he could not recall being informed on 28 October 1991 of his *Boykin* rights and that he was unfamiliar with the procedures in criminal court. However, he also testified that he was unable to remember anything that the judge had told him on that date. He did admit to being “a little” familiar with “the system” as he had been in court on previous charges. Three attorneys from the Guilford County bar testified that they did not recall Judge Haines informing defendants, who offered guilty pleas in district court, of their *Boykin* rights during 1991, the year when defendant offered his guilty plea. However, none of the attorneys testified that they were present in court when the defendant pled guilty. Judge Haines, in the original judgment, noted that defendant “freely, voluntarily, and understandingly pled guilty” to driving while impaired. From the evidence in the record, we conclude that there was competent evidence to support the trial court’s finding that defendant had not met his burden of proof with respect to his motion for appropriate relief.

Furthermore, although defendant’s motion for appropriate relief was properly taken as a direct attack on the validity of his guilty plea, we note that this motion was made for the purpose of invalidating a prior conviction which subsequently led to a conviction for habitual impaired driving. This direct attack is similar in nature to collateral attacks which this Court has addressed before. *See, e.g., State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *affirmed*, 346 N.C. 165, 484 S.E.2d 525 (1997); *State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 846, *disc. review denied*, 336 N.C. 614, 447 S.E.2d 410 (1994); *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971). In each of these cases, the defendant asserted a *Boykin* claim that his guilty plea was not voluntary in an attempt to avoid either a recidivist conviction or a recidivist punishment enhancement. The United States Supreme Court recently addressed such a collateral attack to avoid a recidivist enhancement in *Parke v. Raley*, 506 U.S. 20, 121 L. Ed. 2d 391 (1992), *rehearing denied*, 506 U.S. 1087, 122 L. Ed. 2d 372 (1993). The Court held that the “presumption of regularity”—a presumption that the acts of a court were properly done absent evidence to the contrary—applies to cases wherein a final judgment has been reached, and, that in cases where no transcript is available, this presumption must be overcome by the defendant. *Id.* at 29, 121 L. Ed. 2d at 404.

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[133 N.C. App. 650 (1999)]

While presented in the context of a direct attack, the similarity between this case and the prior cases is noted. A transcript is not available in this case and the only evidence presented to the trial court is based on the recollection of the defendant and the “habit” evidence presented by attorneys practicing at the time. Meanwhile, the trial court has before it a finding made by Judge Haines that the defendant’s plea was made voluntarily. The presumption of regularity applies here as well.

Defendant cites *State v. Ratliff*, 14 N.C. App. 275, 188 S.E.2d 14 (1972) in support of his argument; however, it is distinguishable. In *Ratliff*, this Court vacated defendant’s guilty plea based on a “silent” record which contained no indication that defendant’s plea was made voluntarily. *Id.* In this case, the record is not silent as Judge Haines made a finding that the defendant’s plea was voluntary.

For the reasons stated herein, the order of the trial court is

Affirmed.

Judges WYNN and HUNTER concur.

IN THE MATTER OF THE ESTATE OF FAY SHIELDS HODGIN

No. COA98-1152

(Filed 15 June 1999)

Estate Administration—venue—motion to change—timeliness

The trial court did not err by denying a motion to change the venue of an estate administration where the beneficiaries of the will waived venue in Guilford County and consented to venue in Craven County and caveators did not raise their objection to the will and motion to change, which raised the question of priority of venue, until over *four months after the letters testamentary* were issued. They are precluded from challenging venue by N.C.G.S. § 28A-3-5.

Appeal by caveators Ezra Clay Hodgin, III and Catherine Berry DeVane from an order entered 11 June 1998 by Judge James E. Ragan,

IN RE ESTATE OF HODGIN

[133 N.C. App. 650 (1999)]

III in Craven County Superior Court. Heard in the Court of Appeals 29 April 1999.

Nelson Mullins Riley & Scarborough, L.L.P., by Amy Yager Jenkins, for caveators-appellants.

Harris, Shields, Creech and Ward, P.A., by C. David Creech and Mary V. Ringwalt, for propounder-appellee.

WALKER, Judge.

Fay Shields Hodgin (decedent) died on 10 October 1997 in Guilford County, where she lived at the time of her death and for several years prior to her death. On 21 October 1997, Moses Lassiter, decedent's son-in-law and executor who resides in Craven County, sought to have decedent's will, dated 28 February 1997, admitted to probate in Craven County. Along with the application for probate and letters testamentary, Lassiter filed waivers of venue signed by the two named beneficiaries in the will, decedent's daughters, Mary Marshall Bruning of Statesville and Paula Memory Lassiter of New Bern (beneficiaries). The letters testamentary and certificate of probate were issued on 21 October 1997. On 4 March 1998, caveators Ezra Clay Hodgin, III and Catherine Berry DeVane (caveators) filed their objection to probate and a motion to change venue along with a supporting affidavit of Catherine Berry DeVane. The motion to change venue came on for hearing before the trial court on 8 June 1998. The trial court denied the motion to change venue both as a matter of right pursuant to N.C. Gen. Stat. § 28A-3-1 and discretionary change of venue pursuant to N.C. Gen. Stat. § 1-83.

Caveators contend that N.C. Gen. Stat. § 28A-3-1 mandates that venue is proper only in Guilford County where the decedent was domiciled and that the Craven County Clerk of Superior Court (Clerk), as *ex officio* judge of probate, lacked the jurisdiction to admit the will to probate.

The clerk of superior court in each county has exclusive original jurisdiction over the administration of estates. N.C. Gen. Stat. § 28A-2-1 (1984). Venue for the administration of estates is governed by N.C. Gen. Stat. § 28A-3-1 which states in part:

The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be:

IN RE ESTATE OF HODGIN

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- (1) In the county in this State where the decedent had his domicile at the time of his death; or
- (2) If the decedent had no domicile in this State at the time of death, then in any county wherein the decedent left any property or assets or into which any property or assets belonging to this estate may have come. If there be more than one such county, that county in which proceedings are first commenced shall have priority of venue

N.C. Gen. Stat. § 28A-3-1 (Cum. Supp. 1998). Venue is not jurisdictional but is only a ground for removal to another county. *Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952). Prior to 1973, when Chapter 28A of the General Statutes, Administration of Decedents' Estates, was enacted, jurisdiction by a clerk of superior court over a decedent's estate was proper only in the county where the decedent was domiciled and any actions taken in other counties were void. *In re Estate of Cullinan*, 259 N.C. 626, 131 S.E.2d 316 (1963); *In re Bane*, 247 N.C. 562, 101 S.E.2d 369 (1958). However, "[u]nlike the former law, the jurisdiction of the clerk is no longer limited by such considerations as where the decedent died, left property or was domiciled." *In re Estate of Adamee*, 291 N.C. 386, 397, 230 S.E.2d 541, 549 (1976) (quoting 1 Norman A. Wiggins, *Wills and the Administration of Estates in North Carolina* § 115 (1st ed. 1964 & Supp. 1976)). Thus, the jurisdiction of the Clerk is not at issue in this case. Rather, the issue is whether N.C. Gen. Stat. § 28A-3-1 requires venue to be transferred to Guilford County.

N.C. Gen. Stat. § 28A-3-1 provides that venue "shall" be in the county of domicile. N.C. Gen. Stat. § 28A-3-1 (Cum. Supp. 1998). However, N.C. Gen. Stat. § 28A-3-5, which is entitled "Waiver of venue," provides that unless questions of "priority of venue" are raised within three months after the issuance of letters testamentary, "the validity of the proceeding shall not be affected by any error in venue." N.C. Gen. Stat. § 28A-3-5 (1984). Venue, because it is not jurisdictional, is waivable by any party. *Teer Co.*, 235 N.C. at 744, 71 S.E.2d at 56. Venue is waived if objection thereto is not made in "apt time." *Collyer v. Bell*, 12 N.C. App. 653, 184 S.E.2d 414 (1971).

Here, the beneficiaries under the will of decedent waived venue for the administration of the estate in Guilford County and consented to venue in Craven County. Thus, venue was proper in Craven County where the will was probated. The caveators argue that "priority of venue" is only relevant if decedent had no domicile in this State at the

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[133 N.C. App. 653 (1999)]

time of death as N.C. Gen. Stat. § 28A-3-1(2) is the only other statute which utilizes the phrase “priority of venue.” However, N.C. Gen. Stat. § 28A-3-5 is an entirely separate section which deals with priority of venue unrelated to N.C. Gen. Stat. § 28A-3-1(2), and the three-month limit is applicable during which objections to venue must be raised.

Caveators did not file their objection to the will and motion to change venue until 4 March 1998. This motion to change venue raised the question of priority of venue between the counties of Craven and Guilford. Because caveators’ objection was not raised until over four months after the letters testamentary were issued, they are precluded from challenging venue by operation of N.C. Gen. Stat. § 28A-3-5.

For this reason, the order of the trial court is

Affirmed.

Judges WYNN and HUNTER concur.

CHRIS TELESCA, PLAINTIFF v. SAS INSTITUTE INC., DEFENDANT

No. COA98-913

(Filed 15 June 1999)

Statute of Limitations— commencement of action—delayed service—Rule 3

The trial court did not err by dismissing a REDA (Retaliatory Employment Discrimination Act) claim on the grounds that the statute of limitations had run where plaintiff attempted to commence the action by delayed service, the application for the extension to file the complaint was filed and a summons issued by the clerk’s office that day, that summons was not sufficient to begin the action because it was not issued pursuant to an order entered by the clerk granting plaintiff’s application for an extension, a second summons was issued pursuant to such an order and that summons commenced the action, and the action accordingly commenced beyond the time limit.

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[133 N.C. App. 653 (1999)]

Appeal by plaintiff from order filed 16 April 1998 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 30 March 1999.

Daniel F. Read, for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak and Stewart, P.C., by A. Bruce Clarke, C. Matthew Keen, and Robert A. Sar, for defendant-appellee.

GREENE, Judge.

Christopher Telesca (Plaintiff) appeals from the trial court's grant of SAS Institute's (Defendant) motion to dismiss.

Plaintiff was employed with Defendant as a photographer and was terminated. After his termination, Plaintiff filed a complaint with the Workplace Retaliatory Discrimination Division of the North Carolina Department of Labor (NCDOL), alleging retaliatory termination. The NCDOL issued Plaintiff a right-to-sue letter on 19 September 1995, giving Plaintiff until 18 December 1995 to commence a civil action against Defendant. On 18 December 1995, Plaintiff filed an application with the Wake County Superior Court clerk's office for an extension to file his complaint. On that same date, the clerk's office issued a summons to Defendant directing it to "answer the complaint of the plaintiff." The summons, however, was not accompanied by a complaint. On 22 December 1995, a deputy superior court clerk entered an order allowing Plaintiff's application, ordered Plaintiff's complaint to be filed on or before 7 January 1996,¹ and issued a civil summons commencing Plaintiff's suit. This summons, which was served on Defendant along with the order of the clerk authorizing the complaint extension, notified Defendant that it was required to serve its answer "to the complaint upon the plaintiff . . . after you have been served with the complaint as authorized in the attached order." Plaintiff did not file his complaint until 9 January 1996.

On 29 April 1996, Plaintiff voluntarily dismissed his complaint against Defendant without prejudice, but refiled his complaint on 15 April 1997, alleging, among other claims, a violation of the Retaliatory Employment Discrimination Act (REDA).²

1. Because 7 January 1996 fell on a Sunday, Plaintiff automatically was given an extension until Monday, 8 January 1996. See N.C.G.S. § 1A-1, Rule 6 (1990).

2. Although Plaintiff asserts several claims in this re-filed complaint, he only presents and discusses the dismissal of his REDA claim in his brief to this Court. We,

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On 27 February 1998, Defendant moved to dismiss the REDA claim on the grounds that the statute of limitations had expired. The motion was allowed on 16 April 1998.

The dispositive issue is whether a civil action is commenced, within the meaning of Rule 3 of our Rules of Civil Procedure, upon the filing of an application for an extension of time to file a complaint and upon the issuance of a summons.

A civil action under REDA must “be commenced by an employee within 90 days of the date upon which the right-to-sue letter was issued.” N.C.G.S. § 95-243(b) (1993). A civil action can be commenced either by: (1) “filing a complaint with the court”; or (2) the **issuance** of a summons when a person makes an “application to the court . . . requesting permission to file [a] complaint within 20 days” **and** “[the] court makes an order . . . granting the requested permission.” N.C.G.S. § 1A-1, Rule 3(a) (1990). “The summons and the court’s order shall be served in accordance with the provisions of Rule 4.” *Id.* Thus, an action is not commenced under the delayed service provision of Rule 3 until: (1) an application is made to the court for permission to file a complaint within twenty days; (2) the court enters an order granting that extension; and (3) a summons is issued pursuant to that order. *See Osborne v. Walton*, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

In this case, Plaintiff attempted to commence his action by delayed service. The application for the extension to file the complaint was filed on 18 December 1995 and a summons was issued by the clerk’s office on that day. This summons was not sufficient to commence the action because it was not issued pursuant to an order entered by the clerk granting Plaintiff’s application for an extension. A second summons dated 22 December 1995, however, was issued pursuant to an order entered by the clerk granting Plaintiff’s application for a complaint extension, and that summons commenced Plaintiff’s action.

Accordingly, Plaintiff’s REDA action commenced on 22 December 1995, ninety-four days after the right-to-sue letter was issued and four days beyond the ninety-day time limit mandated in section 95-243(b). The trial court, therefore, properly granted Defendant’s motion to dismiss on the grounds that the statute of lim-

therefore, only address the validity of that claim, as he abandoned his right to appellate review of the dismissal of his other claims. *See* N.C.R. App. P. 28(a).

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itations had run on Plaintiff's REDA claim. *See Long v. Fink*, 80 N.C. App. 482, 484, 342 S.E.2d 557, 559 (1986) (statute of limitations violation is a proper basis for the trial court to dismiss a time-barred claim).

Affirmed.

Judges MARTIN and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 JUNE 1999

BODMAN v. MUMM No. 98-599	Buncombe (97CVS3136)	Affirmed
COLLINS v. COLLINS No. 98-355	Guilford (95CVS8469)	Affirmed
COOK v. SECURITY STORAGE CO. OF RALEIGH No. 98-863	Ind. Comm. (473594)	Affirmed
DAVIS v. MARTIN No. 98-935	Mecklenburg (97CVD1275)	Vacated and Remanded
DILLARD v. DILLARD No. 97-1158	Madison (97CVD71)	Dismissed
HARTZELL v. BRYANT INDUS. CONTR'R, INC. No. 98-1022	Ind. Comm. (218452)	Reversed
HOOD v. N.C. DEPT' OF ENV'T, HEALTH AND NAT. RESOURCES No. 98-1056	Wake (96CVS12010) (96CVS04154)	Appeal Dismissed
IN RE BAKER No. 98-946	Ashe (97J12) (97J13)	Affirmed
JONES v. LOWE No. 98-811	Mecklenburg (97CVS2597)	Affirmed
LAW ENG'G AND ENVTL. SERVS., INC. v. TITAN ATLANTIC GRP., INC. No. 98-605	Guilford (97CVZ5023)	Affirmed in part; Reversed in part;
LEACH v KELLY SPRINGFIELD TIRE CORP. No. 98-346	Ind. Comm. (472097)	Affirmed
NICHOLS v. D.J. ROSE, INC. No. 98-1051	Ind. Comm. (359467)	Affirmed
PICKETT v. PICKETT No. 98-250	Duplin (96CVD306)	Affirmed in part, Reversed and remanded in part
ROUNTREE v. MOORE No. 98-1032	Pitt (93CVS2221)	Dismissed

S & W READY MIX CONCRETE CO. v. GUYTON No. 98-939	Bladen (97CD524)	Affirmed
SCOTT DRUG CO. v. PURGASON No. 98-846	Mecklenburg (96CVS8843)	Appeal Dismissed
SLACK v. ROCK ISLAND PT. COMMUNITY ASS'N, INC. No. 98-888	Mecklenburg (97CVS11443)	Affirmed
STATE v. DANLEY No. 98-231	Onslow (97CRS2288) (97CRS2290)	No Error
STATE v. DAVIS No. 98-912	Wayne (97CRS6821) (97CRS6822) (97CRS13382)	No error; remanded for entry of original judgments
STATE v. FLORENCE No. 98-942	Guilford (95CRS74536) (95CRS74537) (96CRS22465)	No Error
STATE v. MELTON No. 98-825	Forsyth (97CRS32043) (97CRS45148)	No Error
STATE v. PARKER No. 98-27	Martin (95CRS1811) (95CRS1812)	No Error
STATE v. RIGGSBEE No. 98-911	Harnett (95CRS14969)	No Error
STATE v. STAFFORD No. 98-872	Cabarrus (92CRS12557) (92CRS12558) (92CRS12666)	Affirmed
STATE v. STANLEY No. 98-768	Davidson (96CRS11420) (96CRS9972)	No Error
STATE v. STURDIVANT No. 98-1183	Mecklenburg (96CRS49420)	New Trial
STATE v. TODD No. 98-966	Davidson (95CRS12845) (95CRS12846) (95CRS12847) (95CRS19733)	Affirmed
STATE v. VALENTINE No. 98-1014	Hertford (96CRS4722)	No Error

WATKINS v. HUDSON
No. 98-1087

Wake
(97CVS7122)

Affirmed

WILLIAMS v. WILLIAMS
No. 98-1119

Mecklenburg
(96CVD3555)

Dismissed

WILLIS v. CITY OF
SOUTHPORT BD. OF ADJUST.
No. 98-1108

Brunswick
(95CVS485)

Reversed

APPENDIX

ORDER ADOPTING RULES
IMPLEMENTING THE YEAR 2000
PRELITIGATION MEDIATION PROGRAM

IN THE SUPREME COURT OF NORTH CAROLINA
ORDER ADOPTING RULES IMPLEMENTING THE YEAR
2000 PRELITIGATION MEDIATION PROGRAM

WHEREAS, section 66-283 of the North Carolina General Statutes establishes a program to provide for mediation of Year 2000 disputes as defined by the statute, and

WHEREAS, N.C.G.S. § 66-283(b) provides for this Court to implement section 66-283 by adopting rules

NOW, THEREFORE, pursuant to N.C.G.S. § 66-283(b), Rules Implementing The Year 2000 Prelitigation Mediation Program are hereby adopted. These rules shall be effective on the 1st day of January, 2000.

Adopted by the Court in conference the 2nd day of December, 1999. The Appellate Division Reporter shall publish the Rules Implementing The Year 2000 Prelitigation Mediation Program in their entirety in the Advance Sheets of the Supreme Court and the Court of Appeals, at the earliest practicable date.

Freeman, J.
For the Court

RULES OF THE NORTH CAROLINA
SUPREME COURT IMPLEMENTING THE
YEAR 2000 PRELITIGATION MEDIATION PROGRAM

**RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION
YEAR 2000 MEDIATION.**

A. A person with a claim for damages allegedly resulting from a Year 2000 problem may initiate mediation by filing a Request for Prelitigation Mediation of Year 2000 Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. SELECTION OF MEDIATOR.

A. Time Period for Selection. The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file their Notice of Selection of Certified Mediator by Agreement.

B. Selection of Certified Mediator by Agreement. The clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate Year 2000 disputes in the judicial district encompassing the county in which the Request was filed. If the parties are able to agree on a certified mediator to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice). Such Notice shall state the name, address, and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. Nomination of Non-Certified Mediator by Agreement. The parties may by agreement select a mediator who is not certified but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-

certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator (Nomination) and shall simultaneously deliver a copy of the Nomination to the senior resident superior court judge. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said Nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The Nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. Court Appointment of Mediator. If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator (Motion) and simultaneously deliver a copy to the senior resident superior court judge who shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The Motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator. The Clerk shall notify the mediator and the parties of the appointment of the mediator.

E. Mediator Information Directory. To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation Year 2000 disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

RULE 3. THE PRELITIGATION YEAR 2000 MEDIATION.

A. When Mediation Is to be Completed. The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. Extensions. A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. Where the Conference Is to be Held. Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time, and location of the mediation to all parties named in the Request or their attorneys.

D. Recesses. The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a thirty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. Duties of Parties, Attorneys and Other Participants. Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference to the extent it is consistent with prelitigation disputes.

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. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded.

F. Sanctions for Failure to Attend. Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

Comment to Rule 4.E.

N. C. Gen. Stat. §7A-38.1(l) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a

mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

RULE 4. AUTHORITY AND DUTIES OF THE MEDIATOR.

A. Authority of Mediator.

(1). Control of Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2). Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3). Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys, and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of Mediator.

(1) The mediator shall define and describe the following at the beginning of the mediation:

- (a) The process of mediation;
- (b) The differences between mediation and other forms of conflict resolution;
- (c) The costs of mediation;
- (d) That the mediation is not a trial, the mediator is not a judge and the parties may pursue their dispute in court if mediation is not successful and they so choose.
- (e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
- (f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

YEAR 2000 PRELITIGATION
MEDIATION PROGRAM

- (g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(1);
 - (h) The duties and responsibilities of the mediator and the participants; and
 - (i) That any agreement reached will be reached by mutual consent.
- (2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.
 - (3) Declaring Impasse. It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.
 - (4) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 3 above. Rule 3 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.
 - (5) Certification. The mediator has a duty to timely file a Certification as required by Rule 8.

RULE 5. COMPENSATION OF THE MEDIATOR.

A. By Agreement. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

B. By Court Order. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of \$125 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of \$125, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at

least seven (7) business day prior to the occurrence of an initial mediation session.

C. Indigent Cases. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their dispute, subsequent to the trial of the action. In ruling on such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

E. Postponement Fees. As used herein, the term "postponement" shall mean rescheduling or not proceeding with a mediated settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney/party. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be \$125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be \$250, except that no postponement fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 5.B.

F. Sanctions for Failure to Pay Mediator's Fee. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the senior resident superior court judge for a finding of indigence, shall constitute contempt of court and may result, following notice, in a hearing and findings and the imposition of any and all lawful sanctions by a resident or presiding superior court judge.

RULE 6. WAIVER OF MEDIATION.

All parties to a Year 2000 dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation (Waiver) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The disputant who requested mediation shall file the Waiver with the clerk and mail a copy to the mediator and all parties named in the Request. No costs shall be assessed any party if all parties waive mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

RULE 7. AFFIRMATIVE DEFENSE.

If a party to the dispute is entitled to an affirmative defense pursuant to G.S. 1-539.26, that party may refuse to participate in the mediation. A party refusing mediation, shall advise the mediator in writing of his or her refusal. The Refusal of Prelitigation Mediation (Refusal) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The party refusing to participate shall file the Refusal with the clerk and mail a copy to the mediator and to all parties. No costs shall be assessed any party if a party with an affirmative defense advises the mediator in writing of his or her refusal to participate in mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED.

A. Contents of Certification. Following the conclusion of mediation, the receipt of a waiver of mediation signed by all parties to the Year 2000 dispute, or the receipt of a refusal of a party with an

affirmative defense under G.S.1-539.26 to participate in mediation, the mediator shall prepare a Mediator's Certification in Prelitigation Year 2000 Dispute (Certification) on a form prescribed by the Administrative Office of the Courts and available through the clerk. If a mediation were held, the Certification shall state the date on which the mediation was concluded and report the general results. If a mediation were not held, the Certification shall state that all parties waived mediation in writing pursuant to Rule 7 above, that a party with an affirmative defense under G.S. 1-539.26 refused to participate with good cause, or that the mediation was not held for other, specified reasons. The mediator shall identify any parties named in the Request who failed, without good cause, to attend or participate in mediation.

B. Deadline for Filing Mediator's Certification. The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation or a refusal to participate. The mediator shall serve a copy of the Certification on each of the parties named in the request.

**RULE 9. CERTIFICATION AND DECERTIFICATION OF
MEDIATORS OF YEAR 2000 DISPUTES.**

Mediators certified to conduct prelitigation mediation of Year 2000 disputes shall be subject to all rules and regulations regarding certification, conduct, discipline, and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of Year 2000 disputes.

**RULE 10. CERTIFICATION OF MEDIATION TRAINING
PROGRAMS.**

The Dispute Resolution Commission may specify a curriculum for a Year 2000 mediation training program and may set qualifications for trainers.

RULE 11. RESPONSIBILITY FOR ENFORCEMENT.

The Senior Resident Superior Court Judge or his/her designee shall be responsible for enforcing these rules and shall enter appropriate court orders as necessary to enforce these rules.

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Youth baseball players—injuries while riding with teammate—national and state organizations—vicarious liability—National and state American Legion organizations were not vicariously liable under the doctrine of respondeat superior for the alleged negligence of the manager of a youth baseball team sponsored by a local American Legion post or of a team member who, with the manager's permission, was driving teammates home after an out-of-town game when a one-car accident killed one teammate and injured others. **Daniels v. Reel, 1.**

ALIENATION OF AFFECTIONS

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Compensatory damages—sufficiency of evidence—Plaintiff presented sufficient evidence to support a \$500,000 award of compensatory damages for alienation of affections and criminal conversation where, in addition to evidence showing a loss of income, life insurance and pension benefits resulting from the actions of defendant, there was plenary evidence that plaintiff likewise suffered loss of consortium, mental anguish, humiliation, and injury to health. **Hutelmyer v. Cox, 364.**

ALIENATION OF AFFECTIONS—Continued

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Punitive damages—sufficiency of evidence—Plaintiff presented sufficient additional circumstances of aggravation to warrant submission of punitive damages to the jury on a claim for alienation of affections. **Hutelmyer v. Cox, 364.**

Sufficiency of evidence—directed verdict—Plaintiff presented sufficient evidence to overcome defendant's motions for directed verdict and j.n.o.v. and the trial court properly submitted plaintiff's claim for alienation of affections to the jury where, taken in the light most favorable to plaintiff, the evidence tended to show that plaintiff and Mr. Hutelmyer had "a fairy tale marriage" prior to 1993 and that the love and affection that once existed between the plaintiff and her husband was alienated and destroyed by defendant's conduct. **Hutelmyer v. Cox, 364.**

APPEAL AND ERROR

Appealability—divorce judgment—remaining issues reserved—appeal premature—An appeal from a divorce judgment was dismissed where plaintiff sought an absolute divorce and equitable distribution, the trial court determined the date of separation, granted an absolute divorce, and reserved the remaining issues for later hearing, and defendant appealed. **Stafford v. Stafford, 163.**

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Appealability—motion to dismiss denied—public duty doctrine—The City's appeal from the denial of a motion to dismiss was interlocutory but was heard because it was grounded on the defense of governmental immunity through the public duty doctrine. **Lovelace v. City of Shelby, 408.**

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Appealability—party aggrieved—An appeal by a store was dismissed where an action against the store, the shopping center owner, and a security company arose from an assault on plaintiff store employee but all claims against the store were dismissed and the store brought no claims itself. The store was not a party aggrieved. **Hoisington v. ZT-Winston-Salem Assocs., 485.**

APPEAL AND ERROR—Continued

Appealability—summary judgment—partial sovereign immunity—An appeal from the denial of partial and total summary judgment for defendant-Town in an action arising from injuries suffered in a park was dismissed where defendant admitted the purchase of liability insurance in an amount less than that sought by plaintiffs, thereby establishing the Town's entitlement to only partial immunity. **Anderson v. Town of Andrews, 185.**

Assignments of error—argument—inadequate—appeal dismissed—An appeal was dismissed where one assignment of error failed to state the legal basis on which error was assigned while the other assignment of error was not supported by argument. **Talley v. Talley, 87.**

Assignments of error—legal basis for error required—The State's appeal was subject to dismissal where the assignment of error failed to set forth the legal basis on which the State contended the trial court erred; however, the State included in the notice of appeal the legal basis on which it challenged the ruling and, since the appellees were informed of the issues to be raised and were thereby allowed to protect their interests, the appeal was reviewed under Appellate Rule 2. **State v. Baggett & Penuel, 47.**

Cross-assignment of error—not an alternative legal ground—Cross-assignments of error relating to the amount of damages awarded by the trial court were not considered where plaintiff sought to increase the damage awards rather than provide an alternative legal ground supporting the judgment. N.C. R. App. P. 10(d). **Atlantic Veneer Corp. v. Robbins, 594.**

Defective indictment—no assignment of error—not considered—An argument that an indictment was defective was deemed abandoned because it was not set out in an assignment of error. **State v. Owen, 543.**

Domestic violence protective order—findings and evidence insufficient—remand futile—Remand of a domestic violence protective order would be futile and the order was reversed where the trial court failed to make findings and conclusions to support its order, but the record contained no evidence which could support a conclusion that domestic violence occurred. **Price v. Price, 440.**

Facts not in record—arguments not supported by authority—Arguments which were based upon facts not contained in the record or which were unsupported by authority were overruled. Appellate review is limited to those things which appear in the record on appeal and assignments of error in support of which no reason or argument is stated or authority cited are deemed abandoned. **Atlantic Veneer Corp. v. Robbins, 594.**

Jurisdiction of appellate court—directed verdict not signed or filed—An appeal to the Court of Appeals was dismissed where the record contained a draft of the directed verdict order from which plaintiffs appealed, but the order was never signed by the trial judge or filed with the clerk. Entry of judgment by the trial court is the event which vests jurisdiction in the Court of Appeals, and entry occurs when a judgment is reduced to writing, signed by the judge, and filed with the clerk of court. Announcement of the judgment in open court merely constitutes rendering of judgment, not entry. **Mastin v. Griffith, 345.**

Notice of appeal—required—An issue as to whether the trial court erred by prohibiting defendant from assigning error to a temporary custody order was not

APPEAL AND ERROR—Continued

addressed where appellant did not at any time give notice of appeal as to the order. **Cox v. Cox, 221.**

Preservation of issues—assignment of error—not to order appealed from—Contentions concerning the denial of motions to intervene by other parties were not properly before the Court of Appeals where the notice of appeal was only from another order, which did not include findings or conclusions relating to the denial of the motion to intervene. **Perkins v. Helms, 620.**

Preservation of issues—bootstrapped argument—not allowed—Defendant in an action arising from a bail bond was not allowed to bootstrap his unpreserved argument regarding submission of punitive damages to the jury onto his challenge to the court's allowance of plaintiff's motion to amend her pleadings. **Shore v. Farmer, 350.**

Preservation of issues—cross-assignment of error—A cross-assignment of error concerning an N.C.G.S. § 1-111 bond was proper where defendants argued that the trial court's order did not deprive plaintiff of an alternative ground for summary judgment, but the decision may have deprived plaintiff of an alternative basis in law for supporting the judgment. **Swan Quarter Farms, Inc. v. Spencer, 106.**

Preservation of issues—instructions on punitive damages—no objection—Defendant waived any challenge to an instruction on punitive damages in an action arising from a bail bond by not objecting at trial. **Shore v. Farmer, 350.**

Preservation of issues—no argument in brief—issue waived—A cross assignment of error which was not supported by an argument in the brief was waived. **Shore v. Farmer, 350.**

Record—motion to dismiss denied—A motion to dismiss based upon an alleged failure to serve a proposed record on appeal or to agree with defendant as to the procedure for preparing the record was denied where a record was submitted with a stipulated agreement as to the settlement of the record. **Patterson v. Strickland, 510.**

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Agreement to arbitrate—employment contract—A trial court order denying defendant's motions to dismiss and to stay proceedings pending final arbitration was reversed and remanded where plaintiff's employment contract included an agreement to arbitrate the claims plaintiff asserts. **Martin v. Vance, 116.**

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Domestic violence protective order—sufficiency of evidence—There was insufficient evidence to issue a domestic violence protective order under N.C.G.S. § 50B-3(a) where the evidence showed at most that defendant entered plaintiff's trailer and spilled pasta and spices on the floor. There was no evidence that defendant attempted to cause or intentionally caused plaintiff bodily injury, placed him or any member of his family or household in fear of imminent serious bodily injury, or committed any sexual offense. **Price v. Price, 440.**

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Youth baseball players—injuries while riding with teammate—local organization—no negligence liability—A local American Legion post that sponsors a youth baseball team was not liable on a direct negligence theory for the death of one player and injuries to other players when a vehicle driven by a sixteen-year-old teammate overturned while he was driving them home after an out-of-town game with the manager's permission. **Daniels v. Reel, 1.**

Youth baseball players—injuries while riding with teammate—national and state organizations—no negligence liability—National and state American Legion organizations could not be held liable for direct negligence in permitting a sixteen-year-old member of a youth baseball team that participates in the American Legion baseball program to transport teammates to and from a game where the evidence shows that the local American Legion post that sponsors the team exercised exclusive day-to-day control over the operation of the team. **Daniels v. Reel, 1.**

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Fees—guaranty agreement and note—one instrument—Defendant-guarantors were liable for attorney fees in an action on a note where there was but one instrument signed by both maker and guarantors and that instrument provided for reasonable attorney fees. **First-Citizens Bank & Tr. Co. v. 4325 Park Rd. Assocs., 153.**

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Petition for partial remission of bail bond—applicable standard—The denial of a petition for partial remission of a bail bond was reversed where the trial court erred by applying N.C.G.S. § 1-52, rather than the "extraordinary cause" standard under N.C.G.S. § 15A-544 (h). N.C.G.S. § 15A-544(e) creates the right to seek remission within ninety days after entry of judgment on an appearance bond; after that time has passed, remission may be granted only when, in the discretion of the trial court, the requirement of N.C.G.S. § 15A-544 (h) for a showing of "extraordinary cause" is met. **State v. Harkness, 641.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Misdemeanor breaking or entering as lesser included offense—instruction refused—The trial court did not err in a prosecution for first-degree burglary by refusing to instruct on the lesser include offense of misdemeanor breaking or entering where the State clearly established each of the elements of first-degree burglary and there was no evidence showing the commission of a lesser included offense. **State v. Campbell, 531.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Attorney fees—child support and alimony—notice—insufficient—The issue of attorney fees was not properly before the trial court in an action involving alimony and child support where defendant moved for attorney fees at the conclusion of trial and submitted an affidavit which revealed his early awareness of his intention to seek attorney fees, but the record reflects no efforts by defendant to notify plaintiff of this intent. Statutory authority providing for attorney fees

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

in modification of child support and alimony actions does not override a party's basic constitutional rights to notice and due process considerations. **Spencer v. Spencer**, 38.

Child support—amount ordered not paid while appeal pending—contempt—The trial court properly found that defendant was in willful contempt where defendant appealed a modified order and continued payments at the old amount. Defendant would have been entitled to a setoff for the overpayment if the order had been reversed; his calculated and deliberate decision to pay the lower amount was at his peril. **Burnett v. Wheeler**, 316.

Child support—attorney fees—The trial court did not abuse its discretion by awarding attorneys fees to plaintiff's counsel in a child support action where defendant had substantial assets while plaintiff's income was \$41,000 per year, with modest bank accounts totaling approximately \$2,000. **Burnett v. Wheeler**, 316.

Child support—calculation of income—accrual accounting—The trial court did not abuse its discretion in a child support action by not considering the accrual accounting method used by defendant's closely held corporation in calculating defendant's income. Although defendant argued that the accrual method creates fictional income and that the court could make no determination of income actually available, accrual accounting figures represent income which is taxable for federal tax purposes and such amounts are thus properly considered for purposes of the Child Support Guidelines. Furthermore, in determining an obligor's gross income derived from an interest in a closely held corporation, the court in its discretion may allow appropriate adjustments. **Cauble v. Cauble**, 390.

Child support—calculation of income—business losses—The trial court on remand in a child support action correctly computed defendant's income under the Child Support Guidelines by considering defendant's business loss but not balancing that loss against his income. The court's findings are reasonable and satisfy the requirements of the mandate on remand; the "Potential Income" section of the Guidelines permits a court to consider potential income when a defendant is voluntarily unemployed or underemployed. **Burnett v. Wheeler**, 316.

Child support—calculation of income—closely held corporation—The trial court did not abuse its discretion in a child support action by imputing income to defendant from a closely held farm supply business without finding that defendant had deliberately depressed his income where the uncontradicted evidence supported the finding that the profits were available to defendant by virtue of his controlling interest in the closely held corporation. **Cauble v. Cauble**, 390.

Child support—calculation of income—losses—The trial court erred in a child support action by not including in defendant's income losses from a corporation. Although straight line depreciation may be excluded from an obligor's gross income in the court's discretion, the order in this case contains no reference to defendant's ownership interest in this corporation and fails to reflect its treatment of these corporate figures. The findings are not sufficiently specific to indicate whether the court properly applied the Guidelines. **Cauble v. Cauble**, 390.

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Child support—closely held corporation—bad debts—The trial court did not abuse its discretion in a child support action by not allowing claimed bad debt and depreciation expenses from a closely held corporation in computing defendant's gross income. Under the Guidelines, the court is accorded the discretion to discern those business expenses which are inappropriate for determining gross income for purposes of calculating child support. **Cauble v. Cauble, 390.**

Child support—modification—authority prior to petition—A child support action was remanded for a determination of the arrearage occurring between the unilateral reduction and the filing of the petition to modify. The trial court lacks authority to modify obligations prior to the filing of the petition. **Spencer v. Spencer, 38.**

Child support—modification—changed circumstances—findings—The trial court properly concluded that a substantial change in circumstances existed justifying modification of a child support order where the court's findings that the needs of the minor child and the needs of the plaintiff to support the child had increased were amply supported by undisputed evidence. **Brooker v. Brooker, 285.**

Child support—modification—deviation from Guidelines—A trial court order modifying child support was remanded for findings concerning the reasonable needs of the child, the relative ability of the parents to support the child, and a determination of whether a variation from the Guidelines is appropriate on those grounds. **Brooker v. Brooker, 285.**

Child support—reduced—evidence of income reduction—sufficient—The trial court did not err by decreasing plaintiff's monthly child support obligation based upon its determination of her income and there was sufficient evidence in the record to support the findings concerning her income. An amount alleged by defendant to be rents was described in testimony as a contribution toward household expenses and the court did not abuse its discretion by electing not to view this payment as rental income. **Spencer v. Spencer, 38.**

Child support—reduction—voluntary reduction of income—no showing that child's needs decreased—The trial court erred by reducing defendant's child support obligation based upon a voluntary reduction in income without a showing that the needs of the child decreased. **Mittendorff v. Mittendorff, 343.**

Child support—unilateral reduction—not willful—not contempt—The evidence before the trial court was sufficient to support the conclusion that plaintiff was not in willful contempt of court in her unilateral reduction of child support where she reduced her payments by half when she took full responsibility for supporting one of the couple's two children and filed motions to change the custody of the children and to reduce payments accordingly. **Spencer v. Spencer, 38.**

Child support—venue—motion for change denied—no abuse of discretion—The trial court did not abuse its discretion in a child support modification proceeding by denying a motion for change of venue where the original child support order was filed in Iredell County and defendant contended in his motion to

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

transfer that he had relocated to Forsyth County and that plaintiff had relocated to Wilkes County. Iredell is essentially located between Forsyth County and Wilkes County and is in relatively close proximity to both. **Brooker v. Brooker, 285.**

Custody—attorney fees—The trial court erred in a child custody and support action by awarding plaintiff attorney fees where the court concluded that plaintiff did not have sufficient assets with which to pay his attorney fees and that defendant did have the means to pay plaintiff's attorney fees, but there were no findings about plaintiff's monthly income or expenses and the court did not explicitly find that plaintiff acted in good faith when he instituted this action. **Cox v. Cox, 221.**

Custody—attorney fees—The trial court did not abuse its discretion by awarding plaintiff attorney fees in an action for child custody and support where the court made the necessary findings of fact and there was sufficient evidence to support those findings. **Cox v. Cox, 221.**

Custody—contempt hearing—in-chambers interview of children—The trial court erred in a child custody action by conducting an in-chambers interview of the children over the objection of defendant, but the error was not prejudicial since the parties' attorneys were present during the interview. **Cox v. Cox, 221.**

Refusal to enter permanent order—appeal not interlocutory—The trial court erred by refusing to enter a permanent order for child support, attorney fees and visitation and by dismissing defendant's appeal. Although all issues were resolved when the order was entered, the trial judge stated that all of his orders were temporary. A mere designation of an order as temporary is not sufficient to make that order interlocutory and not appealable; a clear and specific reconvening time must be set out in the order and the time interval must be reasonably brief. **Cox v. Cox, 221.**

Visitation—findings—The evidence in a custody action supported the court's visitation findings where defendant contended that no competent evidence existed to support the findings since there was no record of the private examination of the children by the court in chambers, but this interview (unlike an earlier interview) was with the consent of both parties and with counsel present. **Cox v. Cox, 221.**

Visitation—supervision of psychologist—findings—The trial court did not abrogate its authority to a child psychologist in a visitation action when it found that visitation with defendant ought to be under the supervision of the psychologist. **Cox v. Cox, 221.**

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Defendant not in custody—Miranda warnings not required—A defendant in a burglary and statutory rape prosecution was not in custody and Miranda warnings were not required where defendant took affirmative steps to contact the police after they contacted him and made an appointment to meet at the police station at a time convenient to him; defendant arrived at the station under his own volition and agreed to speak with the officers; at no time was he searched, handcuffed, or restricted in his movement; officers told him he was free to leave before questioning began; he was told on at least four occasions during questioning that he was free to leave and asked whether he understood; he replied in the affirmative each time; these exchanges occurred before defendant spoke with the officers, before he incriminated himself, and before he wrote the confession; and defendant left the station alone at the end of the interview. **State v. Campbell, 531.**

Request for attorney—reading of rights—contact not re-initiated—The trial court properly held that a robbery and kidnapping defendant had waived his right to counsel and refused to suppress defendant's incriminating statements where the detective questioning defendant was without knowledge of the earlier request for an attorney and was following police procedure; the reading of a person's rights is a normal result of an arrest and custody and does not fall under the definition of interrogation or re-initiation set out by the United States Supreme Court. **State v. Little, 601.**

CONSTITUTIONAL LAW

Effective assistance of counsel—inexperience—subsequent discipline—Defendant was not denied the effective assistance of counsel in a prosecution for burglary, rape and sexual offense because one of his attorneys had only practiced for a few months and his other attorney, who walked out of court, was subsequently suspended from practice for other disciplinary reasons. **State v. Blackwell, 31.**

Equal protection—application of felony murder to impaired driving—The application of the felony murder rule to a case involving the deaths of two col-

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lege students following a collision with an automobile driven by an impaired driver did not violate equal protection. **State v. Jones, 448.**

Ex post facto laws—application of felony murder to impaired driving—The application of the felony murder rule to a case involving the deaths of two college students following a collision with an automobile driven by an impaired driver did not violate the prohibition against ex post facto laws. **State v. Jones, 448.**

State—law of the land clause—sheriff's deputies—termination of employment—The trial court did not err by granting judgment on the pleadings for defendant-sheriff on claims under the Law of the Land Clause of the North Carolina Constitution in an action arising from the termination of employment of several sheriff's deputies where the plaintiffs lacked the requisite property interest in continued employment to trigger the protections afforded by the State Constitution. **Buchanan v. Hight, 299.**

State—statutory rape—disparate sentences—N.C.G.S. § 14-27.7A does not violate the Law of the Land or Cruel and Unusual Punishment Clauses of the North Carolina Constitution because the statutory scheme calibrating sentence severity to the gravity of the offense reflects a rational legislative policy and is not disproportionate to the crime. **State v. Anthony, 573.**

CONSTRUCTION CLAIMS

Contractor's wife—no benefits received—summary judgment—The trial court did not err by granting summary judgment for defendant Mrs. Leonard on causes of action for breach of contract to sell land, unfair trade practices, breach of contract to build a dwelling house, and other claims arising from the construction of a house where Mrs. Leonard signed the warranty deed but only met plaintiffs briefly at the closing, did not sign the sales contract or construction contract, no evidence indicated that she was involved in her husband's construction business, she was not a partner or joint venturer, all the evidence shows that any funds from the lot sale or building contract went exclusively to her husband, and plaintiffs presented no evidence that defendant Mrs. Leonard received money or any other benefit from either contract. **Camp v. Leonard, 554.**

Lender—no duty to inspect progress—The trial court did not err by granting summary judgment for defendant Industrial Federal Savings Bank on claims for breach of contract, breach of a duty of good faith, negligence, conspiracy, unfair trade practices, and wilful and wanton conduct arising from the construction of a house where the Agreement here did not expressly provide an affirmative duty by Industrial to inspect the construction progress of plaintiffs' home for plaintiffs' benefit, and, while Industrial may have assured plaintiffs that the defendant Mr. Leonard could be trusted with advances from the construction loan account, such assurances do not indicate that Industrial took on the duty of monitoring construction for plaintiffs' benefit or any other fiduciary duty. **Camp v. Leonard, 554.**

CONTEMPT

Attorney fees—findings and conclusions—The trial court did not err by awarding plaintiff attorney fees in the amount of \$875 at a civil contempt hearing

CONTEMPT—Continued

where the court made the appropriate findings and conclusions. **Cox v. Cox, 221.**

Condition for purging—vague—The trial court erred in a child custody and support action by entering a civil contempt order by including a vague condition which made it impossible for defendant to purge herself of the contempt. **Cox v. Cox, 221.**

Failure to pay attorney fees—no written undertaking—The trial court did not err by holding defendant in contempt for not paying attorney fees as directed by an order where, although defendant contended that she filed an undertaking pursuant to N.C.G.S. § 1-289 to stay enforcement of the award, she did not have a written undertaking executed by a surety. **Cox v. Cox, 221.**

CONTRACTS

Breach—at will employment—Summary judgment was correctly granted for plaintiff on a counterclaim for breach of an employment contract where defendant did not meet his burden of establishing a specific duration of the contract. An employment contract without a specified duration but with the compensation specified at a rate per year, month, week or day is for an indefinite period. **Ausley v. Bishop, 210.**

Breach—no evidence of damages—summary judgment—Summary judgment was correctly granted on a breach of contract counterclaim where defendant was unable to establish or even estimate damages caused by the alleged breach. In order to prevail, defendant must show that the alleged breach caused him injury. **Ausley v. Bishop, 210.**

Employment compensation—breach—summary judgment—Summary judgment was incorrectly granted for plaintiff on a counterclaim for breach of a written employment contract involving an apprentice appraiser by failing to pay commissions. **Ausley v. Bishop, 210.**

Indemnity—settlement—The trial court did not err by granting summary judgment for a security company on a cross claim by a shopping center owner under an indemnity clause in an action arising from an assault on a store employee. **Hoisington v. ZT-Winston-Salem Assocs., 485.**

Security services at shopping center—store employee not third-party beneficiary—The trial court properly granted summary judgment for defendant-security company in an action arising from an assault upon a store employee at a shopping center where plaintiff-employee contended that she was a third-party beneficiary to the contract between the security company and the shopping center owner. Although complaints from employees may have been the catalyst for a contract revision, that revision provided only increased security for the owner and, to the extent that the employee was benefitted by the contract, that benefit was incidental and does not entitle plaintiff to enforce a contract on her own behalf. **Hoisington v. ZT-Winston-Salem Assocs., 485.**

CRIMINAL CONVERSATION

Abolishment—not Court of Appeals prerogative—Although defendant contended that the North Carolina Supreme Court's decision in *Cannon v. Miller*,

CRIMINAL CONVERSATION—Continued

313 N.C. 324, (refusing to abolish the torts of alienation of affections and criminal conversation) should be reconsidered, it is not the Court of Appeals prerogative to overrule or ignore clearly written decisions of the Supreme Court. **Hutelmyer v. Cox, 364.**

Punitive damages—The trial court did not abuse its discretion by upholding a jury's award of \$500,000 in punitive damages in an action for alienation of affections and criminal conversation. Plaintiff presented sufficient evidence to show her entitlement to punitive damages and there was evidence before the jury concerning the reprehensibility of defendant's motives and conduct, the likelihood of serious harm, defendant's awareness of the probable consequences of her conduct, the duration of the conduct, and the actual damages. **Hutelmyer v. Cox, 364.**

CRIMINAL LAW

Defenses—spousal coercion—valid—The defense of spousal coercion, though created at a time when women could not testify for themselves and now outdated, has not been abolished by the North Carolina Supreme Court and remains a valid defense. **State v. Owen, 543.**

Guilty plea—voluntary—motion for appropriate relief denied—A motion for appropriate relief to a prior guilty plea to an impaired driving charge was properly denied where defendant contended that he had been without counsel and was not informed of his rights against self-incrimination, but there was competent evidence to support the trial court's finding that defendant had not met his burden of proof. **State v. Bass, 646.**

Habitual felon—guilty plea—failure to inform of consequences—Defendant was aware of the consequences of her guilty plea to being an habitual felon. **State v. Williams, 326.**

Habitual felon—no express admission of guilt—guilty plea—The trial court did not err by entering judgment against defendant on an habitual felon indictment where defendant did in fact plead guilty to the habitual felon charge despite the fact that she did not expressly admit her guilt. **State v. Williams, 326.**

Jurisdiction of district court before indictments—production of medical records—The district court had jurisdiction to enter orders for the production of defendant's medical records in a capital first-degree murder prosecution arising from an impaired driving collision where the order was entered before the indictments were returned. Jurisdiction is in the district court before a case is bound over to superior court or indictments returned. N.C.G.S. § 7A-272(b). **State v. Jones, 448.**

Instructions—acting in concert—There was no plain error in a prosecution of two defendants for armed robbery and attempted armed robbery where the State's evidence tended to show that defendants were acting in concert and each defendant contends that the instructions would allow the jury to convict both defendants if either committed the robbery. **State v. Hasty, 563.**

Instructions—reference to "victim"—There was no plain error in a statutory rape prosecution where the court referred to "the victim." Although an instruction using the term "victim" may be error under certain circumstances, the

CRIMINAL LAW—Continued

defendant here admitted committing a strict liability crime. **State v. Anthony, 573.**

Prosecutor's argument—defendant as “sexual predator”—There was no error in a prosecution for first-degree burglary and first-degree statutory rape where the prosecutor in closing arguments labeled defendant a “sexual predator.” The use of the term was slight and was confined to one paragraph of the argument; given the abundance of evidence indicating guilt, including defendant's confession, there is no reasonable possibility that this characterization of defendant may have affected the verdict. **State v. Campbell, 531.**

Prosecutor's argument—jury nullification—mistrial denied—The trial court did not err in a prosecution for statutory rape and other offenses in which defendant was charged as an accessory to her husband by denying defendant's motion for a mistrial following a closing argument in which the district attorney asked the jury to disregard the common law presumption of spousal coercion. The trial court sustained defendant's objection and gave a curative instruction. **State v. Owen, 543.**

DAMAGES AND REMEDIES

Judgment—supported by evidence—There was no error in an action to recover money embezzled where the answer was stricken for discovery violations, the court awarded damages in the amount of \$250,000, and defendant contended that the amount was not supported by the evidence. **Atlantic Veneer Corp. v. Robbins, 594.**

Punitive—fraud and undue influence—rescission—The trial court did not err by submitting to the jury the issue of punitive damages on plaintiff's claims for fraud, undue influence, and duress even though plaintiff had elected rescission on those claims. North Carolina public policy supports an award of punitive damages upon a jury verdict establishing fraud and consequent entitlement, at plaintiff's election, either to rescission or to compensatory damages. **Mehovic v. Mehovic, 131.**

Slander and unfair trade practice—after employment termination—Damages were sufficiently pleaded in a counterclaim for unfair or deceptive trade practices based upon slander although other damages related to claims properly dismissed. On remand, the court should limit evidence of damages to those related to plaintiff's alleged slander and unfair and deceptive trade practices that took place after defendant left plaintiff's employment. **Ausley v. Bishop, 210.**

DEEDS

Real property—bona fide purchaser for value—The trial court did not err in an action concerning possession of land by determining that one of defendants' predecessors in title was not a bona fide purchaser for value without notice of any defects in the chain of title where a 1969 deed was presumptively invalid on its face and an inquiry by the purchaser would have disclosed that the conveyance was not open and above board. **Swan Quarter Farms, Inc. v. Spencer, 106.**

Restrictive covenants—group home—The trial court erred by entering summary judgment for defendants in an action to determine whether a group home

DEEDS—Continued

for emergency care for undisciplined, delinquent or at risk youth violated subdivision restrictive covenants. **Parkwood Assoc'n v. Capital Health Care Investors, 158.**

Restrictive covenants—housing not limited based on handicapping condition—A restrictive covenant which prohibited a group home for undisciplined, delinquent or at risk youth did not limit housing based on a handicapping condition. **Parkwood Assoc'n v. Capital Health Care Investors, 158.**

DISCOVERY

Failure to comply—sanctions—The trial court did not abuse its discretion by dismissing defendant's answer for failing to comply with discovery orders where there was no showing that defendant was ordered to provide information which she could not reasonably produce; defendant continued to provide evasive and incomplete answers, despite orders compelling discovery and continuances granted to enable her to comply; and the court indicated in its order that it had considered less severe sanctions. N.C.G.S. § 1A-1, Rule 37(d). **Atlantic Veneer Corp. v. Robbins, 594.**

Letter written by defendant—defendant not permitted to inspect and copy—letter not in possession of State—The trial court did not err in a prosecution for the first-degree rape of an eight-year-old child by allowing testimony concerning a letter written by defendant to the victim's mother where defendant contended that the use of the letter violated N.C.G.S. § 15A-903, which states that the defendant must be permitted to inspect and copy any relevant written statement made by defendant in the possession, custody, or control of the State. The letter was never in the State's possession and defendant made no showing that the mother destroyed the letter in bad faith. **State v. Jarrell, 264.**

Prosecution's failure to disclose exculpatory evidence—no prejudice—There was no prejudicial error in a prosecution for first-degree burglary and first-degree rape from the State's failure to disclose hair samples taken from the crime scene and photographs of the victim's bathroom window. **State v. Campbell, 531.**

Rape—slides from medical examination—discovered during trial—The trial court did not err in a prosecution for the first-degree rape of an eight-year-old child by admitting slides depicting the medical examination of the victim even though the slides had not been provided in response to defendant's discovery request. The State did not know about the slides until defendant elicited the information from a doctor during cross-examination and the court permitted defendant to view the slides during a break. **State v. Jarrell, 264.**

Schedule—modification—discretion of court—The trial court was well within its discretion in a medical malpractice action when it denied amendment of a discovery scheduling order. Plaintiff's contention that her proposed schedule would not result in delay was speculative at best. **Alston v. Duke University, 57.**

DIVORCE

Alimony—substantially changed circumstances—reduced income capacity—The trial court did not err in finding and concluding that there was a sub-

DIVORCE—Continued

stantial change of circumstances warranting termination of plaintiff's alimony payments to defendant. The court was particularly aware of plaintiff's reduced income due to her retirement and specifically found that potential income from a new job was undetermined. The court's findings were clearly supported by the evidence. **Spencer v. Spencer, 38.**

Equitable distribution—listing of marital debts—local rules—stipulation—Plaintiff made stipulations in an equitable distribution action which relieved defendant of the burden of proving that certain credit card debts were marital where a form was filed according to local rules (Fifth Judicial District) which listed debts but did not contain any objection, amendment, or supplement by plaintiff to defendant's classification of the credit card debts even though the form contained a column for that purpose. Under the applicable local rules, a party has affirmatively represented that he does not dispute the initiating party's listing where no objections, amendments, or supplements are made. The trial court may treat this affirmative representation as a stipulation. **Young v. Young, 332.**

EJECTION

Defense bond—not a condition precedent to filing an answer—The trial court did not err in an ejection action by granting defendants' motion for leave to file a defense bond. Posting a defense bond is not a condition precedent to filing an answer; the requirement of a defense bond was never intended to be used to require forfeiture on technical grounds by a party having merit to its argument. **Swan Quarter Farms, Inc. v. Spencer, 106.**

EMOTIONAL DISTRESS

Intentional infliction—extreme and outrageous conduct—summary judgment—Summary judgment was correctly granted for plaintiff on a counterclaim for intentional infliction of emotional distress arising from plaintiff's employment of defendant where plaintiff refused to follow through on his obligation to certify defendant's reports unless defendant entered into an agreement not to compete, contacted the police and caused embezzlement charges to be filed against defendant, and relayed negative and accusatory comments to defendant's creditors and potential clients. **Ausley v. Bishop, 210.**

EMPLOYER AND EMPLOYEE

Sheriff's deputies—termination of employment—breach of contract and due process claims—employment at will—The trial court did not err by granting judgment on the pleadings for defendant on contract and due process claims by several sheriff's deputies arising from the termination of their employment. Plaintiffs made no allegation that they were employed for a definite period of time or that they were exempted from the rule of employment-at-will by one of the well-established exceptions. **Buchanan v. Hight, 299.**

ESTATE ADMINISTRATION

Venue—motion to change—timeliness—The trial court did not err by denying a motion to change the venue of an estate administration where the beneficiaries

ESTATE ADMINISTRATION—Continued

of the will waived venue in Guilford County and consented to venue in Craven County and caveators did not raise their objection to the will and motion to change, which raised the question of priority of venue, until over four months after the letters testamentary were issued. They are precluded from challenging venue by N.C.G.S. § 28A-3-5. **In re Estate of Hodgin, 650.**

ESTOPPEL

Piercing corporate veil—clean hands—The trial court did not err by refusing to pierce the corporate veil in an action to determine possession of a tract of land. Defendants were aware of the defects in the title when they purchased the property, used the defects in the title as leverage in negotiations, and may not resort to equitable principles. **Swan Quarter Farms, Inc. v. Spencer, 106.**

EVIDENCE

Bias of witness—evidence excluded—The trial court erred in an armed robbery prosecution by precluding defendant from introducing evidence concerning the bias of a State's witness where the witness testified that there was no deal to allow him to plead guilty to a reduced charge in exchange for his testimony and the court would not allow defendant to present testimony by an inmate that the witness had stated in jail that he had made a deal with the State. Since this was the only witness directly tying defendant to the crime, this constituted reversible error. **State v. Rankins, 607.**

Character for truthfulness impugned—no prejudice—There was no prejudicial error in a prosecution for driving while impaired where a trooper testified that defendant had told him that she had drunk a little Schnapps and the State was allowed to elicit testimony from the same trooper that he later heard defendant state that she had drunk nothing. **State v. Cardwell, 496.**

Corroborative testimony—excluded—prejudicial and cumulative—The trial court did not abuse its discretion in a prosecution for first-degree statutory rape and other offenses by excluding corroborative testimony by three defense witnesses regarding defendant's claim of misogynistic behavior and domestic violence by her husband. **State v. Owen, 543.**

Driving while impaired—blood plasma alcohol level—not unduly prejudicial—The trial court did not abuse its discretion in a driving while impaired prosecution by determining that the probative value of the results of a blood plasma alcohol test was not substantially outweighed by the risk of prejudice. The test results were highly probative of whether defendant was driving while impaired, the court determined that the Analyzer results were reliable, the test results lacked emotional content, and both sides were allowed to present explanatory expert testimony to reduce the risk of misleading the jury. **State v. Cardwell, 496.**

Driving while impaired—blood plasma alcohol testing—results admissible—The trial court did not abuse its discretion in a driving while impaired prosecution by admitting into evidence the results from a blood plasma alcohol test performed using an ACA Star Analyzer. **State v. Cardwell, 496.**

Expert testimony—excluded—no error—The trial court did not abuse its discretion in a prosecution for first-degree statutory rape and other offenses by

EVIDENCE—Continued

excluding as too prejudicial the testimony of two defense experts where one had never met defendant and had no knowledge of the events on the day of the rape and the other, called for corroborative purposes, did little to corroborate defendant's claims of physical and sexual abuse or threats of abuse by her husband. **State v. Owen, 543.**

Expert testimony—impaired driving—blood alcohol and drugs—The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision by allowing testimony from a doctor that defendant was appreciably impaired when his blood alcohol level reached .046 because the doctor was qualified as an expert in forensic toxicology and had examined a sample of defendant's blood, or testimony from another doctor about the effects of combining alcohol and Xanax. Any problems in the testimony go to its weight, not its admissibility. **State v. Jones, 448.**

Fiduciaries—unmarried “husband-wife” relationship—admissible—The trial court did not err in an action arising from the purchase of property by an unmarried couple by admitting evidence of the parties' behavior as husband and wife to rebut defendant's claims of a mere landlord-tenant relationship. **Patterson v. Strickland, 510.**

Hearsay—state of mind exception—incidents of abuse against victim—factual events—The trial court did not err in a first-degree murder prosecution by admitting hearsay statements of the victim where her state of mind during each of the conversations was relevant because they related to her relationship with defendant preceding her death and rebutted defendant's self-defense inferences. **State v. Wilds, 195.**

Homicide—911 tape from victim's daughter—not unduly prejudicial—The trial court did not abuse its discretion in a first-degree murder prosecution by admitting a tape of the 911 conversation between the victim's eight-year-old daughter and the Sheriff's Office. **State v. Wilds, 195.**

Homicide—photographs of victim's body—The trial court did not abuse its discretion in a first-degree murder prosecution by allowing the State to publish to the jury photographs of the victim's wounds at the crime scene and autopsy photographs taken at the same angles and showing the same wounds where the autopsy photos revealed wounds that could not be seen in the crime scene photos because of the blood covering the body. **State v. Wilds, 195.**

Identification—photographic lineup—failure to object when identification made before jury—There was no error in an armed robbery prosecution in allowing testimony concerning a photographic identification of defendant where all of the photographs were of black men, facial hair varied, and the witness was not told that a suspect was in any of the groups. Moreover, assuming that the procedure was impermissibly suggestive, defendant waived the error by failing to object when the witness later identified him before the jury. **State v. Rankins, 607.**

Offer of proof—absence fatal—An assignment of error to the exclusion of testimony concerning the bias of the investigating offer was overruled where the record was not clear as to the anticipated testimony and both the officer and defendant were extensively questioned concerning an alleged history of ill-will. **State v. Rankins, 607.**

EVIDENCE—Continued

Offer of proof—absence not fatal—The absence of an offer of proof to the exclusion of testimony concerning the bias of a State's witness was not fatal to defendant's argument where the court had specifically informed defense counsel that the record already included the basis of the anticipated testimony. It has been held that failure to make offers of proof is not necessarily fatal if the essential content of the excluded testimony and its significance are obvious from the record. **State v. Rankins, 607.**

Photograph of defendant—shackles and blood—There was no plain error in a first-degree murder prosecution where the court allowed the State to publish to the jury a photograph of defendant taken on the morning of the killing in which his legs were in shackles and there was blood on his hands and clothes and small knife wounds on his hands. The State offered overwhelming evidence of malice, premeditation, and deliberation and the jury would not have reached a different verdict if the photograph had been excluded. **State v. Wilds, 195.**

Prior crime or act—assault on victim—admissible—The trial court did not err in a prosecution for first-degree murder by admitting evidence of defendant's prior convictions, including assaulting the victim. Evidence of a defendant's prior assaults on the victim for whose murder the defendant is being tried is admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim. The ten-year time span between the conviction and the victim's death affected the weight rather than the admissibility. **State v. Wilds, 195.**

Prior crime or act—capital first-degree murder—impaired driving—other charges—conduct just before offense—In a capital first-degree murder prosecution arising from the death of two college students in a collision with an automobile driven by defendant while he was impaired with alcohol and drugs, the trial court did not err by allowing evidence about a pending DWI charge, defendant's 1992 conviction for DWI, and evidence of defendant's conduct just before the offense, all of which were used to show malice. **State v. Jones, 448.**

Prior crime or act—prior burglaries—rape victim's demeanor—admissible—The trial court did not err in a prosecution for first-degree burglary and first-degree statutory rape by allowing testimony regarding previous burglaries to the home and the victim's demeanor after the rape. **State v. Campbell, 531.**

Prior crime or act—similar modus operandi—remoteness—In a prosecution for first-degree statutory rape and first-degree statutory sexual offense against an eleven-year-old female, evidence concerning defendant's sexual assaults on two young females ten and seven years earlier was admissible to establish that defendant was the present victim's assailant by showing a similar modus operandi. **State v. Blackwell, 31.**

Statutory rape—previous rape—There was no prejudicial error in a statutory rape prosecution where the court admitted testimony of a previous rape as evidence of a pattern. Assuming testimony of the other wrong was not admissible, defendant admitted having sexual intercourse with the victim, and the disputed issue of consent did not determine defendant's guilt or innocence under N.C.G.S. § 14-27.7A. **State v. Anthony, 573.**

FRAUD

Fraudulent misrepresentation—evidence of intent—summary judgment—Summary judgment was properly granted for plaintiff on a counterclaim for fraudulent misrepresentation where there was no evidence of plaintiff's intent at the time the misrepresentations were made. **Ausley v. Bishop, 210.**

Negligent misrepresentation—no evidence of failure to exercise reasonable care—summary judgment—Summary judgment was properly granted for plaintiff on a counterclaim for negligent misrepresentation arising from plaintiff's actions in supervising defendant as an apprentice appraiser. There is no evidence to support defendant's contention that plaintiff failed to exercise reasonable care in communicating to defendant that he would sign defendant's log sheets or in communicating his intent regarding compensation. **Ausley v. Bishop, 210.**

GOVERNMENTAL IMMUNITY

Public duty doctrine—911 call—no individual relationship—The trial court erred by denying defendant-City's motion to dismiss a negligence action arising from a slow response to a 911 call reporting a fire where plaintiffs alleged that by receiving the 911 call the City acknowledged that fire protection or other appropriate emergency response would be forthcoming. No individual relationship existed between the dispatcher and the plaintiffs which increased their risk; to hold otherwise would impute a "special duty" in every case where a 911 call is received. **Lovelace v. City of Shelby, 408.**

GRAND JURIES

Copy of proceedings—denied—The trial court did not err in an armed robbery prosecution by denying defendant's motion for a copy of the grand jury proceedings in the case. **State v. Rankins, 607.**

GUARANTY

Contract—liability of individual guarantors limited—total liability not limited—The trial court correctly entered judgment against defendants on a note individually rather than jointly and severally and correctly declined to amend or modify its judgment where defendants (the maker and guarantors of the \$600,000 note) argued that language in the note limited their maximum total liability to \$300,000. The plain language of an amendment to the note allowed plaintiff to pursue collection individually in an amount not in excess of \$300,000. **First-Citizens Bank & Tr. Co. v. 4325 Park Rd. Assocs., 153.**

HIGHWAYS AND STREETS

Successive right-of-way agreements—abutter's rights—access rights appurtenant—Summary judgment was erroneously granted for defendant in an action which arose from a 1960 right-of-way agreement which succeeded a 1953 right-of-way agreement and created a restricted access highway, leading to closure of a crossover created under the 1953 agreement which provided access to plaintiff's property. The 1960 agreement only released "abutter's rights" and "access rights appurtenant" to plaintiff's property, but failed to release plaintiff's separate and distinct rights to the crossover. **Southern Furniture Co. v. Dep't of Transp., 400.**

HOMICIDE

Culpable negligence—instructions—driving on left half of roadway—exceeding posted speed—The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision in its instruction on culpable negligence. Our cases have held that an individual may be culpably or criminally negligent when traveling at excessive rates of speed or when driving on the wrong side of the road. **State v. Jones, 448.**

Culpable negligence—instructions—insulating negligence—The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision by not giving defendant's requested instruction on insulating negligence. Defendant was in the victim's lane of travel and she was forced to swerve into the left lane in an effort to avoid a collision; the argument that she should have swerved to the right and hit a telephone pole and mailbox is completely unpersuasive. **State v. Jones, 448.**

Felony murder—deadly weapon—not unconstitutionally vague—The lack of a specific definition of "deadly weapon" in the felony murder statute, N.C.G.S. § 14-17, did not make the statute unconstitutional in a case involving the deaths of two college students following a collision with an automobile driven by an impaired driver. **State v. Jones, 448.**

Felony murder—instructions—proximate cause of death—The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision by not giving defendant's requested instruction on felony murder that the State must prove that there was no other proximate cause of the death of the victim. It is sufficient if a defendant's culpable negligence is a proximate cause of the death. **State v. Jones, 448.**

Felony murder—legislative intent—Application of the felony murder rule to a prosecution which arose from the deaths of two college students after a collision with an automobile driven by an intoxicated driver did not violate legislative intent. The General Assembly modified the felony murder rule in 1977 and made it more specific, but did not exclude automobiles from the definition of "deadly weapons" even though automobiles had often been treated as "deadly weapons" prior to the amendment. **State v. Jones, 448.**

Felony murder—no merger of underlying felony—The trial court did not err in a first-degree murder prosecution arising from an impaired driving collision by submitting felony murder where defendant argued that the underlying felony of assault with a deadly weapon inflicting serious injury merged with the homicide. **State v. Jones, 448.**

First-degree murder—premeditation and deliberation—sufficiency of evidence—There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution. **State v. Wilds, 195.**

First-degree murder—sufficiency of evidence—impaired driving—The trial court correctly denied a motion to dismiss a charge of first-degree murder arising from an impaired driving automobile collision. **State v. Jones, 448.**

INDECENT LIBERTIES

Children's statute—intent—sufficiency of evidence—The trial court erred in the prosecution of a nine-year-old for taking indecent liberties against a three-

INDECENT LIBERTIES—Continued

year-old under N.C.G.S. § 14-202.2 by denying defendant's motion to dismiss where the State's evidence was insufficient to support a finding of purpose. Although intent may be inferred from the act itself under the adult statute, sexual ambitions must not be assigned to a child's actions without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting. **In re T.S., 272.**

Instructions—masturbation—The trial court did not err in an indecent liberties prosecution by instructing the jury that "masturbation in the presence of another would be an immoral or indecent act." **State v. Nesbitt, 420.**

Presence of children—not unconstitutionally vague—N.C.G.S. § 14-202.1(a)(1), the indecent liberties statute, is not unconstitutionally vague as applied where defendant was 35 feet away inside his home behind a glass door. **State v. Nesbitt, 420.**

Presence of children—sufficiency of evidence—The trial court correctly denied defendant's motion to dismiss a charge of indecent liberties under N.C.G.S. § 14-202.1(a)(1) where defendant let his dogs into his yard to encourage children to stop and play; defendant, while inside his house 35 feet away and in clear view of the children, exposed himself and masturbated while the children were playing with the dogs; and defendant acknowledged the children's presence by waving to them in one instance and changing his position in another instance. The fact that the children were outside defendant's home while he was inside is not material, and neither is the fact that the children were 35 feet away. It is material that defendant involved the children in his scheme to engage in an indecent liberty for the purpose of arousing his own sexual desire. **State v. Nesbitt, 420.**

INDICTMENT AND INFORMATION

Date of offense—correction—The trial court did not err in a prosecution for a first-degree burglary and first-degree statutory rape by granting the prosecution's motion to correct the date of the offenses. **State v. Campbell, 531.**

Statutory rape—date of offenses—bill of particulars denied—The trial court did not err in a prosecution for taking indecent liberties and statutory rape by denying defendant's motion for a bill of particulars as to the dates of the offenses where the indictments alleged that the rapes were "on or about December, 1995," "on or about January 1996," and "on or between February 1 and 14, 1996." The indictments listed the month and year that each offense was alleged to have occurred and sufficiently complied with N.C.G.S. § 15A-924(a)(4) by charging that the offense occurred during a designated period of time. **State v. Jarrell, 264.**

INSURANCE

Automobile—liability—owned-vehicle exclusion—rental car—An owned-vehicle exclusion in an automobile liability insurance policy which did not provide coverage for any vehicle other than the covered auto which was owned by the policy holder or furnished for his regular use did not apply to a rental auto. **Strickland v. State Farm Mut. Auto. Ins. Co., 71.**

INSURANCE—Continued

Automobile—UIM—allocation of liability settlement—primary and excess carriers—The trial court erred in a declaratory judgment action to determine the allocation of a set-off between UIM carriers where plaintiff was injured while riding in a vehicle owned by Robert Penny; the other vehicle was at fault and the liability carrier settled for \$62,500; plaintiff's damages exceeded the settlement; the carriers of the Penny vehicle (Nationwide) and a family member policy which covered plaintiff (Geico) each sought UIM credit for the settlement; and the trial court ordered that the set-off be shared *pro rata* to their respective UIM limits (\$31,250 each). The "other insurance" clauses in each policy are identically worded, but do not have identical meanings. **Iodice v. Jones, 76.**

Underinsured motorist policy—subrogation—South Carolina statute—The trial court erred by granting summary judgment for defendant in an action which arose from an automobile accident in South Carolina between residents of Brunswick County, North Carolina where defendant contended that South Carolina substantive tort law applies and that a South Carolina statute bars insurance companies from being subrogated to the rights of an insured. The South Carolina statute does not regulate the contractual relationship between a North Carolina insurer and its insured where benefits are paid under a policy issued in North Carolina; moreover, North Carolina courts are not required to extend comity to the law of another state where that law is contrary to the public policy of this state, or where the law of another state would operate in opposition to our settled statutory policy or override express provisions of our statutes. **Robinson v. Leach, 436.**

JURISDICTION

Long-arm—general—The trial court erred in an action for misappropriation of trade secrets by granting defendant's motion to dismiss for lack of personal jurisdiction where, assuming that general jurisdiction analysis applied, defendant maintained systematic and continuous contacts with North Carolina through its business relationship with plaintiff and availed itself of the privilege of doing business here through direct mail to at least 50 residents, advertisements in journals circulated in North Carolina, and advertisement on an Internet website available to North Carolina citizens. **Replacements, Ltd. v. MidweSterling, 139.**

Long-arm—specific—The trial court erred in an action for misappropriation of trade secrets by granting defendant's motion to dismiss for lack of personal jurisdiction where the controversy arose out of defendant's contacts with this state and specific jurisdiction was sought. Defendant admitted sending the mail in question to at least 50 North Carolina suppliers soliciting their business and the misappropriation therefore concluded in North Carolina. Moreover, defendant engaged in other acts which may have originated in Missouri but were directed to and concluded in North Carolina. Defendant therefore availed itself of the privilege of conducting business in North Carolina on numerous occasions. **Replacements, Ltd. v. MidweSterling, 139.**

Order extending time to file complaint—entry—The trial court had jurisdiction to order that time for filing a complaint be extended in accordance with N.C.G.S. § 1A-1, Rule 9(j), even though defendants argued that there was no motion pending when the order was signed, because the record clearly shows that the motion was filed and entered on 19 September and the order filed and

JURISDICTION—Continued

entered on 1 October. A judgment is entered when it is reduced to writing, signed by a judge, and filed with the clerk of court. **Webb v. Nash Hosp., Inc.**, 636.

Standing—action by limited partner for injuries to partnership—The trial court correctly dismissed plaintiff's claims for negligence, negligent misrepresentation, and breach of warranty for lack of standing where plaintiff, one of several limited partners, alleged that it had relied on representations by defendants in investing in the limited partnership and that defendants caused the project to fail and plaintiff to lose its investment. The proper analysis of plaintiff's standing requires analogy to the law of shareholders, which allows the special duty and unique injury exceptions to the general rule that a shareholder cannot sue a third party for causing harm to the corporation. The complaint, taken as true, did not allege facts from which one might reasonably infer a special duty between defendants and this particular limited partner, and the damages of which plaintiff complains are common to all of the partners. **Energy Investors Fund, L.P. v. Metric Constructors, Inc.**, 522.

JURY

Defenses—spousal coercion—prospective jurors—instruction not given—no prejudice—There was no prejudice in a prosecution for first-degree statutory rape and other offenses when the trial court refused to inform prospective jurors of defendant's affirmative defense of spousal coercion where defendant was able to testify about her fear of her husband and that her husband forced her to participate, the court informed the jury of the presumption of spousal coercion at the close of the trial, and the court instructed the jury on the presumption of spousal coercion twice more during deliberations. **State v. Owen**, 543.

Selection—prejudicial statements—entire panel not dismissed—peremptory challenges not fully restored—When inappropriate answers are given or comments made by a prospective juror during the jury selection process, the trial court should make an inquiry of all jurors, both accepted and prospective, to determine whether they heard the statements, the effect of the statements on them, and whether they could disabuse their minds of the harmful effects of the comments. **State v. Howard**, 614.

JUVENILES

Neglected—findings—insufficient—A trial court order concluding that a juvenile was neglected was remanded where the conclusion was not supported by adequate findings of fact and did not support the adjudicatory and disposition orders. The finding of fact that the juvenile was not provided proper care, supervision, or discipline by her mother was more properly a conclusion of law; even assuming that the court's determination may be characterized as a finding of fact, the matter must be remanded for findings regarding the effect on the juvenile of the failure of her mother to provide proper care, supervision, and discipline. **In re Everett**, 84.

KIDNAPPING

Second-degree—removal in connection with another felony—The trial court erred by denying defendant's motion to dismiss a charge of second-degree

KIDNAPPING—Continued

kidnapping in a prosecution for armed robbery, conspiracy, and second-degree kidnapping. The evidence falls short of showing that the victim's movement was a removal separate and apart from the armed robbery and defendant was not exposed to greater danger than that inherent in the armed robbery. **State v. Ross, 310.**

Sufficiency of evidence—aspotation—The trial court did not err by denying defendant's motion to dismiss a kidnapping charge where, after taking the victim's money and forcing the victim to withdraw more from a teller machine, the victim was moved more than 200 feet across a parking lot, onto a street, and down a hill into a cul-de-sac. The aspotation was obviously unnecessary to extract more money from the victim. **State v. Little, 601.**

LIBEL AND SLANDER

Statements adversely affecting business or personal reputation—summary judgment—The trial court erred by granting summary judgment for plaintiff on defendant's counterclaim for slander where defendant was launching his own business as an appraiser and plaintiff's statements to defendant's clients and potential clients involving police reports of stolen client files and loan fraud undoubtedly had the capacity to harm defendant in his trade or profession. **Ausley v. Bishop, 210.**

LIENS

Towing and storage of mobile home—contract—implied—The trial court did not err by finding a towing and storage lien for a mobile home even though plaintiff presented no evidence of a contract as required under N.C.G.S. § 44A-2(d). This case is guided by the reasoning of *Case v. Miller*, 68 N.C. App. 729, and *State v. Davy*, 100 N.C. App. 551, which involved an implied contract with a legal possessor to tow and store a vehicle in a situation whereby the legal possessor had no intention of paying the requisite towing and storage costs. **Green Tree Financial Servicing Corp. v. Young, 339.**

MEDICAL MALPRACTICE

On-call physician—no physician-patient relationship—The trial court correctly dismissed a claim against an on-call physician and his employer for failure to state a claim upon which relief could be granted where there was no allegation of a physician-patient relationship or allegations about the subject matter of another doctor's discussion with the on-call physician. **Webb v. Nash Hosp., Inc., 636.**

Sexual assault upon patient—physicians' assistant not assigned to patient—no professional relationship—summary judgment for defendant—The trial court did not err by granting summary judgment for defendant Knutson in a medical malpractice action which arose from Knutson's sexual assault upon a patient to whom he was not assigned but to whom he had access by way of his employment as a physicians' assistant. Plaintiff failed to present evidence of a professional relationship, which must exist to maintain a medical malpractice claim (although it would not be necessary for a civil assault or battery claim). **Massengill v. Duke Med. Ctr., 336.**

MOTOR VEHICLES

Driving while impaired—blood plasma alcohol level— conversion ratio— reliable—The trial court did not abuse its discretion in a driving while impaired prosecution by finding that a ratio of 1 to 1.18 was reliable to convert plasma-alcohol concentration to its blood-alcohol equivalent. **State v. Cardwell, 496.**

Driving while impaired—defendant as driver—evidence sufficient—The trial court did not err in a DWI prosecution by denying defendant's motion to dismiss based upon insufficient evidence that she was the driver where an officer observed a small red vehicle making two turns, he found the vehicle in a residential driveway approximately forty-five seconds later, he pulled behind the vehicle and activated lights which enabled him to see inside the vehicle, he watched the individuals in the vehicle until backup arrived and they stayed in their respective positions, and defendant was sitting in the driver's seat with the keys in the ignition when officers subsequently approached the vehicle. **State v. Foreman, 292.**

NEGLIGENCE

Contributory—diving into shallow water—The trial court correctly granted summary judgment for defendants in a negligence action arising from an injury suffered when the minor plaintiff (Elizabeth) dove from defendants' dock into shallow water to join defendants' daughter on a personal water craft. Elizabeth knew from her experience as a trained diver that diving into water of an unknown depth was dangerous, but did so by her own choosing and at her own risk. Her decision to dive without attempting to measure the water's depth constitutes contributory negligence. **Davies v. Lewis, 167.**

Contributory—riding with intoxicated driver—willful and wanton—The trial court erred in action by the estate of an intoxicated passenger against an intoxicated driver and the owner of the vehicle arising from an automobile accident by finding that there were material issues of fact about whether the passenger contributed to her death by willful and wanton conduct. Under the facts of this case, the driver was willfully and wantonly negligent in operating a motor vehicle while under the influence of intoxicating liquor; to the extent that the evidence establishes willful and wanton negligence on the part of the driver, it also establishes a similarly high degree of contributory negligence on the part of the passenger. **Coleman v. Hines, 147.**

Installing utility poles—mountainous terrain—inherently dangerous activity—activity not collateral—knowledge by defendant—Summary judgment was improperly granted for defendant Blue Ridge Electrical Membership Corporation in a negligence action arising from an injury suffered by plaintiff James Lilley while installing a utility pole in steep, mountainous terrain. Setting utility poles forty-five to fifty feet in length and weighing approximately one ton on rugged mountain terrain described as "straight up and down," making it "difficult to stand or walk," at a minimum presents a factual question of whether there is a recognizable and substantial danger inherent in the work. **Lilley v. Blue Ridge Electric Membership Corp., 256.**

Last clear chance—riding with intoxicated driver—The doctrine of last clear chance did not apply to an intoxicated passenger riding with an intoxicated driver where the evidence tended to show that the passenger had opportunities

NEGLIGENCE—Continued

to avoid riding with the driver but declined and chose to ride with him. **Coleman v. Hines, 147.**

Security guard—no duty to store clerk—The trial court did not err by granting summary judgment for a security company on a negligence claim arising from an attack upon a store employee in a shopping center where the documents filed in the trial court revealed no duty owed the employee by virtue of the contract between the security company and the owner of the shopping center. **Hoisington v. ZT-Winston-Salem Assocs., 485.**

PARTIES

Intervention—zoning action—The trial court erred by denying the proposed intervenors' motion to intervene where extraordinary and unusual circumstances existed and the proposed intervenors satisfied the prerequisites of being interested parties subject to practical impairment of the protection of that interest and inadequate representation of that interest by existing parties. **Proctor v. City of Raleigh, 181.**

PENSIONS AND RETIREMENT

Benefits—retroactive—compounding of interest—The method mandated by the trial court for compounding the interest on underpayment of disability and retirement benefits was erroneous because it failed to recognize that each underpayment was due monthly and that the annual period giving rise to compounding runs from the due date of each underpayment. **Faulkenbury v. Teachers' and State Employees' Ret. Sys., 587.**

Benefits—retroactive—interest—The interest calculation approved by the trial court for the retroactive payment of State disability and service retirement benefits was erroneous. To be consistent with the purpose of N.C.G.S. § 135-1(19), N.C.G.S. § 128-21(18) and the principles of the common law, the statutes must be read to require that any underpayments accrue interest from the date they become due, with payments due and payable on a monthly basis. **Faulkenbury v. Teachers' and State Employees' Ret. Sys., 587.**

PLEADINGS

Amendment—punitive damages—The trial court did not abuse its discretion in an action arising from a bail bond by allowing plaintiff's motion to amend her pleadings to conform to the evidence and seek punitive damages. The specific language of the complaint sufficiently articulated a claim for punitive damages so as to put defendant on notice. **Shore v. Farmer, 350.**

Rule 11 sanctions—against corporation—proper—The trial court did not err by sanctioning plaintiff corporation under N.C.G.S. § 1A-1, Rule 11 where the court correctly determined that the verified complaint was facially implausible and not warranted by existing law. **Polygenex Int'l, Inc. v. Polyzen, Inc., 245.**

Rule 11 sanctions—attorney fees and costs—amount—findings—The trial court's determination of the amount of a Rule 11 sanction was remanded where the court stated only that defendants had "presented evidence" on the issue and

PLEADINGS—Continued

then awarded “reasonable” fees and costs “necessarily incurred.” The court did not make any findings regarding the customary fee for like work, plaintiff’s attorney’s experience and ability, and the amount of time and labor expended. **Polygenex Int’l, Inc. v. Polyzen, Inc., 245.**

Rule 11 sanctions—complaint signed by corporate officer—not a party in individual capacity—An order imposing attorney fees and costs for filing a complaint not warranted in law, not well-grounded in fact, and for an improper purpose was vacated as to the president of plaintiff-corporation, McGarry, where McGarry’s verification of the complaint was in his capacity as a corporate officer and not in his individual capacity. **Polygenex Int’l, Inc. v. Polyzen, Inc., 245.**

Rule 11 sanctions—sufficiency of allegations—The allegations in a Rule 11 motion were sufficient where defendants contended in the motion that the complaint was not well-grounded in fact; not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and was interposed for the improper purpose of harassing defendants. **Polygenex Int’l, Inc. v. Polyzen, Inc., 245.**

PROBATION AND PAROLE

Condition of probation of juvenile—no television—The trial court did not err by placing an additional condition on the appealing juvenile’s probation where the juvenile spray painted the words “Charles Manson” because she had recently watched a television documentary, and the court found that the juvenile’s susceptibility to the influences of television contributed to her delinquent conduct and ordered that she not watch television for one year. The condition of probation was within the judge’s power because it was related to do both the juvenile’s unlawful conduct and her needs. **In re McDonald, 433.**

Restitution—evidence insufficient—The trial court erred by ordering a juvenile to pay restitution for rearranging items and spray painting words and pictures on a boat house wall where it was undisputed that the State failed to provide any evidence about the monetary amount of damages suffered by the boat house owner and it appears that the court looked at pictures and speculated as to the damage. **In re McDonald, 433.**

PUBLIC OFFICERS AND EMPLOYEES

Sheriff—termination of deputies—action in official capacity—The trial court did not err by granting judgment on the pleadings for defendant-sheriff on all claims in his individual capacity arising from the termination of the employment of several deputies. The terminations were within the official duties of the defendant. **Buchanan v. Hight, 299.**

RAPE

Accessory—multiple attempts—double jeopardy—The trial court did not err by denying defendant’s motion to dismiss on double jeopardy grounds two of three counts of statutory rape. The slightest penetration constitutes intercourse and the evidence as to each separate act was thus complete and sufficient to sustain three indictments for first-degree rape. **State v. Owen, 543.**

RAPE—Continued

Defendant as perpetrator—sufficiency of evidence—The State's evidence was sufficient to support a jury finding that defendant was the perpetrator of a rape and a sexual offense against an eleven-year-old victim where it tended to show that the victim recognized defendant's voice and correctly described his hair, beard, and build, and the victim's neighbor observed defendant running from the direction of the victim's home at approximately the same time the attack on the victim ended. **State v. Blackwell, 31.**

Statutory—consent not a defense—There was no plain error in a prosecution for statutory rape in violation of N.C.G.S. § 14-27.7A(b) where the jury was instructed that consent is not an defense. **State v. Anthony, 573.**

Statutory—mistake of age — not a defense—There was no plain error in a statutory rape prosecution where the court did not instruct that mistake of age was a defense. In undertaking to have sex with the victim, defendant assumed the risk that she was under legal age. **State v. Anthony, 573.**

Sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss charges of first-degree rape of an eight-year-old child at the close of the State's evidence. Contradictions and discrepancies in the evidence are for the jury to resolve. **State v. Jarrell, 264.**

Sufficiency of evidence—woman as aider and abettor—The trial court did not err by denying defendant's motion to dismiss charges of first-degree statutory rape against a woman who acted as an aider and abettor to her husband. **State v. Owen, 543.**

REAL ESTATE

Action for possession—surety bond—The trial court did not err by denying plaintiff's motion for a default judgment based upon defendant's failure to file the surety bond required by N.C.G.S. § 1-111. **Laing v. Lewis, 172.**

ROBBERY

Common law—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a common law robbery charge for insufficient evidence. **State v. Williams, 326.**

SEARCH AND SEIZURE

Avoidance of DWI checkpoint—automobile followed—hiding in driveway—reasonable and articulable suspicion of criminal activity—There was a reasonable and articulable suspicion of criminal activity prior to defendant's seizure for driving while impaired where defendant made a quick left turn at the intersection immediately preceding a DWI checkpoint, an officer followed without engaging his siren or blue lights, the vehicle made a second abrupt left turn and parked in a residential driveway, the officer used his lights to see into the vehicle, defendant did not attempt to restart or exit the vehicle, all of its occupants remained "scrunched down" in the vehicle even though it was parked with its engine and lights off, the officer continuously watched the vehicle until backup arrived, and the occupants did not change positions. **State v. Foreman, 292.**

SENTENCING

Allocution—after sentence entered—denied—The trial court did not err when sentencing defendant for armed robbery by denying him the opportunity to speak in his own behalf when defendant made his request after the court had imposed sentence. **State v. Rankins, 607.**

Capital sentencing—aggravating circumstances—especially heinous, atrocious, or cruel—There was no error and no prejudice in a capital prosecution for a first-degree murder in the submission of the especially heinous, atrocious, or cruel aggravating circumstance because the evidence of multiple stab-bings of the victim in the presence of her children was sufficient and the jury found that the mitigating circumstances outweighed the aggravating circum-stances and recommended life imprisonment. **State v. Wilds, 195.**

Capital sentencing—aggravating circumstances—pre-trial hearing denied—The trial court did not abuse its discretion in a capital first-degree mur-der prosecution which resulted in a life sentence by denying defendant's request for a pre-trial hearing to determine whether the evidence was sufficient for the case to proceed capitally. **State v. Wilds, 195.**

Driving while impaired—probation—longer than statutory period—no findings—The trial court erred when sentencing defendant for driving while impaired by sentencing her to a longer probation period than provided in N.C.G.S. § 15A-1343.2 without making the required finding. **State v. Cardwell, 496.**

Structured—presumptive range—evidence of mitigating factors—no evi-dence of aggravating factors—The trial court did not abuse its discretion by sentencing defendant within the Structured Sentencing presumptive range where there was evidence of several mitigating factors, but no aggravating factors. A trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation. **State v. Campbell, 531.**

Structured—prior conviction—offense committed while on probation—The trial court did not err when sentencing defendant Hasty for armed robbery and attempted armed robbery by considering him to have a prior conviction for possession of cocaine with intent to sell or deliver where defendant was on pro-bation under N.C.G.S. § 90-96(a), which provides that proceedings against the defendant will be dismissed and not considered a conviction upon the fulfillment of terms and conditions. Defendant's entry of a guilty plea to possession of cocaine followed by probation was a conviction for purposes of the Structured Sentencing Act and defendant's contention that the result is contrary to the pur-pose of N.C.G.S. § 90-96 is unpersuasive; within a few months of being placed on probation, defendant violated its terms by commission of these felonies. **State v. Hasty, 563.**

SEXUAL OFFENSES

Defendant as perpetrator—sufficiency of evidence—The State's evidence was sufficient to support a jury finding that defendant was the perpetrator of a rape and a sexual offense against an eleven-year-old victim where it tended to show that the victim recognized defendant's voice and correctly described his hair, beard, and build, and the victim's neighbor observed defendant running

SEXUAL OFFENSES—Continued

from the direction of the victim's home at approximately the same time the attack on the victim ended. **State v. Blackwell, 31.**

STATUTE OF FRAUDS

Order enforcing unsigned settlement—statute of frauds not properly raised—Defendant could not raise the statute of frauds for the first time on appeal where a memorandum of settlement involving a breach of a lease was clearly an agreement for the conveyance of an interest in property and within the statute of frauds, but defendant admitted the existence and terms of the agreement and did not plead the statute as a defense to its enforcement. **Laing v. Lewis, 172.**

Ownership of property—unmarried couple—The trial court erred by denying defendant's motion for a directed verdict based upon the statute of frauds in an action arising from the purchase of property by an unmarried couple. **Patterson v. Strickland, 510.**

STATUTE OF LIMITATIONS

Commencement of action—delayed service—Rule 3—The trial court did not err by dismissing a REDA (Retaliatory Employment Discrimination Act) claim on the grounds that the statute of limitations had run where plaintiff attempted to commence the action by delayed service, the application for the extension to file the complaint was filed and a summons issued by the clerk's office that day, that summons was not sufficient to begin the action because it was not issued pursuant to an order entered by the clerk granting plaintiff's application for an extension, a second summons was issued pursuant to such an order and that summons commenced the action, and the action accordingly commenced beyond the time limit. **Telesca v. SAS Inst., Inc., 653.**

Instructions—interest in real property—fiduciary relationship—The trial court did not err in an action arising from the purchase of property by an unmarried couple in its instructions on the statute of limitations where defendant contended that the court erred by instructing that the statute began to run when defendant disavowed plaintiff's interest in the property, but the statute of limitations does not begin to run until a demand and refusal where a fiduciary relation exists. **Patterson v. Strickland, 510.**

Loss of consortium—underlying claim not barred—A loss of consortium claim was improperly dismissed for violation of the statute of limitations where the underlying medical malpractice claim should not have been dismissed. **Webb v. Nash Hosp., Inc., 636.**

Medical malpractice—extension of time to file complaint—all parties not named and served—The trial court erred by dismissing plaintiff's medical malpractice complaint for violation of the statute of limitations. Under *Timour v. Pitt County Mem. Hosp.*, 131 N.C.App. 548, defendants' due process rights to notice were not violated where a motion to extend the time for filing the complaint was extended under N.C.G.S. § 1A-1, Rule 9(j), all of the parties were not named in the motion, and all were not served with notice of the time extension. **Webb v. Nash Hosp., Inc., 636.**

STATUTE OF LIMITATIONS—Continued

Repose—tolling—synthetic stucco—repairs—The trial court did not err by granting a motion to dismiss claims arising from synthetic stucco on a home and replacement windows and doors. A duty to complete performance may occur after the date of substantial completion; however, a “repair” does not qualify as a “last act” under N.C.G.S. § 1-50(5) unless it is required under an improvement contract by agreement of the parties. To allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose. **Monson v. Paramount Homes, Inc.**, 235.

STATUTES

Interpretation—construction of those administering—direct conflict with purpose of act—The interpretation of N.C.G.S. § 135-1(19) and N.C.G.S. § 128-21(18) by the Teachers’ and State Employees’ Retirement System did not influence the Court of Appeals in a decision involving disability and retirement benefits where that interpretation was not consistent with the intent and purpose of the legislature, despite the tenet of statutory construction that the construction of a statute by those vested with the authority to administer law is entitled to great consideration. **Faulkenbury v. Teachers’ and State Employees’ Ret. Sys.**, 587.

SURETIES

Motor vehicle dealer bond—aggrieved purchaser under bond—The trial court correctly held that Ingram purchased a car from Helms and was entitled to recover under an applicable surety bond issued by Hartford, where Ingram did in fact purchase the car from Helms, even though it had already contracted to resell the vehicle and did resell it immediately. N.C.G.S. § 20-288(e). **Perkins v. Helms**, 620.

Motor vehicle dealer bond—effective years—The trial court did not err in its calculation of the effective years of a motor vehicle dealer surety bond where, read in conjunction with the language of N.C.G.S. § 20-288, the wording of the bond indicates that the bond was effective for three license years with an aggregate limit of liability of \$25,000 for each license year rather than a total aggregate liability of \$25,000. **Perkins v. Helms**, 620.

TAXATION

Foreclosure sale—notice to resident of England—The trial court properly granted summary judgment in favor of defendants in an action alleging failure to comply with N.C.G.S. § 105-375, violations of due process, and constitutional violations arising from a tax foreclosure sale where property in the Pinehurst Resort and Country Club was owned by a resident of England; tax notices were sent to the address furnished by the owner and the taxes were paid; and the owner moved to a new address in England in 1993 and arranged for the Royal Mail to forward his mail but did not notify the Moore County Tax Office. Although plaintiff contends that there was a genuine issue of material fact as to whether defendants complied with the statutory requirement of due diligence in seeking his address, requiring the Moore County Tax Department to place a telephone call to the Pinehurst Resort and Country Club to obtain plaintiff’s address as contended

TAXATION—Continued

by plaintiff would place an intolerable burden on local taxing units and would render N.C.G.S. § 105-375 impracticable. **Hardy v. Moore County, 321.**

TELECOMMUNICATIONS

Public Safety Telephone Act—no private cause of action—The Public Safety Telephone Act, N.C.G.S. § 62A-2, contains no provision for a private cause of action and any violation by a slow 911 response does not create an exception to the public duty doctrine for purposes of governmental immunity to a negligence action. **Lovelace v. City of Shelby, 408.**

TORT CLAIMS ACT

Industrial Commission finding of negligence—evidence sufficient—It could not be said that the Industrial Commission erred by finding defendant negligent where plaintiff was injured by a falling light fixture, defendant stipulated that the University owned the building and was responsible for electrical repairs, one of defendant's electricians had worked on the light near the time of the accident, that electrician testified that the light could not fall without someone working on it or messing with it and that he would be the one to work on it, and the light was accessible only by a ladder. The Court of Appeals may not substitute its judgment for that of the Commission if there was competent evidence to support the Commission's findings. **Robinson v. State of N.C., 68.**

TRIALS

Argument of counsel—veracity of witnesses—no prejudicial error—There was no prejudicial error in a medical malpractice action where plaintiff's counsel argued that defense witnesses were lying. **Couch v. Private Diagnostic Clinic, 93.**

Comments by judge—clarification of testimony—not prejudicial—Defendant in a civil claim arising from a bail bond did not show that comments by the trial court were so disparaging in their effect that they could reasonably be said to have prejudiced defendant where there was no indication that the trial court in any manner renounced the seriousness of the trial or discredited the sanctity of the courtroom and the probable effect of the court's interjections may reasonably be considered as having been to clarify testimony and ensure that jurors were able to hear. **Shore v. Farmer, 350.**

Instructions—no objection—finding deemed in accord with judgment—There was no error in an action arising from the purchase of property by an unmarried couple where defendant contended that the issues found by the jury did not support the judgment requiring transfer of a half interest in the property from defendant to plaintiff. Defendant did not object to the instructions before the jury retired and the court is deemed to have made a finding in accord with the judgment entered. **Patterson v. Strickland, 510.**

Motion for JNOV—motion for new trial—granting both inconsistent—An order in a negligence action was remanded where the court granted both plaintiff's motion for JNOV, thereby determining defendant negligent as a matter of law, and plaintiff's motion for a new trial as to the issue of negligence, thus reinstating that issue for the jury. **Streeter v. Cotton, 80.**

TRIALS—Continued

Punitive damages—submitted after all the substantive issues—no error—The trial court did not err in an action for fraud, unjust enrichment, and constructive trust by placing the punitive damages issue at the conclusion of all of the substantive issues. Although defendants contended that it was impossible to determine the issue on which the jury based its award of punitive damages, the evidence was sufficient to sustain the jury's affirmative findings on each of the substantive issues and to support plaintiff's entitlement to punitive damages on each. **Mehovic v. Mehovic, 131.**

Rule 60 motion—excusable neglect—voluntary dismissal—willful act—The trial court erred in a medical malpractice action by allowing plaintiff's counsel to reinstate the Private Diagnostic Clinic as a defendant on a Rule 60 motion following a voluntary dismissal based upon plaintiff's counsel's mistaken belief that an employer-employee relationship existed between all treating physicians and defendant-Duke. The voluntary dismissal was a carefully considered decision, a trial strategy, and thus constitutes a deliberate willful act precluding relief under Rule 60. The fact that the legal consequences of the action were misunderstood by plaintiff's attorney is not material. **Couch v. Private Diagnostic Clinic, 93.**

Voluntary dismissal—summary judgment not submitted—case not rested—A summary judgment order for defendants in a medical malpractice action was vacated where the plaintiff's attorney made every effort to have the court rule on her motion to amend a discovery scheduling order prior to the court hearing defendants' summary judgment motions and attempted to take a voluntary dismissal after the motion for a new schedule was denied. Plaintiff had not submitted the issue of summary judgment to the court for determination and is not deemed to have rested her case at that point. **Alston v. Duke University, 57.**

TRUSTS

Constructive—equitable distribution—jury trial—The trial court erred by denying defendants' demand for a jury trial as to a constructive trust claim arising from equitable distribution. A third party to an equitable distribution action has a state constitutional right to a trial by jury on a claim for constructive trust. **Sharp v. Sharp, 125.**

Constructive—no presumption of confidential relationship—In an action remanded on other grounds, the parties were not entitled upon the evidence presented to a presumption of a confidential relationship, as is usually involved in a constructive trust, but an instruction on constructive trusts might be appropriate on remand if plaintiff can provide evidence of a confidential relationship and fraud. **Patterson v. Strickland, 510.**

Creation—incorporation by reference—A valid trust was created by the doctrine of incorporation by reference where the decedent created a trust agreement prior to executing his will and the will clearly and distinctly referred to the trust agreement. The will clearly expressed an intent on the part of the grantor to make the trust agreement part of his will and it makes no difference whether the purported trust was legally valid. **Tyson v. Henry, 415.**

Creation—transfer of property—An inter vivos trust was not created where the instrument clearly expressed the decedent's intent to create a trust but the

TRUSTS—Continued

decedent never transferred his property to the designated trustee. **Tyson v. Henry, 415.**

Purchase money resulting—summary judgment—The trial court erred by granting defendant's motion for summary judgment on plaintiff's claim for a purchase money resulting trust arising from the purchase of land by plaintiff and defendant as an unmarried couple. If the facts alleged by plaintiff are true, a finder of fact could reasonably determine that plaintiff and defendant had an agreement to purchase the property together and that plaintiff was entitled to some share of the property. The statute of frauds does not apply to resulting trusts. **Patterson v. Strickland, 510.**

UNFAIR TRADE PRACTICES

Attempt to collect under guaranty—summary judgment for defendants—The trial court did not err by denying summary judgment for plaintiff on his unfair trade practices claim or by granting summary judgment for defendants on plaintiff's other claims where plaintiff's son operated a golf course built by plaintiff, the son's company borrowed from defendant-bank, plaintiff was informed after the death of his son that he was responsible for the debt under a guaranty agreement, and plaintiff denied signing any such agreement. **Walker v. Branch Banking and Tr. Co., 580.**

Slander per se—summary judgment—The trial court erred by granting summary judgment for plaintiff on a counterclaim for unfair trade practices which alleged events both before and after the employment relationship between plaintiff and defendant ended. Any portion of the claim relating to events before the termination was properly dismissed, but the parties became competitors upon the termination of the employer-employee relationship and slander per se may constitute a violation of N.C.G.S. § 75-1.1. **Ausley v. Bishop, 210.**

UNJUST ENRICHMENT

Purchase of land by unmarried couple—A cross-assignment of error raising the issue of unjust enrichment in an action arising from the purchase of land by an unmarried couple was overruled where the jury did not reach that issue due to its answers on earlier issues. The issue should not arise on remand since both resulting and constructive trusts may be imposed to prevent unjust enrichment. **Patterson v. Strickland, 510.**

UTILITIES

Electricity—uninsulated power line—not negligent—The trial court properly granted defendant's motion for summary judgment in an action arising from the electrocution and injury of plaintiff and decedent while working on a ladder which came into contact with an uninsulated power line at a construction site. The power lines were plainly visible, conformed to the National Electrical Safety Code, were 21.9 feet away from the house and 25.6 feet above the ground, and plaintiffs did not allege that in the ordinary course of their work they were required to maneuver the ladder in close contact with the power lines, so that defendant was not required to foresee that plaintiffs would permit the ladder to come into contact with the power lines. Mere notice of construction is not

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enough to warrant additional measures by defendant. **Sweat v. Brunswick Electric Membership Corp.**, 63.

VENDOR AND PURCHASER

Realtor—square footage—reliance on appraisal—Summary judgment was improperly granted on claims for breach of fiduciary duty and negligent misrepresentation against a realtor arising from plaintiff's purchase of a house with fewer square feet than represented where the realtor had relied upon the square footage in an appraisal. There was a genuine issue of material fact as to whether defendant exercised reasonable care in obtaining and communicating to plaintiff the heated square footage; a real estate agent's reliance on a reliable appraiser for computation of square footage is evidence of the agent's compliance with her standard of care but is not conclusive. Summary judgment on fraud and unfair and deceptive trade practices claims was proper because there was no evidence that defendant knew it had communicated false square footage information. **Brown v. Roth**, 52.

Return of earnest money—unsatisfactory covenants and restrictions—good faith—Summary judgment was properly granted for plaintiffs in an action to recover an earnest money deposit paid for the purchase of a residence where plaintiffs informed defendants that they were exercising an option to cancel the purchase contract because covenants and restrictions were unsatisfactory and because of problems with the drainage on the property. The purchase contract gave plaintiffs the discretionary power to cancel if they were not satisfied with the covenants and restrictions. **Midulla v. Howard A. Cain, Inc.**, 306.

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Motion to sequester witnesses—denied—The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion to sequester witnesses. Defendant did not show that the court's ruling was so arbitrary that it could not have been the result of a reasoned decision. **State v. Wilds**, 195.

WORKERS' COMPENSATION

Appeal from deputy commissioner—issues raised—The issue of attorney fees in a workers' compensation action was properly before the full Commission even though defendants argued that plaintiff waived the issue by failing to identify it on his Form 44. Plaintiff raised the issue in his brief to the deputy commissioner and, inasmuch as the Commission decides claims without formal pleadings, it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission. Plaintiff appealed the issue in accordance with the guidelines in N.C.G.S. § 97-85. **Hauser v. Advanced Plastiform, Inc.**, 378.

Attorney fees—evasive and incomplete interrogatories—The Industrial Commission in a workers' compensation action did not err by awarding attorney fees where the Commission found bad faith, unfounded, stubborn litigiousness, and that plaintiff was forced to prove the existence of material evidence suppressed by defendants. N.C.G.S. § 1A-1, Rule 37 provides sanctions including

WORKERS' COMPENSATION

attorney fees to parties who provide evasive or incomplete answers to discovery requests. **Hauser v. Advanced Plastiform, Inc.**, 378.

Causation—burden of proof—The Industrial Commission did not err by placing on plaintiff the burden to prove a causal relation between a work-related incident and her medical condition. **Porter v. Fieldcrest Cannon, Inc.**, 23.

Causation—work-related accident—failure of proof—Plaintiff failed to establish that her cervical disc injury was caused by a work-related accident where she testified that she felt sharp pains radiating down her neck while operating a computer at work and that a ruptured disc was discovered a month later, but no physician in the case testified to a reasonable degree of medical certainty that plaintiff's ruptured disc was caused by her work with defendant employer. **Porter v. Fieldcrest Cannon, Inc.**, 23.

Disability—determination—post-injury earning capacity—The relevant factor in assessing disability is the plaintiff's post-injury earning capacity rather than the actual wages earned. **Deese v. Champion Int'l Corp.**, 278.

Disability benefits—burden of proof—Hilliard factors—The Industrial Commission in a workers' compensation case involving disability benefits erroneously placed the initial burden on defendant to prove the absence of the second Hilliard factor (incapacity to earn pre-injury wages in any other employment) before plaintiff had met her initial burden. **Copley v. PPG Indus., Inc.**, 631.

Employer-employee relationship—jurisdiction—A Workers' Compensation award was reversed where plaintiff was a truck driver who suffered frostbite while unloading a truck and the Industrial Commission found that he had sustained an injury by accident arising out of and in the course of his employment. **Williams v. ARL, Inc.**, 625.

Employee murdered—course and scope of employment—The full Industrial Commission in a workers' compensation action did not err by concluding that an employee's death arose out of and in the course of her employment where the employee was an office manager who was kidnapped and murdered by a recently laid off employee. There was sufficient evidence to allow a reasonable inference that the nature of decedent's employment created the risk of attack rather than some personal relationship and the evidence tends to show that decedent was called to action by some person superior in authority. **Hauser v. Advanced Plastiform, Inc.**, 378.

Ex parte communication—portions of deposition—exclusion—Only those portions of deposition testimony by plaintiff's treating physician which were tainted by defense counsel's ex parte communication with the physician were required to be excluded from evidence in a workers' compensation proceeding. **Porter v. Fieldcrest Cannon, Inc.**, 23.

Grounds for reconsideration of evidence—failure to take additional evidence—same findings and conclusions as hearing officer—The Industrial Commission did not err by denying plaintiff's request to present additional evidence and reaching the same findings and conclusions as the deputy commissioner after finding that plaintiff showed good grounds to reconsider the evidence. **Porter v. Fieldcrest Cannon, Inc.**, 23.

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Record on appeal—settlement—documents not introduced—The Industrial Commission's settlement of the record on appeal was not erroneous in failing to include documents which plaintiff wished to be included but which were not introduced into evidence at the hearing. **Porter v. Fieldcrest Cannon, Inc.**, 23.

Review of deputy commissioner's credibility determination—evidence insufficient—Reconsidering 131 N.C. App. 299 on remand from the North Carolina Supreme Court, the Court of Appeals held that the Industrial Commission erred by reversing the determination of the deputy commissioner that plaintiff had regained his wage earning capacity and that defendants should be permitted to terminate benefits. The Commission is not required to demonstrate that sufficient consideration was paid to the fact that credibility may best be judged by a first-hand observer and the Commission is the sole judge of the credibility of witnesses and the weight to be given testimony. **Deese v. Champion Int'l Corp.**, 167.

Temporarily leaving work station—fall in parking lot—injury arising out of and in course of employment—Plaintiff employee's injury when she slipped and fell in the employer's parking lot after she temporarily left the production line to check on a co-worker arose out of and in the course of her employment. A finding that plaintiff left her work station without her supervisor's permission in violation of company policy did not prohibit plaintiff from receiving compensation benefits. **Choate v. Sara Lee Products**, 14.

Withdrawal of counsel—pro se representation—decision not arbitrary—The Industrial Commission did not act arbitrarily in permitting plaintiff's counsel to withdraw and plaintiff to proceed pro se in an appeal to the full Commission. **Porter v. Fieldcrest Cannon, Inc.**, 23.

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Adult business—extraterritorial jurisdiction—The trial court correctly dismissed criminal charges of operating an adult business within 1,000 feet of a residence in violation of a county ordinance where the business was outside the city limits but within the City's extraterritorial jurisdiction and it was not clear whether the county ordinance applied. Where the language of an ordinance is ambiguous, it must be strictly construed. **State v. Baggett & Penuel**, 47.

Board of Adjustment—authority to impose civil penalty—The Guilford County Board of Adjustment had the authority to impose civil penalties because, under N.C.G.S. § 153A-345(b), the Board possesses all of the powers of the enforcement officer and the Guilford County ordinance states that an enforcement officer may impose civil penalties. **JWL Invs., Inc. v. Guilford County Bd. of Adjust.**, 426.

Board of Adjustment member—conflict of interest—Although petitioners in a Board of Adjustment decision involving a claim of grandfathered property contended on appeal that their due process rights were violated because one of the members of the Board was a former planning department employee who had been consulted about the possibility of rezoning the property, the assignment of error was without merit because petitioners did not object during the hearing and made no showing of prejudice. **JWL Invs., Inc. v. Guilford County Bd. of Adjust.**, 426.

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