NORTH CAROLINA COURT OF APPEALS REPORTS

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CONSTITUTION OF NORTH CAROLINA CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

GABRIELLA MURRAY HIEB AND ROBERT NELSON HIEB, PLAINTIFFS V.
WOODROW LOWERY, DEFENDANT

No. COA98-102

(Filed 6 July 1999)

1. Workers' Compensation— lien on UIM benefits—motion for accounting—jurisdiction of trial court

The trial court had jurisdiction under N.C.G.S. § 1-298 to determine a workers' compensation carrier's motion for an accounting of judgment proceeds paid by plaintiff's UIM carrier and disbursed by the clerk of court, although one judge's order setting the amount of the workers' compensation lien was reversed on appeal, where the trial court exercised jurisdiction to effect a prior order and appellate rulings that the compensation carrier was entitled to a lien against the UIM proceeds for "all amounts paid or to be paid" to plaintiff as workers' compensation benefits.

2. Appeal and Error— law of the case—workers' compensation lien

It is the law of this case that a workers' compensation carrier is entitled to a compensation lien on judgment proceeds in the amount of the total workers' compensation "paid or to be paid" to the injured employee where both the Supreme Court and the Court of Appeals held in prior appeals that the carrier was enti-

tled to this lien pursuant to an unappealed superior court judgment in the employee's action against the tortfeasor.

3. Workers' Compensation— judgment proceeds—UIM payment—distribution—jurisdiction in Industrial Commission

The Industrial Commission, rather than the superior court, had exclusive jurisdiction over the distribution of proceeds recovered by an injured employee from a third-party tortfeasor and paid pursuant to a UIM policy where the judgment exceeded the amount of the workers' compensation carrier's judgment lien and the parties did not reach a settlement. N.C.G.S. § 97-10.2(f).

4. Workers' Compensation— attorney fees—judgment proceeds—jurisdiction in Industrial Commission

An award of attorney fees from judgment proceeds recovered by an injured employee from a third-party tortfeasor was within the exclusive jurisdiction of the Industrial Commission, and an award of attorney fees by the trial court was improper.

5. Workers' Compensation— judgment proceeds—premature distribution by attorney—personal liability of attorney

The trial court did not err in holding the attorney who represented a workers' compensation claimant in an action against the third-party tortfeasor personally liable for the repayment of judgment proceeds the attorney prematurely disbursed from his trust account to his clients and himself where the attorney assured a judge that he would take full responsibility for funds in his possession; the attorney knew that, pursuant to prior orders and appellate decisions, the workers' compensation carrier had a lien on the proceeds for compensation "paid or to be paid" to claimant and that the amount of the lien was in dispute, and no Industrial Commission order for counsel fees had been entered.

6. Interest— workers' compensation lien—prejudgment and post-judgment interest

A workers' compensation carrier's lien on judgment proceeds from the claimant's action against the third-party tortfeasor is neither derived from an action in contract nor from an amount "designated by the fact finder as compensatory damages" within the meaning of N.C.G.S. § 24-5; therefore, the carrier was not entitled to prejudgment interest on the amount of its lien. Nor does the lien represent money damages so as to justify an award of post-judgment interest.

Appeal by plaintiffs Gabriella Murray Hieb, Robert Nelson Hieb, and Charles G. Monnett, III, from orders filed 5 May 1997 and 29 October 1997 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 1998.

Charles G. Monnett, III, for plaintiffs-appellants Gabriella Murray Hieb and Robert Nelson Hieb.

Poyner & Spruill, L.L.P., by Cecil W. Harrison, Jr., and Laura B. Russell, for plaintiff-appellant Charles G. Monnett, III.

Dean & Gibson, by Rodney Dean, for defendant-appellee St. Paul Fire and Marine Company.

JOHN, Judge.

Plaintiffs appeal the trial court's grant of defendant's "Motion for Judicial Assistance," and assert the trial court erred, *inter alia*, in: 1) "determin[ing] [Gabriella Hieb's] and her employer's workers' compensation insurance carrier's respective rights to judgment proceeds, and order[ing] how those judgment proceeds were to be disbursed"; 2) holding that attorney's fees paid to [Charles G. Monnett, III (Monnett)] were not proper; 3) "holding [Monnett] personally liable for the repayment of judgment proceeds"; and 4) requiring Mrs. Hieb and "her attorney to pay interest on a worker's compensation lien." We affirm in part, vacate in part, and remand with instructions.

Pertinent facts and procedural history include the following: On 20 July 1990, plaintiffs Gabriella Hieb (Mrs. Hieb) and her husband, Robert Hieb, filed suit against defendant Woodrow Lowery and unnamed defendant Hartford Accident and Indemnity Company (Hartford), Mrs. Hieb's underinsured motorist (UIM) insurance carrier. Plaintiffs sought damages for personal injury and loss of consortium resulting from a 17 October 1992 automobile collision in which Mrs. Hieb was injured while in the scope and course of her employment by Howell's Child Care Center. At trial during the 12 October 1992 Civil Session of Mecklenburg County Superior Court, the jury returned a verdict against defendants and awarded Mrs. Hieb $1,279,000.00 and her husband the sum of $40,000.00.

The 20 November 1992 judgment of the trial judge, Judge Robert E. Gaines (the judgment of Judge Gaines), included the following findings of fact:

> 6. St. Paul Fire and Marine [(St. Paul), the workers' compensation carrier for plaintiff's employer,] contends that it is entitled to a worker's [sic] compensation lien pursuant to North Carolina General Statute[s] [s]ection 97-10.2 against any amounts payable to Plaintiff Gabriella Murray Hieb under the Hartford policy.
>
> 7. The Plaintiffs have instituted a second action against St. Paul . . . and Hartford . . . to determine the respective rights of the parties to the benefits of the Hartford underinsured motorist coverage and to determine the amount of such coverage.
>
> 8. That on or about August 28, 1992, an order was entered in that action by the Honorable Robert P. Johnston which holds that the [sic] Hartford is allowed to reduce its limits by the amount of worker[s'] compensation paid or to be paid to Plaintiff and further holding that the proceeds of the Hartford underinsured policy are subject to the lien of [St. Paul] pursuant to North Carolina General Statute[s] [s]ection 97-10.2. That action is now on appeal to the North Carolina Court of Appeals.

Judge Gaines thereupon ordered that St. Paul was entitled to a lien against proceeds of the Hartford UIM policy (the Hartford proceeds) for "all amounts paid or to be paid" to plaintiff as workers' compensation benefits. Plaintiffs did not pursue an appeal of the judgment of Judge Gaines.

As referenced in that judgment, plaintiffs had filed a 4 March 1991 action against Hartford and St. Paul seeking a declaratory judgment determining the rights of the parties to the Hartford proceeds. Hartford contended its policy contained language allowing it to reduce its policy limits by the amount of any workers' compensation benefits paid or to be paid to Mrs. Hieb. St. Paul disagreed, maintaining it was entitled to a lien against the Hartford proceeds.

In this second action, Judge Robert P. Johnston entered a 28 August 1992 order (Judge Johnston's order), permitting reduction of Hartford's policy limits by the amount of workers' compensation paid or to be paid to Mrs. Hieb and according St. Paul a lien against the Hartford proceeds for "all amounts paid or to be paid to [Mrs. Hieb]." Judge Johnston's order further provided that:

> [a]ny payments which may be made by [Hartford], pursuant to its underinsured motorist coverage, shall be disbursed subject to the provisions of N.C.G.S. § 97-10.2.

Plaintiffs appealed Judge Johnston's order to this Court. In the first of multiple opinions involving plaintiffs, we reversed the provision of the order allowing Hartford to reduce its UIM policy limits, but affirmed that portion pertaining to St. Paul's workers' compensation lien against the Hartford proceeds. *See Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 435 S.E.2d 826 (1993) (*Hieb I*), *overruled on other grounds*, *McMillian v. N.C. Farm Bureau Mutual Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352 (1998). Specifically, we held St. Paul was entitled to a lien on "all amounts paid or to be paid to [Mrs. Hieb]" from the Hartford proceeds because

> N.C. General Statute Section 97-10.2 provides for the subrogation of the workers' compensation insurance carrier . . . to the employer's right, upon reimbursement of the employee, to any payment, including uninsured/underinsured motorist insurance proceeds, made to the employee by or on behalf of a third party as a result of the employee's injury.

See id. at 507, 435 S.E.2d at 828 (quoting *Bailey v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 47, 54, 434 S.E.2d 625, 630 (1993), *overruled on other grounds*, *McMillian*, 347 N.C. 560, 495 S.E.2d 352 (1998)); *see also* N.C.G.S. § 97-10.2 (1991). *Hieb I* was not further appealed.

On or about 20 December 1993 and pursuant to Judge Johnston's order, our decision in *Hieb I*, and the judgment of Judge Gaines, Hartford tendered its UIM policy limits ($475,000.00) to the Office of the Mecklenburg County Clerk of Superior Court (the Clerk). As of 18 December 1993, St. Paul had paid $259,042.77 in workers' compensation benefits to Mrs. Hieb. However, plaintiffs and St. Paul disagreed as to disbursement of the Hartford proceeds, the latter contending no portion thereof could be disbursed either to Mrs. Hieb or her husband until the workers' compensation lien of St. Paul was calculated and satisfied in full.

Plaintiffs consequently filed a Motion to Modify Judgment, Enforce Judgment and Set Workers' Compensation Lien. By order entered 28 July 1994, Judge Claude Sitton (Judge Sitton's order), acting pursuant to N.C.G.S. § 97-10.2, ruled that St. Paul was entitled to recover $241,677.77 as full satisfaction of any workers' compensation lien it might have on benefits paid or to be paid to Mrs. Hieb, and that the remaining Hartford proceeds were to be paid to plaintiffs. St. Paul appealed Judge Sitton's order to this Court. *See Hieb v. Lowery*, 121

N.C. App. 33, 464 S.E.2d 308 (1995) (*Hieb II*), *aff'd*, 344 N.C. 403, 474 S.E.2d 323 (1996).

On 12 August 1994, while awaiting disposition of *Hieb II*, St. Paul contacted

> all treating physicians and advised that [it] would no longer pay plaintiff's medical expenses . . . [and thereafter] stopped paying plaintiff her permanent and total disability compensation.

Further, St. Paul filed with the North Carolina Industrial Commission (the Commission) a 4 October 1994 "Motion to Stop Payment of Compensation and Motion to Stay Distribution of Third Party Proceeds." On 12 May 1995, the Full Commission filed an opinion and award requiring, *inter alia*, St. Paul to resume payments to Mrs. Hieb. The Commission further stated in pertinent part:

> 7. Deputy Commissioner [Nance] considered [St. Paul's] Motion to Stop Payment of Compensation and Motion to Stay Distribution of Third Party Proceeds. Deputy Commissioner Nance, in an order filed on October 4, 1994, determined that the Industrial Commission does not have jurisdiction to act now, and effectively overrule Judge Sitton, until such time as the Court of Appeals rules on defendants' appeal from Judge Sitton's Order.
>
> CONCLUSIONS OF LAW
>
> 1. The Industrial Commission does not have jurisdiction over the disbursement of the third-party funds [*i.e.*, the Hartford proceeds] in this case.
>
> . . . The Industrial Commission is not a court of general jurisdiction, and any jurisdiction it exercises must be conferred by statute. The statutory authority for distribution of third-party funds for the Industrial Commission is [G.S. §] 97-10.2(f) . . . . The Industrial Commission has no authority to distribute funds under [G.S. §] 97-10.2(j). Authority for distribution of funds under that subsection is granted exclusively to the General Court of Justice. The Court must accept jurisdiction to distribute funds when: a) Judgment is obtained which is insufficient to compensate the subrogation claim of the workers' compensation insurance carrier; or b) There is a settlement, and the parties apply to the Superior Court judge for distribution for determination of how the funds ought to be distributed.

> 2. [Judge Sitton] in the instant case decided that the judgment was insufficient to compensate the subrogation claim of the workers' compensation carrier and assumed jurisdiction over the distribution of funds under [G.S. §] 97-10.2(j). Whether the judge's exercise of discretion was correct or incorrect is not a question for the Industrial Commission to decide. The matter is properly on appeal to the Court of Appeals at this time, and the Industrial Commission will abide accordingly with any of the Court's determinations or directions with regard to this matter.

St. Paul subsequently appealed the Commission's opinion and award to this Court. *See Hieb v. Howell's Child Care Center*, 123 N.C. App. 61, 472 S.E.2d 208 (*Hieb III*), *disc. review denied*, 345 N.C. 179, 479 S.E.2d 204 (1996).

On 5 December 1995, a divided panel of this Court in *Hieb II* reversed Judge Sitton's order, holding that, in view of Judge Johnston's order specifying that "St. Paul could assert a lien pursuant to § 97-10.2 against all of the [Hartford] proceeds," *Hieb II*, 121 N.C. App. at 38, 464 S.E.2d at 311, the trial court was without authority to exercise its discretion under G.S. § 97-10.2(j) to determine the amount of the lien and order the balance of the Hartford proceeds to be paid to plaintiffs. *Id.* We stated that the trial court could not modify the order of another superior court judge because the "judgment" exceeded the amount necessary to reimburse the workers' compensation insurance carrier and that the court was prohibited from speculating upon what might happen in the future. *Id.* at 37-8, 464 S.E.2d at 311.

On appeal, our Supreme Court elaborated that but two events "trigger the authority of a judge to exercise discretion in determining or allocating the amount of lien or disbursement" under G.S. § 97-10.2(j):

> (1) a judgment insufficient to compensate the subrogation claim of the workers' compensation insurance carrier or (2) a settlement.

Hieb v. Lowery, 344 N.C. 403, 409, 474 S.E.2d 323, 326-27 (1996) (*Lowery*). In that neither event was present in *Hieb II*, the Supreme Court upheld our reversal of Judge Sitton's order. *Id.* at 409-10, 474 S.E.2d at 326-27.

Subsequently, on 2 July 1996, this Court issued its opinion in *Hieb III*, addressing St. Paul's appeal from the Commission's

Opinion and Award. We affirmed the action of the Commission, but noted that:

> [w]ithout the benefit of our decision in *Hieb II*, the Commission erred in finding that it did not have jurisdiction over the disbursement of the third party funds [since] . . . we found in *Hieb II* that the Commission, not the superior court, has jurisdiction to disburse third party proceeds in this case . . . .

Hieb III, 123 N.C. App. at 66-67, 472 S.E.2d at 212.

During the pendency of these multiple appeals, Monnett secured from the Clerk disbursement of the proceeds deposited by Hartford, $424,076.17 thereof being designated as payable to Monnett as attorney for Mrs. Hieb, and $50,923.83 payable to Monnett as attorney for Robert Hieb. Monnett placed the former in an interest-bearing certificate of deposit account in his name as attorney for Mrs. Hieb, and the latter in his law firm's regular trust account.

Regarding these funds, Monnett states in his affidavit attendant to the instant appeal:

> 8. At the time the funds were deposited in my trust account and in the certificate of deposit, and at all times since, there has been no legitimate question regarding my attorney's fee. As to St. Paul's portion of the recovery, in the November 20, 1992, judgment, Judge Gaines determined that [I] was allowed "an attorney's fee of 33.33% of all amounts . . . paid to [St. Paul]." As to the Hieb's portion of the recovery, I had . . . [a contingency fee agreement] which allowed an attorney's fee of one-third of all amounts recovered on behalf of the Hiebs. . . . St. Paul did not timely seek review of my attorney's fees by an appeal of The judgment of Judge Gaines. . . .
>
> 9. On March 29, 1994, in accordance with Judge Gaines' Order and the fee agreement with the Hiebs, I withdrew $142,329.61 from the certificate of deposit . . . for attorney fees.
>
> . . . .
>
> 11. After entry of Judge Sitton's Order, [the Hiebs] requested that I pay them their portion of the judgment proceeds to which they were entitled to pursuant to Judge Sitton's order.

12. On July 26 and 28, 1994, almost two weeks after the entry of Judge Sitton's order and in accordance therewith, I disbursed the remaining judgment proceeds as follows:

7/26/94	[Mrs. Hieb]	$10,000.00
7/28/94	[Monnett]	$18,344.66
7/28/94	[Judgment lien against plaintiffs]	$5,112.50
7/28/94	[Lien for a loan to plaintiffs]	$3,000.00
7/28/94	[St. Paul] [Representing $241,677.77 less attorney fee of $80,551.20]	$161,126.57
7/28/94	[The Hiebs]	$115,964.72

By letter to Monnett dated 10 September 1996 and citing our decision in *Hieb II*, St. Paul requested that

> all of the proceeds which were taken from the Clerk of Superior Court be returned to the [C]lerk for deposit within ten days less [$161,126.57,] the amount which has already been reimbursed to St. Paul.

Monnett refused, thus bringing us chronologically to the subject of the instant appeal.

St. Paul thereupon filed a "Motion for Judicial Assistance" (St. Paul's motion) 25 March 1997 seeking an accounting by plaintiffs and Monnett regarding the funds disbursed by the Clerk to Monnett. In an Order filed 5 May 1997, Judge Dennis Winner (Judge Winner's order I) ruled the trial court was accorded jurisdiction over St. Paul's motion by N.C.G.S. § 1-298 (1996) in order

> to effect the rulings of the Court of Appeals and the Supreme Court and . . . the inherent power to enforce the Orders of this Court; in this case, the ruling of Judge Robert Johnston.

On 29 October 1997, Judge Winner amplified order I in a directive (Judge Winner's order II) providing in pertinent part as follows:

> 2. . . . Both the Order by Judge Johnston and the Judgment by Judge Gaines specifically directed that St. Paul was entitled to a workers' compensation lien for all workers' compensation "paid or to be paid to the Plaintiff." These Orders are the law of this case, and this Court is not willing to change the prior rulings of either Judge . . . .

3. . . . A total of $475,000.00 of money paid by the UIM carrier (Hartford), which was paid in to the Clerk . . . and subsequently taken by Mr. Monnett, is subject to a lien by St. Paul for all payments made and to be made for workers' compensation benefits in accordance with the Order of Judge Johnston, Judge Gaines, two Court of Appeals orders and the Order of the North Carolina Supreme Court.

The prior Order of Judge Sitton accounted for $241,677.77 being disbursed to or on behalf of St. Paul. Of that amount, $161,126.57 was paid directly to St. Paul on July 28, 1994, and $80,551.20 was paid as attorney fees to [Monnett]. This leaves a remaining balance of $233,322.23. Two-thirds of that amount ($155,548.15) is the amount potentially recoverable by St. Paul from the remaining funds after allowing for a one-third attorney's fee.

[The] Order of this Court . . . require[s] that only the amount of $155,548.15, with interest at the rate of eight percent from July 28, 1994 until paid, be deposited with the Clerk . . . and to be disbursed in the manner set forth [herein]. . . .

. . . .

6. . . .[Moreover, Monnett] has requested that the liability for replacement of the funds be solely that of Mr. and Mrs. Hieb, and that he be relieved of any obligation for payment of these funds. The Court finds from this record that [Monnett] took these funds from the Clerk . . . without the knowledge or consent of St. Paul, prior to the issuance of any Order by Judge Sitton, and refused the requests by St. Paul to return the funds to the Clerk of Court. The Court finds that [Monnett] created a fiduciary obligation to St. Paul by the taking of these funds, and that he, thus, created an obligation to St. Paul to account for such funds.

Regarding Monnett's attorney fees, Judge Winner stated:

4. This Court finds that under the provisions of G.S. § 97-10.2 any determination with respect to the payment of counsel fees must be made by the Industrial Commission and all attorneys' fees must be approved by the Industrial Commission. G.S. § 97-10.2(j) makes no provision for calculation or disbursement of attorneys' fees. It would appear to this Court that no Order has ever been entered by the North Carolina Industrial Commission approving the disbursement of attorneys' fees from this recovery. The Court

finds that unless and until such an Order from the North Carolina Industrial Commission is entered, the disbursement of attorneys' fees to [Monnett] was not proper.

Plaintiffs and Monnett filed timely notice of appeal from Judge Winner's order I and order II respectively.

[1] Preliminarily, we address plaintiffs' assertion that Judge Winner's order I "holding that [the trial court] had jurisdiction [to enter an order] pursuant to N.C. Gen Stat. § 1-298 [was] in error." We conclude plaintiffs are mistaken.

G.S. § 1-298 states that

[i]n civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance . . . .

Plaintiffs maintain Judge Winner's order I constituted error in light of the reversal of Judge Sitton's order by this Court, *see Hieb II*, 121 N.C. App. 33, 464 S.E.2d 308, and because G.S. § 1-298 "has no application to a decision of this Court *reversing* the judgment of the lower court." *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966). Plaintiffs' argument is misdirected.

In focusing upon Judge Sitton's order, plaintiffs fail to account for Judge Winner's explicit finding that the trial court had "jurisdiction pursuant to [G.S. §] 1-298 to effect the rulings of the Court of Appeals and the Supreme Court and . . . *the ruling of Judge Robert Johnston*" (emphasis added). As opposed to Judge Sitton's order which was rendered invalid on appeal, *see Hieb II*, 121 N.C. App. at 39, 464 S.E.2d at 312; *see also D & W, Inc.*, 268 N.C. at 722, 152 S.E.2d at 202 ("[a] reversal, when filed in the lower court, automatically sets the lower court's decision aside without further action by that court") (citation omitted), Judge Winner sought to effect Judge Johnston's order which had been modified on appeal, *see Hieb I*, 112 N.C. App. at 506-07, 435 S.E.2d at 828, and which provided for a lien by St. Paul on "*all* [workers' compensation] amounts paid or to be paid" to Mrs. Hieb. *See id.* at 506, 435 S.E.2d at 828 (emphasis added); *see also Lowery*, 344 N.C. at 408, 474 S.E.2d at 326 (observing that this Court in *Hieb I* "unanimous[ly] . . . affirm[ed] that portion of Judge Johnston's order relating to the workers' compensation lien of St. Paul"). The trial court in Judge Winner's order I thus properly assumed jurisdiction of St.

Paul's motion under G.S. § 1-298 because Judge Johnston's prior order, albeit modified, was, in the words of the trial court, "still in effect."

Plaintiffs next assert the trial court erred in "determin[ing] the Hiebs' and St. Paul's respective rights to judgment proceeds and order[ing] the disbursement of those judgment proceeds." The latter portion of plaintiffs' argument has merit.

Without doubt, it is well established that "one Superior Court judge . . . may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). Further, "after an appeal the action becomes final and conclusive." *In re Griffin*, 98 N.C. 225, 227, 3 S.E. 515 (1887). Accordingly, any trial court action which varies,

> disregard[s] the decree of this [appellate court], . . . [or] attempt[s] to postpone its enforcement [is] beyond [the trial court's] authority and [its] order to that effect is a nullity.

Severance v. Ford Motor Co., 105 N.C. App. 98, 101, 411 S.E.2d 618, 620, *disc. review denied*, 331 N.C. 286, 417 S.E.2d 255 (1992) (quoting *D & W, Inc.*, 268 N.C. at 724, 152 S.E.2d at 203).

[2] Concerning plaintiffs' attack upon Judge Winner's determination of the entitlement of St. Paul to a lien on the Hartford proceeds and the amount of that lien, we note our Supreme Court resolved this identical argument in *Lowery* as follows:

> Plaintiffs argue that the issue previously decided by Judges Gaines and Johnston was whether [St. Paul] could *assert* a lien . . . against the [Hartford] proceeds . . . while the issue before Judge Sitton was the amount of such workers' compensation lien that should be allowed. . . .
>
> From the plain language of [Judge Gaines'] judgment, it is clear that the amount of the lien is to be the total of all amounts *paid or to be paid* to plaintiff as workers' compensation benefits. . . . Thus, the issue of amount was dealt with and decided . . . prior to plaintiffs presenting the matter to Judge Sitton.

Lowery, 344 N.C. at 408, 474 S.E.2d at 326. Likewise, in *Hieb I* this Court held that "St. Paul is entitled to a workers' compensation lien against all amounts paid or to be paid to Mrs. Hieb by Hartford

pursuant to its UIM coverage." *Hieb I*, 112 N.C. App. at 507, 435 S.E.2d at 828.

Plaintiffs' arguments to the contrary, it is indisputably the law of this case that St. Paul is entitled to a workers' compensation lien in the amount of the total workers' compensation "paid or to be paid to the Plaintiff." *See Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) ("[t]he decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal"); *see also Stone v. Martin*, 85 N.C. App. 410, 417, 355 S.E.2d 255, 259, *disc. review denied*, 320 N.C. 638, 360 S.E.2d 105 (1987) ("[o]ur decision in the previous appeal constitutes the law of the case").

[3] However, plaintiff is on surer grounds in asserting the trial court had no authority to direct disbursement of the Hartford proceeds. An employer or its insurance carrier subrogee, St. Paul herein, is entitled to seek reimbursement under the Workers' Compensation Act from damages recovered by an employee from a third party tortfeasor. *See Buckner v. City of Asheville*, 113 N.C. App. 354, 358, 438 S.E.2d 467, 469, *disc. review denied*, 336 N.C. 602, 447 S.E.2d 385 (1994). "The amount of reimbursement, if any, and the method for seeking that reimbursement is determined by . . . N.C.G.S. § 97-10.2." *Id.*

G.S. § 97-10.2 provides in relevant part:

> (f)(1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> a. First to the payment of actual court costs . . . .
>
> b. Second to the payment of the fee of the attorney making settlement or obtaining judgment. . . .
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation of medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

> d. Fourth to the payment of any amount remaining to the employee . . . .
>
> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge . . . to determine the subrogation amount. . . . [T]he judge shall determine, in his discretion, the amount, if any, of the employer's lien and the amount of cost of the third-party litigation to be shared between the employee and employer. . . .

G.S. § 97-10.2(f)(1), (j).

Under Subsection (f), therefore, the Commission is specifically granted exclusive authority to distribute third party proceeds subject to Subsection (j) which, when applicable, accords that authority to the Superior Court. *See Buckner*, 113 N.C. App. at 359, 438 S.E.2d at 470. Further, as noted earlier,

> the two events which will trigger the authority of a judge to exercise discretion [under subsection (j)] in determining or allocating the amount of . . . disbursement are (1) a judgment insufficient to compensate the subrogation claim of the workers' compensation insurance carrier or (2) a settlement.

Lowery, 344 N.C. at 409, 474 S.E.2d at 326-27.

At the time of Judge Winner's order II, the judgment of Judge Gaines based upon the jury verdict in favor of Mrs. Hieb remained greater than the amount of St. Paul's lien. The parties also had not reached a settlement. Therefore, neither event "trigger[ing]" the authority of the trial court to disburse the Hartford proceeds had occurred, and Judge Winner lacked authority to order such disbursements under G.S. § 97-10.2(j). *See Lowery*, 344 N.C. at 409-10, 474 S.E.2d at 327 (trial court had no authority for order under [G.S. §] 97-10.2(j) because of absence of either statutory event). In addition, Judge Winner's order II deviates from Judge Johnston's order directing that "[a]ny payments . . . made by [Hartford] . . . be disbursed subject to the provisions of [G.S. §] 97-10.2," under which disbursement by the Commission is mandated in the absence of either statutorily prescribed event "triggering" the authority of the trial court.

In short, as we observed in *Hieb III*,

> the Industrial Commission, not the superior court, has exclusive jurisdiction over distribution of the proceeds recovered from the third party tortfeasor in this case.

Hieb III, 123 N.C. App. at 66, 472 S.E.2d at 212. Accordingly, the sole mechanism for disbursement of the Hartford proceeds in the case *sub judice* lies with the Industrial Commission acting pursuant to G.S. § 97-10.2(f), and Judge Winner's order II directing disbursement of the Hartford proceeds was in excess of the court's authority and must be vacated.

[4] Plaintiffs next attack the trial court's ruling regarding counsel fees to be paid Monnett. Specifically, plaintiffs contend this Court previously addressed "the issue regarding attorneys' fees . . . [and] determined [it] to be untimely." Moreover, plaintiffs also advance the notion that because the judgment of Judge Gaines, which was not appealed, provided that "Monnett is entitled to an attorney's fee of 33.33% of all amounts paid to St. Paul," Judge Winner was without authority to "reconsider this issue and overrule prior Superior Court orders." Plaintiffs' argument misses the mark.

In *Hieb II*, this Court wrote in pertinent part:

> [St. Paul] contends that this Court should review the award of attorney's fees to [Monnett]. . . . As defendant has failed to adequately preserve these issues for appellate review, we need not address [this argument] at this juncture.

Hieb II, 121 N.C. App. at 39, 464 S.E.2d at 312. We thus specifically declined to address counsel fees in *Hieb II*, and as such, our opinion therein is of no effect regarding the counsel fees portion of Judge Winner's order II.

Further, plaintiffs place inconsistent reliance upon the judgment of Judge Gaines. On the one hand, plaintiffs assert the award of counsel fees therein as justification for disbursement of fees to Monnett and as the basis for claiming later error by Judge Winner. On the other hand, plaintiffs do not appear to view as binding the provision in the judgment of Judge Gaines that St. Paul was entitled to a lien for "all amounts paid or to be paid" in workers' compensation to plaintiffs. As defendant aptly observes,

> [i]t is difficult to understand what basis the plaintiffs have for objecting to Judge Winner's order that simply confirms the very

> argument made by [Monnett] in his brief that the only body with authority to [order any disbursements of the Hartford proceeds] is the . . . Industrial Commission."

Significantly, the award of counsel fees by Judge Gaines was based in part upon his finding of fact that:

> an order was entered . . . by the Honorable Robert P. Johnston [and] . . . [t]hat action is now on appeal to the North Carolina Court of Appeals. This Court is bound by the Order of Judge Johnston *unless and until said Order is modified by the Court of Appeals* or any other court of competent jurisdiction (emphasis added).

On appeal in *Hieb I*, Judge Johnston's order was indeed modified by this Court, but we did not disturb the portion thereof requiring the Hartford proceeds to "be disbursed subject to the provisions of N.C.G.S. § 97-10.2." We have held above and stated previously in *Hieb III* that it is Subsection (f) of G.S. § 97-10.2 which governs disbursement of the Hartford proceeds. *See Hieb III*, 123 N.C. App. at 66, 472 S.E.2d at 211. Therefore, "the Industrial Commission can award an attorney's fee not to exceed 'one third of the amount obtained or recovered of the third party.' " *Westmoreland v. Safe Bus, Inc.*, 20 N.C. App. 632, 634, 202 S.E.2d 605, 606 (1974) (quoting G.S. § 97-10.2(f)(1)(b)). However, "[t]his action is within the exclusive province of the Industrial Commission, [and] a [trial] court's award of attorney's fees [is] improper." *Id.*

Consistent with the directive in Judge Johnston's order that the Hartford proceeds be "disbursed subject to . . . G.S. § 97-10.2," Judge Winner properly ruled that "any determination with respect to the payment of counsel fees must be made by the Industrial Commission," and that "unless and until such an Order from the [Industrial Commission] is entered, the disbursement of attorneys' fees to [Monnett] was not proper." Because the judgment of Judge Gaines provided on its face that it was "bound" by Judge Johnston's earlier order "unless and until" modified on appeal, and because this Court indeed modified Judge Johnston's order, plaintiffs' reliance upon the judgment of Judge Gaines is ineffectual and Judge Winner did not err in his directive addressing counsel fees.

[5] Plaintiffs next assert that the trial court erred in "holding [Monnett] personally liable for the repayment of judgment proceeds," citing our decision in *Poore v. Swan Quarter Farms, Inc.*, 119 N.C.

App. 546, 459 S.E.2d 52 (1995). Plaintiffs' reliance upon *Poore* is unavailing.

In *Poore*, we upheld the trial court's refusal to direct the plaintiffs' attorney therein to return certain rental proceeds to which the defendants were entitled. *Poore*, 119 N.C. App. at 548, 459 S.E.2d at 53. The funds had previously been released by the clerk of court to plaintiffs and said attorney. *Id.* We observed that

> plaintiffs' attorney is not a party to this action, and the trial court therefore had no authority to require him to account for the funds the plaintiffs received.

Id. at 549, 459 S.E.2d at 53.

However, the circumstances *sub judice* stand in marked contrast. Prior to Judge Sitton's order upon which plaintiffs rely as justifying the majority of the disbursements to Monnett, the latter assured Judge Sitton by letter that:

> I am the Plaintiffs' attorney of record in this case. . . . My office routinely satisfies liens against personal injury settlement proceeds. *I take full responsibility for those funds that are in my possession.*

(emphasis added).

Further, notwithstanding plaintiffs' argument that "[t]he money was . . . distributed . . . in strict compliance with the terms . . . of a then valid Order of [Judge Sitton]," review of the record reveals that substantial funds were disbursed by Monnett prior to Judge Sitton's order. For instance, on 29 March 1994, subsequent to the orders of Judges Johnston and Gaines and our decision in *Hieb I*, each providing a lien on behalf of St. Paul for all amounts of workers' compensation "paid or to be paid" to plaintiff, Monnett "withdrew $142,329.61 from the certificate of deposit . . . for attorney's fees."

It must also be noted that the foregoing distribution occurred approximately three weeks subsequent to plaintiffs' motion before Judge Sitton to modify that provision of the judgment of Judge Gaines pertaining to the amount of St. Paul's lien and to determine disbursement of the Hartford proceeds as between plaintiffs and St. Paul. North Carolina Rule of Professional Conduct 1.15-1(e)(2) (1998) (the Rule) provides that

> funds belonging in part to a client or a third party and in part presently or potentially to the lawyer . . . shall be deposited into the trust account, but the portion belonging to the lawyer shall be withdrawn when the lawyer becomes entitled to the funds unless the right of the lawyer to receive the portion of the funds is disputed . . . ."

No violation of the Rule by Monnett is suggested. Indeed, the instant record contains the 15 April 1997 no probable cause dismissal by the North Carolina State Bar of St. Paul's grievance against Monnett based upon his disbursement of the Hartford proceeds. Nonetheless, the protocol of the Rule is instructive.

In addition, the record indicates earlier distributions by Monnett of $2,500.00 on 23 December 1993 and $1,197.17 on 3 February 1994, both on behalf of Mr. Hieb. *Cf. McMillian v. N.C. Farm Bureau Mutual Ins. Co.*, 125 N.C. App. 247, 255, 480 S.E.2d 437, 441 (1997), *rev'd on other grounds*, 347 N.C. 560, 495 S.E.2d 352 (1998) (loss of consortium judgment not recoverable where judgment by primary plaintiff exhausts policy coverage). Further, on 26 July 1994, Monnett paid Mrs. Hieb $10,000. Finally, on 28 July 1994, the filing date of Judge Sitton's order, Monnett disbursed the remaining funds, including two additional checks payable to Monnett totaling $98,895.86, bringing the approximate total of counsel fees received by Monnett to $241,225.47. *See, e.g.*, G.S. § 97-10.2(f)(1)(b) (fee of attorney representing person obtaining judgment shall not exceed one-third of amount recovered of third party); *see also Hardy v. Brantley Construction Co. and Wells v. Brantley Construction Co.*, 87 N.C. App. 562, 567, 361 S.E.2d 748, 751 (1987), *rev'd on other grounds*, 322 N.C. 106, 366 S.E.2d 485 (1988) (under N.C.G.S. § 97-90, attorney's fee taken from employee's share of judgment may not exceed one-third of amount recovered).

In holding Monnett personally liable for the return of disbursed Hartford proceeds, the court in Judge Winner's order II reasoned:

> [d]espite [Monnett's] knowledge that two prior Superior Court Judges had ordered that St. Paul had a lien against all proceeds, and that St. Paul had specifically requested that no disbursement of these proceeds be made which were subject to St. Paul's lien, [Monnett] issued disbursement of these funds. Considering the totality of the circumstances, the equities involved, the notice to [Monnett] of the dispute over these funds, and the conscious choice of [Monnett] to disburse the funds

notwithstanding the prior Orders of this Court and the claims by St. Paul, the Court finds that [Monnett should be held personally responsible].

In light of our holding herein requiring a Commission order prior to disbursement of counsel fees, the timing of Monnett's actual disbursements of the Hartford proceeds, and Monnett's assurance to Judge Sitton of "full responsibility" for the Hartford proceeds, we cannot say the trial court erred in its directive that Monnett be "personally liable for repayment of [the Hartford] proceeds." Plaintiffs' challenge to that portion of Judge Winner's order II is thus unfounded.

[6] Finally, plaintiffs except to the amount of monies ordered returned to the Clerk. Plaintiffs maintain the trial court improperly assessed interest thereon and submit the court's failure to account for certain tax and judgment liens was in error. We agree in part.

In support of their argument, plaintiffs cite our Supreme Court's decision in *Devereaux v. Burgwin*, 33 N.C. 490 (1850) and assert "that interest, as interest, is allowed when expressly given by statute or by express or implied agreement between the parties." *See id.* at 494. In this regard, we note that prejudgment interest is allowable pursuant to N.C.G.S. § 24-5 (*1991*) from the "date of the breach" in suits for breach of contract, and in other actions "from the date the action is instituted" upon that amount "designated by the fact finder as compensatory damages." G.S. § 24-5 (a)(b). G.S. § 24-5 also provides for post-judgment interest on judgments for money damages until the judgment is paid. *See Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 138, 463 S.E.2d 199, 202 (1995).

Under the specific facts herein, St. Paul's workers' compensation lien on the Hartford proceeds is neither derived from an action in contract nor from an amount "designated by the fact-finder as compensatory damages." *See* G.S. § 24-5; *cf. Bartell v. Sawyer*, 132 N.C. App. 484, 487, 512 S.E.2d 93, 95 (1999) (G.S. § 97-10.2(f)(1)(c) provides for reimbursement to defendant insurance company "for all benefits . . . paid or to be paid by the employer under award of the Industrial Commission" and "does not state that [insurance company is] entitled to any prejudgment interest").

Moreover, St. Paul's lien does not represent money damages so as to justify an award of post-judgment interest. *See Custom Molders*, 342 N.C. at 138, 463 S.E.2d at 202. There being no statutory authority

sustaining an award of interest *sub judice* nor any "express or implied agreement" between the parties as to payment of interest, *see Devereaux*, 33 N.C. at 495, the award of interest in Judge Winner's order II must be vacated.

Plaintiffs also assert error in computation of the amount to be returned based upon the trial court's failure to account for certain tax and judgment liens allegedly having priority over the lien of St. Paul. However, we note that other than copies of checks and Monnett's statement in his affidavit that said checks were paid toward the alleged liens, the record contains no evidence or device for discerning the respective priority thereof over the lien of St. Paul. Moreover, plaintiffs cite no authority for this argument, *see* N.C.R. App. P. 28(b)(5) ("assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned"), and as appellants herein, bear the burden of establishing the record on appeal. *See Mcleod v. Faust*, 92 N.C. App. 370, 371, 374 S.E.2d 417, 418 (1988). Plaintiffs' argument in this regard is thus deemed abandoned.

In sum, Judge Winner's order II is affirmed 1) as it pertains to St. Paul's entitlement to a lien referencing the Hartford proceeds "for all payments made and to be made" to Mrs. Hieb; 2) in disallowing counsel fees to Monnett; and 3) in holding Monnett personally liable for repayment of the Hartford proceeds. However, those portions of Judge Winner's order II 1) requiring disbursement of the Hartford proceeds; and 2) computing and awarding interest, are vacated. Further, this case is remanded with the instruction that the Superior Court remand to the Industrial Commission for disbursement proceedings and award of counsel fees pursuant to G.S. § 97-10.2.

Affirmed in part, vacated in part, and remanded with instructions.

Judges McGEE and HORTON concur.

HIEB v. LOWERY

[134 N.C. App. 21 (1999)]

GABRIELLA MURRAY HIEB AND ROBERT NELSON HIEB, PLAINTIFFS V. WOODROW LOWERY, DEFENDANT

COA98-102

(Filed 7 September 1999)

Appeal by plaintiffs Gabriella Murray Hieb, Robert Nelson Hieb, and Charles G. Monnett, III, from orders filed 5 May 1997 and 29 October 1997 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 24 September 1998.

Charles G. Monnett, III, for plaintiffs-appellants Gabriella Murray Hieb and Robert Nelson Hieb.

Poyner & Spruill, L.L.P., by Cecil W. Harrison, Jr., and Laura Broughton Russell, for plaintiff-appellant Charles G. Monnett, III.

Dean & Gibson, by Rodney Dean, for defendant-appellee St. Paul Fire and Marine Insurance Company.

JOHN, Judge.

On 9 August 1999, plaintiffs filed with this Court a "Petition for Rehearing by Charles G. Monnett, III," referencing our decision herein filed 6 July 1999 and reported at 134 N.C. App. 1, —— S.E.2d —— (1999). Pursuant to N.C.R. App. P. 31, the petition is allowed without entertainment of further argument or additional briefing.

Upon review, this Court's earlier opinion is modified as follows:

The final full sentence on page eighteen of the opinion, commencing "[w]e thus . . . ," 134 N.C. App. at 15, —— S.E.2d at ——, is deleted and the following sentence inserted in lieu thereof:

> We thus specifically declined to address St. Paul's appeal concerning counsel fees in *Hieb II*, and as such, our opinion therein is of no effect regarding plaintiffs' appeal of the counsel fees portion of Judge Winner's order II.

All that portion of the opinion on page twenty-two beginning "[f]inally, on 28 July 1994," through the conclusion of that paragraph, including citations, 134 N.C. App. at 18, —— S.E.2d at ——, is deleted and the following language inserted in lieu thereof:

Finally, on 28 July 1994, the filing date of Judge Sitton's order, Monnett disbursed the remaining funds, including a check payable to Monnett in the amount of $18,344.66 designated as "reimbursement for expenses advanced."

Except as provided herein, the opinion originally filed 6 July 1999 is unmodified.

Affirmed in part, vacated in part, and remanded with instructions.

Judges McGEE and HORTON concur.

IN THE MATTER OF: A DECLARATORY RULING BY THE NORTH CAROLINA COMMISSIONER OF INSURANCE REGARDING 11 N.C.A.C. 12.0319

No. COA98-927

(Filed 6 July 1999)

1. Insurance— anti-subrogation rule—statutory authority

The Commissioner of Insurance had authority under the statute prohibiting policy provisions less favorable to the insured or beneficiary than required by statutory provisions, N.C.G.S. § 58-50-15(a), to promulgate a rule prohibiting conventional subrogation provisions in life or accident and health insurance contracts. N.C.G.S. § 58-51-15.

2. Insurance— anti-subrogation rule—not delegation of legislative power

Statutory authorization of the Commissioner of Insurance to promulgate a rule prohibiting subrogation provisions in life or accident and health insurance forms did not amount to an unconstitutional delegation of legislative power to an administrative agency. N.C. Const. art. I, § 6; N.C. Const. art. II, § 1.

3. Insurance— anti-subrogation rule—liberty to contract

The anti-subrogation rule promulgated by the Commissioner of Insurance for life, accident and health insurance forms did not impermissibly interfere with the constitutional liberty of insurers to contract.

4. Insurance— anti-subrogation rule—equal protection

The anti-subrogation rule promulgated by the Commissioner of Insurance for life, accident and health policies did not violate the equal protection clauses of the state or federal constitutions because of a prior superior court decision invalidating the rule with respect to one insurer. N.C. Const. art. I, § 19; U.S. Const. amend. XIV.

5. Collateral Estoppel and Res Judicata— insurance—anti-subrogation rule—ruling for one insurer

The Commissioner of Insurance was not collaterally estopped from enforcing the anti-subrogation rule against petitioner life, accident and health insurers following a judgment that the rule could not be enforced against one life, accident and health insurer since the prior judgment was expressly limited to the parties of that case; the prior case was settled post-judgment and was never appealed; petitioners are not in privity with the participants in the prior case; and application of offensive non-mutual collateral estoppel against the Commissioner of Insurance would thus be inappropriate. Even if collateral estoppel technically precluded the parties from relitigating issues decided by the superior court in the prior judgment, it would be inequitable to allow petitioners, even those with privity, to assert collateral estoppel in this case.

6. Constitutional Law— State—separation of powers—insurance—anti-subrogation rule

The Commissioner of Insurance did not violate the doctrine of separation of powers by enforcing an anti-subrogation rule against life, accident and health insurers after a superior court had invalidated that rule with respect to one insurer since there was no appellate ruling on the validity of the rule, and the Commissioner was not required to consider the superior court decision as the final judicial interpretation in any other applications of the rule.

Appeal by North Carolina Commissioner of Insurance from judgment entered 20 April 1998 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 30 March 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lorinzo L. Joyner, Assistant Attorney Generals Francis J. Di Pasquantonio, Sue Y. Little and Ted R. Williams, for the State.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington and Deanna L. Davis, for appellee Employers Health Insurance Co.

Maupin, Taylor & Ellis, P.A., by M. Keith Kapp and Kevin W. Benedict, for appellees Blue Cross and Blue Shield of North Carolina.

Bailey & Dixon, L.L.P., by Alan J. Miles, amicus curiae, for North Carolina Association of Defense Attorneys.

Patterson, Harkavy & Lawrence, L.L.P., by Burton Craige, amicus curiae, for North Carolina Academy of Trial Lawyers.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., and John J. Korzen, amicus curiae, for Citizens for Business and Industry, United HealthCare of North Carolina, Inc., Kaiser Foundation Health Plan of North Carolina, Fortis Provider Markets, Fortis Insurance Company, and Fortis Benefits Company.

MARTIN, Judge.

On 26 September 1978 the North Carolina Department of Insurance (NCDOI) adopted a rule pursuant to the North Carolina Administrative Procedures Act (currently codified as N.C. Gen. Stat. § 150B), stating that "Life or accident and health insurance forms shall not contain a provision allowing subrogation of benefits." 11 N.C.A.C. 12.0319 (anti-subrogation rule). The validity of this rule is the subject of this dispute. Employers Health Insurance Company (Employers) and Blue Cross Blue Shield of North Carolina (BCBS) filed a joint petition on 15 October 1997 seeking a formal declaration regarding the enforceability of the 1978 anti-subrogation rule.

Known historically as the principle of substitution, the doctrine of subrogation allows a party who has compensated a creditor under the color of some obligation, to step into the shoes of the creditor, thereby succeeding to the creditor's rights to proceed against the debtor for reimbursement. *Journal Pub. Co. v. Barber*, 165 N.C. 478, 487-88, 81 S.E. 694, 698 (1914). When an insurer has compensated the

insured for a loss according to the terms of an insurance policy, the insurer is subrogated to the rights of the insured with respect to any third party who may be liable for the loss covered by the policy. *Phoenix Ins. Co. of Brooklyn v. Erie & Western Transp. Co.*, 117 U.S. 312, 29 L.Ed. 873 (1886); *Fidelity Insurance Co. v. Atlantic Coast Line Railroad Co.*, 165 N.C. 136, 80 S.E. 1069 (1914).

In a declaratory ruling of 29 December 1997, the Commissioner upheld the anti-subrogation rule. The superior court reversed the Commissioner's ruling but stayed the judgment pending final appellate determination. NCDOI appeals.

Appellate review of a judgment of the superior court entered upon review of an administrative agency decision requires that the appellate court determine whether the superior court utilized the appropriate scope of review and, if so, whether the superior court did so correctly. *Act-Up Triangle v. Com'n for Health Serv.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citing *Amanini v. North Carolina Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994)). The nature of the error asserted by the party seeking review dictates the appropriate manner of review: if the appellant contends the agency's decision was affected by a legal error, G.S. § 150B-51(1)(2)(3)&(4), *de novo* review is required; if the appellant contends the agency decision was not supported by the evidence, G.S. § 150B-51(5), or was arbitrary or capricious, G.S. § 150B-51(6), the whole record test is utilized. *In re Appeal by McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993).

In this case, petitioners' claim and respondent's assignments of error both address the legal efficacy of the anti-subrogation rule, 11 N.C.A.C. 12.0319; thus the appropriate standard of review for the superior court and this Court is *de novo* review. *Id.* It makes no difference that a declaratory ruling, rather than a contested case, is now before us. N.C. Gen. Stat. § 150B-4 (1995) ("A declaratory ruling is subject to judicial review in the same manner as an order in a contested case."). Accordingly, we consider *de novo* whether the Commissioner erred in upholding the anti-subrogation rule adopted by the NCDOI.

Respondent's Appeal

The superior court concluded that NCDOI exceeded its statutory authority and violated the United States Constitution when it promulgated the anti-subrogation rule. With respect to the question of

statutory authority, NCDOI contends the superior court erred when it concluded promulgation of the anti-subrogation rule (1) exceeded the statutory authority of the NCDOI, (2) effectively changed North Carolina substantive law allowing legal subrogation, and (3) amounted to an unconstitutional delegation of legislative powers. The Commissioner also takes issue with the superior court's conclusion that: (4) adoption of the rule impermissibly interfered with petitioners' constitutional freedom of contract, and (5) application of the rule to prohibit subrogation clauses in the policies of fewer than all health and accident insurers in this State violated Constitutional guarantees of equal protection under the law. For the following reasons we reverse the judgment of the superior court.

I. Statutory Authority

[1] The power of the Commissioner of Insurance is limited by statute. As stated in *State ex rel. Com'r of Ins. v. North Carolina Auto. Rate Administrative Office*,

> While the Office of Commissioner of Insurance is created by Article III, sec. 7(1) of the North Carolina Constitution, section 7(2) of that Article says his duties shall be prescribed By law. Hence, the power and authority of the Commissioner emanate from the General Assembly and are limited by legislative prescription.

287 N.C. 192, 202, 214 S.E.2d 98, 104 (1975), *appeal after remand*, 30 N.C. App. 427, 227 S.E.2d 603 (1976), *reh'g granted, opinion vacated by*, 292 N.C. 1, 231 S.E.2d 867 (1977); *State ex rel. Com'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 398, 269 S.E.2d 547, 561, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980) (hereinafter *Rate Bureau*); *Mullins v. North Carolina Criminal Justice Educ. and Training Standards Com'n*, 125 N.C. App. 339, 481 S.E.2d 297 (1997). In addition to express powers, administrative agencies have implied powers reasonably necessary for the proper execution of their express purposes. *Mullins* at 344, 481 S.E.2d at 300; *State ex rel. Com'r of Ins. v. Integon Life Ins. Co.*, 28 N.C. App. 7, 10, 220 S.E.2d 409, 411-12 (1975). Absent express authority or an implied power reasonably necessary for proper administrative functions, "[a]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." *Integon Life Ins. Co.* at 11, 220 S.E.2d at 412. However, just because an asserted power is "novel and unprecedented" does not necessarily mean the action exceeds

statutory authority. *Rate Bureau* at 401, 269 S.E.2d at 562 (citing *United States v. Morton Salt Company*, 338 U.S. 632, 94 L.Ed. 401 (1950)). Despite the "novel and unprecedented" aspects of the anti-subrogation rule, we must determine whether the NCDOI was given express or implied authority to promulgate 11 N.C.A.C. 12.0319.

"An issue as to the existence of power or authority in a particular administrative agency is one primarily of statutory construction." *Rate Bureau* at 399, 269 S.E.2d at 561; *Mullins, supra.*

> In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished. The best indicia of that legislative purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish."

Rate Bureau at 399, 269 S.E.2d at 561 (citations omitted); *Mullins, supra.* Rules of statutory construction apply, and so statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. *Rate Bureau* at 399-400, 269 S.E.2d at 561; *Redevelopment Commission v. Security National Bank of Greensboro*, 252 N.C. 595, 114 S.E.2d 688 (1960). "Such statutes should be reconciled with each other when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent." *Rate Bureau* at 400, 269 S.E.2d at 561; *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E.2d 410 (1951).

A review of the statutory insurance regulatory scheme reveals a legislative intent to grant the Commissioner broad authority to review insurance forms and restrict those provisions less favorable to the consumer, i.e., the insured or beneficiary, than required by statutory provisions.

The Commissioner is given the authority to require filing and approve insurance policies. N.C. Gen. Stat. § 58-51-1 (filing and approval authority over sickness and accident insurance forms prior to use); N.C. Gen. Stat. § 58-51-85 (filing and approval authority over policies of group or accident and health insurance prior to use); N.C. Gen. Stat. § 58-51-95 (filing and approval authority over forms and rates for individual sickness or bodily injury or death by accident policies prior to use); N.C. Gen. Stat. § 58-67-50 (filing and approval authority over evidences of coverage, amendments issued by HMOs

prior to use). However, these statutes do not provide express authority to exclude substantive provisions, absent some other authority within the insurance statutes.

G.S. § 58-2-40 (Powers and Duties of Commissioner) states that the Commissioner shall:

> (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws.

N.C. Gen Stat. § 58-2-40(1) (1994). In particular,

> [t]he Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.

Id. Thus, in addition to the enforcement of express statutory provisions protecting the public, the Commissioner is authorized to adopt "further rules" to prevent insurers from "engaging in practice injurious to the public." *Id.* The Commissioner argues that this statute provides express and/or implied authority to limit subrogation provisions, as they are "injurious to the public."

G.S. § 58-2-40 (formerly G.S. 58-9(1)), has been interpreted to place a duty upon the Commissioner to administer the insurance laws of the State, and does not confer any other express powers or duties. *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 384, 192 S.E.2d 57, 59 (1972) ("The Commissioner of Insurance of North Carolina is charged with the duty under G.S. § 58-9 with administering the laws of the State with regard to the insurance industry. Specific powers and duties are statutorily conferred upon the Commissioner to aid him in the administration of the insurance laws."). Standing alone, G.S. § 58-2-40 does not contain an express or implied grant of power to limit subrogation provisions. *See Integon Life Ins. Co.*, 28 N.C. App. at 11, 220 S.E.2d at 412 ("Clearly, G.S. 58-9(1) contains no express grant of authority to set rates and it is not such an implied power as is 'reasonably necessary for (the Commissioner's) proper functioning.' "). Therefore some other statutory provision must provide a specific basis for authority,

before the Commissioner has the authority to promulgate "further rules" restricting "practices injurious to the public." N.C. Gen. Stat. § 58-2-40.

Regarding health and accident insurance policies, G.S. § 58-51-15 sets out required and prohibited policy provisions. G.S. § 58-51-15(a) states twelve specific provisions that must be found in every health and accident insurance policy. Prohibited provisions are regulated in G.S. § 58-51-15(b) which precludes eleven different substantive contractual provisions in health and accident policies, unless those policies adopt the language and wording of the statute. Subrogation rights are neither required nor prohibited by the statute on health and accident insurance policies; however, G.S. § 58-50-15(a) provides that:

> No policy provision which is not subject to G.S. 58-51-15 shall make a policy, or any portion thereof, less favorable in any respect to the insured or the beneficiary than the provisions thereof which are subject to Articles 50 through 55 of this Chapter.

N.C. Gen. Stat. § 58-50-15(a) (1994). This statutory provision gives the Commissioner a broad latitude and flexibility in evaluating other provisions in insurance policies.

Citing *Durrett v. Bryan*, 14 Kan.App.2d 723, 729, 799 P.2d 110, 115 (1990), as persuasive authority, the Commissioner argues that "a subrogation provision, by having the effect of reducing the benefits ultimately received by a policyholder, would be a less favorable provision, and so prohibited by KSA 40-2204(A)." Interpreting statutory provisions almost identical to G.S. §§ 58-51-15 and 58-50-15, the Kansas Court of Appeals found that "a subrogation clause is a provision less favorable to the insured than those provisions delineated in" the Kansas equivalent to G.S. § 58-51-15. *Id.* at 729, 799 P.2d at 115-16. That Court concluded that these statutes provide "adequate statutory authority for the promulgation of" the anti-subrogation rule. *Id.* at 729, 799 P.2d at 116. We agree with the reasoning of the Kansas Court that subrogation provisions are certainly "less favorable in any respect to the insured or the beneficiary" than those required by G.S. § 58-51-15, because subrogation inevitably reduces the potential amount of compensation received by the insured. Thus the statutory scope of the Commissioner's authority allows the prohibition of subrogation provisions in insurance contracts.

Given these legislative pronouncements we conclude that "the language of the statute, the spirit of the act, and what the act seeks to accomplish," all demonstrate a legislative intent to grant the Commissioner of Insurance broad authority to limit insurance policy provisions, like subrogation, that are less favorable to the insured than those specifically addressed by G.S. § 58-51-15. *Cf. Rate Bureau* at 399, 269 S.E.2d at 561.

Nevertheless, the superior court held that promulgation of the anti-subrogation rule exceeded the Commissioner's authority by altering or adding to the substantive common law allowing for subrogation. Petitioners cite *State ex rel. Com'r of Ins. v. Integon Life Ins. Co.*, 28 N.C. App. 7, 11, 220 S.E.2d 409, 412 (1975), for the proposition that "[a]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." Because the anti-subrogation rule prohibits subrogation provisions in accident and health insurance forms, petitioners contend that the rule is an unauthorized restriction on all forms of subrogation, contractual or equitable.

Where an agency has the authority to act, its rules and regulations have the binding effect of statutes and may accordingly alter the common law. *Taylor v. Superior Motor Co.*, 227 N.C. 365, 367, 42 S.E.2d 460, 461 (1947) (noting that "proper regulations authorized under the Act have the binding effect of law," because such regulations "are the tools used to effectuate the policy and purposes of the Act."). As discussed above, NCDOI had the authority to limit contractual provisions providing subrogation rights to insurers. The Commissioner is charged with enforcing the laws governing insurance *contracts*. N.C. Gen. Stat. § 58-2-40 (Powers and Duties of Commissioner to enforce insurance laws); N.C. Gen. Stat. § 58-1-10 ("A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest.") Therefore, to the extent the anti-subrogation rule limited contractual rights, it was promulgated within the authority of the agency and has the binding effect of law. The question is whether the scope of the anti-subrogation rule exceeded the authority delegated by the legislature, and purported to limit rights arising outside contracts. A review of the anti-subrogation rule in the context of the general law of subrogation reveals that the rule is limited to contractual (or conventional) subrogation.

Subrogation rights are categorized as "either the right of conventional subrogation—that is, subrogation by agreement between the insurer and the insured—or the right of equitable subrogation, by operation of law, upon the payment of the loss." *Milwaukee Ins. Co. v. McLean Trucking Co.*, 256 N.C. 721, 726, 125 S.E.2d 25, 29 (1962). Conventional subrogation arises from an express contract between the payer and creditor (or debtor), that the payer will be subrogated to the rights of the payee. *Journal Pub. Co. v. Barber*, 165 N.C. 478, 488, 81 S.E. 694, 698-99 (1914) ("Conventional subrogation or subrogation by act of parties may take place by the debtor's agreement that one paying a claim shall stand in the creditor's shoes; and furthermore can arise only by reason of an express or implied agreement between the payer and either the debtor or the creditor, and the agreement, like other agreements, must be supported by a consideration."); *Grantham v. Nunn*, 187 N.C. 394, 121 S.E. 662 (1924).

Equitable subrogation is "a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it" and "arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable." *Beam v. Wright*, 224 N.C. 677, 683, 32 S.E.2d 213, 218 (1944); *Lyon & Sons, Inc. v. N.C. State Bd. of Educ., et al.*, 238 N.C. 24, 32, 76 S.E.2d 553, 559 (1953); *Harris-Teeter Super Markets, Inc. v. Watts*, 97 N.C. App. 101, 103, 387 S.E.2d 203, 205 (1990). "It is sufficient to invoke the doctrine of subrogation if (1) the obligation of another is paid; (2) 'for the purpose of protecting some real or supposed right or interest of his own.' " *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 222, 176 S.E.2d 751, 756 (1970) (citations omitted); *North Carolina Ins. Guar. Ass'n v. Century Indem. Co.*, 115 N.C. App. 175, 188, 444 S.E.2d 464, 472, *disc. review denied*, 337 N.C. 696, 448 S.E.2d 532 (1994) (hereinafter *NCIGA*). Even where there is no express subrogation agreement in an insurance contract, equitable subrogation rights may arise by operation of law. *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E.2d 457, 460 (1957) ("Where an insurance company, pursuant to the terms of its contract of insurance, indemnifies the insured for loss resulting from a wrongful act of a third person, it is by operation of law subrogated to the extent of such payment to the rights of its insured against the tortfeasor."); *Standard Acc. Ins. Co. v. Pellecchia*, 15 N.J. 162, 104 A.2d 288 (1954) ("The right does not arise out of contract but rather exists without the consent of the insured. [A]lthough of course the parties may by agreement waive or limit the right."). Also, equitable subrogation rights have been recognized in the context of recovering pay-

ments for medical benefits, as in uninsured motorists automobile insurance policies. *Moore v. Beacon Ins. Co.*, 54 N.C. App. 669, 670, 284 S.E.2d 136, 138, *disc. review denied*, 305 N.C. 301, 291 S.E.2d 150 (1981) ("It is well-settled in North Carolina that an insurer is subrogated to its insured's rights to recover medical expenses resulting from injuries inflicted by a tortfeasor when the insurer has paid such medical expenses pursuant to a medical payments provision in the [automobile] insurance policy.")

The anti-subrogation rule itself only applies to subrogation as it appears in insurance forms, i.e., conventional subrogation by agreement. 11 N.C.A.C. 12.0319 states that "[l]ife or accident and health insurance forms shall not contain a provision allowing subrogation of benefits." We conclude that the Commissioner did not exceed the statutory authority granted by the General Assembly when promulgating the rule prohibiting subrogation provisions in life or accident and health insurance contracts. The superior court's conclusion that the NCDOI exceeded its authority in limiting contractual subrogation is accordingly overruled. The question of whether equitable subrogation rights might also arise in the context of life or accident and health insurance coverage is not before us and, therefore, we do not address that question. *See NCGIA* at 190-91, 444 S.E.2d at 473 (Even where the General Assembly has expressly excluded contractual subrogation claims, this Court has held that the General Assembly did not also intend to restrict equitable subrogation rights.).

[2] The superior court also held that even if the General Assembly had intended to authorize the Commissioner to restrict insurance provisions like subrogation, such authorization amounted to an invalid and unconstitutional delegation of legislative power to an administrative agency. We disagree.

The North Carolina Supreme Court has interpreted Article I, section 6 of the North Carolina Constitution (separation of power) and Article II, section 1 of the Constitution (vesting legislative power in General Assembly) to mean that "the legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create." *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 696, 249 S.E.2d 402, 410 (1978) (citing *North Carolina Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965)). Recognizing the complexity of the modern legislative process, the Court concluded that "strict adherence to ideal notions of the non-

delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers;" therefore, "the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers." *Id.* at 697, 249 S.E.2d at 410.

When evaluating what constitutes "adequate guiding standards" in the "exercise of delegated powers," the court has stated that "such declarations need be only as specific as the circumstances permit." *Bring v. North Carolina State Bar*, 348 N.C. 655, 658, 501 S.E.2d 907, 909, *reh'g denied*, 349 N.C. 242, 514 S.E.2d 271 (1998) (quoting *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978)).

> When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Id. In addition, the existence of adequate procedural safeguards supports the constitutionality of the delegated power and tends to "insure that the decision-making by the agency is not arbitrary and unreasoned." *Id.* ("Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated.").

The statutory provisions, G.S. §§ 58-2-40, 58-51-15, 58-50-15, granting and guiding the Commissioner's authority in health and accident insurance policies, articulate "general policies and standards" which sufficiently "provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Bring* at 568, 501 S.E.2d at 909. Also, judicial review of the Commissioner's declaratory ruling and specific application of the rule in contested cases under the North Carolina Administrative Procedures Act (G.S. § 150B), offer adequate procedural safeguards tending to "encourage adherence to legislative standards" and also demonstrate the constitutionality of the legislative delegation of power to the Commissioner.

We therefore conclude that the Commissioner was within the statutory and constitutional powers delegated by the General Assembly when adopting the anti-subrogation rule, 11 N.C.A.C. 12.0319.

II. Constitutional Violations

The superior court also concluded that: (A) adoption of the anti-subrogation rule impermissibly interfered with petitioners' constitutional freedom of contract, and (B) application of the rule to prohibit subrogation provisions in the policies of some, but not all, insurers violated Constitutional guarantees of equal protection under the law. We disagree and reverse the superior court on these issues as well.

A.

[3] Promulgation of the anti-subrogation rule does not interfere with petitioner's constitutional right to contract. The right to contract is a property right protected by our State Constitution and the Fourteenth Amendment to the United States Constitution. *Alford v. Textile Insurance Co.*, 248 N.C. 224, 227, 103 S.E.2d 8, 10-11 (1958); *Morris v. Holshouser*, 220 N.C. 293, 17 S.E.2d 115 (1941); *Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 500 S.E.2d 439, *disc. review denied*, 349 N.C. 360, 515 S.E.2d 705 (1998); *Louchheim, Eng & People, Inc. v. Carson*, 35 N.C. App. 299, 241 S.E.2d 401 (1978). However, this right is qualified by the power of the legislature to supervise economic relations, providing restrictive safeguards and reasonable regulations. *Morris, supra*; *Mark IV Beverage, Inc., supra*; *Louchheim, supra*. Limitations on the right to contract are constitutional "so long as they are reasonable in light of the purposes to be accomplished." *Louchheim* at 306, 241 S.E.2d at 405-06 (citing *Morris v. Holshouser, supra*).

> The test for determining the constitutionality of a statute under the law of the land is whether the legislature has employed reasonable means to effect a proper governmental purpose. . . . The due process inquiry is whether "the state measure bear[s] a rational relation to a constitutionally permissible objective."

Mark IV Beverage, Inc., 129 N.C. App. at 486-87, 500 S.E.2d at 446 (citations omitted). "It has been long established that the insurance business is charged with a public interest, and that its regulation is constitutional." *Rate Bureau* at 386, 269 S.E.2d at 555 (citing *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389, 58 L.Ed. 1011 (1914)).

Here, the anti-subrogation rule is a reasonable means to accomplish a proper governmental purpose. Restricting conventional subrogation provisions in insurance policies increases the amount of potential recovery for the insured public. Thus the superior court erred when concluding that the anti-subrogation rule impermissibly interfered with the constitutional liberty to contract.

B.

[4] The superior court also concluded

> [t]he application of 11 NCAC 12.0319 to prohibit subrogation provisions in the accident and health policies of some, but not all, similarly situated insurers, including Employers Health and Blue Cross, contravenes the constitutional guarantees of equal protection of the laws found in Article I, Section 19 of the North Carolina Constitution and Amendment XIV of the United States Constitution.

The conclusion was engendered by the court's finding that in 1983, Pilot Life Insurance Company (Pilot Life) had sought judicial review of the anti-subrogation rule. In the 1983 action, the Superior Court of Wake County entered a judgment on 12 July 1984 in which it declared the rule null and void "to the extent it attempts to prohibit Pilot's exercise of its rights to be subrogated . . .," and permanently restrained NCDOI from enforcing the rule against Pilot Life. *Pilot Life Insurance Company v. Ingram*, Wake County case number 83 CVS 6671. The Commissioner interpreted the judgment as applying only to Pilot Life, did not appeal, and continued to enforce the anti-subrogation rule against all other North Carolina commercial accident and health insurers.

"State economic regulatory classifications such as this involve no suspect classification or fundamental freedom and receive only 'reasonable scrutiny.' " *American Nat. Ins. Co. v. Ingram*, 63 N.C. App. 38, 46, 303 S.E.2d 649, 654, *cert. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983) (citing *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 49 L.Ed.2d 220 (1976)).

> Legislation subject only to reasonable scrutiny, even though it may cause some disparate treatment among similarly situated businesses, will not be held violative of the Equal Protection or Due Process Clauses of the Fourteenth Amendment if it bears a "rational relationship to a permissible state objective." Such legislation need not be the best resolution of a particular problem. It

> can, in fact, be seriously flawed and result in substantial inequality and still remain constitutional if it has some reasonable basis. It will not be set aside if "any state of facts reasonable may be conceived to justify it." [citations omitted.]

Ingram at 46-47, 303 S.E.2d at 654 (quoting *Prudential Property and Casualty Co. v. Ins. Commission, et al.*, 534 F.Supp. 571, 576 (C.D.S.C. 1982), *affirmed*, 699 F.2d 690 (4th Cir. 1983)).

Reviewing application of the anti-subrogation rule under this level of scrutiny, we conclude there is no equal protection violation. The anti-subrogation rule serves a legitimate purpose, and the existence of the prior superior court decision invalidating the rule with respect to Pilot Life alone constitutes a rational basis for NCDOI's disparate treatment of the similarly situated insurers.

Petitioners argue that a stricter level of scrutiny should be applied because the Commissioner's application of a facially neutral rule intentionally and purposefully discriminated against insurers other than Pilot Life. Relying upon *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 661, 178 S.E.2d 382, 386 (1971), petitioners contend that " '[t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.' " (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed 220 (1886)). However, to evoke a greater level of scrutiny under the equal protection clause, the discrimination at issue must involve a suspect class such as race or national origin. *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 49 L.Ed.2d 220 (1976); *Ingram*, 63 N.C. App. 38, 303 S.E.2d 649; Sheila Foster, Intent and Incoherence, 72 Tul. L. Rev. 1065 (1998). "A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Washington v. Davis*, 426 U.S. 229, 241, 48 L.Ed.2d 597, 608 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220 (1886)).

The differential treatment in this case involves no suspect class, and so stricter scrutiny is not appropriate. *Id.* The 1983 Pilot Life judgment provides a rational basis for NCDOI's differential treatment, and therefore NCDOI's application of the rule to insurers other than Pilot Life does not violate the constitutional guarantee of equal protection under the law.

Petitioners' Cross-Assignments of Error

Petitioners Employers and BCBS argue two cross-assignments of error. 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 their favor. *Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982); *Leonard v. Lowes*, 131 N.C. App. 304, 506 S.E.2d 291 (1998). We have considered petitioners' arguments in the alternative, reject them, and overrule their cross-assignments of error.

[5] First, petitioners argue that the superior court's decision is supported by the doctrine of issue preclusion. Under the principles of issue preclusion, petitioners claim the Commissioner is estopped from enforcing the anti-subrogation rule against other insurers following the Pilot Life judgment. We disagree.

The Pilot Life judgment was expressly limited to the parties of that case. Moreover, the case was settled post-judgment, and was never appealed. Petitioners are not in privity with the participants in the Pilot Life dispute, and seek to use that decision offensively against the agency. Under such circumstances we do not believe that the application of offensive non-mutual collateral estoppel against the state agency would be appropriate. *See e.g.*, *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 270, 488 S.E.2d 838, 841 (1997). However, even if the principles of collateral estoppel technically precluded the parties from relitigating the issues decided by the superior court in Pilot Life, "it would be inequitable to allow petitioners, even those with privity, to assert the doctrine in this case." *Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach*, 64 N.C. App. 239, 243, 307 S.E.2d 181, 185, *disc. review denied*, 310 N.C. 156, 311 S.E.2d 296 (1983).

> When the issue, however, as in this case, involves the scope and formulation of a law never before addressed by an appellate court in this State, we believe that our duty to develop the law outweighs the resulting burden on petitioners.

Id. at 244, 307 S.E.2d at 185. We decline to apply the doctrine of collateral estoppel to this appeal.

[6] Second, petitioners argue that the doctrine of separation of powers "requires administrative agencies to follow the law of the . . . courts [which have] jurisdiction over the cause of action." *Thomas v. North Carolina Dept. of Human Resources*, 124 N.C. App. 698, 709,

478 S.E.2d 816, 823 (1996), *affirmed*, 346 N.C. 268, 485 S.E.2d 295 (1997). They contend the Commissioner violated the separation of powers doctrine when enforcing the anti-subrogation rule, after a superior court had invalidated that rule with respect to *Pilot Life*. We disagree. Petitioners' interpretation of *Thomas* is too broad. The holding in *Thomas* applies only to decisions of appellate courts.

> It is well-established that when an appellate court of this State determines that a statute enacted by the General Assembly is facially unconstitutional, that statute may not be subsequently enforced against any citizen or entity. An order of this Court proclaiming a statute unconstitutional applies not only to the named litigants, it voids the statute entirely as if it no longer existed. Once a statute is determined to be unconstitutional, no private citizen or division of the State may take any further action pursuant to the provisions of that unconstitutional statute.

Id. at 709-10, 478 S.E.2d at 823. Explaining the great deference ordinarily due administrative interpretations of statutes, the *Thomas* Court stated that "[d]eference is inappropriate where, by attempting to arrogate to itself the distinct duties of the judiciary in having *the final word* in interpreting statutes." *Id.* at 708, 478 S.E.2d at 822 (emphasis added).

In the present case, the judgment of the superior court in Pilot Life did not constitute the "final word" in interpreting the anti-subrogation rule; rather, that decision was expressly limited to the parties involved in the dispute. Absent an appellate ruling on the validity of the rule, the agency did not violate the separation of powers by attempting "to arrogate to itself the distinct duties of the judiciary." *Id.* The doctrine of separation of powers does not require the Commissioner to consider the *Pilot Life* decision as the final judicial interpretation of the anti-subrogation rule in any other applications of the rule. This assignment of error is overruled.

Accordingly we hold that the Commissioner had authority to promulgate and enforce the anti-subrogation rule; the decision of the superior court is reversed.

Reversed.

Judges GREENE and McGEE concur.

DUKE UNIVERSITY MEDICAL CENTER, MISSION-ST. JOSEPH'S HEALTH SYSTEM, INC., MOSES CONE HEALTH SYSTEM, THE NORTH CAROLINA BAPTIST HOSPITALS, INC., WAKE MEDICAL CENTER, PETITIONER-APPELLEES v. H. DAVID BRUTON, M.D., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, RESPONDENT-APPELLANTS

No. COA98-940

(Filed 6 July 1999)

1. Administrative Law— standard of review—DMA policy—construction of state and federal law

Where petitioner hospitals alleged in their petition for judicial review that the Division of Medical Assistance erroneously construed state and federal law regarding the relation between Medicare and Medicaid in adopting a policy to deny Medicaid payments for hospital services to Medicaid recipients who are eligible but have failed to apply for Medicare, the standard for appellate review is de novo.

2. Public Assistance— Medicaid—denial for failure to apply for Medicare—DMA policy—violation of federal law

A policy of the Division of Medical Assistance which denies Medicaid payments for hospital services to Medicaid recipients who are eligible but have failed to apply for Medicare is not permitted by and is contrary to federal law since (1) no federal statute or regulation makes a Medicare application a condition of Medicaid eligibility; (2) no federal statute or regulation directs or authorizes a state agency to deny Medicaid coverage on the ground that the recipient is potentially eligible for Medicare; (3) Medicare is not "available" for these patients as third-party coverage; and (4) the buy-in agreement between the state and federal governments does not provide authority to deny Medicaid coverage on the ground that the recipient failed to enroll in Medicare.

3. Administrative Law— Medicaid policy—unpromulgated legislative rule—unlawful procedure

A policy of the Division of Medical Assistance which denies Medicaid payments for hospital services to Medicaid recipients who are eligible but have failed to apply for Medicare constitutes an unpromulgated legislative rule such that enforcement amounts

to an unlawful procedure under the N.C. Administrative Procedure Act.

Appeal by respondents from judgment entered 2 June 1998 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 8 June 1998.

Turner Enochs & Lloyd, P.A., by Thomas E. Cone, for petitioner-appellees.

Attorney General Michael F. Easley, by Assistant Attorney General Kathryn J. Thomas, for respondent-appellants.

MARTIN, Judge.

Petitioners sought a declaratory ruling from the North Carolina Department of Human Resources, now the North Carolina Department of Health and Human Services (DHHS), regarding the validity of a policy of DHHS's Division of Medical Assistance (DMA), which denies Medicaid payments for hospital services rendered to recipients who were otherwise eligible but had failed to also file for Medicare. This policy was initiated in the June 1995 *Medical Bulletin* of the Claims Analysis Unit of DMA and was described as follows:

> Effective for claims processed on or after June 1, 1995, Medicaid will deny claims for recipients age 65 and over who are entitled to Medicare benefits but fail to apply. You may bill the recipient for Medicare-covered services if he fails to apply for Medicare benefits. Claims will be denied with [the entry of] . . . "Recipient is entitled to Medicare but failed to apply. Service is not covered. Bill recipient."

The policy was reviewed and upheld by DMA.

Petitioners sought judicial review of DMA's ruling in Guilford County Superior Court. Upon review of the declaratory ruling, the superior court found that the June 1995 *Medical Bulletin* effectively initiated a policy to "deny claims for recipients age 65 or over who are entitled to Medicare but failed to apply." The superior court also noted the existence of a "buy-in" agreement between the State and the Federal Department of Health and Human Services which "requires DMA to take certain actions to enroll potentially Medicare-eligible Medicaid recipients, but does not impose responsibility for this enrollment on Medicaid recipients."

After reviewing the "buy-in" agreement, relevant federal and state law, and the state Medicaid Plan, the superior court concluded that DMA's policy was unauthorized. Citing 42 C.F.R. § 435.608, the superior court concluded that DMA may not require Medicare enrollment as a condition of eligibility for the receipt of Medicaid, and that Medicare was not a condition of Medicaid coverage, except under the limited circumstances not applicable to this case. In addition, the superior court concluded that the DMA policy was not a properly promulgated rule within the meaning of the North Carolina Administrative Procedure Act (NCAPA), G.S. § 150B-18, and was therefore not binding on the public. Finally, the superior court concluded that federal statutes and regulations regarding third party coverage did not authorize DMA to deny claims on the grounds that Medicare provided third party coverage under these circumstances, and that DMA was required by federal law to pay for Medicaid services on behalf of such individuals without delay. The declaratory ruling was therefore reversed, and respondent agency now appeals.

I. Standard of Review

[1] Appellate review of a judgment of the superior court entered upon review of an administrative agency decision requires that the appellate court determine whether the superior court utilized the appropriate scope of review and, if so, whether the superior court did so correctly. *Act-Up Triangle v. Com'n for Health Serv.*, 345 N.C. 699, 483 S.E.2d 388 (1997). The nature of the error asserted by the party seeking review dictates the appropriate manner of review: if the appellant contends the agency's decision was affected by a legal error, G.S. § 150B-51(1)(2)(3) & (4), *de novo* review is required; if the appellant contends the agency decision was not supported by the evidence, G.S. § 150B-51(5), or was arbitrary or capricious, G.S. § 150B-51(6), the whole record test is utilized. *In re Appeal by McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993). G.S. § 150B-4(a) permits review of an agency's declaratory ruling in the same manner as that of an order in a contested case. Therefore, the standard of review for the agency's declaratory ruling is determined by G.S. § 150B-51. "Under section 150B-51, a reviewing court is permitted to reverse or modify the agency's decision if the rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are affected by error of law." *D.G. Matthews & Son v. State ex rel. McDevitt*, 131 N.C. App. 3, 508 S.E.2d 331, 333 (1998), *disc. review denied*, 350 N.C. 92 (1999). Because appellees alleged in their petition for judicial review that appellants

erroneously construed state and federal law regarding the relation between Medicare and Medicaid, our standard of review is *de novo*. *See id.*; *Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 452 S.E.2d 337 (1995). In *de novo* review, an appellate court may substitute its judgment for that of the agency. *See id.*

II. Background

A summary of the Medicare and Medicaid acts is helpful in understanding DMA's policy and its operation with respect to the patients and health providers involved with this case.

A. Medicare

Title XVIII of the Social Security Act, entitled "Health Insurance for the Aged and Disabled," 42 U.S.C. §§ 1395-1395ccc, established the Medicare program, administered and funded by the federal government. Medicare provides health care benefits to the elderly and disabled: an individual must be at least 65 years old or disabled to be eligible. 42 U.S.C. § § 1395c and 426(a). These individuals are commonly referred to as Medicare-eligible patients.

Medicare coverage is primarily divided into two parts. Part A covers all inpatient hospital expenses through an insurance plan. *See* 42 U.S.C. §§ 1395c to 1395i-4. Enrollment is essentially automatic for Medicare-eligible patients receiving this benefit. Part B covers certain physician services, hospital outpatient services, and other health services not covered under part A. *See* 42 U.S.C. §§ 1395j to 1395w-4(j). Part B coverage is not freely or automatically available to all Medicare-eligible patients, who must first enroll in the part B insurance program by paying insurance premiums ("Part B insurance premiums"). See §§ 1395o -1395s. Once this is done, the federal government pays most of the "reasonable costs" of outpatient hospital services and most of the "reasonable charges" for physician services rendered to the insured. § 1395l. The part B patients themselves must pay the remaining charges for the outpatient hospital services and physician services (co-payments or coinsurance), as well as an annual deductible. *Id.*; § 1395cc(a)(2)(A). Together, the part B premiums, deductibles and coinsurance are generally referred to as "Part B cost-sharing." Reasonable costs and charges for the services covered under part B are established pursuant to the Medicare Act and its implementing regulations. See § 1395w-4(a), (b).

However, payment of Medicare cost-sharing would pose a problem for some poor Medicare-eligible patients. As explained below,

Congress resolved this problem by requiring payment of Medicare cost-sharing under state Medicaid plans.

B. Medicaid

Congress established the Medicaid program as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq., in 1965 to provide "federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301, 65 L.Ed.2d 784, 794 (1980). States participating in the optional program are entitled to federal financial participation (FFP) and are thereby reimbursed for a portion of their costs. See *Atkins v. Rivera*, 477 U.S. 154, 91 L.Ed.2d 131 (1986); *McKoy v. North Carolina Department of Human Resources*, 101 N.C. App. 356, 399 S.E.2d 382 (1991). "Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX," *Harris*, 448 U.S. at 301, 65 L.Ed.2d at 794, and the requirements of the Secretary of Health and Human Services. *Atkins*, 477 U.S. at 157, 91 L.Ed.2d at 137. Participating states must serve (1) the "categorically needy," defined as families with dependent children eligible for public assistance under the Aid to Families with Dependent Children ("AFDC") program, 42 U.S.C. § 601 *et seq.*, and (2) the aged, blind, and disabled persons eligible for benefits under the Supplemental Security Income ("SSI") program, 42 U.S.C. § 1381 *et seq.* See 42 U.S.C. § 1396a(a)(10)(A); *Harris*, 448 U.S. at 301 n. 1, 65 L.Ed.2d at 795 n. 1; *Elliot v. North Carolina Dept. of Human Resources*, 115 N.C. App. 613, 446 S.E.2d 809 (1994), *affirmed*, 341 N.C. 191, 459 S.E.2d 273 (1995).

C. Interaction Between Medicare and Medicaid

Some individuals are eligible for benefits under both the Medicare and Medicaid Acts; they are either elderly or disabled, and they are poor. These individuals are commonly called "dual eligibles." 42 U.S.C. §§ 1395v & 1395i-2(g). While dual eligibles are, by definition, eligible for Medicare part A enrollment and part B insurance coverage, because they are impoverished there exists the risk that they will be unable to afford cost sharing requirements.

Medicare and Medicaid statutes have addressed this problem by creating a "buy-in" program, under which participating states with Medicaid plans use Medicaid funds (i.e., state funds for which federal matching funds under Medicaid are available) to pay for the cost-sharing requirements under Medicare. *Rehabilitation Assoc. of*

Virginia, Inc., v. Kozlowski et al., 42 F.3d 1444, 1448 (4th Cir. 1994). For dual eligibles, "the state gets a real deal, because, given that Medicaid is treated as a payor of last resort, by enrolling dual eligibles for part B coverage, the primary financial payment for services received comes from the federal government for any services that are covered under both Medicare and Medicaid." *Id.* In other words, states use their Medicaid dollars, some of which are themselves federal in origin, to buy their dual eligibles into the federal program, thus shifting the primary payment for costs from the state Medicaid program to the federal Medicare program. *Id.*

Although the "buy in" agreements are considered voluntary, the state Medicaid program is required, under the statutory revisions of 1990, to pay the cost-sharing portions of Medicare as these expenditures fall within the definition of "medical assistance" in the Medicaid statute. 42 U.S.C. § 1396a(a)(10)(E)(i) and 42 U.S.C. § 1396d(p)(3) (Omnibus Budget Reconciliation Act of 1989).

Taken together, the Medicare and Medicaid schemes create a great incentive for states to enroll dual eligibles into Medicare using Medicaid state and federal matching funds. The statutes do not specifically address the situation in this case where the state wishes to deny Medicaid because the otherwise eligible recipient has failed to file for Medicare.

III. The DMA Policy and its Operation

As described above, the policy at issue denies Medicaid payments to recipients who are potentially eligible for Medicare, but who have failed to apply. In their request for a declaratory ruling, petitioners submitted three hypothetical situations which illustrate the operation of the policy in the context of Medicare and Medicaid.

Patient A is a 67 year old Medicaid recipient under the M-AA program (medical assistance for those 65 and over) who simply failed to apply for Medicare, and therefore has never been found eligible for Medicare Benefits.

Patient B is a 71 year old hospital inpatient, eligible for medical assistance under the M-AA program. This patient applies for Medicare subsequent to his discharge from the hospital, but Medicare is denied for lack of proof of age. The denial is appealed, but no final determination is made.

Patient C is a 66 year old Medicaid recipient who has received medical assistance under Medicaid prior to admission to the hospital. After being admitted to the hospital, the patient applies for Medicare but is denied. She dies shortly after the Medicare denial, and so a current application for Medicare exists but has not been approved.

Under all of these circumstances the patients qualify for Medicaid benefits, but those benefits are denied pursuant to DMA's policy because the Medicaid recipients appear to be eligible for Medicare but have failed to properly enroll in Medicare.

It is also helpful to understand the position of the health care providers under these circumstances. Providers cannot deny services to Medicaid beneficiaries under these circumstances, even though the state agency will deny Medicaid payment. Services may not be denied for Medicaid beneficiaries on the basis of potential third party liability; federal law requires the state Medicaid plan to provide:

> that a person who furnishes services and is participating under the plan may not refuse to furnish services to an individual (who is entitled to have payment made under the plan for the services the person furnishes) because of a third party's potential liability for payment for the service.

42 U.S.C. § 1396a(25)(D). Therefore, the providers must accept the Medicaid eligible patient who is also potentially eligible for Medicare, knowing that the state agency will deny Medicaid payments because of potential eligibility. In addition, the health care providers are prohibited by state regulation from billing the Medicaid patient directly, under these circumstances because the patient is not enrolled in Medicare.

> (c) Providers may bill a patient accepted as a Medicaid patient only in the following situations:
>
> . . .
>
> (3) the patient is 65 years of age or older and is enrolled in the Medicare program at the time services are received but has failed to supply a Medicare number as proof of coverage.

10 N.C.A.C. 26K.0006(c)(3). In effect, the provider is stuck with the costs because the state agency failed to make Medicaid payments to Medicaid eligible patients and the otherwise eligible patient failed to file for Medicare. The underlying issue is whether the state or the health care provider should bear the burden of a Medicaid recipient's

failure to take advantage of federal Medicare assistance. We conclude that federal law requires the state to bear this burden. A review of the pertinent statutes and regulations reveals that the DMA policy is contrary to federal law. In addition, we conclude that this policy constitutes an unpromulgated legislative rule such that enforcement amounts to an "unlawful procedure" under the NCAPA.

IV. Federal Law

A. Medicare as a Condition of Eligibility

[2] As noted above, any state receiving federal funds under the Medicaid program must make medical assistance available to classes of individuals who meet the eligibility requirements. 42 U.S.C. § 1396a(a)(10)(A). A state is required to "[f]urnish Medicaid promptly to recipients without any delay . . ." and "[c]ontinue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible . . . ." 42 C.F.R. § 435.930(a) & (b).

The parties agree that the classes of patients at issue in this case (A,B,C above) meet the Medicaid eligibility requirements. In addition, the definition of "medical assistance" under the Medicaid statute includes hospital inpatient and outpatient services. 42 U.S.C. § 1396d(a)(xi)(1) & (2). Under these circumstances, the Medicare application requirement as a condition of receiving Medicaid payments is not supported by federal law.

Medicare is not a condition of eligibility for Medicaid under federal law:

> As a condition of eligibility, the agency must require applicants and recipients to take all necessary steps to obtain any annuities, pensions, retirement, and disability benefits to which they are entitled, unless they can show good cause for not doing so.

42 C.F.R. § 435.608. Medicare is neither an annuity, pension, retirement, or disability benefit. No federal statute or regulation makes Medicare application a condition of Medicaid eligibility. As discussed below, respondents admit that Medicare is not a condition of Medicaid eligibility, but maintain that federal and state law supports the DMA policy of denying payments under these circumstances.

B. Medicare as a Condition of Coverage

Respondents argue that 42 U.S.C. § 1396b(b)(1) makes Medicare a condition of Medicaid coverage. This federal statute describes one

situation where federal matching Medicaid payments for services under Medicare part A are restricted because the services would have been covered by Medicare part B, and the recipient has simply failed to enroll in part B. This section withholds federal matching Medicaid funds:

> with respect to individuals aged 65 or over and disabled individuals entitled to hospital insurance benefits under subchapter XVIII of this chapter [Medicare Part A] which would not have been so expended if the individuals involved had been enrolled in the insurance program established by part B of subchapter XVIII of this chapter, ...

42 U.S.C. § 1396b(b)(1). The statute operates to deny federal matching Medicaid payments for those services rendered to a patient who has enrolled in Medicare part A but has failed to enroll in part B, *and* part B would have paid for those services. 42 U.S.C. § 1396b(b)(1) has been further interpreted by federal regulation:

> No FFP [Federal Financial Participation] is available in State Medicaid expenditures that could have been paid for under Medicare part B but were not because the person was not enrolled in part B. This limit applies to all recipients eligible for enrollment under part B, whether individually or through an agreement [buy-in] . . . .

42 C.F.R. § 431.625(d) ("Federal financial participation: Medicare Part B premiums"). Respondents argue that this statute provides the state agency a basis to deny state Medicaid payments when otherwise eligible recipients have failed to previously enroll in Medicare. We disagree.

42 U.S.C. § 1396b(b)(1) as interpreted by 42 C.F.R. § 431.625(d) applies to *federal* payment of matching funds, not to *state* Medicaid payments to otherwise eligible recipients. Far from providing state agencies a ground to *deny* Medicaid payments, this statute was intended to effectively *require* states to enroll dual eligibles in Medicare part B in order to receive matching funds for part A. S. Rep. No. 744, *reprinted in* 1967 U.S.C.C.A.N. 2869, 3135 ("The bill would provide that Federal matching amounts would not be available to States toward the cost of services which could have been covered under the supplementary medical insurance programs but were not."); *See Briggs v. Commonwealth*, 707 N.E.2d 355, 359, n. 13 (Mass. 1999) (describing how 42 U.S.C. § 1396b(b)(1) "effectively

made the program for 'dual eligibles' mandatory by denying Federal matching Medicaid funds to States for costs that could have been avoided if the individual had been enrolled in Medicare part B coverage.").

In addition, § 1396b(b)(1) does not apply to this case because that statute restricts federal participation only when services are covered by Medicare *part B*. Petitioners in this case seek payment for inpatient hospital services generally covered by Medicare *part A*. Medicare part A generally covers all inpatient hospital expenses, *see* 42 U.S.C. §§ 1395c to 1395i-4; while, part B generally covers certain physician services, hospital outpatient services, and other health services not covered under part A. *See* 42 U.S.C. §§ 1395j to 1395w-4(j). Because § 1396b(b)(1) restricts Medicaid payments for services covered under part B, and the patients in this case seek payment for hospital inpatient services covered by part A, § 1396b(b)(1) does not apply to payments for services provided to the patients in this case.

Finally, no other statute or regulation specifically directs or authorizes the state agency to deny Medicaid coverage on the grounds that the recipient is potentially eligible for Medicare.

C. Medicare as Third Party Coverage

Respondents also argue that the DMA policy is authorized under federal law because Medicare exists for these patients as third party coverage, and the state agency can therefore deny Medicaid payments where there are third parties liable for the payments. We disagree with respondents' claim that Medicare is "available" for the purposes of third party liability, when the Medicaid recipients have not applied for Medicare.

"Medicaid is intended to be the payer of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program." S.Rep. No. 146, *reprinted in* 1986 U.S.C.C.A.N. 42, 279. Thus, the Medicaid statute mandates that states require applicants and recipients to "assign the State any rights . . . to support . . . for the purpose of medical care . . . and to payment for medical care from any third party." 42 U.S.C. § 1396k(a)(1)(A). The state agency is also required to:

> take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans . . . , service benefit plans, and health maintenance organi-

> zations) to pay for care and services available under the plan, including—
>
> (i) the collection of sufficient information (as specified by the Secretary in regulations) to enable the State to pursue claims against such third parties, with such information being collected at the time of any determination or redetermination of eligibility for medical assistance, and
>
> (ii) the submission to the Secretary of a plan (subject to approval by the Secretary) for pursuing claims against such third parties, which plan shall be integrated with, and be monitored as a part of the Secretary's review of, the State's mechanized claims processing and information retrieval systems required under section 1396b(r) of this title

42 U.S.C. § 1396a(25)(A); 42 C.F.R. § 433.138. A third party is broadly defined as "any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan." 42 C.F.R. § 433.136.

In the present case, Medicare is an "insurance program," under 42 U.S.C. § 1395c, and may be available as third party coverage in the context of Medicaid. *NYSDSS v. Bowen*, 846 F.2d 129, 133 (2d Cir. 1988) ("It cannot be disputed, as the district court conceded, that Medicare is a 'third party' for purposes of the third party liability provision."). However, Medicare coverage does not accrue or vest until an application has been successfully approved. 42 U.S.C. § 426(a)(2)(A). Until a person has at least filed for Medicare, it cannot be said that Medicare is a "program that is or may be liable" as a third party. 42 C.F.R. § 433.136.

Our conclusion is supported by the federal regulation which specifies the procedure states must follow in evaluating third party claims. 42 C.F.R. § 433.139(c) requires that state agencies pay the full Medicaid benefits when "[p]robable [third party] liability is not established or benefits are not available at the time the claim is filed."

> If the probable existence of third party liability cannot be established or third party benefits are not available to pay the recipient's medical expenses at the time the claim is filed, the agency must pay the full amount allowed under the agency's payment schedule.

42 C.F.R. § 433.139(c). In the present case, the DMA policy requires that the agency discover whether Medicare coverage *does not exist.* Upon finding no existing Medicare coverage, the federal regulation requires the agency to "pay the full amount." However, DMA's policy denies Medicaid payments *because* Medicare liability is not established. The DMA policy therefore directly contradicts this federal regulation.

Nevertheless, respondents maintain that the probable existence of third party liability can be determined simply by ascertaining the age of the Medicaid recipient. Respondents argue that because the Medicaid recipient is 65 or over and is enrolled in Medicaid, the recipient need only apply for Medicare and enrollment (the payment of premiums) is automatic. Following this reasoning, respondents conclude that Medicare is probably liable as a third party. However, respondents' argument fails to account for another provision of the same regulation which states:

> (b) Probable liability is established at the time claim is filed.
>
> . . .
>
> (1) If the agency has established the probable existence of third party liability at the time the claim is filed, the agency must reject the claim and return it to the provider for a determination of the amount of liability. *The establishment of third party liability takes place when the agency receives confirmation from the provider or a third party resource indicating the extent of third party liability.* When the amount of liability is determined, the agency must then pay the claim to the extent that payment allowed under the agency's payment schedule exceeds the amount of the third party's payment (emphasis added).

42 C.F.R. § 433.139(b)(1). Under this provision, the agency must establish the existence of third party liability with confirmation "indicating the amount of third party liability." Here, even assuming that DMA correctly has determined the probable existence of third party liability by inferring such potential liability from the age of the recipient, DMA cannot confirm the actual existence or amount of Medicare liability, as required by the regulation, because no such actual current Medicare liability exists. We conclude that DMA's policy is contrary to federal law. Under the federal statutes and regulations, the mere existence of possible Medicare eligibility does not create third party Medicare liability.

D. State and Federal Buy-In Agreement

There is some confusion in this dispute as to the role of the "buy-in" agreement between the state and federal governments. The superior court found that the buy-in agreement required the state agency "to take certain actions to enroll potentially Medicare-eligible Medicaid recipients," but the buy-in agreement "does not impose responsibility for this enrollment on Medicaid recipients." As discussed above, the buy-in agreement provides a mechanism for the state to enroll Medicaid recipients into Medicare. The question of the respective obligations of the state and recipients under the buy-in agreement is not before us. For the purposes of this appeal, it is sufficient to note that the buy-in agreement does not provide DMA authority to deny Medicaid coverage on the grounds that the recipient has failed to enroll in Medicare.

We conclude that DMA's policy of denying Medicaid coverage for hospital inpatient services because recipients have not applied for Medicare is contrary to federal law.

V. Administrative Procedure

[3] In addition, DMA's policy is also unauthorized because it involves the application of an unpromulgated legislative rule. An administrative agency may not act outside the mandates of the NCAPA, G.S. §§ 150B *et seq.*; specifically, "a rule is not valid unless it is adopted in substantial compliance with this Article." N.C. Gen. Stat. § 150B-18 (1995). For the following reasons we conclude that DMA's policy is a legislative rule, and application of that policy constitutes an unlawful procedure under the NCAPA; thus, we affirm the superior court's ruling that the agency acted without authority in implementing that policy without complying with the rule making requirements of the NCAPA.

G.S. § 150B-2(8a) defines "rule" as

> any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by federal agency or that describes the procedure or practice requirements of an agency . . . . The term does not include the following:
>
> . . .

c. Nonbinding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

The policy denying Medicaid payments to those who are eligible for Medicare, but have failed to enroll, is an administrative "rule" within the foregoing definition; the requirement creates a binding standard which interprets the eligibility and coverage provisions of the Medicaid law and, in addition, denies a substantial right. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 411, 269 S.E.2d 547, 568, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980) (Rules operate to " 'fill the interstices of the statutes,' ", and " 'go beyond mere interpretation of statutory language or application of such language and within statutory limits set down additional substantive requirements.' "); *Beneficial North Carolina, Inc. v. State ex rel. North Carolina State Banking Com'n*, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

Respondent agency argues, however, that its interpretation of the several state and federal laws implicated by this question tend to uphold its policy. We disagree and accordingly hold that there is neither statutory nor regulatory authority for DMA's policy denying Medicaid under these circumstances. The DMA policy of denying Medicaid payments to otherwise eligible recipients on the grounds that they have failed to enroll in Medicare is an application of unpromulgated legislative rule and amounts to an unlawful procedure, requiring that we affirm the judgment of the superior court. *See Dillingham v. N.C. Dep't of Human Res*, 132 N.C. App. 704, 513 S.E.2d 823 (1999); *Surgeon v. Division of Social Services*, 86 N.C. App. 252, 357 S.E.2d 388, *disc. review denied*, 320 N.C. 797, 361 S.E.2d 88 (1987).

Affirmed.

Judges GREENE and WYNN concur.

KYLE J. LANNING, EMPLOYEE-PLAINTIFF v. FIELDCREST-CANNON, INC., SELF-INSURED, EMPLOYER-DEFENDANT

No. COA98-41

(Filed 6 July 1999)

1. Workers' Compensation— change of condition—return to work—compensation terminated—relapse

The evidence supported the Industrial Commission's finding that machinist jobs within plaintiff's functional limits were not available in the open market and the Commission's conclusion that plaintiff experienced a substantial change of condition warranting reinstatement of his compensation benefits for a back injury he suffered while working as a mixer operator for defendant employer where plaintiff was thereafter employed as a machinist by a second employer but held the position for less than a month because the lifting requirements exceeded his physical abilities; plaintiff then worked full-time as a machinist for another employer and his compensation payments were discontinued as a result of this return to work; this employer at first accommodated plaintiff's lifting restrictions, but as plaintiff's responsibilities increased, he was repeatedly called upon to lift heavy materials; and plaintiff suffered a relapse and deterioration of his previous back injury and was no longer able to perform his machinist job.

2. Workers' Compensation— marketing distributorship—employment—wages—marketable skills—no total disability

The Industrial Commission erred by concluding that plaintiff's self-employment venture as a marketing representative or distributor for Market America did not qualify as "employment" and that plaintiff's earnings of $300-$600 per month in commissions based upon his own sales and sales of other distributors he has recruited did not constitute "wages." Therefore, where the evidence shows that plaintiff is actively engaged in the personal management of this business venture and that those skills are marketable in the labor force, plaintiff's earning capacity was not totally obliterated, and the Commission erred in determining that plaintiff is totally disabled under N.C.G.S. § 97-29.

3. Workers' Compensation— partial disability—partial impairment—time constraints

The Industrial Commission erred by implicitly concluding that plaintiff is entitled to partial disability benefits under N.C.G.S. § 97-30 or partial impairment compensation under N.C.G.S. § 97-31 for a work-related back injury where plaintiff's compensation for total disability ended when he returned to work for another employer; plaintiff suffered a relapse because of lifting requirements of his new job; plaintiff is no longer eligible to receive compensation under § 97-30 because more than 300 weeks have passed from the date of the injury; and plaintiff is not entitled to compensation under § 97-31 because more than 90 days have passed since his 30% permanent partial disability rating.

4. Workers' Compensation— attorney fees—decision for employer

Plaintiff's motion for attorney fees under N.C.G.S. § 97-88 was denied by the Court of Appeals where defendant employer brought the present appeal but the Court of Appeals determined that the Industrial Commission erred in awarding plaintiff continuing benefits under N.C.G.S. § 97-29.

Appeal by defendant from opinion and award entered 14 November 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 September 1998.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for plaintiff-appellee.

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

TIMMONS-GOODSON, Judge.

Fieldcrest-Cannon, Incorporated (defendant) appeals from an opinion and award of the North Carolina Industrial Commission (Commission) finding and concluding that Kyle J. Lanning (plaintiff) sustained a "change in condition" for which he is entitled to permanent total compensation until further order of the Commission. For the following reasons, we affirm in part, reverse in part, and remand for further appropriate proceedings.

At the time of the injury giving rise to plaintiff's workers' compensation claim, plaintiff was 26 years old and worked for defendant as a mixer operator. While at work on 30 December 1985, plaintiff injured his back in an attempt to lift a ten-gallon bucket of dye mixes from the floor as he proceeded to climb a stairway. The bucket stuck to the floor, and plaintiff immediately felt pain and numbness in his back. Plaintiff promptly reported the injury to defendant and attempted to continue working until 20 January 1986, when he was advised to take time off and receive medical care. On 30 January 1986, Dr. William Mason, an orthopaedic specialist treating plaintiff for his injury, performed a laminectomy diskectomy to relieve plaintiff's herniated nucleus pulposus. After surgery, however, the pain continued and plaintiff needed an additional operation. On 30 June 1987, Dr. Robin Hicks performed an intertransverse fusion. Following this procedure, plaintiff continued to experience significant chronic pain and, thus, undertook physical therapy and work hardening programs to alleviate the pain. During his treatment, plaintiff has received disability ratings ranging from 25% to 45%. When he was last discharged prior to the initial award in this matter, he was rated as having 25-30% permanent partial disability of the back.

On 11 March 1991, Deputy Commissioner Scott Taylor entered an opinion and award ordering defendant to pay plaintiff compensation for total disability for the remainder of plaintiff's life, until plaintiff returned to work, or until plaintiff's condition changed, whichever occurred first. From this opinion and award, defendant appealed to the Full Commission, which entered an opinion and award on 1 July 1992 affirming the deputy commissioner's decision.

In September of 1993, plaintiff enrolled in machinist courses at Davidson County Community College in Lexington, North Carolina. Plaintiff completed these courses on or about 4 August 1994, and, on 5 September 1994, plaintiff began working as a machinist with Dunning Metals Innovations (Dunning), a job which plaintiff retained for less than a month. Plaintiff began the job working only a few hours a day and gradually increased his hours to full time. However, due to Dunning's lifting requirements, which exceeded plaintiff's physical restrictions, he was unable to remain in the position. During plaintiff's employment with Dunning, defendant mistakenly continued to pay him disability benefits, resulting in an overpayment of $894.98.

In October of 1994, plaintiff obtained full-time employment with Everette's Machine Company (Everette's) as a machinist. This consti-

tuted a "return to work," and, pursuant to the terms of the Commission's 1 July 1992 opinion and award, defendant terminated plaintiff's weekly compensation benefits on 5 October 1994. Initially, plaintiff was able to adapt to the machinist position at Everette's, primarily due to the employer's willingness to structure the job to suit plaintiff's physical limitations. However, beginning in late 1995 or early 1996, plaintiff was promoted to shop foreman, and his job requirements increased. The growth of the business required plaintiff to perform repetitive lifting in excess of his limitations, and his employer was no longer able to provide him with the necessary lifting assistance to assure that plaintiff would be able to perform the job without further injury to his back.

In April of 1996, plaintiff suffered a relapse, and the condition of his back deteriorated due to the lifting requirements of his job. On 22 April 1996, plaintiff found it necessary to consult Dr. Hicks, who prescribed a regimen of physical therapy to alleviate the reoccurrence of back pain, and required plaintiff to remain out of work after completing his physical therapy. Following this course of events, plaintiff determined that Everette's could no longer modify his job to meet his lifting restrictions; therefore, plaintiff has not returned to the job at Everette's, nor has he sought any other machinist position.

Since April of 1996, plaintiff's sole source of income has been his self-employment venture as a marketing representative or distributor for Market America. This enterprise is described as a "multi-level marketing" approach whereby representatives purchase a distributorship, sell products and recruit other distributors. Plaintiff has been expending ten to twenty hours per week in this venture, earning $300.00-$600.00 per month in commissions. If the business continues to thrive, plaintiff hopes to spend less time actively soliciting accounts, since his compensation is based upon his own sales and commissions from the sales of other distributors he has recruited.

Plaintiff filed a motion before the Commission for modification of the 1 July 1992 opinion and award pursuant to section 97-47 of the North Carolina General Statutes. Plaintiff asserted that, although his condition had substantially improved, he remained permanently partially disabled as a result of his work-related injury. The matter came on for hearing before Deputy Commissioner William Bost, who filed an opinion and award on 6 February 1997 denying plaintiff's motion for modification. The deputy commissioner concluded that plaintiff had not undergone a material change of condition which would enti-

tle him to reinstatement of benefits. From the opinion and award of the deputy commissioner, plaintiff appealed to the Full Commission. The Full Commission reversed the deputy commissioner's decision, and defendant now appeals.

At the outset, we address defendant's argument that the Commission erred in concluding that plaintiff experienced a substantial change of condition warranting reinstatement of his disability benefits. As a related matter, defendant contends that the Commission improperly found as fact that machinist jobs within plaintiff's functional limits were not available in the open market and that other employers were not likely to make the same accommodations for plaintiff as did Everette's. Based on the record before us, we find defendant's arguments unpersuasive.

The scope of this Court's review of an opinion and award entered by the Industrial Commission is limited to resolving whether: (1) the Commission's findings of fact are supported by competent evidence, and (2) the Commission's conclusions of law are justified by its findings of fact. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 765, 487 S.E.2d 746, 750-51 (1997). In a workers' compensation case, the Industrial Commission serves as the finder of fact, *Harrington v. Pait Logging Co.*, 86 N.C. App. 77, 356 S.E.2d 365 (1987), and, thus, it is exclusively within the Commission's province to determine the credibility of the witnesses and the evidence and the weight each is to receive. *Floyd v. First Citizens Bank*, 132 N.C. App. 527, 512 S.E.2d 454 (1999). Accordingly, "[w]hen the Commission's findings of fact are supported by competent evidence, they are binding on the reviewing court in spite of the existence of evidence supporting contrary findings." *Saums*, 346 N.C. at 765-66, 487 S.E.2d at 751. Only where there is a complete lack of competent evidence to support the Commission's findings of fact may they be set aside. *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980). The Commission's conclusions of law, however, are fully reviewable. *Peeler v. Piedmont Elastic, Inc.*, 132 N.C. App. 713, 514 S.E.2d 108 (1999).

Section 97-47 of the North Carolina General Statutes provides that upon the application of an interested party "on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded." N.C. Gen. Stat. § 97-47 (1991). A change of condition for purposes of section 97-47

means " 'a substantial change, after final award of compensation, of physical capacity to earn[.]' " *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 104, 360 S.E.2d 109, 114 (1987) (quoting *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 103-04, 296 S.E.2d 456, 459 (1982)). The change in earning capacity must be due to conditions different from those existing when the award was made. *Id.*

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

Blair v. American Television & Communications Corp., 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (citations omitted). The party seeking to modify an award based on a change of condition bears the burden of proving that a new condition exists and that it is causally related to the injury upon which the award is based. *Id.* "Whether the facts amount to a change of condition pursuant to N.C. Gen. Stat. § 97-47 is a 'question of law' " and, thus, is subject to *de novo* review. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996) (citing *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987)).

[1] The evidence demonstrates that plaintiff has undergone a change of condition since the 1 July 1992 opinion and award of the Full Commission. From September of 1994 to March of 1996, plaintiff's medical condition improved enabling him to retain a full-time job as a machinist with Everette's, and, as a result of this "return to work," plaintiff's disability payments were discontinued. When plaintiff first began his position with Everette's, he was not required to do much heavy lifting. He testified that while other employees in similar positions were required to lift materials weighing a hundred pounds several times daily, he was permitted to use a fork lift or to get assistance from other employees to lift materials weighing more than ten to fifteen pounds. However, as time progressed and his responsibilities increased, plaintiff was repeatedly called upon to lift materials that weighed in excess of seventy pounds. Consequently, in April of 1996, plaintiff suffered a relapse and deterioration of his previous back injury and was no longer able to perform his machinist job.

It is worthy of noting that prior to obtaining the position at Everette's, plaintiff was employed as a machinist at Dunning. He held the position for less than a month because the lifting requirements exceeded his physical abilities. As with the job at Everette's, plaintiff began lifting very small parts and graduated to parts weighing anywhere from thirty-five to one hundred pounds. In light of these facts, we hold that there was plenary evidence in the record to support the Commission's finding that machinist jobs within plaintiff's physical capacities were not available in the open market and that plaintiff was not likely to enjoy the same accommodations at other machinist jobs as he did at Everette's. The evidence likewise demonstrates a change in plaintiff's capacity to earn wages. Thus, we hold that the Commission did not err in concluding that plaintiff experienced a substantial change of condition under section 97-47.

[2] Next, we consider defendant's contention that the Commission erred by concluding that plaintiff's earnings from his self-employment venture are not "wages" and that the venture itself does not qualify as "employment." Defendant argues that neither the evidence of record nor the Commission's findings of fact supported such a conclusion. Therefore, it is defendant's position that the Commission further erred in awarding plaintiff total disability benefits under section 97-29, subject to a credit for net earnings from his self-employment enterprise. We are compelled to agree.

The term "disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (Cum. Supp. 1997). To establish a claim for disability benefits, the plaintiff must make the following showing:

> (1) [he] was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) [he] was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) [his] incapacity to earn was caused by [his] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee is entitled to receive benefits for total disability under section 97-29 if he is "totally unable to 'earn wages which . . . [he] was receiving at the time [of injury] in the same or any other employment.' " *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Tyndall v. Walter Kiddie 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)). Stated another way, compensation for total disability is payable only where the employee's capacity to earn wages is "totally obliterated." *McGee v. Estes Express Lines*, 125 N.C. App. 298, 300, 480 S.E.2d 416, 418 (1997). "If the employee has the capacity to earn some wages, but less than he was earning at the time of the injury, he is entitled to partial disability benefits under section 97-30." *Id.* The burden is on the plaintiff to establish the existence and the extent of his disability. *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 489 S.E.2d 445 (1997).

A disability is "a diminished capacity to earn money rather than physical infirmity," *Arrington v. Texfi Industries*, 123 N.C. App. 476, 478, 473 S.E.2d 403, 405 (1996), and a claimant's "earning capacity" is determined by his ability to compete in the work force, *Estes*, 125 N.C. App. at 300, 480 S.E.2d at 418. "Thus employee ownership of a business can support a finding of earning capacity only to the extent the employee is actively involved in the personal management of that business and only to the extent that those management skills are marketable in the labor market." *Id.*

In the case presently before us, the Commission relevantly concluded as follows:

> 6. [Plaintiff's] earnings from his venture as a distributor for Market America are not "wages" because these earnings are not directly related to the ability of [plaintiff] to engage in full-time employment, nor to any measurable time or effort expended by [plaintiff]. Nor can this be classified as "employment", [sic] as there is [sic] no requirements that [plaintiff] devote any time or effort to this venture. At most, any income from [plaintiff's] venture as a Market America distributor would properly be classified as income for which Defendant would be entitled to be given credit. *Barnhardt vs. Yellow Cab Co.*, 266 N.C. 419[, 146] S.E.2d 479 (1966). Additionally, U.S. Chamber of Commerce statistics show that the majority of newly-created small enterprises fail [sic] as economic entities within the first five years of their life. People do not ordinarily undergo the expense of starting such a risky entrepreneurial experience unless they are unable to obtain a paying job in the real economy. Therefore, creating a new enterprise is more indicative of inability to be employed in the workplace than it is indicative of ability.

Based on this conclusion and this Court's holding in *Estes*, 125 N.C. App. 298, 480 S.E.2d 416, the Commission awarded plaintiff perma-

nent total compensation from 22 April 1996 to the present and continuing for as long as plaintiff "is unable to earn any wages." The Commission made the award "subject to a credit to Defendant for any net earnings from Plaintiff's attempt to become self[-] employed."

The evidence in the record reveals that plaintiff owns a distributorship of a network marketing company called "Market America." Plaintiff works out of his home ten to twenty hours per week and earns $300.00 to $600.00 a month from his own sales and the commissions from sales of distributors he has recruited. Plaintiff testified that in the course of this business, he performs the following tasks:

> I basically make phone calls to different companies and make appointments to come in and talk to them. I also call different people and try to recruit them into the business, and basically just go in homes and show the plan and just try to market the products.

Plaintiff projected that in a year's time, he should be able to earn approximately $30,000 per year.

Although the Commission was well within its authority to find plaintiff's expectation of making a living through this venture "to be a triumph of hope over experience and thus not highly credible," there was no basis whatsoever for the Commission's conclusion that plaintiff's marketing business is not "employment" and that his earnings are not "wages." Furthermore, the evidence shows that plaintiff is "actively involved in the personal management of [his] business," and there is little doubt that plaintiff's "management skills are marketable in the labor market." *See Estes*, 125 N.C. App. at 300, 480 S.E.2d at 418. Therefore, since plaintiff's earning capacity is not "totally obliterated," we conclude that the Commission erred in determining that plaintiff is totally disabled under section 97-29. *See id.*

[3] Lastly, we review defendant's argument that the Commission erred by entering the following conclusion of law:

> While caselaw holds that an injured worker cannot collect both total permanent disability compensation and partial permanent disability compensation *at the same time*, it does not hold that a person who is able to return to work and thus remove himself from total permanent disability compensation cannot thereafter, when the return to work fails because of restrictions resulting from the compensable injury, be entitled to partial permanent disability compensation when he is able to earn some wages but

not as much as he was earning at the time of the compensable injury.

Defendant contends that in so concluding, the Commission impliedly ruled that plaintiff could recover additional benefits for permanent partial disability under section 97-30 or permanent partial impairment under section 97-31. Although the Commission's conclusion is an accurate statement of the law, *see Smith v. American and Efird Mills*, 51 N.C. App. 480, 488, 277 S.E.2d 83, 88 (1981) (recognizing that while "a claimant cannot simultaneously be both totally and partially incapacitated[,]" the language of section 97-30 demonstrates that the General Assembly "envisioned that an employee might receive compensation under both G.S. 97-29 and G.S. 97-30" in the case where a period of " 'partial disability begins after a period of total disability' ") (quoting N.C. Gen. Stat. § 97-30), *modified*, 305 N.C. 507, 290 S.E.2d 634 (1982), we hold that under the circumstances of the instant case, plaintiff is precluded from recovering any partial disability benefits at this juncture.

Pertinently, section 97-30 of the North Carolina General Statutes provides as follows:

> Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and *in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury.* In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability.

N.C. Gen. Stat. § 97-30 (1991) (emphasis added). Thus, the 300-week period for which a claimant is entitled to partial disability under section 97-30 must include any period during which he has already received total disability under section 97-29. *Brown v. Public Works Comm.*, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

In the case *sub judice*, the injury to plaintiff's back occurred on 30 December 1985. Therefore, the 300-week period for which he

could receive partial disability benefits ran on or about 8 October 1991. The record indicates that plaintiff and defendant entered into a Form 21 Agreement for Compensation following plaintiff's injury and that, pursuant to the 1 July 1992 opinion and award by the Commission, defendant thereafter paid plaintiff total disability benefits from 14 December 1988 to 5 October 1994, when plaintiff became employed at Everette's as a machinist. After 300 weeks had passed from the date of the injury, plaintiff was no longer eligible to receive compensation under section 97-30. *See id.* (recognizing that partial disability can last no longer than 300 weeks from the date of injury).

Likewise, section 97-31 provides as follows regarding impairment of the back:

> In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:
>
> . . .
>
> (23) For the total loss of use of the back, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered "total industrial disability" and compensated as for total loss of use of the back.

N.C. Gen. Stat. § 97-31 (1991). In the present opinion and award, the Commission made no findings concerning when plaintiff reached maximum medical improvement; however, the Commission found that "[p]laintiff was last discharged prior to the initial award with a rating of 25-30% permanent partial disability of [the] back." The record reveals that on 27 March 1990, Dr. Wheeler found plaintiff to have reached maximum medical improvement and rated him as having a 27.5% permanent partial disability of his back. Under section 97-31, a 30% impairment of the back would entitle plaintiff to partial disability compensation for 90 weeks from the date on which he

reached maximum medical improvement. Plaintiff, therefore, could not be compensated under section 97-31 beyond 27 June 1990. Accordingly, we hold that by implicitly concluding that plaintiff was entitled to partial disability benefits under section 97-30 or partial impairment compensation under section 97-31, the Commission erred. We have examined defendant's remaining assignments of error and determine them to be without merit.

[4] During the pendency of the present appeal, plaintiff filed a motion under the provisions of section 97-88 of the General Statues for an award of counsel fees. Section 97-88, entitled "Expenses of appeals brought by insurers," reads as follows:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88 (1991). While it is true that defendant brought the present appeal, we conclude that the Commission erred in awarding plaintiff continuing benefits under section 97-29. Plaintiff's motion for counsel fees pursuant to section 97-88 is, therefore, denied.

For the above-stated reasons, the opinion and award of the North Carolina Industrial Commission is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN and HORTON concur.

PAMELA BRISSON AND DALLAS BRISSON, PLAINTIFFS V. KATHY A. SANTORIELLO, M.D., P.A., AND KATHY A. SANTORIELLO, M.D., DEFENDANTS

No. COA98-822

(Filed 6 July 1999)

Statute of Limitations— medical malpractice—amendment to original complaint denied—action dismissed and refiled

The trial court erred by entering judgment on the pleadings for defendant in a medical malpractice action based upon the statute of limitations where plaintiffs' initial complaint did not comply with N.C.G.S. § 1A-1, Rule 9(j), defendants filed a motion to dismiss, plaintiffs filed a motion to amend and attached a proposed amended complaint, the trial court denied the motion to amend but allowed plaintiffs' to take a voluntary dismissal without prejudice prior to ruling on the motion to dismiss, plaintiffs refiled their complaint, and defendant's new motion for judgment on the pleadings based upon the statute of limitations was granted. N.C.G.S. § 1A-1, Rule 15(a) provides that a party may amend his pleading once as a matter of course before a responsive pleading is served and defendant had not filed any responsive pleading when plaintiffs filed their motion to amend and proposed amended complaint. Plaintiffs were not required to seek the court's permission to amend their complaint and the ruling prohibiting the amendment was error. The original complaint unquestionably gave notice of the transactions and occurrences plaintiffs sought to establish pursuant to the amended complaint, so that the amended complaint related back to the filing of the original and fell within the statute of limitations. This case can be distinguished from *Estrada v. Burnahm*, 316 N.C. 318, and *Robinson v. Entwistle*, 132 N.C. App. 519.

Appeal by plaintiffs from order entered 26 February 1998 by Judge Coy E. Brewer, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 24 February 1999.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Charles George, and Law Office of Thomas M. Lavigne, by Thomas M. Lavigne, for plaintiffs-appellants.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Pamela and Dallas Brisson ("plaintiffs") appeal from an order granting Kathy A. Santoriello, M.D., P.A. and Kathy A. Santoriello, M.D. ("defendants") judgment on the pleadings in plaintiffs' action for medical malpractice and loss of consortium. For the reasons given in the following analysis, we vacate the order of the trial court and remand for further appropriate proceedings.

On 27 July 1994, Dr. Santoriello, an OB/GYN practicing in Fayetteville, North Carolina, performed an abdominal hysterectomy on plaintiff Pamela Brisson. Several months after the surgery was conducted, plaintiff Pamela Brisson discovered an obstruction of her vaginal canal that prevented her from engaging in sexual intercourse. On 3 June 1997, plaintiffs filed a complaint against defendants alleging claims for medical malpractice and loss of consortium arising out of Dr. Santoriello's performance of the abdominal hysterectomy. However, the complaint did not comply with the following requirement of Rule 9(j) of the North Carolina Rules of Civil Procedure:

> Any complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care . . . shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C.R. Civ. P. 9(j). Based on this omission, defendants filed a Rule 12(b)(6) motion to dismiss the complaint on 21 August 1997.

On 30 September 1997, plaintiffs filed a motion to amend their complaint and attached a Proposed First Amended Complaint that included the following allegation:

> 9. An expert, who is reasonably expected to qualify as an expert under Rule 702 of the Rules of Evidence, has reviewed plaintiff's medical care, and is willing to testify that said medical care does not meet the applicable standard of care, referenced in paragraph seven.

A hearing on defendants' motion to dismiss and plaintiffs' motion to amend was held before the Honorable D.B. Herring on 6 October

1997. After hearing oral arguments of counsel, Judge Herring denied plaintiffs' motion to amend but allowed plaintiffs to take a voluntary dismissal without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, prior to ruling on defendants' motion to dismiss.

Plaintiffs filed a notice of voluntary dismissal on 6 October 1997 and refiled their action on 9 October 1997. In their second complaint, plaintiffs included the appropriate Rule 9(j) certification. On 20 October 1997, defendants moved for entry of judgment on the pleadings on the grounds that the claims alleged in plaintiffs' complaint were barred by the applicable statutes of limitations and repose. Defendants noticed the matter for hearing at the 8 December 1997 civil session of Cumberland County Superior Court, and on 18 December 1997, Judge Herring entered an order continuing the hearing until 12 January 1998, based, in part, on Judge Herring's decision to recuse himself from the case.

By order entered 9 February 1998, Judge Orlando F. Hudson, Jr. granted defendants' motion for judgment on the pleadings, based on the court's determination that the statute of limitations barred plaintiffs' claims. Plaintiffs filed motions for relief under Rule 60(b) from the 6 October 1997 order of Judge Herring and the 9 February 1998 order of Judge Hudson based on excusable neglect. Both motions were denied, and plaintiffs appeal.

Plaintiffs bring forth three assignments of error on appeal. However, because plaintiffs have withdrawn two of their assignments of error, we need only address the one remaining, wherein plaintiffs contend that the trial court erred in granting defendants' motion for judgment on the pleadings. Plaintiffs argue that this ruling was error, because the causes of action alleged in the second complaint were not barred by the applicable statute of limitations. We agree.

Under Rule 12(c) of the North Carolina Rules of Civil Procedure, the trial court may, upon review of the pleadings, dispose of claims or defenses when their lack of merit is apparent on the face of the pleadings. *Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 659, 507 S.E.2d 923, 926 (1998). Judgment on the pleadings pursuant to Rule 12(c) is proper where all material questions of fact are resolved in the pleadings, and only issues of law remain. *Id.* In deciding a motion for judgment on the pleadings, the trial court must consider the facts and permissible inferences in the light most favorable to the

non-moving party, accepting all well-pleaded factual allegations of the non-moving party as true. *Id.* If, after undertaking such an examination, the court determines that the moving party is entitled to judgment as a matter of law, entry of judgment on the pleadings in favor of the moving party is appropriate. *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987).

A motion for judgment on the pleadings under Rule 12(c) is an appropriate vehicle for dismissing claims barred by the statute of limitations. *Aetna Casualty and Surety Co. v. Anders*, 116 N.C. App. 348, 447 S.E.2d 504 (1994). Section 1-15(c) of the North Carolina General Statutes is the statute of limitations applicable to claims for medical malpractice and provides that such claims must be brought within three years of the last negligent act of the defendant-physician. N.C. Gen. Stat. § 1-15(c) (1996).

In the present case, Dr. Santoriello performed the abdominal hysterectomy surgery about which plaintiffs complain on 27 June 1994. Plaintiffs filed their original complaint for medical malpractice and loss of consortium on 3 June 1997, well within the three-year statute of limitations period. This complaint, however, failed to comply with the Rule 9(j) certification requirement. Therefore, defendants filed a motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. Plaintiffs, operating under the erroneous belief that they needed to obtain leave of court to amend their complaint, filed a motion to amend and a Proposed First Amended Complaint that fully complied with the Rule 9(j) certification requirement. The trial court denied plaintiffs' motion to amend, and we hold that this ruling was incorrect.

Rule 15(a) of the North Carolina Rules of Civil Procedure provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served." N.C.R. Civ. P. 15(a). For purposes of this rule, a Rule 12(b)(6) motion to dismiss is not a "responsive pleading" and, thus, "does not itself terminate plaintiff's unconditional right to amend a complaint under Rule 15(a)." *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987).

In the instant case, defendants had not filed any responsive pleading when plaintiffs filed their motion to amend and Proposed First Amended Complaint. Therefore, plaintiffs were not required to seek the court's permission to amend their complaint, and the court's rul-

ing prohibiting such an amendment was error. The question then becomes whether plaintiffs' amended complaint relates back to the filing of the original pleading. We hold that it does.

Rule 15(c) of the North Carolina Rules of Civil Procedure governs whether an amendment will be deemed to have been filed at the time of the original pleading:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C.R. Civ. P. 15(c). Thus, where the original complaint gave defendants sufficient notice of the events to be established pursuant to the amended complaint, the amendment relates back to the original complaint. *Bowlin v. Duke University*, 119 N.C. App. 178, 457 S.E.2d 757 (1995).

Unquestionably, the original complaint in the present case gave notice of the transactions and occurrences plaintiffs sought to establish pursuant to the amended complaint. From the original complaint, defendants were notified that plaintiffs' medical malpractice and loss of consortium claims were based on Dr. Santoriello's allegedly negligent performance of Pamela Brisson's abdominal hysterectomy. Indeed, the amended complaint varied from the original only by its inclusion of the Rule 9(j) certification. Accordingly, we hold that the amended complaint related back to the filing of the original and, thus, fell within the statute of limitations.

When the trial court denied their motion to amend, plaintiffs took a voluntary dismissal on 6 October 1997 and refiled their action on 9 October 1997. Defendants, in their motion for judgment on the pleadings, argued that the causes of action alleged in plaintiffs' second complaint were time-barred under section 1-15(c) of the General Statutes. Plaintiffs, on the other hand, argued that by taking a voluntary dismissal under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, they were entitled to an additional year after the date of dismissal within which to refile their claims; therefore, the second complaint was timely filed.

Plaintiffs rely on the one-year "saving provision" of Rule 41(a)(1), which reads as follows:

> If an action commenced within the time prescribed therefore, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal.

N.C.R. Civ. P. 41(a)(1). Defendants contend, however, that the case currently before us is indistinguishable from our Supreme Court's holding in *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986), and this Court's recent decision in *Robinson v. Entwistle*, 132 N.C. App. 519, 512 S.E.2d 438 (1999). Defendants, therefore, argue that plaintiffs may not take advantage of the "saving provision," because their original complaint did not comply with the pleading requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure. Contrary to defendants' contention, we hold that *Estrada* and *Robinson* are inapposite to the present set of facts and, thus, the trial court erred in granting defendants' motion for judgment on the pleadings.

In *Estrada*, the plaintiff underwent an embolectomy operation on 18 June 1979 to address complications arising from an earlier surgery. The operation was unsuccessful, and on the following day, the plaintiff's left leg was amputated below the knee. On 18 June 1982, at 4:28 p.m., the plaintiff filed an unverified "bare bones" complaint alleging that the surgeon who performed the embolectomy operation did so negligently and that the plaintiff suffered damages as a result. The complaint, however, failed to allege facts concerning the specific manner in which the defendant was negligent. At 4:30 p.m., two minutes after the original complaint was filed, the plaintiff filed a notice of voluntary dismissal purporting to dismiss the claim under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. The three-year statute of limitations expired the following day, on 19 June 1982. The plaintiff's counsel did not serve the summons and complaint or notice of dismissal on the defendant.

On 16 June 1983, the plaintiff filed a second unverified complaint for medical malpractice against the defendant, and the defendant was served with a summons and the second complaint on 14 July 1983. The defendant filed a motion to dismiss the complaint under Rule 12(b)(6) on the ground that the action was barred by the applicable statute of limitations. It was after this motion was served that the defendant learned that, one year earlier, plaintiff had filed and voluntarily dismissed a complaint for damages arising out of the same set of facts. Following a hearing, the trial court granted the

defendant's motion to dismiss and dismissed the plaintiff's action with prejudice. The plaintiff appealed the ruling to this Court, and we reversed the order of dismissal. The defendant appealed to the Supreme Court, which reversed our decision and reinstated the order of dismissal.

In his brief before the Court, the plaintiff candidly admitted that the 1982 complaint " 'was filed with the intention of dismissing it in order to avoid the lapse of the statute of limitations.' " *Estrada*, 316 N.C. at 322, 341 S.E.2d at 541. During oral argument, the plaintiff's counsel conceded that, when the original complaint was filed, " '[the plaintiff] did not intend at that point in time to prosecute a legal action against the [defendant-doctor].' " *Id.* at 323, 341 S.E.2d at 542. In light of these facts, the Court framed "the dispositive question" as follows:

> whether a plaintiff may file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to Rule 41(a)(1).

Id. at 323, 341 S.E.2d at 542. The Court answered this question in the negative and articulated the following reasoning for its decision:

> The Rules of Civil Procedure represent a carefully drafted scheme, modeled after the Federal Rules of Civil Procedure, "designed to eliminate the sporting element from litigation. . . . [T]he rules should be construed as a whole, giving no one rule disproportionate emphasis over another applicable rule." Although it is true that Rule 41(a)(1) does not, on its face, contain an explicit prerequisite of a good-faith filing with the intent to pursue the action, we find such a requirement implicit in the general spirit of the rules, as well as in the mandates of Rule 11(a). Construing the rules as a whole, we hold that Rules 41(a)(1) and 11(a) must be construed *in pari materia* to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including Rule 11(a). A pleading filed in violation of Rule 11(a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of Rule 41(a)(1). A second complaint, filed in

> reliance on the one-year "extension" in such a situation, is subject to dismissal upon appropriate motion by the adverse party upon grounds that the new action is time-barred.

Id. at 323-24, 341 S.E.2d at 542.

In *Robinson*, the decedent, William J. Robinson, died on 18 August 1994, and on 12 August 1996, the plaintiff, as executrix of Robinson's estate, filed an order extending the statute of limitations for bringing a medical malpractice action until 1 September 1996. On 30 August 1996, the plaintiff filed a complaint alleging that the defendants were negligent in treating the patient, but the pleading did not include a Rule 9(j) certification. Before defendants filed a responsive pleading, plaintiff amended her complaint to include a statement which purportedly complied with Rule 9(j). However, it was later determined that the amendment was also flawed, "because it alleged that the medical care was reviewed by an expert who did not qualify under Rule 702 to testify as to the standard of care applicable to the defendants in this action." *Robinson*, 132 N.C. App. at 522, 512 S.E.2d at 440.

On 21 April 1997, the plaintiff voluntarily dismissed the amended complaint pursuant to Rule 41(a)(1) and refiled the action on 6 June 1997. The defendants filed motions to dismiss for failure to comply with Rule 9(j), for judgment on the pleadings pursuant to Rule 12(c), and for summary judgment. The trial court denied the motions to dismiss and for judgment on the pleadings on the grounds that the new complaint complied with the requirements of Rule 9(j). However, the court granted defendants' motion for summary judgment finding that the plaintiff's action was barred by the relevant statute of limitations. On appeal, this Court affirmed, holding that "Rule 41(a)(1) is only available in an action where the complaint complied with the rules which govern its form and content prior to the expiration of the statute of limitations." *Id.* at 523, 512 S.E.2d at 441.

Estrada and *Robinson* can be distinguished from the present case by the fact that, here, plaintiffs filed an amended complaint containing the mandatory Rule 9(j) verification that related back to the filing of the original complaint. Moreover, there was no evidence that plaintiff filed their original complaint solely for the purpose of tolling the statute of limitations or that they otherwise acted in bad faith so as to prevent them from taking advantage of the Rule 41(a)(1) "saving provision." Thus, insofar as plaintiffs filed an amended complaint that "complied with the rules which govern its form and content prior to

the expiration of the statute of limitations," *id.*, we hold that plaintiffs were entitled to the benefit of the Rule 41(a)(1) extension. Plaintiffs' second complaint, therefore, was not barred by the statute of limitations, and the trial court erred in entering judgment on the pleadings in favor of defendants.

Based upon the foregoing, we reverse the order entering judgment for defendants and remand this matter for further proceedings consistent with this opinion.

Reversed and remanded.

Judges MARTIN and HUNTER concur.

JAMES L. FREEMAN, JR., PLAINTIFF v. SUGAR MOUNTAIN RESORT, INC., DEFENDANT

No. COA98-120

(Filed 6 July 1999)

1. Premises Liability— injury on ski slope—knowledge of hazard

Summary judgment should not have been granted for defendant in a negligence action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp. Although defendant argued that plaintiff failed to present any evidence that defendant either knew or reasonably could have known that skiers were jumping off a makeshift snowramp, plaintiff presented evidence that defendant did not have an adequate number of ski patrols, from which arises a material issue of fact as to whether defendant would have known about the makeshift ramp with an adequate number of patrols.

2. Premises Liability— injury on ski slope—foreseeability

Summary judgment should not have been granted for defendant in an action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp where defendant argued that plaintiff's accident was not reasonably foreseeable, but plaintiff presented evidence of a sign on defendant's property forbidding jumping, there was evidence that defendant was understaffed on this night, raising the issue of whether defendant would have noticed the jumping with adequate employees patrolling the slope, and there was testimony

that the jumping was in plain view of the lift operator, who did nothing.

3. Premises Liability— contributory negligence—injury on ski slope

Summary judgment should not have been granted for defendant on contributory negligence in an action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp. Whether plaintiff should have recognized the danger of jumping skiers and chosen an alternate path is a question of fact.

Judge LEWIS dissenting.

Appeal by plaintiff from judgment entered 2 September 1997 by Judge Dennis Winner in Avery County Superior Court. Heard in the Court of Appeals 5 October 1998.

At approximately 9:50 p.m. on 16 December 1993, plaintiff was snow-skiing on the only open slope on defendant's premises when he was struck by another skier who jumped into him from a makeshift ramp. One hundred and eighty people had purchased tickets to ski on the slope during the course of the evening and three or four ski patrols were on duty at the time.

Plaintiff stated in a deposition that the makeshift ramp was not on the slope itself, that "another skier wouldn't have hit it or run over it," and that one would have to get off of the slope to get on to the ramp. Plaintiff did not recall ever seeing anyone jump from that ramp at any other point that evening, and had made no prior complaints to management about other skiers. Plaintiff also stated that he was told by defendant's employees that defendant was understaffed on the night of the injury. Defendant's affidavits indicated that there were no reports of jumping made to the ski patrol or to the administrative office. Defendant, while denying that skiers were constructing such ramps at the time in question, admitted in an interrogatory that defendant did not allow skiers to construct these makeshift ramps. Plaintiff asserts that in providing a ski patrol, defendant assumed a duty to protect him, and that defendant was negligent in failing to carry out this duty.

In his complaint of 25 October 1996, plaintiff cites four specific acts or omissions that he claims constitute defendant's negligence: (1) the failure to "enforce its rules and regulations governing jumping on the ski slopes"; (2) the failure to be properly staffed at the time of

the collision, thereby leaving defendant unable to enforce its rules governing safety; (3) the failure "to warn its business patrons of the potentially hazardous condition created on its ski slopes by skiers constructing makeshift ramps from which to jump"; and (4) the failure "to provide a reasonably safe condition on its ski slope for its business patrons" at the time of the collision. After a period of discovery, defendant moved for summary judgment on 2 July 1997 and the motion was granted on 2 August 1997. Plaintiff appeals.

Campbell & Taylor, by Jason E. Taylor, for plaintiff-appellant.

Robert E. Riddle, P.A., by Robert E. Riddle, for defendant-appellee.

EAGLES, Chief Judge.

First we consider whether the trial court erred by granting defendant's summary judgment motion. Plaintiff argues that there were genuine issues of material fact as to whether defendant was negligent. We agree.

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. 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) (citations omitted).

To recover damages under a claim for negligence, plaintiff must establish "(1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Waltz v. Wake County Bd. of Education*, 104 N.C. App. 302, 304, 409 S.E.2d 106, 107 (1991) (quot-

ing *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 217, 152 S.E.2d 336, 341 (1967)), *disc. review denied*, 330 N.C. 618, 412 S.E.2d 96 (1992). "[A]s a general proposition, issues of negligence are ordinarily not susceptible to summary adjudication either for or against the claimant." *Phelps v. Duke Power Co.*, 76 N.C. App. 222, 229, 332 S.E.2d 715, 719 (1985), *disc. review denied*, 314 N.C. 668, 336 S.E.2d 401 (1985). The better practice is for the trial court to submit the case to the jury and enter a judgment notwithstanding the verdict if the evidence is insufficient to support the verdict. *Id.*

Here, both parties acknowledge that plaintiff was an invitee at the time of his injury, so the duty defendant owed was one of reasonable care under the circumstances. *Nelson v. Freeland*, 349 N.C. 615, 618, 507 S.E.2d 882, 884 (1998), *reh'g denied*, 350 N.C. 108, —— S.E.2d —— (1999). Next, plaintiff was required to introduce evidence that defendant breached its duty. Here there was contradictory evidence presented by the parties. "Breach of duty," as an element of a negligence claim, occurs when a person fails to conform to the standard required. *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996). General Statute Section 99C-2(c) requires the defendant to "provide adequate ski patrols." In addition, when an unsafe condition is created by a third party, such as a makeshift ramp, plaintiff must show that it has existed for such a length of time that defendant knew or, by exercising reasonable care, should have known of its existence in time to have removed the danger or have given a warning of its presence. *Stafford v. Food World*, 31 N.C. App. 213, 216, 228 S.E.2d 756, 757 (1976), *disc. review denied*, 291 N.C. 324, 230 S.E.2d 677 (1976).

[1] Here, the defendant argues that plaintiff failed to present any evidence that established defendant either knew or reasonably could have known that skiers were jumping off a makeshift snow ramp. We disagree.

Plaintiff presented evidence through his own deposition testimony as well as through Eric Rauch's affidavit that defendant did not have an adequate number of ski patrols on the night of plaintiff's injury. From that evidence arises a material issue of fact as to whether defendant would have known about the makeshift ramp if defendant had an adequate number of ski patrols. Defendant presented affidavits from employees at the summary judgment hearing that denied that defendant was short staffed on the night in question.

Because there is contradictory evidence presented by the parties, there is a genuine issue of material fact as to whether there was adequate ski patrols when plaintiff was hurt.

[2] Next, plaintiff must present evidence that defendant's negligence was the proximate cause of plaintiff's injuries. Defendant argues that plaintiff's accident was not reasonably foreseeable. We disagree.

Plaintiff presented evidence that there was a sign on defendant's property forbidding jumping. The presence of the sign indicates that skiers' jumping was apparently foreseeable. In addition, plaintiff introduced evidence that defendant was understaffed on the night in question which raises the issue of whether the defendant would have noticed the skiers jumping if defendant had adequate employees patrolling the slope. This is a genuine issue of material fact that should have gone to the jury. Finally, plaintiff testified during his deposition that the jumping that was occurring on the night he was injured, was in plain view of the lift operator but that the operator did nothing to stop the skiers from jumping. Accordingly, we hold that there were issues of material fact and that the trial court erred in granting defendant's summary judgment motion.

[3] Finally we consider whether the trial court erred in granting defendant's summary judgment motion on the issue of plaintiff's contributory negligence. Plaintiff argues that he was not contributorily negligent as a matter of law and contends that the issue should have gone to the jury. We agree.

A "nonsuit on the ground of contributory negligence will be granted only when the plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom." *Keener v. Beal*, 246 N.C. 247, 252, 98 S.E.2d 19, 22 (1957). Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment. *Lamm v. Bissette Realty*, 327 N.C. 412, 418, 395 S.E.2d 112, 116 (1990). Only where the evidence establishes plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468-69, 279 S.E.2d 559, 563 (1981).

Here an issue of fact exists as to whether the plaintiff's conduct was reasonable under the circumstances. Whether plaintiff should have recognized the danger of jumping skiers colliding into his per-

son and chosen an alternative path is a question of fact for the jury. Accordingly, the trial court erred in granting defendant's summary judgment motion on the issue of plaintiff's contributory negligence. Reversed and remanded for trial.

Judge HUNTER concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

Because I consider there to have been a number of reasons to grant defendant's motion for summary judgment in this case, I must respectfully dissent.

Plaintiff could establish a valid claim of negligence by showing "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996). If defendant, as the moving party, "prov[es] that an essential element of the opposing party's claim is nonexistent, or [shows] 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). Here, there is no question as to the existence of a duty. I do not think that defendant breached any duty, or that if he did such a breach proximately caused plaintiff's injury.

The majority indicates that plaintiff establishes a breach of duty by defendant through the hearsay statements of plaintiff and his friend that defendant had an inadequate number of ski patrols on the night in question. Such a bare allegation is too sweeping to go forward at this stage. Our Supreme Court has stated that "[n]egligence is not presumed from the mere fact of injury. Plaintiff is required to offer legal evidence tending to establish *beyond mere speculation or conjecture* every essential element of negligence, and upon failure to do so, nonsuit is proper." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992) (emphasis added). Plaintiff presents no evidence beyond his speculative generalizations to

demonstrate just how many ski patrols would be adequate to keep him from harm.

The evidence that defendant's alleged negligence proximately caused plaintiff's injury is similarly insufficient for plaintiff to go forward with his case. Our Supreme Court has summarized the law regarding proximate cause as follows:

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (citations omitted). "A defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable." *Id.* at 234, 311 S.E.2d at 565. When the facts are established, a court must determine as a matter of law whether negligence exists. *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E.2d 457, 461 (1972).

Based on the facts established in this case, I would determine as a matter of law that any negligence by defendant was not the proximate cause of plaintiff's injury. While we now know that it was possible for a person or persons to pack snow into a makeshift ramp off the slope and jump from it into other skiers on the slope itself, this accident was not reasonably foreseeable. To say that plaintiff's injury in a collision with another skier from outside the slope could have been prevented by having some unknown number of ski patrols employed to discover a ramp constructed off the actual ski slope, unnoticed by plaintiff and unreported by every other skier that night, is for this Court to make an improvident jump down the slope of causation.

The majority is misguided in its analysis of proximate cause. The mere presence of a sign forbidding something does not make it reasonably foreseeable that the forbidden activity will occur, leaving the proprietor posting the sign liable if the event happens to take place. The majority's approach would seemingly require every establish-

ment prohibiting, for example, the carrying of concealed weapons to provide enough security personnel and metal detectors to ensure that no such weapons were brought on the premises. That is not a burden I wish to place on businesses, government offices, or public places in this state. Furthermore, the majority's statement that plaintiff "introduced evidence" of defendant's understaffing is a misstatement. The plaintiff introduced "mere speculation or conjecture," *see Roumillat*, but no substantive evidence on this issue. Finally, plaintiff's testimony as to what the ski lift operator saw is unpersuasive for at least two reasons. First, if the operator could have seen the purported jumping, we should learn this in the operator's testimony and not through plaintiff's theory on what the operator might have seen. There was no testimony from the ski lift operator in the record, and it is not our place to create such testimony based on what plaintiff thinks the operator might have seen. Second, if plaintiff could see what the operator could see, it would seem to be a more efficient use of time to eliminate the middle man and have plaintiff report the jumping instead of waiting on the operator to do so. Instead, no one made any reports of any jumping from this makeshift snow bank ramp that night.

It is also worth noting that defendant was not the only party to this action with a statutory duty of care on the ski slopes. Plaintiff had the responsibility

> (1) [t]o know the range of his own abilities to negotiate any ski slope or trail and to ski within the limits of such ability; [and]
>
> (2) [t]o maintain control of his speed and course at all times when skiing and *to maintain a proper lookout so as to be able to avoid other skiers* . . . .

N.C. Gen. Stat. § 99C-2(b) (1985) (emphasis added). "[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). "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).

Plaintiff had a statutorily imposed duty to be on the lookout for other skiers, and it cannot be seriously contended that the ski patrol was more responsible than plaintiff was for his own safety. Assuming *arguendo* that defendant somehow was negligent as a ski slope operator on the night in question, plaintiff's failure to take greater caution when participating in an activity such as night skiing than he did on the night in question demonstrates a lack of ordinary care. This "want of ordinary care was at least one of the proximate causes of the injury," *id.*, and plaintiff's contributory negligence is a bar to recovery.

In his complaint, plaintiff claims defendant "failed to enforce its rules and regulations governing jumping on the ski slopes" and to warn others of the construction of makeshift ramps, but neither he nor anyone else claimed to have seen any jumping or ramps prior to the accident. Plaintiff also claims defendant was understaffed at the time, but fails to demonstrate how having a larger staff could have made the only accident of this nature on this night foreseeable. Finally, plaintiff claims defendant "failed to provide a reasonably safe condition on its ski slope for its business patrons" at the time of the collision, but admits that the makeshift ramp in question was actually formed off the slope itself. In short, plaintiff fails to establish that any negligence by defendant proximately caused him to be injured.

Plaintiff may have a claim for his injuries, but the proper defendant is the skier who collided with him on the night in question. The identity of that skier is unknown, and it is doubtful that his pockets are as deep as defendant's, but that does not make defendant the proper party to this action. I will not be a party to a holding that enables every skier who is hurt on a slope to sue the proprietors of that slope on the bare allegation that some unknown number of patrols should have been provided to ensure that he need not watch out for himself and his surroundings. Such a holding not only is inappropriate in light of the facts before this Court, but also has the potential to devastate the businesses and communities of western North Carolina that depend on skiing and tourism for their economic livelihood.

For all of these reasons, I would affirm the trial court's grant of summary judgment in favor of defendant.

DAVID T. BUCKINGHAM, PLAINTIFF v. CYNTHIA B. BUCKINGHAM, DEFENDANT

No. COA98-436

(Filed 6 July 1999)

1. **Judgments— consent—consent withdrawn between signed memorandum and formal judgment**

A consent judgment memo was a final judgment where it was not merely rendered in open court, but was a document which was represented by the parties as their full agreement, presented to the court, signed by the parties and the judge, and filed by the clerk of court. The directive for a "final order" was only contained in the order so that a more formal entry of judgment would be entered into the records and that second, more formal document was merely surplusage. Plaintiff's attempt to rescind his consent between the judgment memo and the formal entry of judgment was ineffectual.

2. **Child Support, Custody, and Visitation— custody—consent judgment—findings not required**

The trial court did not err by entering a consent order for child custody which contained neither findings of fact nor conclusions of law related to custody. While findings of fact and conclusions of law are clearly necessary in an adjudication of child custody, they are not necessary when a consent judgment is rendered.

3. **Appeal and Error— preservation of issues—no written order denying motion**

An assignment of error in a child custody action to the denial of motions for revision prior to final judgment and for relief from final judgment was dismissed where the record did not contain a written order denying the motions.

Appeal by plaintiff from judgment entered 20 January 1998 by Judge L. W. Payne in Wake County District Court. Heard in the Court of Appeals 24 February 1999.

Wyrick Robbins Yates & Ponton LLP, by Robert A. Ponton, Jr. and Alexandra M. Hightower for plaintiff-appellant.

Gailor & Associates, P.L.L.C., by Carole S. Gailor and Kimberly A. Wallis for defendant-appellee.

HUNTER, Judge.

Plaintiff David T. Buckingham appeals the entry of a consent agreement on 14 October 1997 and final order entered 20 January 1998. The dispositive issue in this case concerns whether or not a memo of consent judgment, which has been signed by the parties and judge, and entered into the court record, is valid as a final judgment on the issue of child custody. Additionally, we will consider whether child custody consent judgments must contain findings of fact and conclusions of law.

The evidence indicates that plaintiff, David T. Buckingham, and defendant, Cynthia B. Buckingham, were married on 3 January 1993. The parties had one child during the course of their marriage, Anne Elizabeth Buckingham, who was born 7 January 1995. The parties separated on 5 November 1996, and plaintiff filed a verified complaint for divorce from bed and board and motion for custody on 6 November 1996. The parties attended mandatory mediation on the issue of custody, and it was unsuccessful. Plaintiff and defendant consented to psychiatric and psychological evaluations which were completed and reports issued prior to the trial date of 14 October 1997.

On 14 October 1997, plaintiff and defendant signed a document entitled "Memo of Consent Judgment" ("consent judgment memo") in which the parties consented to joint legal custody of the minor child, with the defendant maintaining primary physical custody. The consent judgment memo stipulated the terms of plaintiff's secondary custody of the minor child, custody of the child during holidays, religious rearing of the child, counseling and mediation regarding additional visitation of the child with plaintiff, and other miscellaneous matters. On the same day, the parties appeared before Judge L. W. Payne in Wake County District Court, and represented to him that they both consented to his signing the consent judgment memo and a final judgment which would contain identical terms and conditions. The consent judgment memo contained neither findings of fact nor conclusions of law as to the fitness of either parent nor the best interests of the child. Both parties and their attorneys signed the consent judgment memo, as did Judge Payne, who signed it as "approved." The consent judgment memo was filed with the Wake County Clerk of Court at 4:45 p.m. on 14 October 1997.

On the final hearing date of 5 January 1998, plaintiff filed with the court, and served on defendant, objections to a final judgment as well

as motions pursuant to Rule 54(b) for revision prior to final judgment, and Rule 60 for relief from final judgment or order. Plaintiff objected to the entry of final judgment on the basis that he no longer consented to the terms of the consent judgment memo, and that a formal order without findings of fact and conclusions of law would be invalid. The trial court overruled plaintiff's objections. Thereupon plaintiff asked the court to permit him to offer the testimony of Dr. George Corwin as an offer of proof in support of his Rule 54(b) motion. The court sustained defendant's objection to this testimony. A document captioned "Consent Judgment for Permanent Custody" was signed at 10:00 a.m. as of 5 January 1998, *nunc pro tunc* 14 October 1997, but was stricken that same day because it contained findings of fact and conclusions of law which were not contained in the consent judgment memo.

Plaintiff filed an offer of proof and notice of hearing on 7 January 1998. On 20 January 1998, Judge Payne allowed the testimony of Dr. Corwin, but only as an offer of proof in support of plaintiff's motions. Dr. Corwin testified that he disagreed with the conclusion of the court-ordered evaluations as to the fitness of defendant as the child's primary physical custodian. Dr. Corwin stated that he based his opinion solely on the review of defendant's previous medical history; that he was retained by plaintiff in August 1997 and relayed his opinions to plaintiff's counsel in September 1997; and, that he did not consider any information regarding defendant's mental or emotional status after 14 October 1997. Apparently, plaintiff did not learn of Dr. Corwin's opinion regarding the fitness of defendant until a 3 November 1997 meeting with him. The court entered an order captioned "Consent Order for Permanent Custody" on 20 January 1998 which stated that judgment was rendered on 14 October 1997 and signed 20 January 1998. Plaintiff appeals.

[1] Plaintiff first contends that the trial court committed reversible error in entering the "Consent Order for Permanent Custody" on 20 January 1998, when plaintiff had filed motions objecting to entry of final judgment and a notice of hearing on entry of judgment. Plaintiff argues that he did not consent to the order of 20 January 1998; therefore, the order is not effective.

Plaintiff does not dispute that he and the defendant both consented to the consent judgment memo which was presented to the court on 14 October 1997, signed by Judge Payne as "approved," and filed by the clerk of court. 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 (Supp. 1998). Defendant argues that applying the plain language of this rule to the facts in this case, judgment was entered on 14 October 1997. We find defendant's argument persuasive. The consent judgment memo states, in part:

> This memo is made and entered into between [plaintiff] and [defendant] as a complete settlement of all issues outstanding between them with regard to Child Custody, retroactive Child Support, Post Separation Support/Alimony and attorney fees and other costs in that matter now pending and set for trial on October 14, 1997 . . . . In that regard the parties have agreed as follows:
>
> 1. That this memo shall be received by the District Court as the memo of their agreement to be entered by the court with the consent of the parties. A formal order containing the terms of this Memo of Judgment shall be prepared by [plaintiff's attorneys] to be approved by [defendant's attorneys] and then signed as the final order by the court with regard to the issues set forth in the memo.

While, according to the consent judgment memo, some additional issues were to be mediated, it stipulated that:

> e. The issue of primary and secondary custody and other issues is not open to negotiation/mediation unless either party files a Motion to Change Custody. The burden of proof shall be a substantial change of circumstances adversely affecting the child.

It is clear from the language of the memo that both parties consented to its terms, which were to be binding and promulgated as an order of the court. "[T]he power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." *Milner v. Littlejohn*, 126 N.C. App. 184, 187, 484 S.E.2d 453, 456, *review denied*, 347 N.C. 268, 493 S.E.2d 458 (1997) (*quoting Brundage v. Foye*, 118 N.C. App. 138, 140, 454 S.E.2d 669, 670 (1995)). While plaintiff concedes that consent existed at the time the consent judgment memo was signed and entered into court records, he attempts to persuade this Court that the consent judgment memo was

not binding as a final judgment. Our review of similar cases indicates otherwise.

Like the present parties, the plaintiff and defendant in *Stevenson v. Stevenson*, 100 N.C. App. 750, 398 S.E.2d 334 (1990), announced to the court at their trial date that they had reached an agreement on the issues which were to be brought before it; however, they did not submit any memo to the court. Counsel for the plaintiff read certain provisions of the agreement into the record, including that plaintiff was to have sole possession of the marital home and the value of the home would be assessed through a certain formula which included a deduction in the value based on a loan to the parties from defendant's employer connected with the purchase of their home. *Id.* The trial court admonished the attorneys to draft an artful order, and after several revisions, a final draft, which both parties and their attorneys signed, was submitted to the court and filed 6 July 1988. *Id.* This judgment made no mention of the provision read into the record on the trial date which specified that the loan from defendant's employer would be included in the formula for computing the value of the parties' home; however, the Court stated:

> While in this case, there is clear evidence of a prior contrary oral agreement, there are no findings in the trial court's order which would establish that plaintiff and her attorney were mistaken as to the effect of the language of the agreement and that defendant was aware of this mistake at the time the consent judgment was signed. Our review of the record likewise reveals insufficient evidence to support such a conclusion. The agreement was altered many times by both parties. It should be enforced as written.

Id. at 753, 398 S.E.2d at 336. Because the parties in *Stevenson* did not submit a written agreement at their trial date, and revised the proposed order several times, it is apparent that they only had a partial agreement at the time they originally appeared before the trial court. To the contrary, the parties in the present case had made a full agreement on the trial date and represented it as such to the court.

In another similar case, *Blee v. Blee*, 89 N.C. App. 289, 365 S.E.2d 679 (1988), the parties and their attorneys represented to the court that a written agreement had been reached and signed by the parties; however, certain provisions were not in "writing" and plaintiff read them into the record. *Id.* at 291-92, 365 S.E.2d at 681. The written agreement was made part of a formal judgment signed by the judge approximately four months later, on 8 September 1986; however,

defendant filed a motion on 17 September 1986 pursuant to Rule 60(b) for relief from the judgment on the grounds that he withdrew his consent prior to the time the formal order was entered. The motion was granted, but this Court reversed that decision, stating:

> While we realize the better practice would be for the formal judgment to be prepared and signed immediately after the hearing, such is seldom, if ever, possible or practical, and it is not necessary or required by our rules. It would be a travesty to say that a party to a judgment so solemnly promulgated and entered as the one depicted by this record could repudiate that judgment at any time after the judgment was entered. Defendant's efforts three days later to repudiate the judgment are of no effect whatsoever.

Id. at 293, 365 S.E.2d at 682. The Court in *Blee* relied on the former version of Rule 58, which provided

> where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

Id. at 292-93, 365 S.E.2d at 681-82. On this basis the Court held that "the record before us manifests that a judgment was promulgated and entered by Judge Long on 13 June 1986, and the signing thereof on 8 September 1986 merely memorialized said judgment." *Id.* at 293, 365 S.E.2d at 682. Rule 58 has been modified since *Blee* in that judgments in open court are no longer considered final judgments. However, unlike that case, the judgment here was not merely rendered in open court. Rather, a document represented by the parties to be their full agreement was presented to the court, signed by the parties, and filed by the clerk of court. As stated in *Blee*, it would be a better practice to have the formal order drafted at the time the parties present a "memo of agreement;" however, oftentimes parties reach settlement just prior to or on the date of trial. Nevertheless, if a consent agreement is presented to the court by the parties who express their consent, is approved by the court and filed with the clerk of court, the agreement is a final judgment pursuant to Rule 58 of the North Carolina Rules of Civil Procedure.

Accordingly, we conclude that the consent judgment memo filed on 14 October 1997 is a final judgment. While the consent judgment memo states that a "final order" would be entered, the record reveals

that the order of 20 January 1998 is identical in its terms and provisions as the consent judgment memo. Apparently, the directive for a "final order" was only contained in order for a more formalized document to be entered into court records. Therefore, the entry of judgment on 20 January 1998 was merely surplusage to the final judgment of 14 October 1997. Plaintiff's attempt to rescind his consent after that date is ineffectual, as he concedes consent existed at the time the 14 October 1997 judgment was rendered. A consent judgment is not only a judgment of the court but is also a contract between the parties and "[i]t cannot be amended without showing fraud or mutual mistake, which showing must be by a separate action, or by showing the judgment as signed was not consented to by a party, which showing may be by motion in the cause." *Cox v. Cox*, 43 N.C. App. 518, 519, 259 S.E.2d 400, 401-02 (1979), *review denied*, 299 N.C. 329, 265 S.E.2d 394 (1980). Accordingly, we find no error.

[2] Plaintiff next contends that the trial court committed reversible error in signing the "Consent Order for Permanent Custody" of 20 January 1998 because the document contained neither findings of fact nor conclusions of law related to the custody of the parties' minor child. Because we have ruled that the consent judgment memo of 14 October 1997 was actually the final judgment, we will apply plaintiff's assignment of error to that document.

This Court has held that in a proceeding for custody and support of a minor child, the trial court is required to "find the facts specially and state separately its conclusions of law thereon and direct entry of appropriate judgment." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156, 231 S.E.2d 26, 28 (1977) (*citing* N.C. Gen. Stat. § 1A-1, Rule 52 (a)(1)). Additionally, N.C. Gen. Stat. § 50-13.2 mandates that:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. . . .

N.C. Gen. Stat. § 50-13.2(a) (Supp. 1988). The trial court is required to find the specific ultimate facts to support the judgment, and the facts

found must be sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence. *Montgomery*, 32 N.C. App. at 156-57, 231 S.E.2d at 28.

While findings of fact and conclusions of law are clearly necessary in an adjudication of child custody, a review of existing precedent indicates that they are not necessary when a consent judgment is rendered. Permanent custody orders arise in one of two ways: (1) the trial court enters a consent decree which contains the agreement of the necessary parties, or (2) after a hearing of which all parties so entitled are notified and at which all parties so entitled are given an opportunity to be heard, the court issues an order resolving a contested claim for permanent custody of a child. *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998) (citations omitted). While the welfare of the child is the paramount consideration which must guide the court in a custody decision and findings of fact regarding the competing parties must be made to support the necessary legal conclusions, the trial "court need *only find those facts which are material to the resolution of the dispute.*" *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990), *aff'd*, 328 N.C. 324, 401 S.E.2d 362 (1991) (emphasis added) (*citing Green v. Green*, 54 N.C. App. 571, 284 S.E.2d 171 (1981)). An order of permanent custody based on consent of the parties does not involve adjudication or resolution of the merits of the case. Any judgment by consent

> is the agreement of the parties, their decree, entered upon the record with the sanction of the court. It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the preexisting agreement of the parties. It acquires the status of a judgment, with all its incidents, through the approval of the judge and its recordation in the records of the court.

McRary v. McRary, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948) (citations omitted). This Court specifically stated that a consent judgment need not contain findings of fact or conclusions of law in *In re Estate of Peebles*, 118 N.C. App. 296, 454 S.E.2d 854 (1995):

> [A] consent judgment is "merely a recital of the parties' agreement and not an adjudication of rights." This type of judgment does not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties.

Id. at 300, 454 S.E.2d at 857 (citations omitted). While N.C. Gen. Stat. § 1A-1, Rule 52 and N.C. Gen. Stat. § 50-13.2 mandate that findings of

fact and conclusions of law be made when a court adjudicates child custody, those statutes anticipate an adjudication by the court. As previously stated by this Court:

> A statutory mandate which contemplates the production of a trial record sufficient to permit proper appellate review should not be held to apply automatically to a consent judgment which ends litigation, and, by its very nature, contemplates no appellate review. Rather, a consent judgment should be examined more generally to see if it is fair, if it does not contradict statutory or judicial policy.

Cox v. Cox, 36 N.C. App. 573, 575-76, 245 S.E.2d 94, 96 (1978). Additionally, it is a settled principle of law in this state that a consent judgment is the contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval, and persons *sui juris* have a right to make any contract not contrary to law or public policy. *Wachovia Bank v. Bounous*, 53 N.C. App. 700, 281 S.E.2d 712 (1981). *See Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983); *Ross v. Voiers*, 127 N.C. App. 415, 490 S.E.2d 244 (1997). Therefore, the court should review a consent judgment to ensure that it does not contradict statutory, judicial, or public policy, but it need not make findings of fact or conclusions of law. When parties enter into an agreement and ask the court to approve the agreement as a consent judgment, they waive their right to have the court adjudicate the merits of the case. In the present case, the parties did not wish for the court to adjudicate child custody, having resolved that issue between them. Therefore, the court has no duty to make findings of fact or conclusions of law as to the child's best interest when it approved the parties' agreement. Accordingly, we find no merit to plaintiff's second assignment of error.

[3] Finally, plaintiff contends that the trial court committed reversible error in failing to grant plaintiff's motions made pursuant to Rule 54(b) and Rule 60 of the North Carolina Rules of Civil Procedure.

The record reveals that the trial court allowed Dr. Corwin to testify only as an offer of proof for plaintiff's motions. "[F]or a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Love*, 131 N.C. App. 350, 357, 507 S.E.2d 577, 583 (1998) (*quoting State v. Simpson*, 314

N.C. 359, 370, 334 S.E.2d 52, 60 (1985)). Plaintiff has not assigned error to the exclusion of Dr. Corwin's evidence. Furthermore, there is no indication that the trial court considered his testimony proffered or plaintiff's Rule 54(b) or Rule 60 motions, as the record does not reveal any order by the trial court in this regard. Rule 9(h) of the North Carolina Rules of Appellate Procedure provides that the record on appeal must contain "a copy of the judgment, order, or other determination from which appeal is taken." N.C.R. App. P. 9(h) (1998). In order to preserve a question for appellate review, the complaining party must "obtain a ruling upon the party's request, objection or motion." N.C.R. App. P. 10(b)(1) (1998). The Rules of Appellate Procedure are mandatory. *Sessoms v. Sessoms*, 76 N.C. App. 338, 332 S.E.2d 511 (1985). Because the record in this case does not contain a written order denying plaintiff's motions, such order was not entered by the trial court. *State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388 (1999) (*citing State v. Williams*, 280 N.C. 132, 137, 184 S.E.2d 875, 878 (1971) (noting that the appellate courts are "bound by the record as certified and can judicially know only what appears of record")). Accordingly, this assignment of error is dismissed.

Affirmed.

Judges MARTIN and McGEE concur.

CONCRETE MACHINERY COMPANY, INC., PLAINTIFF-APPELLEE v. CITY OF HICKORY, DEFENDANT-APPELLANT

No. COA98-1267

(Filed 6 July 1999)

1. Easements— sewer line rebuilt—partially outside existing easement—no writing

The trial court did not err by concluding that a taking had occurred in an action arising from the rebuilding of a sewer line partially outside the existing easement where the City contended that the property owner had orally agreed to relocate the sewer line. There was no written document or memorandum showing an alteration of the original easement or the creation of a new easement and no indication in the record that the City Council had authorized the relocation or abandonment of the easement.

2. Appeal and Error— appealability—interlocutory order—substantial right—not appealed immediately

In an action arising from the rebuilding of a sewer line partially outside the original easement, the court's conclusion that a taking had occurred affected a substantial right and the City was required to appeal within 30 days. The Court of Appeals nevertheless reviewed the issue in the interests of judicial economy and found it without merit.

3. Eminent Domain— interest—prudent investor—fourteen percent

The trial court did not err in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding fourteen percent interest after concluding that a taking had occurred where the court determined the return a prudent investor would reasonably realize based upon an investment one-half in certificates of deposit and one-half in the stock market. The statutory rate is presumptively reasonable under the prudent investor standard, but the owner shall be put in as good a position as if the property had not been taken and may demonstrate that the prevailing rates are higher than the statutory rate. Plaintiff here introduced evidence indicating a reasonable rate of return between 7.2 percent and 28.8 percent, while the City offered no evidence.

4. Eminent Domain— interest—prudent investor—compound interest

The trial court did not err in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding compound interest. Compound interest is warranted in condemnation cases if the evidence shows that the prudent investor could have obtained compound interest in the marketplace and the uncontradicted evidence here was that interest compounded annually could be realized by the prudent investor in today's financial markets.

5. Eminent Domain— interest—rate—date of judgment to satisfaction

The trial court erred in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding fourteen percent interest compounded annually from the date of the taking to the time the judgment is satisfied. Awarding four-

teen percent interest after the date of judgment would be speculative and N.C.G.S. § 40A-53 specifically provides for interest in eminent domain actions from the date of judgment until its satisfaction at six percent.

6. Eminent Domain— attorney fees—findings required

The award of attorney fees in a condemnation was remanded where the court did not make the findings required by N.C.G.S. §§ 40A-8(b) and (c).

Appeal by defendant from judgment entered 18 May 1998 by Judge Marcus L. Johnson in Catawba County Superior Court. Heard in the Court of Appeals 10 June 1999.

Hamel, Hicks, Wray & Brown, P.A., by William L. Sitton, Jr., Esq., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Sara R. Lincoln and Jeffrey A. Doyle, for defendant-appellant.

SMITH, Judge.

Plaintiff, Concrete Machinery Company, Inc. (CMC) is a private corporation located within the City of Hickory (City). City is a municipal corporation duly organized and existing under the laws of this state. The record tends to show that on 30 April 1959, (CMC) granted the City a permanent, 25-foot-wide easement for the purpose of constructing, maintaining, repairing and enlarging a sanitary sewer line. In late May 1996, the City discovered that sections of the sewer line within the permanent easement had collapsed and needed repair. The City contends that prior to beginning the repair work on the sewer line, CMC orally consented to a relocation of the pre-existing 1959 easement. CMC denies this contention.

The City rebuilt the sewer line between 4 June 1996 and 14 June 1996. The record indicates that the new sewer line location deviated from the pre-existing line by approximately 300 lineal feet, whereby approximately 275 lineal feet of the new sewer line was outside the 1959 easement. During construction of the new sewer line, the City stored sewer pipes, construction equipment and excavated contaminated soil on CMC's property. Additionally, CMC's use of its paved driveway and parking lot became "totally restricted" and the pavement was subsequently destroyed by the placement of the new sewer line and the operation of heavy construction equipment.

CMC submitted written quotes to the City for repair work in repaving the driveway and parking lot. The City, however, refused to pay for the repairs, and CMC filed this action pursuant to N.C. Gen. Stat. § 40A-51 (1984), alleging that construction of the new sewer line outside the boundaries of the 1959 easement constituted a taking under the fifth amendment to the United States Constitution, and Article I § 19 of the North Carolina Constitution. Following a hearing, the trial court determined that the City's construction of the new sewer line outside the boundaries of the 1959 easement constituted a taking as a matter of law, and ordered that damages be the sole issue to be determined by the jury at trial, as provided by N.C. Gen. Stat. § 40-47A (1984). A jury awarded CMC $97,903.00 in damages representing the value of the property taken for construction of the new sewer line. Finding that the jury had awarded compensation in this inverse condemnation, the trial court subsequently awarded $8,949.00 in expert and appraisal fees; $50,527.10 in attorneys' fees; and interest on the entire judgment at a rate of fourteen percent compounded annually until the judgment is satisfied. Defendant appeals.

On appeal, defendant brings forth the following assignments of error: (I) there was insufficient evidence to support the trial court's ruling that a taking had occurred; (II) the fourteen percent interest rate awarded by the trial court was unreasonable and contrary to North Carolina law; and (III), the attorneys' fees awarded to CMC were unreasonable and contrary to the laws of North Carolina.

I.

"Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

The City assigns error to the trial court's determination that the placement of the sewer line outside the 1959 easement constituted a taking as a matter of law. The City's first assignment of error is based on two sub-issues.

[1] In the first sub-issue the City contends that CMC orally agreed to relocate the sewer line outside the 1959 easement. North Carolina law requires that contracts or deeds purporting to convey an easement be in writing. *Tedder v. Alford*, 128 N.C. App. 27, 493 S.E.2d 487 (1997), *disc. review denied*, 348 N.C. 290, 501 S.E.2d 917 (1998).

The North Carolina Statute of Frauds provides in pertinent part: 'All contracts to sell or convey any lands, tenements or heredita-

> ments, *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.'
>
> As an interest in land, *an easement is subject to the statute of frauds*. Thus, North Carolina law requires that a contract or deed purporting to convey an easement be in writing . . .[.] The burden of proving that a sufficient writing exists memorializing the conveyance of the easement is on the party claiming its existence.

Id. at 31, 493 S.E.2d at 489-90 (footnotes omitted) (emphasis added).

Further, "[a]ll contracts made by or on behalf of a City shall be in writing, and if not so written, shall be void and unenforceable." N.C. Gen. Stat. § 160A-16 (1994). In addition, the law provides that cities, as municipal corporations, are vested with all of the property and rights in property belonging to the corporation, whereby all powers, functions, rights, etc. of the corporation shall be exercised by the City council and carried into execution as provided by law. N.C. Gen Stat. §§ 160A-11 (1994), 160A-12 (1994), 160A-67 (1994). Thus, changes in use, or City action effectuating the sale or disposition of real or personal property belonging to the City can only be ordered or approved by the City council. N.C. Gen Stat. § 160-265 (1994).

Assuming *arguendo* that CMC did in fact orally consent to the modification of the 1959 easement, the oral agreement to relocate would nonetheless be unenforceable because the Statute of Frauds requires that the conveyance of all interests in real property be in writing. *See* N.C. Gen. Stat. § 22-2 (1986). Additionally, as an interest in real property, the purported relocation of the 1959 easement could have only been effectuated by action of the Hickory City council.

After reviewing the record, we find no written document or memorandum showing an alteration of the 1959 easement or the creation of a new easement. Similarly, there is no indication in the record that the City council authorized the relocation or abandonment of the 1959 easement. In fact, in oral argument before this Court, counsel for both the City and CMC acknowledged that the City council did not authorize relocation of the 1959 easement. Thus, the trial court's determination that the City abandoned the 1959 easement was in error. There being no evidence in the record of a valid modification or agreement to modify the 1959 easement, we find this sub-issue to be without merit and it is dismissed.

[2] Secondly, the City contends that the trial court erroneously concluded that the City's actions constituted a taking. Pursuant to N.C. Gen. Stat. § 40A-47 (1984), "the judge upon motion, shall hear and determine any and all issues raised by the pleadings other than the issue of compensation, including the condemnor's authority to take." Pursuant to N.C. Gen. Stat. § 40A-47, the trial court ruled on 30 March 1998, as a matter of law, that the City's placement of the new sewer line outside the 1959 easement constituted a taking. After the trial court determined there was a taking, it subsequently became the final law of the case. *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967). "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." *Id.* at 13, 155 S.E.2d at 783. "Appeals in civil actions are governed by N.C. Gen. Stat. § 1-277, which permits an appeal from every judicial order involving a matter of law which affects a substantial right." *Id.* at 13, 155 S.E.2d at 783. For an interlocutory order to be immediately appealable under North Carolina law, it must: (1) affect a substantial right, and (2) work injury if not corrected before final judgment. *Id.* at 13, 155 S.E.2d at 783.

Our Supreme Court has adopted the definition of "substantial right" as: "a right materially affecting those interests which a man is entitled to have preserved and protected by law[.]" *Ostreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976). The trial court's determination that the City's placement of the sewer line outside the 1959 easement constituted a taking affected the defendant's substantial rights and was immediately appealable. It would be an act of futility and injurious to the interests of the City to otherwise compel it to proceed through trial on the issue of damages if the trial court's initial determination that a taking had occurred was in error.

In the case of the *Dep't of Transp. v. Rowe*, 131 N.C. App. 206, 505 S.E.2d 911 (1998), *disc. review allowed*, 350 N.C. 93, —— S.E.2d —— (1999), this Court held that interlocutory orders which effect a substantial right of the defendant require an immediate appeal of the order. Pursuant to N.C.R. App. P. 3(c), "[a]ppeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry." "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

PAMELA BRISSON AND DALLAS BRISSON, PLAINTIFFS v. KATHY A. SANTORIELLO, M.D., P.A., AND KATHY A. SANTORIELLO, M.D., DEFENDANTS

No. COA98-822

(Filed 6 July 1999)

Statute of Limitations— medical malpractice—amendment to original complaint denied—action dismissed and refiled

The trial court erred by entering judgment on the pleadings for defendant in a medical malpractice action based upon the statute of limitations where plaintiffs' initial complaint did not comply with N.C.G.S. § 1A-1, Rule 9(j), defendants filed a motion to dismiss, plaintiffs filed a motion to amend and attached a proposed amended complaint, the trial court denied the motion to amend but allowed plaintiffs' to take a voluntary dismissal without prejudice prior to ruling on the motion to dismiss, plaintiffs refiled their complaint, and defendant's new motion for judgment on the pleadings based upon the statute of limitations was granted. N.C.G.S. § 1A-1, Rule 15(a) provides that a party may amend his pleading once as a matter of course before a responsive pleading is served and defendant had not filed any responsive pleading when plaintiffs filed their motion to amend and proposed amended complaint. Plaintiffs were not required to seek the court's permission to amend their complaint and the ruling prohibiting the amendment was error. The original complaint unquestionably gave notice of the transactions and occurrences plaintiffs sought to establish pursuant to the amended complaint, so that the amended complaint related back to the filing of the original and fell within the statute of limitations. This case can be distinguished from *Estrada v. Burnahm*, 316 N.C. 318, and *Robinson v. Entwistle*, 132 N.C. App. 519.

Appeal by plaintiffs from order entered 26 February 1998 by Judge Coy E. Brewer, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 24 February 1999.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Charles George, and Law Office of Thomas M. Lavigne, by Thomas M. Lavigne, for plaintiffs-appellants.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Pamela and Dallas Brisson ("plaintiffs") appeal from an order granting Kathy A. Santoriello, M.D., P.A. and Kathy A. Santoriello, M.D. ("defendants") judgment on the pleadings in plaintiffs' action for medical malpractice and loss of consortium. For the reasons given in the following analysis, we vacate the order of the trial court and remand for further appropriate proceedings.

On 27 July 1994, Dr. Santoriello, an OB/GYN practicing in Fayetteville, North Carolina, performed an abdominal hysterectomy on plaintiff Pamela Brisson. Several months after the surgery was conducted, plaintiff Pamela Brisson discovered an obstruction of her vaginal canal that prevented her from engaging in sexual intercourse. On 3 June 1997, plaintiffs filed a complaint against defendants alleging claims for medical malpractice and loss of consortium arising out of Dr. Santoriello's performance of the abdominal hysterectomy. However, the complaint did not comply with the following requirement of Rule 9(j) of the North Carolina Rules of Civil Procedure:

> Any complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care . . . shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C.R. Civ. P. 9(j). Based on this omission, defendants filed a Rule 12(b)(6) motion to dismiss the complaint on 21 August 1997.

On 30 September 1997, plaintiffs filed a motion to amend their complaint and attached a Proposed First Amended Complaint that included the following allegation:

> 9. An expert, who is reasonably expected to qualify as an expert under Rule 702 of the Rules of Evidence, has reviewed plaintiff's medical care, and is willing to testify that said medical care does not meet the applicable standard of care, referenced in paragraph seven.

A hearing on defendants' motion to dismiss and plaintiffs' motion to amend was held before the Honorable D.B. Herring on 6 October

1997. After hearing oral arguments of counsel, Judge Herring denied plaintiffs' motion to amend but allowed plaintiffs to take a voluntary dismissal without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, prior to ruling on defendants' motion to dismiss.

Plaintiffs filed a notice of voluntary dismissal on 6 October 1997 and refiled their action on 9 October 1997. In their second complaint, plaintiffs included the appropriate Rule 9(j) certification. On 20 October 1997, defendants moved for entry of judgment on the pleadings on the grounds that the claims alleged in plaintiffs' complaint were barred by the applicable statutes of limitations and repose. Defendants noticed the matter for hearing at the 8 December 1997 civil session of Cumberland County Superior Court, and on 18 December 1997, Judge Herring entered an order continuing the hearing until 12 January 1998, based, in part, on Judge Herring's decision to recuse himself from the case.

By order entered 9 February 1998, Judge Orlando F. Hudson, Jr. granted defendants' motion for judgment on the pleadings, based on the court's determination that the statute of limitations barred plaintiffs' claims. Plaintiffs filed motions for relief under Rule 60(b) from the 6 October 1997 order of Judge Herring and the 9 February 1998 order of Judge Hudson based on excusable neglect. Both motions were denied, and plaintiffs appeal.

Plaintiffs bring forth three assignments of error on appeal. However, because plaintiffs have withdrawn two of their assignments of error, we need only address the one remaining, wherein plaintiffs contend that the trial court erred in granting defendants' motion for judgment on the pleadings. Plaintiffs argue that this ruling was error, because the causes of action alleged in the second complaint were not barred by the applicable statute of limitations. We agree.

Under Rule 12(c) of the North Carolina Rules of Civil Procedure, the trial court may, upon review of the pleadings, dispose of claims or defenses when their lack of merit is apparent on the face of the pleadings. *Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 659, 507 S.E.2d 923, 926 (1998). Judgment on the pleadings pursuant to Rule 12(c) is proper where all material questions of fact are resolved in the pleadings, and only issues of law remain. *Id.* In deciding a motion for judgment on the pleadings, the trial court must consider the facts and permissible inferences in the light most favorable to the

non-moving party, accepting all well-pleaded factual allegations of the non-moving party as true. *Id.* If, after undertaking such an examination, the court determines that the moving party is entitled to judgment as a matter of law, entry of judgment on the pleadings in favor of the moving party is appropriate. *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987).

A motion for judgment on the pleadings under Rule 12(c) is an appropriate vehicle for dismissing claims barred by the statute of limitations. *Aetna Casualty and Surety Co. v. Anders*, 116 N.C. App. 348, 447 S.E.2d 504 (1994). Section 1-15(c) of the North Carolina General Statutes is the statute of limitations applicable to claims for medical malpractice and provides that such claims must be brought within three years of the last negligent act of the defendant-physician. N.C. Gen. Stat. § 1-15(c) (1996).

In the present case, Dr. Santoriello performed the abdominal hysterectomy surgery about which plaintiffs complain on 27 June 1994. Plaintiffs filed their original complaint for medical malpractice and loss of consortium on 3 June 1997, well within the three-year statute of limitations period. This complaint, however, failed to comply with the Rule 9(j) certification requirement. Therefore, defendants filed a motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. Plaintiffs, operating under the erroneous belief that they needed to obtain leave of court to amend their complaint, filed a motion to amend and a Proposed First Amended Complaint that fully complied with the Rule 9(j) certification requirement. The trial court denied plaintiffs' motion to amend, and we hold that this ruling was incorrect.

Rule 15(a) of the North Carolina Rules of Civil Procedure provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served." N.C.R. Civ. P. 15(a). For purposes of this rule, a Rule 12(b)(6) motion to dismiss is not a "responsive pleading" and, thus, "does not itself terminate plaintiff's unconditional right to amend a complaint under Rule 15(a)." *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987).

In the instant case, defendants had not filed any responsive pleading when plaintiffs filed their motion to amend and Proposed First Amended Complaint. Therefore, plaintiffs were not required to seek the court's permission to amend their complaint, and the court's rul-

ing prohibiting such an amendment was error. The question then becomes whether plaintiffs' amended complaint relates back to the filing of the original pleading. We hold that it does.

Rule 15(c) of the North Carolina Rules of Civil Procedure governs whether an amendment will be deemed to have been filed at the time of the original pleading:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C.R. Civ. P. 15(c). Thus, where the original complaint gave defendants sufficient notice of the events to be established pursuant to the amended complaint, the amendment relates back to the original complaint. *Bowlin v. Duke University*, 119 N.C. App. 178, 457 S.E.2d 757 (1995).

Unquestionably, the original complaint in the present case gave notice of the transactions and occurrences plaintiffs sought to establish pursuant to the amended complaint. From the original complaint, defendants were notified that plaintiffs' medical malpractice and loss of consortium claims were based on Dr. Santoriello's allegedly negligent performance of Pamela Brisson's abdominal hysterectomy. Indeed, the amended complaint varied from the original only by its inclusion of the Rule 9(j) certification. Accordingly, we hold that the amended complaint related back to the filing of the original and, thus, fell within the statute of limitations.

When the trial court denied their motion to amend, plaintiffs took a voluntary dismissal on 6 October 1997 and refiled their action on 9 October 1997. Defendants, in their motion for judgment on the pleadings, argued that the causes of action alleged in plaintiffs' second complaint were time-barred under section 1-15(c) of the General Statutes. Plaintiffs, on the other hand, argued that by taking a voluntary dismissal under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, they were entitled to an additional year after the date of dismissal within which to refile their claims; therefore, the second complaint was timely filed.

Plaintiffs rely on the one-year "saving provision" of Rule 41(a)(1), which reads as follows:

> If an action commenced within the time prescribed therefore, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal.

N.C.R. Civ. P. 41(a)(1). Defendants contend, however, that the case currently before us is indistinguishable from our Supreme Court's holding in *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986), and this Court's recent decision in *Robinson v. Entwistle*, 132 N.C. App. 519, 512 S.E.2d 438 (1999). Defendants, therefore, argue that plaintiffs may not take advantage of the "saving provision," because their original complaint did not comply with the pleading requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure. Contrary to defendants' contention, we hold that *Estrada* and *Robinson* are inapposite to the present set of facts and, thus, the trial court erred in granting defendants' motion for judgment on the pleadings.

In *Estrada*, the plaintiff underwent an embolectomy operation on 18 June 1979 to address complications arising from an earlier surgery. The operation was unsuccessful, and on the following day, the plaintiff's left leg was amputated below the knee. On 18 June 1982, at 4:28 p.m., the plaintiff filed an unverified "bare bones" complaint alleging that the surgeon who performed the embolectomy operation did so negligently and that the plaintiff suffered damages as a result. The complaint, however, failed to allege facts concerning the specific manner in which the defendant was negligent. At 4:30 p.m., two minutes after the original complaint was filed, the plaintiff filed a notice of voluntary dismissal purporting to dismiss the claim under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. The three-year statute of limitations expired the following day, on 19 June 1982. The plaintiff's counsel did not serve the summons and complaint or notice of dismissal on the defendant.

On 16 June 1983, the plaintiff filed a second unverified complaint for medical malpractice against the defendant, and the defendant was served with a summons and the second complaint on 14 July 1983. The defendant filed a motion to dismiss the complaint under Rule 12(b)(6) on the ground that the action was barred by the applicable statute of limitations. It was after this motion was served that the defendant learned that, one year earlier, plaintiff had filed and voluntarily dismissed a complaint for damages arising out of the same set of facts. Following a hearing, the trial court granted the

defendant's motion to dismiss and dismissed the plaintiff's action with prejudice. The plaintiff appealed the ruling to this Court, and we reversed the order of dismissal. The defendant appealed to the Supreme Court, which reversed our decision and reinstated the order of dismissal.

In his brief before the Court, the plaintiff candidly admitted that the 1982 complaint " 'was filed with the intention of dismissing it in order to avoid the lapse of the statute of limitations.' " *Estrada*, 316 N.C. at 322, 341 S.E.2d at 541. During oral argument, the plaintiff's counsel conceded that, when the original complaint was filed, " '[the plaintiff] did not intend at that point in time to prosecute a legal action against the [defendant-doctor].' " *Id.* at 323, 341 S.E.2d at 542. In light of these facts, the Court framed "the dispositive question" as follows:

> whether a plaintiff may file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to Rule 41(a)(1).

Id. at 323, 341 S.E.2d at 542. The Court answered this question in the negative and articulated the following reasoning for its decision:

> The Rules of Civil Procedure represent a carefully drafted scheme, modeled after the Federal Rules of Civil Procedure, "designed to eliminate the sporting element from litigation. . . . [T]he rules should be construed as a whole, giving no one rule disproportionate emphasis over another applicable rule." Although it is true that Rule 41(a)(1) does not, on its face, contain an explicit prerequisite of a good-faith filing with the intent to pursue the action, we find such a requirement implicit in the general spirit of the rules, as well as in the mandates of Rule 11(a). Construing the rules as a whole, we hold that Rules 41(a)(1) and 11(a) must be construed *in pari materia* to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including Rule 11(a). A pleading filed in violation of Rule 11(a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of Rule 41(a)(1). A second complaint, filed in

> reliance on the one-year "extension" in such a situation, is subject to dismissal upon appropriate motion by the adverse party upon grounds that the new action is time-barred.

Id. at 323-24, 341 S.E.2d at 542.

In *Robinson*, the decedent, William J. Robinson, died on 18 August 1994, and on 12 August 1996, the plaintiff, as executrix of Robinson's estate, filed an order extending the statute of limitations for bringing a medical malpractice action until 1 September 1996. On 30 August 1996, the plaintiff filed a complaint alleging that the defendants were negligent in treating the patient, but the pleading did not include a Rule 9(j) certification. Before defendants filed a responsive pleading, plaintiff amended her complaint to include a statement which purportedly complied with Rule 9(j). However, it was later determined that the amendment was also flawed, "because it alleged that the medical care was reviewed by an expert who did not qualify under Rule 702 to testify as to the standard of care applicable to the defendants in this action." *Robinson*, 132 N.C. App. at 522, 512 S.E.2d at 440.

On 21 April 1997, the plaintiff voluntarily dismissed the amended complaint pursuant to Rule 41(a)(1) and refiled the action on 6 June 1997. The defendants filed motions to dismiss for failure to comply with Rule 9(j), for judgment on the pleadings pursuant to Rule 12(c), and for summary judgment. The trial court denied the motions to dismiss and for judgment on the pleadings on the grounds that the new complaint complied with the requirements of Rule 9(j). However, the court granted defendants' motion for summary judgment finding that the plaintiff's action was barred by the relevant statute of limitations. On appeal, this Court affirmed, holding that "Rule 41(a)(1) is only available in an action where the complaint complied with the rules which govern its form and content prior to the expiration of the statute of limitations." *Id.* at 523, 512 S.E.2d at 441.

Estrada and *Robinson* can be distinguished from the present case by the fact that, here, plaintiffs filed an amended complaint containing the mandatory Rule 9(j) verification that related back to the filing of the original complaint. Moreover, there was no evidence that plaintiff filed their original complaint solely for the purpose of tolling the statute of limitations or that they otherwise acted in bad faith so as to prevent them from taking advantage of the Rule 41(a)(1) "saving provision." Thus, insofar as plaintiffs filed an amended complaint that "complied with the rules which govern its form and content prior to

the expiration of the statute of limitations," *id.*, we hold that plaintiffs were entitled to the benefit of the Rule 41(a)(1) extension. Plaintiffs' second complaint, therefore, was not barred by the statute of limitations, and the trial court erred in entering judgment on the pleadings in favor of defendants.

Based upon the foregoing, we reverse the order entering judgment for defendants and remand this matter for further proceedings consistent with this opinion.

Reversed and remanded.

Judges MARTIN and HUNTER concur.

JAMES L. FREEMAN, JR., PLAINTIFF v. SUGAR MOUNTAIN RESORT, INC., DEFENDANT

No. COA98-120

(Filed 6 July 1999)

1. Premises Liability— injury on ski slope—knowledge of hazard

Summary judgment should not have been granted for defendant in a negligence action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp. Although defendant argued that plaintiff failed to present any evidence that defendant either knew or reasonably could have known that skiers were jumping off a makeshift snowramp, plaintiff presented evidence that defendant did not have an adequate number of ski patrols, from which arises a material issue of fact as to whether defendant would have known about the makeshift ramp with an adequate number of patrols.

2. Premises Liability— injury on ski slope—foreseeability

Summary judgment should not have been granted for defendant in an action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp where defendant argued that plaintiff's accident was not reasonably foreseeable, but plaintiff presented evidence of a sign on defendant's property forbidding jumping, there was evidence that defendant was understaffed on this night, raising the issue of whether defendant would have noticed the jumping with adequate employees patrolling the slope, and there was testimony

that the jumping was in plain view of the lift operator, who did nothing.

3. Premises Liability— contributory negligence—injury on ski slope

Summary judgment should not have been granted for defendant on contributory negligence in an action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp. Whether plaintiff should have recognized the danger of jumping skiers and chosen an alternate path is a question of fact.

Judge LEWIS dissenting.

Appeal by plaintiff from judgment entered 2 September 1997 by Judge Dennis Winner in Avery County Superior Court. Heard in the Court of Appeals 5 October 1998.

At approximately 9:50 p.m. on 16 December 1993, plaintiff was snow-skiing on the only open slope on defendant's premises when he was struck by another skier who jumped into him from a makeshift ramp. One hundred and eighty people had purchased tickets to ski on the slope during the course of the evening and three or four ski patrols were on duty at the time.

Plaintiff stated in a deposition that the makeshift ramp was not on the slope itself, that "another skier wouldn't have hit it or run over it," and that one would have to get off of the slope to get on to the ramp. Plaintiff did not recall ever seeing anyone jump from that ramp at any other point that evening, and had made no prior complaints to management about other skiers. Plaintiff also stated that he was told by defendant's employees that defendant was understaffed on the night of the injury. Defendant's affidavits indicated that there were no reports of jumping made to the ski patrol or to the administrative office. Defendant, while denying that skiers were constructing such ramps at the time in question, admitted in an interrogatory that defendant did not allow skiers to construct these makeshift ramps. Plaintiff asserts that in providing a ski patrol, defendant assumed a duty to protect him, and that defendant was negligent in failing to carry out this duty.

In his complaint of 25 October 1996, plaintiff cites four specific acts or omissions that he claims constitute defendant's negligence: (1) the failure to "enforce its rules and regulations governing jumping on the ski slopes"; (2) the failure to be properly staffed at the time of

the collision, thereby leaving defendant unable to enforce its rules governing safety; (3) the failure "to warn its business patrons of the potentially hazardous condition created on its ski slopes by skiers constructing makeshift ramps from which to jump"; and (4) the failure "to provide a reasonably safe condition on its ski slope for its business patrons" at the time of the collision. After a period of discovery, defendant moved for summary judgment on 2 July 1997 and the motion was granted on 2 August 1997. Plaintiff appeals.

Campbell & Taylor, by Jason E. Taylor, for plaintiff-appellant.

Robert E. Riddle, P.A., by Robert E. Riddle, for defendant-appellee.

EAGLES, Chief Judge.

First we consider whether the trial court erred by granting defendant's summary judgment motion. Plaintiff argues that there were genuine issues of material fact as to whether defendant was negligent. We agree.

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. 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) (citations omitted).

To recover damages under a claim for negligence, plaintiff must establish "(1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Waltz v. Wake County Bd. of Education*, 104 N.C. App. 302, 304, 409 S.E.2d 106, 107 (1991) (quot-

ing *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 217, 152 S.E.2d 336, 341 (1967)), *disc. review denied*, 330 N.C. 618, 412 S.E.2d 96 (1992). "[A]s a general proposition, issues of negligence are ordinarily not susceptible to summary adjudication either for or against the claimant." *Phelps v. Duke Power Co.*, 76 N.C. App. 222, 229, 332 S.E.2d 715, 719 (1985), *disc. review denied*, 314 N.C. 668, 336 S.E.2d 401 (1985). The better practice is for the trial court to submit the case to the jury and enter a judgment notwithstanding the verdict if the evidence is insufficient to support the verdict. *Id.*

Here, both parties acknowledge that plaintiff was an invitee at the time of his injury, so the duty defendant owed was one of reasonable care under the circumstances. *Nelson v. Freeland*, 349 N.C. 615, 618, 507 S.E.2d 882, 884 (1998), *reh'g denied*, 350 N.C. 108, —— S.E.2d —— (1999). Next, plaintiff was required to introduce evidence that defendant breached its duty. Here there was contradictory evidence presented by the parties. "Breach of duty," as an element of a negligence claim, occurs when a person fails to conform to the standard required. *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996). General Statute Section 99C-2(c) requires the defendant to "provide adequate ski patrols." In addition, when an unsafe condition is created by a third party, such as a makeshift ramp, plaintiff must show that it has existed for such a length of time that defendant knew or, by exercising reasonable care, should have known of its existence in time to have removed the danger or have given a warning of its presence. *Stafford v. Food World*, 31 N.C. App. 213, 216, 228 S.E.2d 756, 757 (1976), *disc. review denied*, 291 N.C. 324, 230 S.E.2d 677 (1976).

[1] Here, the defendant argues that plaintiff failed to present any evidence that established defendant either knew or reasonably could have known that skiers were jumping off a makeshift snow ramp. We disagree.

Plaintiff presented evidence through his own deposition testimony as well as through Eric Rauch's affidavit that defendant did not have an adequate number of ski patrols on the night of plaintiff's injury. From that evidence arises a material issue of fact as to whether defendant would have known about the makeshift ramp if defendant had an adequate number of ski patrols. Defendant presented affidavits from employees at the summary judgment hearing that denied that defendant was short staffed on the night in question.

Because there is contradictory evidence presented by the parties, there is a genuine issue of material fact as to whether there was adequate ski patrols when plaintiff was hurt.

[2] Next, plaintiff must present evidence that defendant's negligence was the proximate cause of plaintiff's injuries. Defendant argues that plaintiff's accident was not reasonably foreseeable. We disagree.

Plaintiff presented evidence that there was a sign on defendant's property forbidding jumping. The presence of the sign indicates that skiers' jumping was apparently foreseeable. In addition, plaintiff introduced evidence that defendant was understaffed on the night in question which raises the issue of whether the defendant would have noticed the skiers jumping if defendant had adequate employees patrolling the slope. This is a genuine issue of material fact that should have gone to the jury. Finally, plaintiff testified during his deposition that the jumping that was occurring on the night he was injured, was in plain view of the lift operator but that the operator did nothing to stop the skiers from jumping. Accordingly, we hold that there were issues of material fact and that the trial court erred in granting defendant's summary judgment motion.

[3] Finally we consider whether the trial court erred in granting defendant's summary judgment motion on the issue of plaintiff's contributory negligence. Plaintiff argues that he was not contributorily negligent as a matter of law and contends that the issue should have gone to the jury. We agree.

A "nonsuit on the ground of contributory negligence will be granted only when the plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom." *Keener v. Beal*, 246 N.C. 247, 252, 98 S.E.2d 19, 22 (1957). Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment. *Lamm v. Bissette Realty*, 327 N.C. 412, 418, 395 S.E.2d 112, 116 (1990). Only where the evidence establishes plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468-69, 279 S.E.2d 559, 563 (1981).

Here an issue of fact exists as to whether the plaintiff's conduct was reasonable under the circumstances. Whether plaintiff should have recognized the danger of jumping skiers colliding into his per-

son and chosen an alternative path is a question of fact for the jury. Accordingly, the trial court erred in granting defendant's summary judgment motion on the issue of plaintiff's contributory negligence. Reversed and remanded for trial.

Judge HUNTER concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

Because I consider there to have been a number of reasons to grant defendant's motion for summary judgment in this case, I must respectfully dissent.

Plaintiff could establish a valid claim of negligence by showing "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996). If defendant, as the moving party, "prov[es] that an essential element of the opposing party's claim is nonexistent, or [shows] 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). Here, there is no question as to the existence of a duty. I do not think that defendant breached any duty, or that if he did such a breach proximately caused plaintiff's injury.

The majority indicates that plaintiff establishes a breach of duty by defendant through the hearsay statements of plaintiff and his friend that defendant had an inadequate number of ski patrols on the night in question. Such a bare allegation is too sweeping to go forward at this stage. Our Supreme Court has stated that "[n]egligence is not presumed from the mere fact of injury. Plaintiff is required to offer legal evidence tending to establish *beyond mere speculation or conjecture* every essential element of negligence, and upon failure to do so, nonsuit is proper." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992) (emphasis added). Plaintiff presents no evidence beyond his speculative generalizations to

demonstrate just how many ski patrols would be adequate to keep him from harm.

The evidence that defendant's alleged negligence proximately caused plaintiff's injury is similarly insufficient for plaintiff to go forward with his case. Our Supreme Court has summarized the law regarding proximate cause as follows:

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (citations omitted). "A defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable." *Id.* at 234, 311 S.E.2d at 565. When the facts are established, a court must determine as a matter of law whether negligence exists. *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E.2d 457, 461 (1972).

Based on the facts established in this case, I would determine as a matter of law that any negligence by defendant was not the proximate cause of plaintiff's injury. While we now know that it was possible for a person or persons to pack snow into a makeshift ramp off the slope and jump from it into other skiers on the slope itself, this accident was not reasonably foreseeable. To say that plaintiff's injury in a collision with another skier from outside the slope could have been prevented by having some unknown number of ski patrols employed to discover a ramp constructed off the actual ski slope, unnoticed by plaintiff and unreported by every other skier that night, is for this Court to make an improvident jump down the slope of causation.

The majority is misguided in its analysis of proximate cause. The mere presence of a sign forbidding something does not make it reasonably foreseeable that the forbidden activity will occur, leaving the proprietor posting the sign liable if the event happens to take place. The majority's approach would seemingly require every establish-

ment prohibiting, for example, the carrying of concealed weapons to provide enough security personnel and metal detectors to ensure that no such weapons were brought on the premises. That is not a burden I wish to place on businesses, government offices, or public places in this state. Furthermore, the majority's statement that plaintiff "introduced evidence" of defendant's understaffing is a misstatement. The plaintiff introduced "mere speculation or conjecture," *see Roumillat*, but no substantive evidence on this issue. Finally, plaintiff's testimony as to what the ski lift operator saw is unpersuasive for at least two reasons. First, if the operator could have seen the purported jumping, we should learn this in the operator's testimony and not through plaintiff's theory on what the operator might have seen. There was no testimony from the ski lift operator in the record, and it is not our place to create such testimony based on what plaintiff thinks the operator might have seen. Second, if plaintiff could see what the operator could see, it would seem to be a more efficient use of time to eliminate the middle man and have plaintiff report the jumping instead of waiting on the operator to do so. Instead, no one made any reports of any jumping from this makeshift snow bank ramp that night.

It is also worth noting that defendant was not the only party to this action with a statutory duty of care on the ski slopes. Plaintiff had the responsibility

> (1) [t]o know the range of his own abilities to negotiate any ski slope or trail and to ski within the limits of such ability; [and]
>
> (2) [t]o maintain control of his speed and course at all times when skiing and *to maintain a proper lookout so as to be able to avoid other skiers* . . . .

N.C. Gen. Stat. § 99C-2(b) (1985) (emphasis added). "[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). "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).

Plaintiff had a statutorily imposed duty to be on the lookout for other skiers, and it cannot be seriously contended that the ski patrol was more responsible than plaintiff was for his own safety. Assuming *arguendo* that defendant somehow was negligent as a ski slope operator on the night in question, plaintiff's failure to take greater caution when participating in an activity such as night skiing than he did on the night in question demonstrates a lack of ordinary care. This "want of ordinary care was at least one of the proximate causes of the injury," *id.*, and plaintiff's contributory negligence is a bar to recovery.

In his complaint, plaintiff claims defendant "failed to enforce its rules and regulations governing jumping on the ski slopes" and to warn others of the construction of makeshift ramps, but neither he nor anyone else claimed to have seen any jumping or ramps prior to the accident. Plaintiff also claims defendant was understaffed at the time, but fails to demonstrate how having a larger staff could have made the only accident of this nature on this night foreseeable. Finally, plaintiff claims defendant "failed to provide a reasonably safe condition on its ski slope for its business patrons" at the time of the collision, but admits that the makeshift ramp in question was actually formed off the slope itself. In short, plaintiff fails to establish that any negligence by defendant proximately caused him to be injured.

Plaintiff may have a claim for his injuries, but the proper defendant is the skier who collided with him on the night in question. The identity of that skier is unknown, and it is doubtful that his pockets are as deep as defendant's, but that does not make defendant the proper party to this action. I will not be a party to a holding that enables every skier who is hurt on a slope to sue the proprietors of that slope on the bare allegation that some unknown number of patrols should have been provided to ensure that he need not watch out for himself and his surroundings. Such a holding not only is inappropriate in light of the facts before this Court, but also has the potential to devastate the businesses and communities of western North Carolina that depend on skiing and tourism for their economic livelihood.

For all of these reasons, I would affirm the trial court's grant of summary judgment in favor of defendant.

DAVID T. BUCKINGHAM, PLAINTIFF v. CYNTHIA B. BUCKINGHAM, DEFENDANT

No. COA98-436

(Filed 6 July 1999)

1. **Judgments— consent—consent withdrawn between signed memorandum and formal judgment**

A consent judgment memo was a final judgment where it was not merely rendered in open court, but was a document which was represented by the parties as their full agreement, presented to the court, signed by the parties and the judge, and filed by the clerk of court. The directive for a "final order" was only contained in the order so that a more formal entry of judgment would be entered into the records and that second, more formal document was merely surplusage. Plaintiff's attempt to rescind his consent between the judgment memo and the formal entry of judgment was ineffectual.

2. **Child Support, Custody, and Visitation— custody—consent judgment—findings not required**

The trial court did not err by entering a consent order for child custody which contained neither findings of fact nor conclusions of law related to custody. While findings of fact and conclusions of law are clearly necessary in an adjudication of child custody, they are not necessary when a consent judgment is rendered.

3. **Appeal and Error— preservation of issues—no written order denying motion**

An assignment of error in a child custody action to the denial of motions for revision prior to final judgment and for relief from final judgment was dismissed where the record did not contain a written order denying the motions.

Appeal by plaintiff from judgment entered 20 January 1998 by Judge L. W. Payne in Wake County District Court. Heard in the Court of Appeals 24 February 1999.

Wyrick Robbins Yates & Ponton LLP, by Robert A. Ponton, Jr. and Alexandra M. Hightower for plaintiff-appellant.

Gailor & Associates, P.L.L.C., by Carole S. Gailor and Kimberly A. Wallis for defendant-appellee.

HUNTER, Judge.

Plaintiff David T. Buckingham appeals the entry of a consent agreement on 14 October 1997 and final order entered 20 January 1998. The dispositive issue in this case concerns whether or not a memo of consent judgment, which has been signed by the parties and judge, and entered into the court record, is valid as a final judgment on the issue of child custody. Additionally, we will consider whether child custody consent judgments must contain findings of fact and conclusions of law.

The evidence indicates that plaintiff, David T. Buckingham, and defendant, Cynthia B. Buckingham, were married on 3 January 1993. The parties had one child during the course of their marriage, Anne Elizabeth Buckingham, who was born 7 January 1995. The parties separated on 5 November 1996, and plaintiff filed a verified complaint for divorce from bed and board and motion for custody on 6 November 1996. The parties attended mandatory mediation on the issue of custody, and it was unsuccessful. Plaintiff and defendant consented to psychiatric and psychological evaluations which were completed and reports issued prior to the trial date of 14 October 1997.

On 14 October 1997, plaintiff and defendant signed a document entitled "Memo of Consent Judgment" ("consent judgment memo") in which the parties consented to joint legal custody of the minor child, with the defendant maintaining primary physical custody. The consent judgment memo stipulated the terms of plaintiff's secondary custody of the minor child, custody of the child during holidays, religious rearing of the child, counseling and mediation regarding additional visitation of the child with plaintiff, and other miscellaneous matters. On the same day, the parties appeared before Judge L. W. Payne in Wake County District Court, and represented to him that they both consented to his signing the consent judgment memo and a final judgment which would contain identical terms and conditions. The consent judgment memo contained neither findings of fact nor conclusions of law as to the fitness of either parent nor the best interests of the child. Both parties and their attorneys signed the consent judgment memo, as did Judge Payne, who signed it as "approved." The consent judgment memo was filed with the Wake County Clerk of Court at 4:45 p.m. on 14 October 1997.

On the final hearing date of 5 January 1998, plaintiff filed with the court, and served on defendant, objections to a final judgment as well

as motions pursuant to Rule 54(b) for revision prior to final judgment, and Rule 60 for relief from final judgment or order. Plaintiff objected to the entry of final judgment on the basis that he no longer consented to the terms of the consent judgment memo, and that a formal order without findings of fact and conclusions of law would be invalid. The trial court overruled plaintiff's objections. Thereupon plaintiff asked the court to permit him to offer the testimony of Dr. George Corwin as an offer of proof in support of his Rule 54(b) motion. The court sustained defendant's objection to this testimony. A document captioned "Consent Judgment for Permanent Custody" was signed at 10:00 a.m. as of 5 January 1998, *nunc pro tunc* 14 October 1997, but was stricken that same day because it contained findings of fact and conclusions of law which were not contained in the consent judgment memo.

Plaintiff filed an offer of proof and notice of hearing on 7 January 1998. On 20 January 1998, Judge Payne allowed the testimony of Dr. Corwin, but only as an offer of proof in support of plaintiff's motions. Dr. Corwin testified that he disagreed with the conclusion of the court-ordered evaluations as to the fitness of defendant as the child's primary physical custodian. Dr. Corwin stated that he based his opinion solely on the review of defendant's previous medical history; that he was retained by plaintiff in August 1997 and relayed his opinions to plaintiff's counsel in September 1997; and, that he did not consider any information regarding defendant's mental or emotional status after 14 October 1997. Apparently, plaintiff did not learn of Dr. Corwin's opinion regarding the fitness of defendant until a 3 November 1997 meeting with him. The court entered an order captioned "Consent Order for Permanent Custody" on 20 January 1998 which stated that judgment was rendered on 14 October 1997 and signed 20 January 1998. Plaintiff appeals.

[1] Plaintiff first contends that the trial court committed reversible error in entering the "Consent Order for Permanent Custody" on 20 January 1998, when plaintiff had filed motions objecting to entry of final judgment and a notice of hearing on entry of judgment. Plaintiff argues that he did not consent to the order of 20 January 1998; therefore, the order is not effective.

Plaintiff does not dispute that he and the defendant both consented to the consent judgment memo which was presented to the court on 14 October 1997, signed by Judge Payne as "approved," and filed by the clerk of court. 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 (Supp. 1998). Defendant argues that applying the plain language of this rule to the facts in this case, judgment was entered on 14 October 1997. We find defendant's argument persuasive. The consent judgment memo states, in part:

> This memo is made and entered into between [plaintiff] and [defendant] as a complete settlement of all issues outstanding between them with regard to Child Custody, retroactive Child Support, Post Separation Support/Alimony and attorney fees and other costs in that matter now pending and set for trial on October 14, 1997 . . . . In that regard the parties have agreed as follows:
>
> 1. That this memo shall be received by the District Court as the memo of their agreement to be entered by the court with the consent of the parties. A formal order containing the terms of this Memo of Judgment shall be prepared by [plaintiff's attorneys] to be approved by [defendant's attorneys] and then signed as the final order by the court with regard to the issues set forth in the memo.

While, according to the consent judgment memo, some additional issues were to be mediated, it stipulated that:

> e. The issue of primary and secondary custody and other issues is not open to negotiation/mediation unless either party files a Motion to Change Custody. The burden of proof shall be a substantial change of circumstances adversely affecting the child.

It is clear from the language of the memo that both parties consented to its terms, which were to be binding and promulgated as an order of the court. "[T]he power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." *Milner v. Littlejohn*, 126 N.C. App. 184, 187, 484 S.E.2d 453, 456, *review denied*, 347 N.C. 268, 493 S.E.2d 458 (1997) (*quoting Brundage v. Foye*, 118 N.C. App. 138, 140, 454 S.E.2d 669, 670 (1995)). While plaintiff concedes that consent existed at the time the consent judgment memo was signed and entered into court records, he attempts to persuade this Court that the consent judgment memo was

not binding as a final judgment. Our review of similar cases indicates otherwise.

Like the present parties, the plaintiff and defendant in *Stevenson v. Stevenson*, 100 N.C. App. 750, 398 S.E.2d 334 (1990), announced to the court at their trial date that they had reached an agreement on the issues which were to be brought before it; however, they did not submit any memo to the court. Counsel for the plaintiff read certain provisions of the agreement into the record, including that plaintiff was to have sole possession of the marital home and the value of the home would be assessed through a certain formula which included a deduction in the value based on a loan to the parties from defendant's employer connected with the purchase of their home. *Id.* The trial court admonished the attorneys to draft an artful order, and after several revisions, a final draft, which both parties and their attorneys signed, was submitted to the court and filed 6 July 1988. *Id.* This judgment made no mention of the provision read into the record on the trial date which specified that the loan from defendant's employer would be included in the formula for computing the value of the parties' home; however, the Court stated:

> While in this case, there is clear evidence of a prior contrary oral agreement, there are no findings in the trial court's order which would establish that plaintiff and her attorney were mistaken as to the effect of the language of the agreement and that defendant was aware of this mistake at the time the consent judgment was signed. Our review of the record likewise reveals insufficient evidence to support such a conclusion. The agreement was altered many times by both parties. It should be enforced as written.

Id. at 753, 398 S.E.2d at 336. Because the parties in *Stevenson* did not submit a written agreement at their trial date, and revised the proposed order several times, it is apparent that they only had a partial agreement at the time they originally appeared before the trial court. To the contrary, the parties in the present case had made a full agreement on the trial date and represented it as such to the court.

In another similar case, *Blee v. Blee*, 89 N.C. App. 289, 365 S.E.2d 679 (1988), the parties and their attorneys represented to the court that a written agreement had been reached and signed by the parties; however, certain provisions were not in "writing" and plaintiff read them into the record. *Id.* at 291-92, 365 S.E.2d at 681. The written agreement was made part of a formal judgment signed by the judge approximately four months later, on 8 September 1986; however,

defendant filed a motion on 17 September 1986 pursuant to Rule 60(b) for relief from the judgment on the grounds that he withdrew his consent prior to the time the formal order was entered. The motion was granted, but this Court reversed that decision, stating:

> While we realize the better practice would be for the formal judgment to be prepared and signed immediately after the hearing, such is seldom, if ever, possible or practical, and it is not necessary or required by our rules. It would be a travesty to say that a party to a judgment so solemnly promulgated and entered as the one depicted by this record could repudiate that judgment at any time after the judgment was entered. Defendant's efforts three days later to repudiate the judgment are of no effect whatsoever.

Id. at 293, 365 S.E.2d at 682. The Court in *Blee* relied on the former version of Rule 58, which provided

> where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

Id. at 292-93, 365 S.E.2d at 681-82. On this basis the Court held that "the record before us manifests that a judgment was promulgated and entered by Judge Long on 13 June 1986, and the signing thereof on 8 September 1986 merely memorialized said judgment." *Id.* at 293, 365 S.E.2d at 682. Rule 58 has been modified since *Blee* in that judgments in open court are no longer considered final judgments. However, unlike that case, the judgment here was not merely rendered in open court. Rather, a document represented by the parties to be their full agreement was presented to the court, signed by the parties, and filed by the clerk of court. As stated in *Blee*, it would be a better practice to have the formal order drafted at the time the parties present a "memo of agreement;" however, oftentimes parties reach settlement just prior to or on the date of trial. Nevertheless, if a consent agreement is presented to the court by the parties who express their consent, is approved by the court and filed with the clerk of court, the agreement is a final judgment pursuant to Rule 58 of the North Carolina Rules of Civil Procedure.

Accordingly, we conclude that the consent judgment memo filed on 14 October 1997 is a final judgment. While the consent judgment memo states that a "final order" would be entered, the record reveals

that the order of 20 January 1998 is identical in its terms and provisions as the consent judgment memo. Apparently, the directive for a "final order" was only contained in order for a more formalized document to be entered into court records. Therefore, the entry of judgment on 20 January 1998 was merely surplusage to the final judgment of 14 October 1997. Plaintiff's attempt to rescind his consent after that date is ineffectual, as he concedes consent existed at the time the 14 October 1997 judgment was rendered. A consent judgment is not only a judgment of the court but is also a contract between the parties and "[i]t cannot be amended without showing fraud or mutual mistake, which showing must be by a separate action, or by showing the judgment as signed was not consented to by a party, which showing may be by motion in the cause." *Cox v. Cox*, 43 N.C. App. 518, 519, 259 S.E.2d 400, 401-02 (1979), *review denied*, 299 N.C. 329, 265 S.E.2d 394 (1980). Accordingly, we find no error.

[2] Plaintiff next contends that the trial court committed reversible error in signing the "Consent Order for Permanent Custody" of 20 January 1998 because the document contained neither findings of fact nor conclusions of law related to the custody of the parties' minor child. Because we have ruled that the consent judgment memo of 14 October 1997 was actually the final judgment, we will apply plaintiff's assignment of error to that document.

This Court has held that in a proceeding for custody and support of a minor child, the trial court is required to "find the facts specially and state separately its conclusions of law thereon and direct entry of appropriate judgment." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156, 231 S.E.2d 26, 28 (1977) (*citing* N.C. Gen. Stat. § 1A-1, Rule 52 (a)(1)). Additionally, N.C. Gen. Stat. § 50-13.2 mandates that:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. . . .

N.C. Gen. Stat. § 50-13.2(a) (Supp. 1988). The trial court is required to find the specific ultimate facts to support the judgment, and the facts

found must be sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence. *Montgomery*, 32 N.C. App. at 156-57, 231 S.E.2d at 28.

While findings of fact and conclusions of law are clearly necessary in an adjudication of child custody, a review of existing precedent indicates that they are not necessary when a consent judgment is rendered. Permanent custody orders arise in one of two ways: (1) the trial court enters a consent decree which contains the agreement of the necessary parties, or (2) after a hearing of which all parties so entitled are notified and at which all parties so entitled are given an opportunity to be heard, the court issues an order resolving a contested claim for permanent custody of a child. *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998) (citations omitted). While the welfare of the child is the paramount consideration which must guide the court in a custody decision and findings of fact regarding the competing parties must be made to support the necessary legal conclusions, the trial "court need *only find those facts which are material to the resolution of the dispute.*" *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990), *aff'd*, 328 N.C. 324, 401 S.E.2d 362 (1991) (emphasis added) (*citing Green v. Green*, 54 N.C. App. 571, 284 S.E.2d 171 (1981)). An order of permanent custody based on consent of the parties does not involve adjudication or resolution of the merits of the case. Any judgment by consent

> is the agreement of the parties, their decree, entered upon the record with the sanction of the court. It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the preexisting agreement of the parties. It acquires the status of a judgment, with all its incidents, through the approval of the judge and its recordation in the records of the court.

McRary v. McRary, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948) (citations omitted). This Court specifically stated that a consent judgment need not contain findings of fact or conclusions of law in *In re Estate of Peebles*, 118 N.C. App. 296, 454 S.E.2d 854 (1995):

> [A] consent judgment is "merely a recital of the parties' agreement and not an adjudication of rights." This type of judgment does not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties.

Id. at 300, 454 S.E.2d at 857 (citations omitted). While N.C. Gen. Stat. § 1A-1, Rule 52 and N.C. Gen. Stat. § 50-13.2 mandate that findings of

fact and conclusions of law be made when a court adjudicates child custody, those statutes anticipate an adjudication by the court. As previously stated by this Court:

> A statutory mandate which contemplates the production of a trial record sufficient to permit proper appellate review should not be held to apply automatically to a consent judgment which ends litigation, and, by its very nature, contemplates no appellate review. Rather, a consent judgment should be examined more generally to see if it is fair, if it does not contradict statutory or judicial policy.

Cox v. Cox, 36 N.C. App. 573, 575-76, 245 S.E.2d 94, 96 (1978). Additionally, it is a settled principle of law in this state that a consent judgment is the contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval, and persons *sui juris* have a right to make any contract not contrary to law or public policy. *Wachovia Bank v. Bounous*, 53 N.C. App. 700, 281 S.E.2d 712 (1981). *See Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983); *Ross v. Voiers*, 127 N.C. App. 415, 490 S.E.2d 244 (1997). Therefore, the court should review a consent judgment to ensure that it does not contradict statutory, judicial, or public policy, but it need not make findings of fact or conclusions of law. When parties enter into an agreement and ask the court to approve the agreement as a consent judgment, they waive their right to have the court adjudicate the merits of the case. In the present case, the parties did not wish for the court to adjudicate child custody, having resolved that issue between them. Therefore, the court has no duty to make findings of fact or conclusions of law as to the child's best interest when it approved the parties' agreement. Accordingly, we find no merit to plaintiff's second assignment of error.

[3] Finally, plaintiff contends that the trial court committed reversible error in failing to grant plaintiff's motions made pursuant to Rule 54(b) and Rule 60 of the North Carolina Rules of Civil Procedure.

The record reveals that the trial court allowed Dr. Corwin to testify only as an offer of proof for plaintiff's motions. "[F]or a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Love*, 131 N.C. App. 350, 357, 507 S.E.2d 577, 583 (1998) (*quoting State v. Simpson*, 314

N.C. 359, 370, 334 S.E.2d 52, 60 (1985)). Plaintiff has not assigned error to the exclusion of Dr. Corwin's evidence. Furthermore, there is no indication that the trial court considered his testimony proffered or plaintiff's Rule 54(b) or Rule 60 motions, as the record does not reveal any order by the trial court in this regard. Rule 9(h) of the North Carolina Rules of Appellate Procedure provides that the record on appeal must contain "a copy of the judgment, order, or other determination from which appeal is taken." N.C.R. App. P. 9(h) (1998). In order to preserve a question for appellate review, the complaining party must "obtain a ruling upon the party's request, objection or motion." N.C.R. App. P. 10(b)(1) (1998). The Rules of Appellate Procedure are mandatory. *Sessoms v. Sessoms*, 76 N.C. App. 338, 332 S.E.2d 511 (1985). Because the record in this case does not contain a written order denying plaintiff's motions, such order was not entered by the trial court. *State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388 (1999) (*citing State v. Williams*, 280 N.C. 132, 137, 184 S.E.2d 875, 878 (1971) (noting that the appellate courts are "bound by the record as certified and can judicially know only what appears of record")). Accordingly, this assignment of error is dismissed.

Affirmed.

Judges MARTIN and McGEE concur.

CONCRETE MACHINERY COMPANY, INC., PLAINTIFF-APPELLEE v. CITY OF HICKORY, DEFENDANT-APPELLANT

No. COA98-1267

(Filed 6 July 1999)

1. Easements— sewer line rebuilt—partially outside existing easement—no writing

The trial court did not err by concluding that a taking had occurred in an action arising from the rebuilding of a sewer line partially outside the existing easement where the City contended that the property owner had orally agreed to relocate the sewer line. There was no written document or memorandum showing an alteration of the original easement or the creation of a new easement and no indication in the record that the City Council had authorized the relocation or abandonment of the easement.

2. Appeal and Error— appealability—interlocutory order—substantial right—not appealed immediately

In an action arising from the rebuilding of a sewer line partially outside the original easement, the court's conclusion that a taking had occurred affected a substantial right and the City was required to appeal within 30 days. The Court of Appeals nevertheless reviewed the issue in the interests of judicial economy and found it without merit.

3. Eminent Domain— interest—prudent investor—fourteen percent

The trial court did not err in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding fourteen percent interest after concluding that a taking had occurred where the court determined the return a prudent investor would reasonably realize based upon an investment one-half in certificates of deposit and one-half in the stock market. The statutory rate is presumptively reasonable under the prudent investor standard, but the owner shall be put in as good a position as if the property had not been taken and may demonstrate that the prevailing rates are higher than the statutory rate. Plaintiff here introduced evidence indicating a reasonable rate of return between 7.2 percent and 28.8 percent, while the City offered no evidence.

4. Eminent Domain— interest—prudent investor—compound interest

The trial court did not err in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding compound interest. Compound interest is warranted in condemnation cases if the evidence shows that the prudent investor could have obtained compound interest in the marketplace and the uncontradicted evidence here was that interest compounded annually could be realized by the prudent investor in today's financial markets.

5. Eminent Domain— interest—rate—date of judgment to satisfaction

The trial court erred in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding fourteen percent interest compounded annually from the date of the taking to the time the judgment is satisfied. Awarding four-

teen percent interest after the date of judgment would be speculative and N.C.G.S. § 40A-53 specifically provides for interest in eminent domain actions from the date of judgment until its satisfaction at six percent.

6. Eminent Domain— attorney fees—findings required

The award of attorney fees in a condemnation was remanded where the court did not make the findings required by N.C.G.S. §§ 40A-8(b) and (c).

Appeal by defendant from judgment entered 18 May 1998 by Judge Marcus L. Johnson in Catawba County Superior Court. Heard in the Court of Appeals 10 June 1999.

Hamel, Hicks, Wray & Brown, P.A., by William L. Sitton, Jr., Esq., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Sara R. Lincoln and Jeffrey A. Doyle, for defendant-appellant.

SMITH, Judge.

Plaintiff, Concrete Machinery Company, Inc. (CMC) is a private corporation located within the City of Hickory (City). City is a municipal corporation duly organized and existing under the laws of this state. The record tends to show that on 30 April 1959, (CMC) granted the City a permanent, 25-foot-wide easement for the purpose of constructing, maintaining, repairing and enlarging a sanitary sewer line. In late May 1996, the City discovered that sections of the sewer line within the permanent easement had collapsed and needed repair. The City contends that prior to beginning the repair work on the sewer line, CMC orally consented to a relocation of the pre-existing 1959 easement. CMC denies this contention.

The City rebuilt the sewer line between 4 June 1996 and 14 June 1996. The record indicates that the new sewer line location deviated from the pre-existing line by approximately 300 lineal feet, whereby approximately 275 lineal feet of the new sewer line was outside the 1959 easement. During construction of the new sewer line, the City stored sewer pipes, construction equipment and excavated contaminated soil on CMC's property. Additionally, CMC's use of its paved driveway and parking lot became "totally restricted" and the pavement was subsequently destroyed by the placement of the new sewer line and the operation of heavy construction equipment.

CMC submitted written quotes to the City for repair work in repaving the driveway and parking lot. The City, however, refused to pay for the repairs, and CMC filed this action pursuant to N.C. Gen. Stat. § 40A-51 (1984), alleging that construction of the new sewer line outside the boundaries of the 1959 easement constituted a taking under the fifth amendment to the United States Constitution, and Article I § 19 of the North Carolina Constitution. Following a hearing, the trial court determined that the City's construction of the new sewer line outside the boundaries of the 1959 easement constituted a taking as a matter of law, and ordered that damages be the sole issue to be determined by the jury at trial, as provided by N.C. Gen. Stat. § 40-47A (1984). A jury awarded CMC $97,903.00 in damages representing the value of the property taken for construction of the new sewer line. Finding that the jury had awarded compensation in this inverse condemnation, the trial court subsequently awarded $8,949.00 in expert and appraisal fees; $50,527.10 in attorneys' fees; and interest on the entire judgment at a rate of fourteen percent compounded annually until the judgment is satisfied. Defendant appeals.

On appeal, defendant brings forth the following assignments of error: (I) there was insufficient evidence to support the trial court's ruling that a taking had occurred; (II) the fourteen percent interest rate awarded by the trial court was unreasonable and contrary to North Carolina law; and (III), the attorneys' fees awarded to CMC were unreasonable and contrary to the laws of North Carolina.

I.

"Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

The City assigns error to the trial court's determination that the placement of the sewer line outside the 1959 easement constituted a taking as a matter of law. The City's first assignment of error is based on two sub-issues.

[1] In the first sub-issue the City contends that CMC orally agreed to relocate the sewer line outside the 1959 easement. North Carolina law requires that contracts or deeds purporting to convey an easement be in writing. *Tedder v. Alford*, 128 N.C. App. 27, 493 S.E.2d 487 (1997), *disc. review denied*, 348 N.C. 290, 501 S.E.2d 917 (1998).

The North Carolina Statute of Frauds provides in pertinent part: 'All contracts to sell or convey any lands, tenements or heredita-

> ments, *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.'
>
> As an interest in land, *an easement is subject to the statute of frauds*. Thus, North Carolina law requires that a contract or deed purporting to convey an easement be in writing . . .[.] The burden of proving that a sufficient writing exists memorializing the conveyance of the easement is on the party claiming its existence.

Id. at 31, 493 S.E.2d at 489-90 (footnotes omitted) (emphasis added).

Further, "[a]ll contracts made by or on behalf of a City shall be in writing, and if not so written, shall be void and unenforceable." N.C. Gen. Stat. § 160A-16 (1994). In addition, the law provides that cities, as municipal corporations, are vested with all of the property and rights in property belonging to the corporation, whereby all powers, functions, rights, etc. of the corporation shall be exercised by the City council and carried into execution as provided by law. N.C. Gen Stat. §§ 160A-11 (1994), 160A-12 (1994), 160A-67 (1994). Thus, changes in use, or City action effectuating the sale or disposition of real or personal property belonging to the City can only be ordered or approved by the City council. N.C. Gen Stat. § 160-265 (1994).

Assuming *arguendo* that CMC did in fact orally consent to the modification of the 1959 easement, the oral agreement to relocate would nonetheless be unenforceable because the Statute of Frauds requires that the conveyance of all interests in real property be in writing. *See* N.C. Gen. Stat. § 22-2 (1986). Additionally, as an interest in real property, the purported relocation of the 1959 easement could have only been effectuated by action of the Hickory City council.

After reviewing the record, we find no written document or memorandum showing an alteration of the 1959 easement or the creation of a new easement. Similarly, there is no indication in the record that the City council authorized the relocation or abandonment of the 1959 easement. In fact, in oral argument before this Court, counsel for both the City and CMC acknowledged that the City council did not authorize relocation of the 1959 easement. Thus, the trial court's determination that the City abandoned the 1959 easement was in error. There being no evidence in the record of a valid modification or agreement to modify the 1959 easement, we find this sub-issue to be without merit and it is dismissed.

[2] Secondly, the City contends that the trial court erroneously concluded that the City's actions constituted a taking. Pursuant to N.C. Gen. Stat. § 40A-47 (1984), "the judge upon motion, shall hear and determine any and all issues raised by the pleadings other than the issue of compensation, including the condemnor's authority to take." Pursuant to N.C. Gen. Stat. § 40A-47, the trial court ruled on 30 March 1998, as a matter of law, that the City's placement of the new sewer line outside the 1959 easement constituted a taking. After the trial court determined there was a taking, it subsequently became the final law of the case. *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967). "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." *Id.* at 13, 155 S.E.2d at 783. "Appeals in civil actions are governed by N.C. Gen. Stat. § 1-277, which permits an appeal from every judicial order involving a matter of law which affects a substantial right." *Id.* at 13, 155 S.E.2d at 783. For an interlocutory order to be immediately appealable under North Carolina law, it must: (1) affect a substantial right, and (2) work injury if not corrected before final judgment. *Id.* at 13, 155 S.E.2d at 783.

Our Supreme Court has adopted the definition of "substantial right" as: "a right materially affecting those interests which a man is entitled to have preserved and protected by law[.]" *Ostreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976). The trial court's determination that the City's placement of the sewer line outside the 1959 easement constituted a taking affected the defendant's substantial rights and was immediately appealable. It would be an act of futility and injurious to the interests of the City to otherwise compel it to proceed through trial on the issue of damages if the trial court's initial determination that a taking had occurred was in error.

In the case of the *Dep't of Transp. v. Rowe*, 131 N.C. App. 206, 505 S.E.2d 911 (1998), *disc. review allowed*, 350 N.C. 93, —— S.E.2d —— (1999), this Court held that interlocutory orders which effect a substantial right of the defendant require an immediate appeal of the order. Pursuant to N.C.R. App. P. 3(c), "[a]ppeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry." "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

In *Rowe*, this Court held that a City has thirty days after the trial court's order determining that a taking has occurred in which to file its appeal. *Rowe* at 209-10, 505 S.E.2d at 914. This, however, was not done in the instant case. Instead, the City proceeded to trial on the issue of damages and did not file an appeal of the 30 March 1998 order until 18 June 1998, a date after the trial on damages had already taken place. "The Rules of Appellate procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). Further, this Court is bound by our earlier decision in *Rowe* and our Supreme Court's ruling in *Nuckles*. *See In the Matter of Appeal from Civil Penalty*. Thus, because the City failed to file an appeal from the 30 March 1998 interlocutory order within the thirty-day filing date as required by law, the City is precluded from raising the issue on appeal.

Notwithstanding this however, pursuant to N.C.R. App. P. 2, and in our supervisory powers under N.C. Gen. Stat. § 7A-32(c) (1986), in the interest of judicial economy, and because we are aware that our Supreme Court has allowed discretionary review in *Rowe*, we have reviewed the record on appeal and find this sub-issue to be meritless. Thus, defendant's first assignment of error is dismissed.

II.

[3] In its second assignment of error, the City contends the trial court erred in awarding fourteen percent interest compounded annually from the date of the taking to the date of satisfaction of the judgment. Because we have determined that the record supports the trial court's determination that the City's placement of the new sewer line outside the 1959 easement constituted a taking without prior payment of compensation, CMC is entitled to additional compensation for the delay in payment as required by the fifth and fourteenth amendments to the Constitution of the United States and Article I, section 19, of the Constitution of North Carolina. U.S. Const. amend. V; U.S. Const. amend. XIV; N.C. Const. art. I, § 19; *Lea Company v. N.C. Bd. of Transportation*, 317 N.C. 254, 345 S.E.2d 355 (1986).

The trial court in a condemnation case is required to add interest to the amount awarded as damages as part of just compensation from the date of the taking to the date of judgment. N.C. Gen. Stat. § 40A-53 (1984). However, under the "prudent investor" standard adopted by our Supreme Court, although the statutory rate is to be regarded as presumptively reasonable, in awarding just compensa-

tion for property taken, "the owner shall be put in as good position . . . as he would have been if his property had not been taken, and thus, the landowner may rebut the rate's reasonableness by introducing evidence of prevailing market rates and demonstrating that the prevailing rates are higher than the statutory rate." *Lea* at 258, 345 S.E.2d at 357, *quoting Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984). Under this standard, the trial court is to consider "prevailing rates, during the period of delay, for investments of varying lengths and risk [which] typically [include] short, medium, and long-term government and corporate obligations." *Lea* at 262-63, 345 S.E.2d at 360, *quoting Redevelopment AG. Of C. of Burbank v. Gilmore*, 38 Cal.3d 790, 214 Cal. Rptr. 904, 700 P.2d 794 (1985).

CMC introduced evidence indicating that the reasonable rate of return for investments from 4 June 1996 to the time judgment was entered, ranged between seven and two-tenths percent and twenty-eight and eight-tenths percent. *Lea* at 261, 345 S.E.2d at 359. The City offered no evidence as to what a reasonable prudent investor would have earned as a return or prevailing rate from the date of the taking through the date judgment was entered.

The trial court subsequently determined that with approximately one-half of an investment in interest-bearing certificates of deposit at a rate of return between seven and eight percent, and the remaining one half in the stock market at a rate of return of twenty percent, the prudent investor would reasonably realize a return of fourteen percent. Based upon the record and without evidence to the contrary, we conclude that the fourteen percent awarded by the trial judge is a fair and reasonable rate of return that would be realized by the prudent investor.

[4] A second collateral issue is whether the trial court was correct in awarding compound interest rather than simple interest as a means of compensating CMC for the delay in payment resulting from the taking. In adopting the prudent investor standard, our Supreme Court held that compound interest is warranted in condemnation cases if the evidence shows that from the time of the taking to the date of judgment, the prudent investor could have obtained compound interest in the marketplace. *Id.* at 264, 345 S.E.2d at 361. CMC's uncontradicted evidence indicated that interest compounded annually could be realized by the prudent investor in today's financial markets. "The use of compound interest as a measure in calculating additional

compensation for delay is a matter which will turn upon the evidence in each case and must be decided on a case by case basis." *Id.* at 264, 345 S.E.2d at 361. Because the record supports the trial court's determination that compound interest could be realized by the prudent investor, the trial court did not err in awarding compound interest.

[5] The trial court was in error, however, in awarding fourteen percent interest on the judgment to accrue from the date of taking up to the time the judgment is satisfied. To award fourteen percent interest as a rate of return after the date of judgment would be speculatory and inconsistent with the detailed actual rate analysis required by *Lea. See Id.* at 254, 345 S.E.2d at 355. Though we are aware that N.C. Gen. Stat. § 24-5(b) (1991) might be construed as allowing interest at the legal rate until the judgment is satisfied, N.C. Gen. Stat. § 40A-53 specifically provides for interest in eminent domain actions from the date of judgment until its satisfaction at the rate of six percent per annum.

III.

[6] Lastly, the City assigns error to the trial court's award of attorneys' fees. Regarding attorneys' fees, the pertinent North Carolina General Statute provides in pertinent part:

> (b) If a condemnor institutes a proceeding to acquire by condemnation any property and (i) if the final judgment in a resulting action is that the condemnor is not authorized to condemn the property, or (ii) if the condemnor abandons the action, the court with jurisdiction over the action shall after making appropriate findings of fact award each owner of the property sought to be condemned a sum that, in the opinion of the court based upon its findings of fact, will reimburse the owner for: his reasonable costs; disbursements; expenses (including reasonable attorney, appraisal, and engineering fees); and, any loss suffered by the owner because he was unable to transfer title to the property from the date of the filing of the complaint under N.C. Gen. Stat. § 40A-41.
>
> (c) If an action is brought against a condemnor under the provisions of N.C. Gen. Stat. § 40A-20 or N.C. Gen. Stat. § 40A-51 seeking compensation for the taking of any interest in property by the condemnor and judgment is for the owner the court shall award to the owner as a part of the judgment after appropriate finding

> of fact a sum that, in the opinion of the court based upon its finding of fact, will reimburse the owner as set out in subsection (b).

N.C. Gen. Stat. § 40A-8(b)(c) (1984).

The award of attorneys' fees under the statute providing for such an award to the prevailing plaintiff in inverse condemnation cases is within the sound discretion of the trial judge and is not reviewable except for abuse of discretion. *Lea Co. v. N.C. Board of Transportation*, 323 N.C. 691, 374 S.E.2d 868 (1989). However, the award of attorneys' fees is not to be arbitrarily determined.

> It is well settled that the judicial determination of reasonable attorney fees in an eminent domain action does not depend solely upon hourly rates and the number of hours devoted to the case. Accordingly, after initial analysis calculating the attorney services in terms of time the attorneys actually spent on the case, the court should then examine such factors as the nature of litigation . . . nature of the award, difficulty, amount involved, skill required in its handling, skill employed, attention given, [and] the success or failure of the attorney's efforts.

McQuillin Mun Corp § 32.96 (3rd Ed).

In the case before us, the trial court awarded what it deemed to be "reasonable" attorneys' fees, and such fees are permitted pursuant to the statute. The trial court failed, however, to make any findings of fact as required by the statute. As N.C. Gen. Stat. § 40A-8(b) and (c) mandate findings of fact, we remand to the trial court for entry of appropriate findings of fact to support any award of attorneys' fees.

Though neither party has raised the issue, we note that N.C. Gen. Stat. § 40A-54 (1984) requires that judgments under said statute be recorded in the registry of the county where the land is situated. We are unable to determine from the record that this has been done. On remand the trial court should further ascertain compliance with said statute, and if necessary provide therefor.

In summary, we conclude that the issue relating to placement of the sewer line outside the boundaries of the 1959 easement and whether that constituted a taking is not appealable because the notice of appeal was not filed timely. However, after reviewing the record pursuant to N.C.R. App. P. 2 and N.C. Gen. Stat. § 7A-32(c), we find no error in the trial court's determination that a taking occurred. Further, the trial court's judgment that the City abandoned the 1959

easement is reversed. We also hold fourteen percent interest is a reasonable rate of return for a prudent investor and that the fourteen percent interest compounded annually is to be added to the value of the land taken from the date of the taking to the date of judgment. An interest rate of six percent per annum is to be added to the judgment from the time of entry of judgment to the time when the judgment is satisfied. Finally, we hold that the award of $50,527.10 in attorneys' fees is remanded for findings of fact and conclusions justifying the reasonableness of any attorneys' fees awarded as is required by statute.

No error in part, reversed in part and remanded.

Judges WALKER and EDMUNDS concur.

IN RE: ELIZABETH V. HUSKINS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF DAVID H. HUSKINS, PLAINTIFF v. SCOTT E. HUSKINS; JAMES C. HUSKINS; LISA H. MOORE; CYNTHIA H. SITTON; JONATHAN HUSKINS, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM, DAVID P. HUSKINS; JOE D. HUSKINS, DEFENDANTS

No. COA98-1147

(Filed 6 July 1999)

1. Gifts— contents of safe—combination mailed to son—no gift to wife

The trial court erred by granting summary judgment for plaintiff-wife in an action to determine whether certain monies represented completed gifts where defendants argued that decedent's mailing of the combination of a safe to his son before committing suicide was not a gift of the contents of the safe to his wife. Although there was a notation that the contents of the safe belonged to Mrs. Huskins, there is a serious question about whether mailing the combination to the son was a constructive delivery of the contents to the wife.

2. Gifts— check—not paid before death—not a gift

The trial court erred by deciding that a check mailed to decedent's son made payable to decedent's wife constituted a completed gift to the wife where the bank had not paid the check

when the donor died. Decedent's death revoked the relationship with the bank and precluded the bank from honoring the check; the check is a part of the decedent's probate estate.

3. Wills— cash on decedent's person—personal effect

The trial court properly found that cash found on decedent's body is a personal effect and would pass under a personal effects clause rather than under a residuary clause. It would not be prudent to formulate a bright line rule that large amounts of cash are not personal effects as a matter of law. The courts must continue to ascertain the intention of each testator afresh in each case, analyzing the wording of each will as it relates to the circumstances of each individual testator.

Appeal by defendants Scott E. Huskins, James C. Huskins, Lisa H. Moore, Cynthia H. Sitton, and Jonathan Huskins, a minor by and through his guardian ad litem, David P. Huskins from judgment entered 17 June 1998 by Judge Zoro J. Guice, Jr., in McDowell County Superior Court. Heard in the Court of Appeals 28 April 1999.

On or about 8 September 1996, David H. Huskins (decedent) mailed an envelope to his son Scott E. Huskins (Scott) containing a check payable to decedent's wife, Elizabeth V. Huskins (Mrs. Huskins), in the amount of $220,000.00. The envelope also contained a handwritten note which gave the combination to a safe in decedent's apartment with the statement, "the contents belong to your mother" underneath the combination. In addition, a separate entry on the note stated "cash the check before my will is probated."

Later on the day of 8 September 1996, decedent committed suicide. The police officer who arrived on the scene found a white envelope on decedent's person which contained the amount of $8,720.00 in cash. An additional $1,330.25 was in decedent's wallet which was in his pocket. On 10 September 1996, Scott met with Peggy Neighbors (Ms. Neighbors), a twenty-year employee of decedent, who gave Scott the combinations to decedent's safe which was located in the apartment in which decedent and Mrs. Huskins lived. Ms. Neighbors told Scott that decedent had given her the combination to the safe about a year before he died and instructed her to give the combination only to Scott and no one else. Mrs. Huskins was never given the combination to the safe before decedent died even though the safe was in the residence that she shared with decedent.

On 12 September 1996, Mrs. Huskins and four of decedent's five children, Scott, Cynthia Sitton (Cynthia), Lisa Moore (Lisa), and David P. Huskins (David), opened the safe with the combination provided by Ms. Neighbors. The upper vault of the safe contained approximately $220,000.00 in cash. On 13 September 1996, Scott returned to his home in Georgia and received the envelope mailed by decedent containing the check payable to Mrs. Huskins and the combination to the safe.

The decedent died testate. His will provided in part:

> I bequeath to my wife, ELIZABETH VANCE HUSKINS, if she shall survive me, all household furniture and furnishings which I may own at the time of my death, all of my personal effects and any automobiles which I may own at the time of my death.

The will also provided for the establishment of two trusts: the Elizabeth V. Huskins Trust (a marital trust), and the David H. Huskins family trust. Mrs. Huskins is the sole beneficiary of the marital trust and is a beneficiary of the income from the family trust. Scott, Lisa, Cynthia, David, Jonathan Huskins and James Huskins (collectively, defendants) may also benefit from the family trust income in the trustee's discretion.

An amount in excess of $400,000.00, which includes the proceeds from decedent's check made payable to Mrs. Huskins, the cash found in the safe, plus earned interest, was placed in an escrow account. Mrs. Huskins and the five children signed an agreement on 6 April 1997 which stated that the "approximately four hundred nineteen thousand dollars currently being held in escrow by Dameron and Burgin Law firm on behalf of the Estate of David H. Huskins be provided to establish the marital trust specified in the last will and testament of David H. Huskins." Mrs. Huskins then filed this complaint in July 1997 to determine whether any of the money in the escrow account represented completed gifts to her so that they would not be subject to the testamentary trusts established in decedent's will. Both Mrs. Huskins and defendants filed motions for summary judgment. The trial court granted Mrs. Huskins' motion for summary judgment and denied defendants' motion. Defendants appealed, assigning errors.

Carnes and Franklin, P.A., by Hugh J. Franklin, for plaintiff appellee Elizabeth V. Huskins.

Adams Hendon Carson Crow & Saenger, P.A., by Philip G. Carson and Joy Gragg, for defendant appellants Scott E. Huskins, James C. Huskins, Lisa H. Moore, Cynthia H. Sitton; and Jonathan Huskins, by David P. Huskins, guardian ad litem.

HORTON, Judge.

The issues in this case are whether: (I) mailing the combination to the safe constituted a completed gift of the contents of the safe to Mrs. Huskins; (II) the check mailed to Scott was a completed gift to Mrs. Huskins; and (III) the cash found on decedent's body was a "personal effect" and passed to Mrs. Huskins under decedent's will.

I

[1] Defendants argue that decedent's act of mailing the combination to the safe was not a gift of the contents of the safe to Mrs. Huskins because the cash in the safe was never actually or constructively delivered to Mrs. Huskins; the letter mailed to Scott was not received before decedent's death, thereby delivery did not take place; and the letter was sent to Scott who was not a trustee of Mrs. Huskins. We agree with defendants' contention that there is insufficient evidence of an actual or constructive delivery of the contents of the safe for the reasons set out below.

There are two types of gifts recognized in North Carolina: *inter vivos* gifts and gifts *causa mortis*. *Creekmore v. Creekmore*, 126 N.C. App. 252, 256, 485 S.E.2d 68, 71 (1997). "In all cases of gifts, whether inter vivos or causa mortis, there must be a delivery to complete the gift. And, in North Carolina, the law of delivery is the same for gifts inter vivos and gifts causa mortis." *Atkins v. Parker*, 7 N.C. App. 446, 450, 173 S.E.2d 38, 41 (1970) (citations omitted).

> In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery. These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery, which delivery must divest the donor of all right, title, and control over the property given. . . . The intention to give, unaccompanied by the delivery, constitutes a mere promise to make a gift, which is unsupported by consideration, and, therefore, non-obligatory

> and revocable at will. Likewise, delivery unaccompanied by donative intent does not constitute a valid gift.

Courts v. Annie Penn Memorial Hospital, 111 N.C. App. 134, 138-39, 431 S.E.2d 864, 866 (1993) (citations omitted). Delivery of a gift may be "actual, constructive, or symbolic," therefore, there is no absolute rule as to the sufficiency of a delivery which is applicable to all cases. *Taylor v. Coburn*, 202 N.C. 324, 326, 162 S.E. 748, 749 (1932). Indeed, "[t]he delivery must be as perfect and as complete as the nature of the property and attendant circumstances will permit. . . . If actual delivery is impracticable, then there must be some act equivalent to it; it is not necessary that there be a manual delivery, or an actual tradition from hand to hand . . . ." 38A C.J.S. *Gifts* § 94 (1996).

In this case, there was some evidence of donative intent from the written notation that "the contents belong to your mother." Because this notation was found immediately below the combination to the safe, we may reasonably infer that decedent was making reference to the contents of the safe. Further, there is no elaboration as to the items included in the term "contents." We note that in this case, the safe in question had both upper and lower compartments, each of which had a combination. Decedent included both combinations in his handwritten note to Scott, and we might also reasonably infer that the term "contents" included everything to be found within either compartment. There is, however, a serious question about whether mailing the combinations and the note to Scott was a constructive delivery of the contents of the safe to Mrs. Huskins. Had the combinations of the safe and the accompanying note been mailed to Mrs. Huskins, or left for her in the apartment which she shared with decedent, her argument would be far stronger. Mrs. Huskins cites *Bynum v. Bank*, 221 N.C. 101, 19 S.E.2d 121 (1942), in which that decedent gave the key to a lockbox to a person and stated:

> Mattie, everything in this box is yours and this key unlocks this box and in this box it is that little box you sent to Pa, in that box is a little wooden box, the deed is in that, and in the box you sent to Pa, the big bank book and the little bank book is in there.

Id. at 104, 19 S.E.2d at 122. A jury found that there was a delivery of the bank book to the donee Mattie, and our Supreme Court upheld the jury verdict, stating:

> The delivery of a lock box and the keys thereto by a donor *to a donee*, together with a recital of the contents of the box and the

> statement that "Everything in this box is yours," would constitute delivery of the contents of the box . . . .

Id. at 105, 19 S.E.2d at 123 (emphasis added). In *Bynum*, however, there was an actual delivery of the box to the donee, unlike the case before us. Therefore, although decedent in *Bynum* retained the box for safekeeping, the jury properly found that there was a valid delivery. *Accord, Fesmire v. Bank*, 267 N.C. 589, 592, 148 S.E.2d 589, 592 (1966) ("when there has been an *actual transfer of possession* with the requisite intent, the gift is not defeated by the subsequent return of the article to the possession of the donor for safekeeping[.]" (Emphasis added.))

We find no authority in North Carolina as to whether there is sufficient delivery of a gift when the subject of the gift is mailed by the donor to the donee, but not received by the donee until after the donor's death. There is authority in other jurisdictions that a valid delivery had been made when the gift was deposited with the United States Post Office. 38 Am. Jur. 2d *Gifts* § 23 (1999). Indeed, in *Ray v. Leader Federal Sav. & Loan Ass'n*, 40 Tenn. App. 625, 292 S.W.2d 458 (1953), it was determined that a gift of a bank deposit was completed when the passbook containing an assignment by the donor was picked up by the post carrier from the donor's mailbox and the donor then committed suicide. *But see, Pikesville Nat. Bank & Trust Co. v. Shirley*, 281 Ky. 150, 135 S.W.2d 426 (1939) (holding that there was no valid gift of the money in a savings account when the decedent directed his bank to transfer a deposit to his sister and enclosed the passbook, mailed the letter and committed suicide, and the bank did not receive the letter and passbook until after the death of decedent).

We note that in *Ray* the mailing was directed to the *donee*, not to a third person. In this case, however, the combinations were not mailed to the donee, Mrs. Huskins, but to a third party. Although the third party, Scott, was informed that the contents were his mother's property, there was no instruction that he deliver the property to his mother. In fact, although it is reasonable to interpret the note to Scott to mean that the contents in the safe were to be the separate property of Mrs. Huskins, the same language may be interpreted to mean that the moneys in the safe were to be used to fund the marital trust of which Mrs. Huskins is the sole beneficiary.

Other circumstances lead us to the conclusion that there was no valid delivery of the contents of the safe. While we agree with Mrs. Huskins that one cannot easily deliver a safe, that same consideration

does not apply to the delivery of the *contents* of the safe, especially when the parties in this case resided together in the apartment in which the safe was located. Considering the large amount of money found in the safe, decedent could have also delivered the combinations directly to Mrs. Huskins with an express statement of his intent that she have the contents.

Finally, we think it is crucial to our analysis that had decedent wanted to change his will to provide that the contents of the safe were to be the property of his wife, the record demonstrates that he was well aware of how to make those changes. On the day of his death, he wrote a second codicil to his will relating to the disposition of a certain tract of real estate in Mitchell County. The codicil was in his own handwriting, and read as follows:

> Sept 8—1996
>
> Codicil to my will
>
> I David H. Huskins will
> to my brother Joe D Huskins
> the tract of land I own
> in Mitchell County registered
> in book 274 page 571—
>
> David H. Huskins

The codicil prepared by decedent identifies the property in question, is an unmistakable statement of his donative intent, and is dated and signed by him. Clearly, decedent could have easily done the same as to the contents of his safe. Under the circumstances of this case, all of which we have carefully weighed and considered, we are not able to say that there was a valid delivery of the contents of the safe to Mrs. Huskins. The judgment of the trial court in this respect is reversed.

II

[2] In *Creekmore*, this Court adopted the rule that "a donor's own check drawn on a personal checking account is not, prior to acceptance or payment by the bank, the subject of a valid gift either *inter vivos* or *causa mortis*." *Creekmore*, 126 N.C. App. at 257, 485 S.E.2d at 72. This holding was based on the fact that until the bank accepts and pays the money, the donor retains control over the funds. *Id.* at 257-58, 485 S.E.2d at 72. This is true even if the donor dies, because

the donor's command to the bank to pay the funds is revoked at the death of the donor. *Id.*

In this case, the check was not a valid gift because the bank had not paid on the check before decedent died, and the death of decedent revoked the relationship between decedent and the bank. Indeed, the death of decedent precluded the bank from honoring the check. As a result, the check to Mrs. Huskins was not a gift and is a part of decedent's probate estate. The decision of the trial court to the contrary is reversed.

III

[3] Defendants next argue that the cash found on decedent's person was not a "personal effect" which would pass to Mrs. Huskins under Article II of decedent's will, but instead was a part of the residue which would pass to the trusts to be set up under the will. We disagree.

"When a will is presented for construction the intention of the testator is to govern and this is to be ascertained from the language used by him, giving effect, if possible, to every clause, phrase, and expression in the entire instrument." *Adler v. Trust Co.*, 4 N.C. App. 600, 603, 167 S.E.2d 441, 442 (1969). The *Adler* Court defined "personal effects" as " 'property especially appertaining to one's person and having a close relationship thereto.' " *Id.* at 605, 167 S.E.2d at 444 (quoting Webster's Third New International Dictionary (1968)). In *Adler*, the testator bequeathed his "personal effects" to his brother, Harold Adler. The trial court determined that Harold Adler did not receive the houseboat "Heaven" as a part of that bequest, and this Court affirmed. Noting that ascertaining the correct meaning of the phrase "personal effects" had often "occasioned considerable difficulty," we held that the testator in *Adler* did not intend the words "personal effects" to include all of his personal property, because that interpretation would have rendered the residuary clause nugatory. *Id.* at 604-05, 167 S.E.2d at 443-44. Further, the testator in *Adler* clarified the meaning of the term "personal effects" as used in his will by expressly

> includ[ing] jewelry, clothing, and his household furniture, as well as such of his china, silver and crystal as should not be desired by his two cousins. By using the words "personal effects" in conjunction with these other items, it is apparent that testator intended to include only things *ejusdem generis* with those cov-

> ered by the other terms. A houseboat is clearly not *ejusdem generis* with articles of jewelry, clothing, household furniture, china, silver or crystal.

Id. at 605, 167 S.E.2d at 444.

In the present case, decedent clearly did not intend that "personal effects" be as broad in meaning as "personal property." In Article II, decedent bequeathed to his wife "all household furniture and furnishings which I may own at the time of my death, all of my personal effects and any automobiles which I may own at the time of my death." Then in Article III, which contains a residuary clause, decedent made disposition of the "rest, residue and remainder of [his] estate, both real and *personal* property . . . ." (Emphasis added.) We believe it is significant that decedent made no explicit disposition of any cash money which might be on his person at the time of his death. Although decedent knew well how to draft a holographic codicil to his will, as we pointed out above, he did not make any disposition of the cash money on his person at the time he decided to commit suicide. He also did not leave any other directions for the disposition of the funds, nor did he place them in his safe or other secure place. Moreover, by way of contrast, the other items of personal property expressly bequeathed by decedent were larger items including furniture and automobiles, both categories of personal property not carried on or about the person. In the absence of any clear indications to the contrary, in order to carry out the intention of decedent, the term "personal effects" should be given its ordinary and usual meaning.

Black's Law Dictionary defines "personal effects" as "[a]rticles associated with person, as property having more or less intimate relation to person of possessor . . . ." Black's Law Dictionary 1143 (6th ed. 1990). Likewise, "personal effects" are defined by The American Heritage Dictionary as "privately owned items, [such as] a wallet . . . that are . . . carried on one's person." The American Heritage Dictionary 925 (2d ed. 1985). In this case, decedent states in his will that *all* of his personal effects were bequeathed to his wife, Mrs. Huskins. If items such as a wallet are considered personal effects, it is impractical and arbitrary to then state that any items within the wallet are not personal effects or because the item was found in another pocket of the clothes decedent was wearing, that item was not a personal effect. Although the amount of cash in this case was substantial, we do not believe it would be prudent to formulate a "bright line" rule that large amounts of cash on a decedent's person

and in his wallet are as a matter of law not "personal effects." Instead, we must continue to ascertain the "true intention of each testator as expressed in his will . . . afresh in each individual case[,]" analyzing "the wording of each particular will as it relates to the circumstances of each individual testator." *Adler*, 4 N.C. App. at 604, 167 S.E.2d at 443.

Considering the wording of the will and the circumstances of decedent in the case before us, we hold that the trial court properly concluded that the cash money found on decedent's body is a "personal effect" and belongs to Mrs. Huskins according to decedent's will. The decision of the trial court in this regard is affirmed.

Affirmed in part, and reversed in part.

Judges LEWIS and TIMMONS-GOODSON concur.

FRAN'S PECANS, INC., PLAINTIFF v. WILLIAM A. GREENE AND CENTENNIAL FOODS, INC., DEFENDANTS

No. COA98-1053

(Filed 6 July 1999)

1. Appeal and Error— assignment of error—required

The denial of a motion to dismiss under forum non conveniens was affirmed where defendant failed to assign error to the trial court's conclusion of law.

2. Jurisdiction— long arm—injury to person or property in state

The trial court did not err by denying defendant-Centennial Foods' motion to dismiss for lack of personal jurisdiction where defendant argued that N.C.G.S. § 1-75.4(4) (a) requires proof of an actual injury within the state, but the statute requires only an allegation of injury; the injuries alleged here all occurred with the implementation of defendant's solicitation and sales to North Carolina customers in the fall of 1997, by which time plaintiff had relocated its headquarters to North Carolina and could claim injury within the state; these local injuries were the result of activities by defendant outside of North Carolina; and the

sales and solicitation activities admitted by defendant in the fall of 1997 are proximate enough in time to fulfill the statute's requirements.

3. Jurisdiction— minimum contacts—sufficient

Defendant had sufficient minimum contacts to justify the exercise of personal jurisdiction without violating due process where defendant mailed at least 1,937 sales catalogs to North Carolina residents, sold products to 239 North Carolina residents, generating over $12,000 in sales, and defendant could expect to use North Carolina courts to enforce the sales contracts.

Appeal by defendant Centennial Foods, Inc. from an order filed 11 June 1998 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 April 1999.

Haynsworth Baldwin Johnson & Greaves LLC, by Robert S. Phifer and Linda M. Fox, for defendant-appellant.

Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr., for plaintiff-appellee.

LEWIS, Judge.

Defendant Centennial Foods, Inc. appeals the trial court's denial of its motion to dismiss for lack of personal jurisdiction or, alternatively, to dismiss on the grounds of *forum non conveniens*. Defendant William A. Greene ("Greene") is not a party to this appeal. The evidence presented showed that plaintiff is a Georgia corporation with its principal place of business in Charlotte and an office in Harlem, Georgia. Plaintiff acquired space in an office building in Charlotte and established its headquarters there in September 1997. Defendant is a Georgia corporation with its headquarters in Augusta, Georgia. Both corporations sell gifts of specialty foods and do the majority of their business in the holiday buying season from September through the end of December. Prior to August 1997 Greene was the president and a director of plaintiff corporation. In this capacity he had access to information pertaining to the inner workings of plaintiff, specifically customer lists, pricing and profit margin information, customer history, and financial information about plaintiff's debts and profitability. Greene also established the wholesale prices each year by factoring in component costs, information not generally known in the industry.

In 1996 plaintiff attempted to acquire Eilenberger's Bakery, ("Eilenberger's") a commercial bakery based in Texas, for $1.6 million. Greene and Charles Calhoun began their own attempt to purchase both plaintiff and Eilenberger's in October 1996. Since plaintiff knew that Greene wished to acquire both it and Eilenberger's, plaintiff did not pursue the purchase of Eilenberger's further. The anticipated sale to Greene fell through. In May 1997 Greene learned that Eilenberger's was again for sale, this time for less than $1 million. Rather than inform plaintiff, Greene told Calhoun. Calhoun incorporated defendant in Georgia for the purpose of acquiring Eilenberger's. It did so on 15 August 1997. Greene resigned from plaintiff effective 1 September 1997 and began working for defendant on that same day. Greene's employment with defendant included responsibilities for sales and marketing of their product. Defendant mailed 1,937 of its catalogs to North Carolina residents, 239 of whom placed orders totaling $12,323.95 in sales. Plaintiff alleges these sales opportunities were the result of Greene's taking valuable information about trade secrets and proprietary information with him upon his termination of employment with plaintiff.

[1] In its notice of appeal, defendant claims it is entitled to a dismissal under the common law doctrine of *forum non conveniens*. However, defendant failed to assign error to Conclusion of Law No. 5, in which the trial court stated, "Dismissing or staying this litigation under . . . the common law doctrine of *forum non conveniens* would be inappropriate, as there is insufficient evidence to establish that a substantial injustice would result from Defendant Centennial litigating this case in North Carolina." The appellant must assign error to each conclusion it believes is not supported by the evidence. N.C.R. App. P. 10. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts. *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 760, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Therefore, the denial of the motion to dismiss under *forum non conveniens* is affirmed.

Defendant also moved for a motion to dismiss for lack of personal jurisdiction. The test for establishing *in personam* personal jurisdiction over a foreign corporation is two-fold: first, "Whether North Carolina's 'long-arm' statute permits courts in this jurisdiction to entertain the action;" and second, "whether exercise of this jurisdictional power comports with due process of law." *ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 668, 386 S.E.2d 766, 767 (1990). Defendant challenges both prongs of this test.

[2] Defendant first challenges plaintiff's assertion of jurisdiction under our long-arm statute, G.S. Section 1-75.4(4)(a). The statute allows the exercise of personal jurisdiction

> in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury . . . :
>
> a. [s]olicitation or services activities were carried on within this State by or on behalf of the defendant . . . .

N.C. Gen. Stat. § 1-75.4(4)(a) (1996). To exercise personal jurisdiction over a foreign corporation, the plaintiff must establish: 1) an action claiming injury to a North Carolina person or property; 2) that the alleged injury arose from activities by the defendant outside of North Carolina; and 3) that the defendant was engaging in solicitation or services within North Carolina "at or about the time of the injury." *Id.*

Defendant mistakenly argues that the statute demands plaintiff prove an actual injury to a person or property within the state. However, the statute requires only that plaintiff allege an injury. *Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062, 1067 (4th Cir. 1982). Plaintiff alleges that defendant misappropriated trade secrets, interfered with prospective business relations and carried on unfair trade practices, thereby harming plaintiff's business. Intangible injuries like these are considered injuries under G.S. Section 1.75-4(4)(a). *Munchak Corporation v. Riko Enterprises, Inc.*, 368 F. Supp. 1366, 1372 (M.D.N.C. 1973). Specifically, a plaintiff's claim to loss of potential profits and damage to business reputation constitutes injury under G.S. Section 1-75.4(4)(a). *Vishay*, 696 F.2d 1062. Furthermore, a defendant's misuse of inside information amounts to an injury to a plaintiff. *Hankins v. Somers*, 39 N.C. App. 617, 621, 251 S.E.2d 640, 643, *disc. rev. denied*, 297 N.C. 300, 254 S.E. 920 (1979). These claimed injuries all occurred with the implementation of defendant's solicitation and sales to North Carolina customers in the fall of 1997. By this time plaintiff had relocated its headquarters to North Carolina and could then claim injury to its person or property in the state, thus fulfilling the statutory requirement.

Next, these local injuries were the result of activities by defendant outside of North Carolina. Defendant engaged in sales and solicitation activities with North Carolinians in the fall of 1997 via catalog distribution by mail.

Finally, under G.S. Section 1.75-4(4)(a), a defendant need only be carrying on solicitation or services with North Carolinians "at or about the time of the injury." Statutes used to establish personal jurisdiction are to be liberally construed in favor of establishing the existence of personal jurisdiction. *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 506 S.E.2d 754, 757 (1998). By its own admission defendant engaged in sales and solicitation activities with North Carolina residents during the fall of 1997. These activities contributed to plaintiff's alleged injury and are proximate enough in time to fulfill the statute's requirements. Therefore, we conclude that personal jurisdiction over defendant exists under G.S. Section 1.75-4(4)(a).

Defendant also challenges plaintiff's assertion of jurisdiction under G.S. Section 1-75.4(1)(d). Since personal jurisdiction has been established under G.S. Section 1-75.4(4)(a) we need not address this issue.

[3] We next consider whether the exercise of *in personam* jurisdiction satisfies due process, "not offending traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). North Carolina exercises specific jurisdiction over a party when it exercises personal jurisdiction in a suit arising out of that party's contacts within the state. *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989). To establish specific jurisdiction, the court looks at "the relationship among the parties, the cause of action, and the forum state" to see if minimum contacts are established. *ETR Corporation*, 96 N.C. App. at 669, 386 S.E.2d at 768. The test for minimum contacts is not mechanical, but instead requires individual consideration of the facts in each case. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 607, 334 S.E.2d 91, 92 (1985). The activity must be such that defendant could reasonably anticipate being brought into court there. *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 292, 62 L. Ed. 2d 490, 498 (1980). The factors to consider for minimum contacts include: (1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state; and (5) the convenience to the parties. *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E.2d 300, 302, *disc. rev. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985).

In the present case, defendant has engaged in numerous contacts with the state. Defendant mailed at least 1,937 of its sales catalogs to

North Carolina residents in the fall of 1997. It sold products to 239 North Carolina residents in that season, generating over $12,000 in sales. Should those persons who order products in North Carolina fail to pay, defendant could expect to use our courts to enforce those contracts. By soliciting sales and selling products within North Carolina, defendant purposefully availed itself of the privilege of conducting activities within the state with the benefits and protection of its laws. *Hanson v. Denkla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958). *See also Dowless v. Warren-Rupp Houdailles, Inc.*, 800 F.2d 1305, 1308, (4th Cir. 1986) (sale of products by a foreign corporation in North Carolina amounts to minimum contacts because the corporation purposefully availed itself of the benefits and protections of North Carolina law). Defendant's sales and solicitations with North Carolina residents through its mail-order catalog business establish minimum contacts for specific jurisdiction because the actions are directly related to the basis of plaintiff's claim. Because we have found minimum contacts under specific jurisdiction, due process is satisfied. We need not establish general jurisdiction under these facts. *ETR Corporation*, 96 N.C. App. at 669, 386 S.E.2d at 768.

Litigating this matter in North Carolina serves both plaintiff's and North Carolina's best interests. Plaintiff is headquartered in North Carolina and performs all of its administrative functions in North Carolina. North Carolina has a manifest interest in providing its residents with a convenient forum for addressing injuries inflicted by parties out of state. *Id.* In addition, defendant has failed to assign error to Conclusion of Law No. 5, holding that no substantial injustice would result from defendant litigating this case in North Carolina. We hold that defendant has made sufficient minimum contacts to justify the exercise of personal jurisdiction in this state without violating due process.

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

CATHY HOWARD, PLAINTIFF-APPELLEE v. OAKWOOD HOMES CORP., DEFENDANT-APPELLANT

No. COA98-1101

(Filed 6 July 1999)

1. Appeal and Error— appealability—right to arbitrate

The right to arbitrate a claim is a substantial right which may be lost if review is delayed and an order denying arbitration is therefore immediately appealable.

2. Employer and Employee— dispute resolution program— employment contract

The trial court erred by denying defendant's motion to compel dispute resolution and stay judicial proceedings where the court concluded that the dispute resolution program (DRP) was unenforceable due to lack of consideration. The evidence was sufficient to show that plaintiff knew that the terms of the DRP would apply to her should she continue her employment and both plaintiff and defendant were mutually bound by the terms of the DRP. Unlike a covenant not to compete, an arbitration agreement requires a new promise from both parties which mutually changes the nature of the employment relationship and this mutual promise is new and sufficient consideration. Agreements to arbitrate are favored and encouraged, whereas covenants not to compete are disfavored.

Appeal by defendant from judgment entered 9 July 1998 by Judge Catherine Eagles in Guilford County Superior Court. Heard in the Court of Appeals 20 April 1999.

Gray, Newell & Johnson, LLP, by Angela Newell Gray, for plaintiff-appellee.

Constangy, Brooks & Smith, LLC, by W.R. Loftis, Jr., and Virginia A. Piekarski, for defendant-appellant.

MARTIN, Judge.

Defendant Oakwood Homes Corp. appeals the denial of its motion to compel arbitration and stay judicial proceedings in the underlying civil action. Briefly summarized, the record discloses that defendant manufactures and sells homes throughout the United

States and employs approximately 9,600 employees to that end. Plaintiff Cathy Howard began employment with defendant on a temporary basis in 1991, and accepted a full time position as an at-will employee in defendant's Title Department in September 1992.

On 1 May 1997, defendant implemented a Dispute Resolution Program ("DRP") requiring defendant and its employees to submit to dispute resolution as the exclusive means of resolving a variety of employment disputes, including those arising out of an employee's termination. The program provides that an employee with a claim may submit a written complaint to defendant's Director of Human Resources. The complaint is then investigated, and an answer is provided to the employee. If the employee is not satisfied, the employee may request non-binding mediation conducted by a mediator provided by the American Arbitration Association. If the defendant and the employee are unable to resolve the dispute through mediation, the employee may elect to submit the dispute to binding arbitration in which the arbitrator may grant any remedy or relief that would have been available through the courts. Under the DRP, all arbitrations are conducted in accordance with the Federal Arbitration Act ("FAA").

Prior to the 1 May 1997 effective date of the DRP, on 1 April 1997, defendant's Vice-President of Human Resources mailed to covered employees a copy of the DRP with a memorandum informing employees that both defendant and the employee would be bound by the program, and that an employee's decision to continue employment with defendant would constitute an agreement to be bound by the terms of the DRP. Additionally, on 7 April 1997, Paul Macksood, defendant's Director of Human Resources, distributed an office memorandum to employees informing them of scheduled meetings at which employees were to be instructed on the terms of the DRP and permitted to ask questions about it.

On 3 June 1997, following implementation of the DRP, plaintiff's employment with defendant was terminated for poor performance. Plaintiff complained that she was not issued a final warning prior to her termination. In response to her complaint, Mr. Macksood informed plaintiff that her claim was treated as though it had been brought under the DRP, that it had been investigated accordingly, and although defendant was not required to issue plaintiff a final warning, defendant would provide plaintiff another opportunity to improve her level of performance. Plaintiff's termination was rescinded. Mr.

Macksood reminded plaintiff by letter that she was bound by the DRP and attached a copy of the program thereto.

On 18 July 1997 plaintiff was again terminated for poor performance, and on 23 April 1998 she commenced the underlying civil action against defendant, alleging wrongful termination, negligent infliction of emotional distress, negligent supervision, negligent retention, and intentional infliction of emotional distress. On 12 June 1998 defendant moved for an order to stay judicial proceedings and compel plaintiff to submit her claim to dispute resolution pursuant to the DRP. The trial court denied defendant's motion, concluding that no agreement to arbitrate existed due to lack of consideration.

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[1] Where a trial court's order, such as the order *sub judice*, fails to resolve all issues between all parties in an action, the order is not a final judgment, but rather is interlocutory. *First Atlantic Management Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 507 S.E.2d 56 (1998). While an interlocutory order is generally not directly appealable, such an order will be considered " 'if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.' " *N.C. Ins. Guar. Ass'n v. Burnette*, 131 N.C. App. 840, 843, 508 S.E.2d 837, 839 (1998) (citation omitted); *see also* N.C. Gen. Stat. § 1-277, 7A-27. The right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable. *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998).

[2] In its sole assignment of error, defendant argues that its motion to compel arbitration should have been granted, and that the trial court erred in concluding that the DRP was not an enforceable agreement due to lack of consideration. We agree.

We note at the outset that North Carolina " 'has a strong public policy favoring the settlement of disputes by arbitration' ", and that "[o]ur 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." *Martin v. Vance*, 133 N.C. App. 116, 120, 514 S.E.2d 306, 309 (1999) (citing *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91-92, 414 S.E.2d 30, 32 (1992)). Although arbitration is favored in the law, in order to be enforced, the underlying agreement must first be shown to be valid as determined by a common law contract analysis. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 423 S.E.2d 791 (1992). It is a basic principle of contract law

that in order to be valid, an agreement must be supported by adequate consideration. *Deans v. Layton*, 89 N.C. App. 358, 368, 366 S.E.2d 560, 567, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 276 (1988) (citation omitted). "Mutual promises may constitute reciprocal consideration to support a contract." *Id.*

In *Vance*, *supra*, this Court recently ruled on the validity of an agreement to arbitrate in the employment context. The plaintiff in *Vance* had been employed with the defendant since 1990, and in 1994 the defendant implemented an alternative dispute resolution grievance procedure which was set forth in the personnel policy manual. In holding that the agreement was supported by adequate consideration, this Court stated,

> . . . the agreement to arbitrate does not fail for lack of consideration. Mutual binding promises provide adequate consideration to support a contract. Where each party agrees to be bound by an arbitration agreement, there is sufficient consideration to uphold the agreement.

Vance at 122, 514 S.E.2d at 310 (citations omitted). The *Vance* court noted that other jurisdictions have held that mutual promises to arbitrate constitute sufficient consideration, specifically citing the Fourth Circuit opinions in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997), and *Johnson v. Circuit City Stores*, 148 F.3d 373 (4th Cir. 1998). We too find such cases instructive.

In *O'Neil*, the plaintiff had been employed with defendant hospital since 1991. In 1994, the plaintiff signed an agreement that she would arbitrate all claims as a condition of her continued employment. *O'Neil* at 273. The plaintiff was subsequently terminated, and she filed suit, arguing that the agreement was invalid for lack of consideration where it was not binding on the hospital. *Id.* at 274-75. The Fourth Circuit, in holding that the agreement was mutually binding, stated that the employer's proffer of the agreement implied that both employer and employee would be bound by the agreement, and that the employer had consistently argued that it was bound by the agreement. *Id.* at 275. The court held that a mutual agreement existed, and that "a mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement." *Id.* (citation omitted).

In *Johnson*, the Fourth Circuit reversed the district court's conclusion that an arbitration agreement was void for lack of consideration, and held that an agreement between the parties to be bound by

the same rules was sufficient consideration to support the arbitration agreement. *Johnson* at 378. The court stated,

> As in O'Neil, both parties in this case agreed to be bound by the arbitration process for the resolution of any claim required to be submitted to arbitration under the Dispute Resolution Agreement. Therefore, we hold that the Dispute Resolution Agreement was supported by adequate consideration. . . . no consideration above and beyond the agreement to be bound by the arbitration process was required.

Id. Following this Court's holding in *Vance*, and applying the reasoning of *O'Neil* and *Johnson*, we hold that the mutual promise to abide by the provisions of the DRP and to relinquish the right to pursue certain disputes in court is sufficient consideration to support the DRP agreement.

Moreover, we are unpersuaded by plaintiff's argument that there was no mutual agreement to be bound by the terms of the DRP. As in *O'Neil*, *supra*, by proffering the DRP, defendant has at least implicitly agreed to be mutually bound by the DRP, and, as in *O'Neil*, defendant has consistently argued that it is bound by the DRP and has shown a commitment to arbitration by virtue of this action. Moreover, the DRP provides that all arbitrations are to be conducted pursuant to the FAA. The FAA requires that agreements to arbitrate be in writing, however, such agreements need not be signed. *See Real Color Displays, Inc. v. Universal Applied Technologies Corp.*, 950 F. Supp. 714 (E.D.N.C. 1997) (As in contract law, the FAA imposes no requirement that a written arbitration agreement be signed by the party to be charged, and it is sufficient that a party by act or conduct commits himself to the agreement.).

In *Vance*, we noted that where the language of a contract is clear and unambiguous, we must interpret the contract as written. *Vance*, *supra* (citing *Robbins v. Trading Post*, 253 N.C. 474, 117 S.E.2d 438 (1960)). The *Vance* court, upon noting that the plaintiff had actually signed the contract, the terms of which unambiguously bound her to arbitration, held it unnecessary to look beyond the writing to determine if mutual assent existed. *Id.* In the present case, however, plaintiff did not sign the agreement, and, while the terms of the DRP unambiguously bound her to the agreement should she continue employment through 1 May 1997, we look beyond the writing to determine if mutual assent to the terms of the DRP existed.

An examination of the record shows that plaintiff continued in defendant's employment with actual notice that the terms of the DRP would be mutually effective 1 May 1997, and she therefore evidenced her mutual assent to the terms of the DRP by continuing in her employment. Defendant mailed to plaintiff's home on 1 April 1997 a copy of the DRP as well as a memorandum regarding the requirements and effective date of the program. On 7 April 1997 defendant notified employees of the impending implementation, as well as a schedule of meetings where employees could learn and ask questions about the DRP. Plaintiff again received a copy of the DRP by mail on 24 June 1997 accompanied by a letter from Mr. Macksood informing her that her prior employment dispute had been handled pursuant to the terms of the DRP. Moreover, plaintiff, in a complaint filed with the Equal Employment Opportunities Commission, acknowledged existence of the DRP agreement and that the recission of her initial termination occurred as a result of DRP procedures. We hold such evidence to be sufficient to show plaintiff knew that the terms of the DRP would apply to her should she continue in her employment, and that by doing so, plaintiff mutually assented to the program. Both plaintiff and defendant were mutually bound by the terms of the DRP, and such mutuality provided the consideration necessary to support the agreement.

We, of course, are advertent to the decisional law in this State which holds that the prospect of continued employment is insufficient consideration to support a covenant not to compete where the employee receives "no change in compensation, commission, duties, nature of employment or other consideration in exchange for signing the agreement . . . ." *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355, *disc. review denied*, 349 N.C. 355, 525 S.E.2d 449 (1998). In *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 870, 433 S.E.2d 811, 814 (1993), this Court held a non-compete agreement to be unsupported by sufficient consideration where the employer "made no new promise that he was required to keep in return for the promise not to compete."

Plaintiff argues that the principle of such cases should apply here. Unlike a covenant not to compete, however, an arbitration agreement requires a new promise from both parties which mutually changes the nature of the employment relationship in that both parties relinquish their right to pursue certain employment disputes in court. As stated above, this mutual promise is new and sufficient consideration to support the agreement. Moreover, the principle that continued

employment alone is insufficient consideration is applied in the context of covenants not to compete which invoke policy concerns and are disfavored by the law, whereas agreements to arbitrate are favored and encouraged. *See Cox v. Dine-A-Mate*, *supra* (in order to be valid, covenant not to compete must be shown to be reasonable and not against public policy); *Johnston County v. R.N. Rouse & Co.*, *supra* (North Carolina has strong public policy favoring agreements to arbitrate).

Additionally, plaintiff argues that the DRP is egregious and violative of plaintiff's constitutional rights. However, the trial court's sole conclusion of law in denying defendant's motion to compel arbitration pursuant to the DRP was that no agreement to arbitrate exists between the parties "since there was no valid consideration." Plaintiff has not cross-assigned error to the trial court's failure to find and conclude, as an alternative basis for denying defendant's motion, that the DRP was egregious and violative of plaintiff's constitutional rights. We therefore do not consider plaintiff's argument. *See* N.C.R. App. P. 10(d) (appellee may cross-assign as error any action or omission of the trial court depriving appellee of alternative basis in law for supporting the trial court's order); N.C.R. App. P. 10(a) ("scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10"); *Albrecht v. Dorsett*, 131 N.C. App. 502, 508 S.E.2d 319 (1998).

The order of the trial court denying defendant's motion to compel dispute resolution and stay judicial proceedings is hereby reversed, and this case is remanded to the trial court for entry of an order granting defendant's motion.

Reversed and remanded.

Judges GREENE and McGEE concur.

STATE OF NORTH CAROLINA v. RICHARD HAROLD SMITH, JR.

No. COA98-781

(Filed 6 July 1999)

1. Evidence— chain of custody—cocaine

The trial court did not abuse its discretion in a prosecution for possession of cocaine with intent to sell and deliver by admitting crack and a cellophane cigarette wrapper where defendant contended that the State did not establish the proper chain of custody and that the cocaine was from an unrelated transaction. The testimony of the deputy who received the evidence from an undercover officer was sufficient to establish the link in the chain of custody and the undercover officer's lack of testimony about the cellophane wrapper is merely an arguably weak link, properly considered by the jury.

2. Evidence— identification—pre-trial—suggestive—no irreparable misidentification

The trial court did not err in a prosecution for possession of cocaine with intent to sell and deliver by admitting an officer's pre-trial identification of defendant where the officer was shown a page from defendant's high school yearbook on which he was the only black male and below which his name was clearly printed, and the officer knew that she was identifying a black male and had been told defendant's name. The pre-trial identification was unnecessarily suggestive, but did not result in the strong probability of misidentification because the officer had ample opportunity to view defendant at the time of each crime, the officer was trained to maintain a high degree of attention when observing suspects and was aware that she would later identify defendant, she gave a detailed description of defendant, and she exhibited a high degree of certainty when shown the high school yearbook.

3. Evidence— identification—in-court not tainted by out-of-court

The trial court did not err in a prosecution for possession of cocaine with intent to sell and deliver by admitting an in-court identification of defendant where defendant argued that the in-court identification had been tainted by an out-of-court identification. The suggestiveness of the out-of-court identification did

not rise to a level conducive to irreparable mistaken identification and, as the officer had ample time to observe defendant at the scene of each crime, any uncertainty goes to the weight and not the admissibility of the testimony.

4. Evidence— identification—voir dire not held on motion to suppress

There was no prejudicial error in a prosecution for possession of cocaine with intent to sell and deliver in the trial court's failure to conduct a voir dire outside the presence of the jury on defendant's motion to suppress identification testimony. Although the court should have conducted a voir dire, the identification was not based on impermissibly suggestive procedures and the clear weight of the evidence shows several indicia of reliability.

Appeal by defendant from judgment entered 4 October 1996 by Judge Zoro J. Guice, Jr., in Transylvania County Superior Court. Heard in the Court of Appeals 8 June 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Christine M. Ryan, for the State.

David G. Belser for defendant-appellant.

MARTIN, Judge.

Defendant appeals from convictions and active sentences imposed on two counts of sale and delivery of cocaine and two counts of possession of cocaine with intent to sell or deliver. At trial, the State offered evidence tending to show that on 4 March and 9 March 1995, the Transylvania County Sheriff's Department and the Brevard Police Department conducted undercover drug purchases. During each operation, undercover officer Susan Dermid met with William Lucas, a confidential informant, and the two drove around a Brevard housing project with the goal of purchasing drugs.

On 4 March, defendant sold Officer Dermid $200 worth of crack cocaine while she wore a one-way body wire monitored by other officers. Following the 4 March purchase, Officer Dermid gave a description of defendant over the body wire, and identified him as Rick Smith. Shortly after the purchases were made, Officer Dermid handed over all evidence received during the transaction to Transylvania County Sheriff's Deputy Gerald Frady.

On 9 March, Officer Dermid again purchased $200 worth of crack cocaine from defendant. Officer Dermid identified defendant over a body wire as the same man as before. On 9 March, Officer Dermid also bought crack cocaine from another suspect, allegedly Perry King. Officer Dermid kept the cocaine purchased from King separate from the cocaine purchased from defendant by placing the drugs from King in a cellophane wrapper from a pack of cigarettes. Shortly after the 9 March purchases were made, Officer Dermid turned over all evidence gathered to Deputy Frady.

The State offered evidence of Officer Dermid's pre-trial photograph identification of defendant, as well as an in-court identification. Defendant moved to suppress the identifications, and his motion was denied. The trial court did not conduct *voir dire* on defendant's motion. Defendant was also identified at trial by William Lucas, the police informant, as having sold Officer Dermid cocaine on both occasions. In addition, the State introduced a plastic bag containing crack cocaine and a cellophane wrapper from a cigarette pack, offering the evidence as the cocaine Officer Dermid purchased from defendant on 4 March. Defendant offered evidence tending to show that he was at his sister's home on 9 March 1995, and that he stands about 6' tall, and wore a goatee in March 1995.

A jury found defendant guilty of two counts of sale and delivery of cocaine, and two counts of possession of cocaine with intent to sell or deliver, and he was sentenced to 6-8 months in prison suspended on supervised probation. Defendant appeals.

I.

[1] Defendant first argues that the trial court violated his right to due process by admitting into evidence the bag containing the crack cocaine and cellophane cigarette wrapper. Specifically, defendant asserts that the State did not establish the proper chain of custody, and that the cocaine contained in the bag was sold to Officer Dermid by Perry King in a transaction unrelated to defendant. Admission of actual evidence is at the trial court's discretion, and the identification of such evidence need not be unequivocal. *State v. Stinnett*, 129 N.C. App. 192, 497 S.E.2d 696, *disc. review denied*, 348 N.C. 508, 510 S.E.2d 669, *cert. denied* 525 U.S. 1008, 142 L.Ed.2d 436 (1998).

> The trial court exercises its discretion "in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in

> unchanged condition. A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Further, any weak links in a chain of custody relate only to the weight to be given the evidence and not to its admissibility."

Stinnett at 198, 497 S.E.2d at 700 (quoting *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984)).

In *Stinnett*, the State introduced evidence of a two-dollar bill allegedly found on the defendant's person. Although the arresting officer testified that he did not remember finding the bill on the defendant, a second officer testified that the evidence bag he received from the arresting officer contained the two-dollar bill. *Id.* at 198, 497 S.E.2d at 700-01. This Court held that "[a]lthough the arresting officer does not remember the plastic-encased two-dollar bill, any arguably weak links in the chain of custody go to the weight of the evidence and not to the issue of whether the evidence should be admitted." *Id.* at 198, 497 S.E.2d at 701.

Similarly, in the present case, Officer Dermid made no mention of a cellophane plastic wrapper during her testimony concerning the 4 March purchase. She testified that she carried the 11 rocks of cocaine sold to her by defendant on 4 March in her bare hand until she gave them to Deputy Frady. Officer Dermid's only testimony concerning a cellophane wrapper related to her 9 March purchase from Perry King; however, Deputy Frady testified that the drugs from the 4 March purchase were also in a cellophane plastic wrapper when he received them from Officer Dermid shortly after the purchase. As with the receiving officer's testimony in *Stinnett*, Deputy Frady's testimony was sufficient to establish the link in the chain of custody, and Officer Dermid's lack of testimony with respect to the cellophane wrapper contained in the evidence bag from 4 March, is merely an arguably weak link in the chain of custody, properly considered by the jury in weighing the reliability of the evidence. The trial court properly exercised its discretion in admitting evidence of the cocaine.

II.

[2] Defendant next argues that Officer Dermid's in-court and out-of-court identifications of defendant should have been suppressed where tainted by unnecessarily suggestive pre-trial identification procedures in violation of due process. " 'The first inquiry when a motion

is made to suppress identification testimony is whether the pretrial identification procedure is impermissibly suggestive.' " *State v. Green*, 129 N.C. App. 539, 554, 500 S.E.2d 452, 462 (1998), *affirmed*, 350 N.C. 59, 510 S.E.2d 375 (1999) (quoting *State v. Powell*, 321 N.C. 364, 368-69, 364 S.E.2d 332, 335 (1988)). Where defendant fails to show that impermissibly suggestive procedures were used, the trial court need not exclude the identification. *State v. Smith*, 130 N.C. App. 71, 502 S.E.2d 390 (1998). However, if the defendant shows that the identification is impermissibly suggestive, he must next prove that "under the totality of the circumstances, the suggestive procedures gave rise to a substantial likelihood of irreparable misidentification." *Id.* at 74, 502 S.E.2d at 392 (citing *State v. Capps*, 114 N.C. App. 156, 162, 441 S.E.2d 621, 624 (1994)).

In the present case, testimony revealed that Deputy Frady conducted a pre-trial identification procedure with Officer Dermid wherein he showed Officer Dermid a page from defendant's high school year book. Defendant's picture was the only picture of a black male on the page, and defendant's name was printed below his picture and clearly visible. Officer Dermid knew that the suspect she was attempting to identify was a black male, and William Lucas had previously told her defendant's name as it appeared under his photo. In view of such evidence, defendant has met his burden of proving that the pre-trial identification procedure was unnecessarily suggestive.

However, the fact that an identification procedure is unnecessarily suggestive does not *ipso facto* render the identification evidence inadmissible; defendant must also show that the identification was "irreparably suggestive, resulting in the strong probability of misidentification and violation of due process." *State v. Breeze*, 130 N.C. App. 344, 350, 503 S.E.2d 141, 145, *disc. review denied*, 349 N.C. 532, —— S.E.2d —— (1998) (citing *State v. McCraw*, 300 N.C. 610, 613-14, 268 S.E.2d 173, 175-76 (1980)). Whether there is a substantial likelihood of misidentification depends upon whether "under the totality of circumstances surrounding the crime itself 'the identification possesses sufficient aspects of reliability.' " *State v. Richardson*, 328 N.C. 505, 510, 402 S.E.2d. 401, 404 (1991) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 106, 53 L.Ed.2d 140, 149 (1977)). In determining the existence of irreparable misidentification, the court must examine the totality of the circumstances, including:

> (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness' degree of attention; (3) the

accuracy of the witness' prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Breeze at 350, 503 S.E.2d at 145-46 (citing *State v. Wilson*, 313 N.C. 516, 529, 330 S.E.2d 450, 460 (1985)).

The evidence shows that prior to making the yearbook identification, Officer Dermid had ample opportunity to view defendant at the time of each crime. On each occasion, Officer Dermid was within a few feet of defendant while he was getting into the car, sitting in the car, and having a conversation with her. Officer Dermid was able to observe defendant under the dome light of the car. Furthermore, Officer Dermid testified that she has been trained to maintain a high degree of attention when observing suspects, she has the benefit of having attended twenty-two training schools, including those on informant training and control, and she was aware that part of her responsibility as a trained law enforcement officer would require that she later identify defendant. Officer Dermid gave a detailed description of defendant following the 4 March purchase, and on 9 March identified defendant as the same man as before. When shown the high school yearbook containing defendant's picture, Officer Dermid exhibited a high level of certainty, as she "immediately recognized the picture." Under the totality of the circumstances Officer Dermid's pre-trial identification of defendant did not give rise to "a substantial likelihood of irreparable misidentification," and the trial court therefore did not err in admitting the evidence.

[3] Defendant also argues that the pre-trial identification procedure tainted Officer Dermid's in-court identification of defendant. In-court identifications are generally admissible, yet they may be excluded "if 'tainted by a prior confrontation in circumstances shown to be "unnecessarily suggestive and conducive to irreparable mistaken identification." ' " *State v. Caporasso*, 128 N.C. App. 236, 239, 495 S.E.2d 157, 160 (1998) (citations omitted). In view of our holding that the suggestiveness of the pre-trial identification did not, in the totality of the circumstances, rise to a level conducive to irreparable mistaken identification, we hold that any effect of the pre-trial identification on Officer Dermid's in-court identification is not a basis for its exclusion.

Moreover, the same indicia of reliability in Officer Dermid's pre-trial identification of defendant applies to her in-court identification.

" 'An in-court identification is . . . competent where the in-court identification is based on the witness' observations at the time and scene of the crime.' " *Id.* As stated above, Officer Dermid had ample time to observe defendant at the scene of each crime, and "any uncertainty in that identification goes to the weight and not the admissibility of the testimony." *Id.* The trial court properly denied defendant's motion to suppress.

III.

[4] Defendant assigns error to the trial court's refusal to conduct *voir dire* outside the presence of the jury on defendant's motion to suppress evidence of Officer Dermid's pre-trial and in-court identifications of defendant. As a general rule, a trial court should conduct a hearing in the absence of the jury in order to determine the admissibility of identification testimony. *State v. Thomas*, 35 N.C. App. 198, 241 S.E.2d 128 (1978). However, a failure to conduct a *voir dire* on identification issues does not necessarily require the granting of a new trial. The standard for reversal is whether a different result could reasonably be expected upon retrial if all evidence of pretrial photographic identification was excluded. *State v. Stepney*, 280 N.C. 306, 185 S.E.2d 844 (1972). The trial court's failure to hold a *voir dire* is harmless where the evidence shows that the identification "originated with the witness's observation of defendant at the time of the crime and not from an impermissibly suggestive pretrial identification procedure." *State v. Flowers*, 318 N.C. 208, 216, 347 S.E.2d 773, 778 (1986).

In this case, while the trial court should have conducted a *voir dire* hearing in order to determine whether Officer Dermid's identifications were admissible, the failure to do so was harmless where neither identification was based on impermissibly suggestive procedures, and the clear weight of the evidence, as set forth above, shows several indicia of reliability in Officer Dermid's identifications which stemmed from her independent observations of defendant on 4 and 9 March. Defendant was not prejudiced by the trial court's failure to conduct *voir dire*. *See Stepney* at 314, 185 S.E.2d at 850 (where pretrial viewing of photographs was free of impermissible suggestiveness, and evidence was clear and convincing that identification originated with observation of defendant at the time of the crime and not with the photographs, failure of trial court to conduct a *voir dire* and make findings of fact was harmless error).

Defendant received a fair trial, free from prejudicial error.

No error.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. ERIC JASON EARHART

No. COA98-1148

(Filed 6 July 1999)

1. Search and Seizure— automobile—cocaine—probable cause

The trial court did not err in a prosecution for trafficking in cocaine by denying defendant's motion to suppress evidence seized from his vehicle where the officers were able to use separate information obtained from the SBI and an independent investigation to corroborate information received from an informant and had reasonable grounds to believe that the tip was accurate and reliable and that drugs were in the vehicle.

2. Evidence— motion to suppress—denied without findings

There was no prejudicial error in a prosecution for trafficking in cocaine where the trial court denied defendant's motion to suppress without making findings. The only contradictory evidence presented by defendant was that he did not give consent to search his vehicle. Since probable cause existed for the search, evidence of defendant's consent is not relevant and the failure to make findings and conclusions is not prejudicial.

3. Evidence— hearsay—conversation between officers—explanation of subsequent conduct

The trial court did not err in a cocaine trafficking prosecution by allowing testimony of a conversation between two officers which led to one officer checking the license plate number of defendant's vehicle. The substance of the conversation was not inadmissible hearsay because it was admitted for the purpose of explaining subsequent conduct.

4. Drugs— constructive possession—automobile

There was sufficient evidence in a trafficking prosecution from which the jury could find that defendant knowingly pos-

sessed cocaine where the cocaine was found in the back seat of a vehicle owned and driven by defendant; there was a passenger in the vehicle but defendant had direct access to the cocaine, which was found behind his seat; and the cocaine was hidden in a similar manner to a handgun which defendant admitted was there.

Appeal by defendant from judgment entered 3 February 1998 by Judge William C. Griffin, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 20 May 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Nora Henry Hargrove for defendant-appellant.

WALKER, Judge.

Defendant was convicted of trafficking by possession of more than 28 but less than 200 grams of cocaine, trafficking by transportation of more than 28 but less than 200 grams of cocaine, and carrying a concealed weapon. He was sentenced to an active term of 35 to 42 months for the trafficking convictions and was given a suspended sentence for the concealed weapon conviction.

The State's evidence at trial tended to show the following: On 27 April 1997, Deputy Joey Davidson received a telephone call at the Currituck County Sheriff's Department from an anonymous male. The caller informed Deputy Davidson that a white Trans Am would be traveling to a residence on North Spot Road in Powell's Point sometime between 27 April and 28 April and that it might be accompanied by a blue Subaru. The caller stated that the white Trans Am would be transporting approximately a pound of marijuana. The caller did not identify himself and Deputy Davidson did not recognize the voice. The caller hung up, but he called back a few minutes later and told Deputy Davidson that the suspects in the vehicles had scanners and that the information should not be broadcast over police radio.

Deputy Davidson then notified Detective Don Nichols and Deputy Richard Shaw of the anonymous tip. Detective Nichols informed Deputy Davidson that he had received information from the SBI about the owner of a white Trans Am who lived on North Spot Road and who was being investigated for suspicion of drug dealing. Detective Nichols also told Deputy Davidson that the suspect was reportedly armed with a Desert Eagle handgun.

Shortly after 6:00 p.m. on 27 April 1997, Deputy Shaw began a surveillance for the described vehicles along North Spot Road. Detective Nichols contacted him there and informed him that a license check he had performed revealed that the white Trans Am would have license number KPA-1083 and would be driven by a person named Earhart who was known to carry weapons. Soon after that conversation, Deputy Shaw observed a blue Subaru, matching the description given by the informant, pull into the driveway of a residence along North Spot Road. Deputy Shaw pulled in behind the vehicle and asked the driver whose residence this was. The driver stated that it was her friend Tammy Taylor's house and that she was visiting Tammy while Tammy's boyfriend was out of town. Deputy Shaw told the driver he had information that a blue Subaru had been involved in a crime and asked permission to search the vehicle. The driver agreed to the search. No contraband was found in the blue Subaru. Deputy Shaw then asked the name of Tammy Taylor's boyfriend and what type of car he drove. The driver stated that his name was Earhart and that he drove a white Trans Am. Deputy Shaw then returned to his surveillance.

Detective Nichols testified that on 10 April 1997, he had received a telephone call from Donnie Varnell, an agent with the SBI, who informed him that a person whose name sounded like "Airhart" was selling cocaine and marijuana from his home on North Spot Road and that he drove a white Trans Am, a blue Chevrolet Cavalier, and a rust Jeep. Varnell also told him that the SBI had received this information from an individual who had been inside Earhart's residence. Detective Nichols used this information to run the license check which revealed the information he later gave to Deputy Shaw on North Spot Road. After he called Deputy Shaw, Detective Nichols joined him on North Spot Road and suggested that they move farther north to watch for the white Trans Am. As they drove north, Detective Nichols radioed Deputy Shaw that the white Trans Am had passed him. Deputy Shaw then pulled over the Trans Am.

The white Trans Am was occupied by two individuals. The driver was identified as the defendant and the passenger was identified as Ellsworth Burrus Midgett. Detective Nichols informed defendant of the information they had received regarding his vehicle and asked him if there were any drugs or weapons in the car. Defendant denied possessing any drugs in the car, but admitted that he had a pistol in the Trans Am. Detective Nichols then testified that he asked for defendant's consent to search the vehicle and that defendant con-

sented. Detective Nichols then used his canine partner, Aris, to search the vehicle for drugs. Aris alerted to the back seat area of the vehicle and Detective Nichols recovered a plastic bag containing approximately 50 grams of a white powder substance, later determined to be cocaine, which was located under the upper portion of the back seat which had been folded down onto the seat. Aris then recovered a cigarette box containing several "joints" of marijuana. Detective Nichols also found a Desert Eagle handgun containing six rounds of ammunition in the back seat hidden in a similar manner to the cocaine.

Prior to trial, defendant filed a motion to suppress the evidence recovered from his vehicle. At a *voir dire* hearing on the motion, defendant testified that he did not give consent to search his vehicle. The State presented substantially the same evidence later presented at trial. The trial court denied the defendant's motion to suppress and indicated its intent to make appropriate findings of fact, but the record contains no order.

[1] Defendant first contends that the trial court erred in denying his motion to suppress the evidence seized from his vehicle and erred in failing to make appropriate findings regarding the evidence presented at the *voir dire* hearing. Defendant argues that the search of his vehicle and his ensuing arrest violated his Fourth Amendment rights because the officers did not have probable cause to conduct the search.

A search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search. *State v. Isleib*, 319 N.C. 634, 356 S.E.2d 573 (1987). "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (*quoting Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890, *rehearing denied*, 338 U.S. 839, 94 L. Ed. 513 (1949)). In utilizing an informant's tip, probable cause is determined using a "totality-of-the-circumstances" analysis which "permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Illinois v. Gates*, 462 U.S. 213, 234, 76 L. Ed. 2d 527, 545, *rehearing denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983). In *Gates*, the United States Supreme Court abandoned the "two-prong test" elaborated in *Aguilar*

v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637 (1969). The "two-prong test" emphasized the need for independent indices or facts supporting the informant's "basis of knowledge" for his tip and the "veracity" or "reliability" of the tip. *Gates*, 462 U.S. at 228-29, 76 L. Ed. 2d at 542. These factors remain relevant to the determination of the value of the informant's report; however, the totality-of-the-circumstances test allows a less rigid evaluation. *Id.* Further, in making the probable cause determination, independent police corroboration of the facts given by the informant are important in evaluating the reliability of the informant's tip. *See Draper v. United States*, 358 U.S. 307, 3 L. Ed. 2d 327 (1959). Thus, all of these factors must be considered in evaluating whether probable cause exists to conduct a search based in part on an informant's tip.

In this case, in addition to the informant's tip which provided the description of the two vehicles and the time they would be driving along North Spot Road, the officers involved were able to use separate information obtained from the SBI and from an independent investigation to corroborate the information received. This included the type of vehicle driven by the defendant, the name of the defendant, and information that the defendant was known to sell drugs including marijuana and cocaine. Detective Nichols had received information about defendant from the SBI and Deputy Shaw learned from the driver of the blue Subaru that defendant was away for the weekend. The officers were able to independently verify all of the anonymous informant's tip except for the presence of drugs in the vehicle prior to the vehicle stop. Based on all this information, the officers had reasonable grounds to believe the tip was accurate and reliable and that drugs were in the vehicle. *See State v. Smith*, 118 N.C. App. 106, 454 S.E.2d 680, *reversed on other grounds*, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 134 L. Ed. 2d 779 (1996). Considering the totality-of-the-circumstances and the factors listed above, we conclude that probable cause existed to search defendant's vehicle and this assignment of error is overruled.

[2] Next, we address the trial court's failure to make findings in support of its order denying defendant's motion to suppress. N.C. Gen. Stat. § 15A-977(d) requires that if a motion to suppress is not summarily denied the trial court "must make the determination after a hearing and finding of facts." N.C. Gen. Stat. § 15A-977(d) (1997). Further, subparagraph (f) requires that the trial court place its findings and conclusions in the record. N.C. Gen. Stat. § 15A-977(f)

(1997). However, this Court and our Supreme Court have held that when there is no material conflict in the evidence presented at *voir dire*, the omission of findings is not error. *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980); *State v. Futrell*, 112 N.C. App. 651, 436 S.E.2d 884 (1993). In this case, the only contradictory evidence presented by defendant was that he did not give consent to search his vehicle. As we have concluded that probable cause existed to search defendant's vehicle, evidence as to whether defendant gave consent to search his vehicle is not relevant and the trial court's failure to make findings and conclusions is not prejudicial error.

[3] Defendant next contends that the trial court erred in allowing the testimony contained in the following exchange between Detective Nichols and the prosecution during direct examination:

> Mr. Trivette (prosecutor): All right. Based upon the information you got from Deputy Shaw and Deputy Davidson, the information you had already gotten from Special Agent Donnie Varnell, what did you do? Did you make a call?
>
> A: Yes, sir. I contacted Donnie Varnell back at that time and tried to gain information again if this was the subject.—
>
> Mr. Lamb (defense counsel): Objection.
>
> Mr. Trivette: Telling what he did.
>
> The Court: Tell us what you did.
>
> A: I contacted Special Agent Varnell and asked him was this the subject we had talked about in the past.
>
> Mr. Lamb: Objection, motion to strike.
>
> The Court: Overruled. Motion denied.
>
> Mr. Trivette: After you had that conversation with Agent Varnell, what did you do?
>
> A: I contacted—I attempted to locate the license plate number of the vehicle.

Defendant argues that, as a result of the conversation with Agent Varnell, Detective Nichols checked the license plate number of defendant's vehicle. Defendant contends that this testimony constitutes hearsay and was inadmissible.

Hearsay is inadmissible unless allowed by an exception. N.C. Gen. Stat. § 8C-1, Rule 802 (1992). Hearsay is a statement made by one not testifying at trial which is offered in evidence to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801(c) (1992). A statement is an "oral or written assertion" or "nonverbal conduct of a person, if it is intended by him as an assertion." N.C. Gen. Stat. § 8C-1, Rule 801(a) (1992).

The substance of the conversation with Agent Varnell was not inadmissible hearsay because it was admitted for the purpose of explaining Detective Nichols' subsequent conduct of checking the license plate number and thus not for the truth of the matter asserted. *See, e.g., State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994); *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990). This assignment of error is overruled.

[4] Finally, defendant contends that the trial court erred in denying his motion to dismiss the charges against him. Defendant argues that there was insufficient evidence that he knowingly possessed the cocaine. In ruling on a motion to dismiss for insufficient evidence, "the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom." *State v. Davidson*, 131 N.C. App. 276, 282, 506 S.E.2d 743, 747 (1998) (*quoting State v. Elliot*, 344 N.C. 242, 266, 475 S.E.2d 202, 212 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997)), *disc. review denied*, 350 N.C. 312, — S.E.2d — (1999). There must be substantial evidence of each element of the offense charged and evidence that the defendant was the perpetrator of the offense. *State v. Mlo*, 335 N.C. 353, 440 S.E.2d 98, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994).

Possession may consist of either physical or constructive possession. *State v. Morris*, 102 N.C. App. 541, 402 S.E.2d 845 (1991). Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband. *State v. Beaver*, 317 N.C. 643, 346 S.E.2d 476 (1986). "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Unless the person has exclusive possession of the place where the narcotics are found, the State must show

other incriminating circumstances before constructive possession may be inferred. *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

In this case, the evidence showed that the cocaine was found in the back seat of a vehicle owned by the defendant who was operating it at the time he was stopped. Although there was a passenger in the vehicle, the cocaine was found behind defendant's seat to which he had direct access. Further, the cocaine was hidden in a similar manner to the handgun—under the folded back seat—which defendant admitted was there. Therefore, we conclude there was sufficient evidence from which the jury could find that defendant knowingly possessed the cocaine. This assignment of error is overruled.

Defendant received a fair trial, free of prejudicial error.

No error.

Judges McGEE and EDMUNDS concur.

IN THE MATTER OF THE CHANGE OF NAME OF CHADWICK HOLLAND CRAWFORD TO CHADWICK HOLLAND CRAWFORD TRULL, BY MARY HOLLAND TRULL, PETITIONER

No. COA98-1274

(Filed 6 July 1999)

1. Parent and Child— name change—unmarried parents—father's consent required

Both the clerk of superior court and the superior court judge correctly denied a name change for a minor child where respondent and petitioner were never married, both had executed an Affidavit of Paternity acknowledging respondent as the father, respondent had submitted to a paternity test which confirmed a 99.92% probability that respondent is the father, both respondent and petitioner are listed on the birth certificate, and petitioner later filed this petition to change the child's surname to match hers. The child was properly given respondent's name under N.C.G.S. § 130A-101(f)(4) and that statute contains no authority for petitioner to unilaterally withdraw her consent as to the child's surname and change it to her own.

2. Parent and Child— changing child's name—consent of both parents required

Neither the clerk of superior court nor the superior court judge erred by denying a petition to change the name of a minor where the parents were never married, the natural father's surname was given to the child on the birth certificate, and the mother sought to change the surname to her own over the father's objection. N.C.G.S. § 101-2 does not permit one parent to change the name of minor children without the consent of the other living parent and respondent here clearly fits an ordinary definition of "father" and "natural parent."

3. Appeal and Error— appealability—issue not raised below

Assignments of error relating to the constitutionality of denying a petition to change the name of petitioner's minor child were not addressed where those issues where not raised before the clerk or in superior court.

4. Parent and Child— change of child's name—best interests of child—not considered

Neither the clerk of superior court nor the superior court judge erred by failing to consider a child's best interests when refusing his mother's petition to change his name. The General Assembly has not required a "best interests" inquiry in the context of naming a child under N.C.G.S. § 130A-101(f)(4) or in the changing of a child's name under N.C.G.S. § 101-2. Its failure to do so in this context when it has in others is clear evidence of its intent that no such inquiry be required.

Appeal by petitioner from order entered 15 June 1998 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 11 May 1999.

Johnson, Mercer, Hearn & Vinegar, PLLC, by Jennifer M. Green, for petitioner-appellant.

Jordan Price Wall Gray Jones & Carlton, by R. Frank Gray and Hope Derby Carmichael, for respondent-appellee.

MARTIN, Judge.

Petitioner Mary Holland Trull and respondent Patrick Sullivan Crawford are the natural parents of Chadwick Holland Crawford, born 7 October 1996. Petitioner and respondent have never been mar-

ried, and neither is presently married to another. On 10 October 1996, both petitioner and respondent executed an Affidavit of Paternity acknowledging respondent as Chadwick's father, and on 23 October 1996, respondent submitted to a paternity test which confirmed a 99.92% probability that respondent is Chadwick's biological father. Both petitioner and respondent are listed on Chadwick's birth certificate as the child's parents, and by their mutual agreement, the child's name was stated on the birth certificate as "Chadwick Holland Crawford."

On 18 September 1997 petitioner filed a Petition for Name Change seeking to change Chadwick's name from "Chadwick Holland Crawford" to "Chadwick Holland Crawford Trull." Petitioner alleged, as grounds for the name change, that she had suffered embarrassment by reason of having a surname different from that of her child, and that her child's different surname was a source of confusion to others. Respondent filed a Motion to Intervene and a Response to the Petition for Name Change, objecting to the child's name being changed. Although respondent acknowledged paternity shortly after the child's birth, the record does not indicate that the child has been legitimated.

The matter came to hearing before the Clerk of Superior Court for Wake County. The clerk found facts consistent with the foregoing summary, concluded "[t]here is no legal or statutory authority permitting the name change as requested in the absence of consent by [respondent], the father of the minor child," and denied the petition. Petitioner appealed to the superior court, which affirmed the order of the clerk. Petitioner appeals.

I.

[1] Petitioner first argues that both the clerk of superior court and the superior court erred in concluding that respondent's consent was necessary to change Chadwick's surname. Specifically, petitioner contends that because Chadwick was born out of wedlock and has not been legitimated, G.S. § 130A-101 operates to vest petitioner with superior rights in naming the child; that despite respondent's acknowledgment of paternity, petitioner could have refused to allow Chadwick to bear respondent's surname; and that it "is illogical that her action in initially acquiescing in the use of [r]espondent's surname is sufficient to confer an absolute right upon him to thereafter withhold consent to her actions."

G.S. § 130A-101(f)(4), upon which petitioner relies, provides, in pertinent part, that,

> (f) If the mother was unmarried at all times from date of conception through date of birth, the name of the father shall not be entered on the certificate unless the child's mother and father complete an affidavit acknowledging paternity . . . .
>
> (4) Upon the execution of the affidavit, the declaring father shall be listed as the father on the birth certificate and shall be presumed to be the natural father of the child, subject to the declaring father's right to rescind under G.S. 110-132 . . . . *The surname of the child shall be determined by the mother, except if the father's name is entered on the certificate, the mother and father shall agree upon the child's surname.* If there is no agreement, the child's surname shall be the same as that of the mother.

N.C. Gen. Stat. § 130A-101(f)(4) (emphasis added). Here, there is no dispute that petitioner and respondent executed an Affidavit of Paternity acknowledging respondent as Chadwick's natural father; that respondent's name is entered on the birth certificate as the father; and that respondent and petitioner agreed that the child would bear the name "Chadwick Holland Crawford." Thus, under the statute, the child was properly given respondent's surname.

Petitioner, however, apparently contends that because Chadwick has not been legitimated, she can unilaterally withdraw her consent as to the child's surname and change it to her own. G.S. § 130A-101(f)(4) plainly contains no such authority and we cannot, under the guise of statutory interpretation, write such a provision into it. *See Walker v. North Carolina Coastal Resources Comm'n*, 124 N.C. App. 1, 11, 476 S.E.2d 138, 144 (1996), *disc. review denied*, 346 N.C. 185, 486 S.E.2d 220 (1997) (quoting *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)) (" '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning' ").

[2] Petitioner also argues that in determining that respondent's consent is necessary to change Chadwick's surname, the lower courts erroneously afforded more weight to G.S. § 101-2, the name change statute, than to G.S. § 130A-101. Although neither the clerk's order nor the superior court's order affirming it cites G.S. § 101-2, the statute is

pertinent to the issue of respondent's consent. As relevant to the issue before us, G.S. § 101-2 provides:

> Applications to change the name of minor children may be filed by their parent or parents or guardian or next friend of such minor children, and such applications may be joined in the application for a change of name filed by their parent or parents: *Provided nothing herein shall be construed to permit one parent to make such application on behalf of a minor child without the consent of the other parent of such minor child if both parents be living . . . .*

N.C. Gen. Stat. § 101-2 (emphasis added). Citing *In re Dunston*, 18 N.C. App. 647, 197 S.E.2d 560 (1973), petitioner contends the word "parent" as contained in the statute does not include respondent, and his consent to change Chadwick's surname is not required.

In *Dunston*, the mother of an illegitimate child whose father was unknown sought to change the child's name to that of the child's stepfather. This Court, in holding that G.S. § 101-2 did not require the stepfather's consent to the change, stated,

> G.S. s 101-2 contemplates only the situation where one natural or adoptive parent petitions for the change of name of a child, and the other parent stands to lose his name with respect to that child . . . . Where the natural mother petitions to change the name of her illegitimate child, the consent of no other person is logically required, *as no other person has any 'rights' inherent in that child's name.*

Dunston at 649, 197 S.E.2d at 562 (emphasis added). *Dunston* is distinguishable from the present case in that respondent does, in fact, have rights in the child's name by virtue of the parties' agreement pursuant to G.S. § 130A-101(f)(4). The natural father in *Dunston* was unknown, clearly played no role in the child's life, and the child's birth certificate listed no one as the father. The issue of the necessity of the natural father's consent was not at issue, and the italicized portion of the Court's opinion quoted above is dicta, inapplicable to the present facts.

Moreover, the *Dunston* court elaborated on the meaning of "parent" within the statute, stating, "G.S. s 101-2 speaks in terms of 'parents', a father or mother. One is either a natural parent, or an adoptive parent." *Dunston* at 649, 197 S.E.2d at 562. Respondent, as Chadwick's legally recognized natural father, in both an Affidavit of

Paternity and the birth certificate, clearly fits within an ordinary definition of "father" and "natural parent." *See Smith v. Bumgarner*, 115 N.C. App. 149, 151, 443 S.E.2d 744, 745 (1994) (citation omitted) ("A statute's words should be given their natural and ordinary meaning."). Thus, under the present facts, there is no authority, statutory or decisional, permitting petitioner to unilaterally change Chadwick's surname absent respondent's consent.

II.

[3] By her second and fourth assignments of error, petitioner argues that the denial of her petition to change the minor's surname unconstitutionally infringes upon her interest in the name of her minor child, thereby violating her rights to due process and equal protection of the laws. While her arguments clearly appear to be without merit, we decline to address these assignments of error because the record fails to show that petitioner raised such constitutional arguments before the clerk or the superior court. N.C.R. App. P. 10(b)(1).

> [Rule 10(b)(1)] requires a question to be presented first to the trial court by objection or motion. The record on appeal does not reflect that the issue of constitutionality . . . was presented to the trial court. This Court has held that it will not pass upon the constitutionality of a statute where the record does not reveal that the trial court was confronted with the issue and passed upon it. *State v. Robertson*, 57 N.C. App. 294, 291 S.E.2d 302, *disc. review denied, appeal dismissed*, 305 N.C. 763, 292 S.E.2d 16 (1982).

State ex rel. Environmental Management Com'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 448-49, 400 S.E.2d 107, 117 (1991), *rev'd on other grounds, House of Raeford Farms, Inc. v. State ex rel. Environmental Management Com'n*, 338 N.C. 262, 449 S.E.2d 453 (1994). *See also, e.g., State v. Horner*, 310 N.C. 274, 283, 311 S.E.2d 281, 287 (1984) (citation omitted) ("[I]n order for an appellant to assert such [a constitutional] right on appeal, the issue must have been presented to the trial court."); *State v. Cooke*, 306 N.C. 132, 137, 291 S.E.2d 618, 621 (1982) (citations omitted) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.").

III.

[4] In her final assignment of error, petitioner alleges that both the clerk and the superior court committed reversible error in failing to consider Chadwick's best interests. Our General Assembly, however,

has not required a "best interests of the child" inquiry in the context of naming a child under G.S. § 130A-101(f)(4), nor in the changing of a child's name under G.S. § 101-2. While the General Assembly has specifically required such an inquiry in contexts such as termination of parental rights, child custody and placement, parental visitation rights, and even in the context of a change in surname on a birth certificate following legitimation, *see* N.C. Gen. Stat. § 130A-118, its failure to require a best interests inquiry in connection with G.S. § 101-2 and G.S. § 130A-101(f)(4) is clear evidence of its intent that no such inquiry is required in this context. This assignment of error is overruled. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citation omitted) ("Legislative purpose is first ascertained from the plain words of the statute."); *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (citation omitted) (" 'The cardinal principle of statutory construction is that the intent of the legislature is controlling.' ").

The order of the trial court denying petitioner's Petition for Name Change is affirmed.

Affirmed.

Judges GREENE and WYNN concur.

GEORGE C. JONES, JR., PETITIONER v. ROBERT J. WINCKELMANN, VIRGINIA WINCKELMANN, BLACK HORSE RUN PROPERTY OWNERS' ASSOCIATION OF RALEIGH, INC., FLEET MORTGAGE CORP., F/K/A FLEET REAL ESTATE FUNDING CORP., MICHAEL LEE FRAZIER, WACHOVIA BANK OF NORTH CAROLINA, N.A., NEW SALEM, INC., AND ANNA LEGGIO, RESPONDENTS

No. COA98-1023

(Filed 6 July 1999)

Highways and Streets— cartway—appeal to superior court—no final order by clerk

A superior court order in a cartway proceeding (under a now repealed portion of the statute) was vacated where a final judgment or order had not been entered by the clerk and the trial court lacked jurisdiction. N.C.G.S. § 136-68 (Cum. Supp. 1997).

Judge LEWIS concurring.

Appeal by respondents from judgment entered 30 June 1998 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 28 April 1999.

George C. Jones, Jr., pro se, petitioner appellee.

Wallace, Creech & Sarda, L.L.P., by Peter J. Sarda and Richard P. Nordan for respondent appellants Robert J. Winckelmann, Virginia Winckelmann, Fleet Mortgage Corporation, and Michael Lee Frazier.

Jordan, Price, Wall, Gray & Jones, L.L.P., by Henry W. Jones, Jr., and C. Marshall Lindsay, for respondent appellant Black Horse Run Property Owners' Association.

Ragsdale, Liggett & Foley, PLLC, by Michael V. Lee, for respondent appellant Anna Leggio.

HORTON, Judge.

This is a special proceeding which was instituted before the Clerk of Superior Court for Wake County to establish a cartway providing access from the land of George C. Jones, Jr. (petitioner), to a public road. The action was brought under the provisions of N.C. Gen. Stat. §§ 136-68 and 136-69, as amended by Chapter 513 of the 1995 Session Laws. The 1995 legislation, which had a sunset provision of 30 June 1997, provided, in pertinent part, that a landowner who owned a tract of at least seven acres, and who desired to use it for a single-family homestead but did not have a "deeded or documented easement or right-of-way to a public road," could institute a special proceeding before the clerk to have a cartway established providing access from the petitioner's property to a public road. 1995 N.C. Sess. Laws ch. 513, § 2. The clerk is to appoint a jury of view to "lay off the cartway" on the land and to assess the damages sustained by the owners of land crossed by the cartway. *Id.*

After the report of the jury of view is filed with the clerk, any interested party may except to such report and the clerk is to determine the exceptions. *Id.* The clerk may affirm or modify the report of the jury of view, or set it aside and order a new jury of view. *Id.* "*From any final order or judgment* in said special proceeding, *any interested party may appeal to the superior court* for a jury trial de novo on all issues, including the right to relief, the location of a cartway, . . . and the assessment of damages." N.C. Gen. Stat. § 136-68 (Cum. Supp. 1997) (emphasis added).

On 18 July 1996, the clerk entered an order finding that the petitioner was entitled to a cartway, and appointing three persons as a jury of view to "lay off a cartway" on the land and to assess the damages to the owners of the property over which it crossed. The jury of view met on 24 July 1996, and orally indicated the proposed location of the cartway. As laid out by the jury of view, the cartway crossed the property of Anna Leggio (Ms. Leggio).

Petitioner moved to amend the petition to add Ms. Leggio as a party because her interests were affected by the decision of the jury of view. The clerk allowed the amendment and added Ms. Leggio as a party to the special proceeding. All of the respondents were then served with a copy of the amended petition, and filed responsive pleadings, raising various defenses. On 13 May 1997, the clerk held a hearing to allow Ms. Leggio to be heard on the issues involved in the petition. Following this hearing, the clerk issued another order dated 27 May 1997, confirming his prior decision that the petitioner was entitled to a cartway, and reappointing the prior jury of view to again go upon the land to "lay off a cartway" and assess damages.

On 3 June 1997, the jury of view "reconvened and . . . received further evidence and argument from counsel for all parties present, including counsel for [Ms.] Leggio." The jury of view apparently filed a written report of their findings on 19 June 1997, although only the first three pages of that report appear in the record on appeal. Counsel for the respondents then gave notice of appeal to the superior court from the orders entered by the clerk on 18 July 1996 and on 27 May 1997. Counsel for the petitioner filed a motion to dismiss the appeals, pointing out in part that "the Clerk of Court has not entered any order either confirming, amending or rejecting the Report of the Jury of View dated June 19, 1997, no 'final order or judgment' has been entered pursuant to which an appeal may lie under N.C.G.S. § 136-68."

The respondents then filed motions for summary judgment in the superior court. Their motions for summary judgment and the petitioner's motion to dismiss the appeal came on for hearing, and the trial court entered an order denying the respondents' motion for summary judgment, awarding summary judgment in favor of the petitioner affirming the orders of the clerk, and remanding the matter to "the Clerk's Office for hearing on any remaining motions necessary to conclude this action." The trial court found, among other things, that the respondents' notices of appeals were not timely entered. It did

not, however, rule on the petitioner's motion to dismiss the appeal. The respondents then appealed to this Court, assigning error to the denial of their motions for summary judgment and the granting of summary judgment to the petitioner.

In this case, the appeals by the respondents and the action of the trial court were premature. As the petitioner pointed out in his motion to dismiss the respondents' appeal to the superior court, no "final judgment or order" was entered by the clerk; therefore, no appeal lay to the superior court. The correct statutory procedure, as set out in the 1995 N.C. Sess. Laws ch. 513, § 2, provides that the parties could file exceptions to the report of the jury of view and the clerk could then rule on those exceptions. The statutory procedure then implies that the clerk enter a judgment setting out the location of the cartway granted to the petitioner, and assessing the damages which the petitioner must pay. From that "final judgment or order" respondents could appeal to the superior court.

Because the respondents appealed prematurely in this case, the trial court should have merely granted the petitioner's motion to dismiss the respondents' appeals, and remanded the matter to the clerk to proceed as provided by the statute. The trial court had no jurisdiction to consider the issues raised by the respondents' appeal, nor does this Court have jurisdiction to rule on the merits of the parties' arguments.

Therefore, the order entered by the trial court is vacated, and this matter is remanded to the Superior Court of Wake County with directions that the Superior Court then remand it to the Clerk of Superior Court of Wake County, in order that the Clerk may consider the report of the jury of view and take such action as is appropriate.

Vacated and remanded.

Judge TIMMONS-GOODSON concurs.

Judge LEWIS concurs with separate opinion.

Judge LEWIS concurring.

I agree that this matter must be remanded to the Superior Court. I write separately to express my opinion that the cartway statute provision cited by petitioner is unconstitutional on its face under both North Carolina's Constitution, Article I, Section 19, and under the Due

Process Clause of the Fourteenth Amendment of the United States Constitution.

"Cartways are regarded as *quasi*-public roads, and the condemnation of private property for such a use has been frequently sustained upon that ground as a valid exercise of the power of eminent domain." *Barber v. Griffin*, 158 N.C. 348, 350, 74 S.E. 110, 111 (1912). "It is clear that private property can be taken by exercise of the power of eminent domain only where the taking is for a public use." *Highway Commission v. Thornton*, 271 N.C. 227, 241, 156 S.E.2d 248, 259 (1967). Our Supreme Court has noted that "[w]hen the way is a private one, the right of eminent domain cannot be successfully invoked." *Cozard v. Hardwood Co.*, 139 N.C. 283, 288, 51 S.E. 932, 934 (1905). In general, cartways have been considered permissible exercises of eminent domain powers because cartways are available for public use. *Id.*

The now-repealed portion of our cartway statute authorizing petitioner essentially to condemn from his neighbors' property a driveway for his private use to his home does not support any public purpose; such a cartway is neither open to the public nor does it provide any quasi-public benefit to the community. *Accord* Kalo and Kalo, *Putting the Cartway Before the House: Statutory Easements by Necessity, or Cartways, in North Carolina*, 75 N.C.L. Rev. 1943, 1962 (1997). The statutory provision used by petitioner to assert a cartway to his private home was allowed to "sunset" by the legislature on 1 July 1997. This was a wise course of action, for I believe that portion of Act of July 29, 1995, ch. 513, sec. 2, 1995 N.C. Sess. Laws 1823, 1823-25 allowing a "private way" for "the use of land as a single-family homestead" is unconstitutional. " 'The question, what is a public use, is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for [the] appropriation of property, but it will not be conclusive.' " *Cozard* at 295, 51 S.E. at 937 (quoting 6 Thomas M. Cooley, *Const. Lim.* 660-61 (1890)). I believe the legislature overstepped our constitution, which restricts all three branches of government, when it enacted the provision on which petitioner here relies allowing the condemnation of cartways for seven-acre private homesteads.

I concur that the appeal is not yet properly before this Court. If it were, however, petitioner would fail in his argument because his statutory authority is unconstitutional.

STATE OF NORTH CAROLINA v. GENE EDWARD PIERCE

No. COA98-916

(Filed 6 July 1999)

1. Contempt— criminal—no specific findings of misconduct

The trial court did not err by denying defendant's motion to dismiss a contempt citation where the court did not make specific findings of improper conduct before issuing the citation. The trial court judge was not required to make a specific finding of improper conduct because the language of the show cause order referred to punishment, defendant referred to the order as being for criminal contempt, and the order sought punishment for interfering with the administration of justice, a function of criminal contempt; unlike a citation for civil contempt, there is no requirement that the judge make a finding of improper conduct upon the issuance of a criminal contempt citation.

2. Evidence— conversations within jury room—admissible in contempt proceeding

The trial court did not err in a criminal contempt proceeding arising from juror misconduct by admitting evidence of conversations which occurred within the jury room. The testimony falls squarely within the exception to N.C.G.S. § 8C-1, Rule 606(b) pertaining to extraneous prejudicial information improperly brought to the jury's attention.

3. Contempt— criminal—sufficiency of evidence

The trial court correctly denied defendant's motion to dismiss in a criminal contempt proceeding arising from juror misconduct where defendant argued that the State failed to present sufficient evidence in addition to defendant's own remarks, but ten of the twelve jurors testified that defendant had reported his own investigation of the Breathalyzer machine to them; defendant ate lunch alone on the second day of deliberations, supplying the opportunity to conduct an independent investigation; and defendant only displayed his uncommon familiarity with Breathalyzer machines after lunch on the second day.

Appeal by defendant from judgment dated 17 March 1998 by Judge W. Douglas Albright in Randolph County Superior Court. Heard in the Court of Appeals 20 April 1999.

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

Moser, Schmidly, Mason & Roose, by Stephen S. Schmidly and Richard G. Roose, for defendant-appellant.

GREENE, Judge.

Gene Edward Pierce (Defendant) appeals from the trial court's order holding him in criminal contempt of court.

Defendant served as a juror on the criminal case of Freddie Carroll for driving while impaired (DWI) on 2 February 1998. Throughout the trial, and specifically at the conclusion of the trial, the presiding judge, Judge Preston Cornelius (Judge Cornelius), instructed the jury "not to discuss the case with anyone outside the courtroom and . . . not to do any research or investigation on their own."

The jury retired to deliberate on the afternoon of Wednesday, 4 February 1998, and continued its deliberations through the entire next day. At some point during the last day of deliberations, the jury foreperson sent a note to Judge Cornelius reporting the jury's inability to reach a verdict, requesting re-instruction on a specific area of the case, and informing Judge Cornelius that she needed to speak to him about the misconduct of one of the jurors. At 5:34 p.m. on Thursday, 5 February 1998, the foreperson reported that a verdict had been reached on one of the counts and the jury was deadlocked on the other count.

After declaring a mistrial, Judge Cornelius spoke with the jury foreperson about her note regarding juror misconduct. The foreperson informed Judge Cornelius that Defendant told the jurors during deliberation that he had conducted his own investigation contrary to the instruction of Judge Cornelius. After questioning Defendant about the foreperson's comments, Judge Cornelius cited Defendant for contempt and ordered him to appear in criminal court "to show cause, if any there be, why [he] should not be punished for contempt."

Prior to his contempt hearing before Judge W. Douglas Albright (Judge Albright), Defendant moved to dismiss the contempt citation because: (1) "there was no specific finding of improper conduct"; (2) "the admission of the only evidence that the State can offer" would be

against public policy and the Rules of Evidence; and (3) "the State is unable to establish the corpus delicti of criminal contempt." In his motion to dismiss, Defendant refers to the contempt citation as a "criminal contempt citation." Also prior to the contempt hearing, Defendant made a motion *in limine* requesting the trial court enter an order "directing that statements made by the jurors during the course of jury deliberation not be offered or admitted into evidence." Both of Defendant's motions were denied.

At Defendant's contempt hearing, the State presented the testimony of ten of the twelve jurors serving with Defendant. Each juror testified that on the second afternoon of deliberations, Defendant reported he had made telephone calls to outside "reliable sources" during lunch, and had received information about the operation of Breathalyzer machines. Defendant went on to inform the other jurors, in detail, precisely how a Breathalyzer operates, telling them that once you blow into the machine, if the machine beeps, then a reading is recorded automatically. He also schooled the jurors about the legal limits for drunk driving and that a police officer easily could "rig" a Breathalyzer to give a false reading. Although the jurors had discussed the Breathalyzer evidence several times throughout their deliberations, Defendant did not display this uncommon familiarity until after lunch on the second day. This information came in the wake of the jury's confusion as to why a reading had not been introduced into evidence, although there was testimony that the Breathalyzer beeped. Several of the jurors testified that Defendant accused the police department and Judge Cornelius of withholding the Breathalyzer evidence from the jury. At the close of the State's evidence, Defendant renewed his motion to dismiss, which again was denied.

Defendant testified in his own defense that he had not conducted his own investigation by telephoning outside sources, but simply "used the wrong words" in explaining his knowledge to the other jurors. Defendant claimed he gained his knowledge of breathalyzers from watching "police programs on television." Defendant also admitted that although he ate lunch with another juror on the first day of deliberations, he ate by himself on the second day. Defendant again renewed his motion to dismiss at the close of all the evidence, which again was denied.

Judge Albright entered an order finding Defendant had "made inquiry about legal alcohol levels and intoxication in North Carolina,

and other legal aspects regarding the Breathalyzer machine, and the mechanical operation of these machines." Judge Albright further found and concluded that these acts were "in willful disobedience to the lawful directions, instructions, and orders of [Judge Cornelius], all in violation of General Statutes 5A-11(a)(3)." An order was entered adjudging Defendant in "criminal contempt of Court."

The dispositive issues are whether: (I) a trial court must make specific findings of improper conduct when issuing a criminal contempt citation; (II) jurors' testimony regarding the alleged misconduct of a fellow juror is inadmissible in a criminal contempt hearing; and (III) there is substantial independent evidence to corroborate Defendant's alleged statements of misconduct.

I

[1] Defendant contends Judge Albright erred in denying his motion to dismiss because Judge Cornelius failed to make specific findings of improper conduct before issuing the contempt citation. We disagree.

When issuing a criminal contempt citation, the presiding judge need only enter "an order directing the person to appear before a judge . . . and show cause why he should not be held in contempt of court." N.C.G.S. § 5A-15(a) (Supp. 1998). Unlike a citation for *civil* contempt, which requires the judge's order be accompanied by a sworn affidavit and a finding of probable cause, *see* N.C.G.S. § 5A-23(a) (Supp. 1998), there is no requirement that the judge make a finding of improper conduct upon the issuance of a *criminal* contempt citation. *Mather v. Mather*, 70 N.C. App. 106, 108-09, 318 S.E.2d 548, 550 (1984).

In this case, Judge Cornelius's order directed Defendant to appear and show cause why he "should not be punished for contempt." This language has been construed to have reference to criminal contempt. *Rose's Stores v. Tarrytown Center*, 270 N.C. 206, 214, 154 S.E.2d 313, 319 (1967). Indeed, Defendant refers to the order as one for criminal contempt in his own motion to dismiss. Furthermore, the order seeks to punish Defendant for interfering with the administration of justice, a function of criminal contempt, rather than compel obedience to an order entered to benefit a private party, a function of civil contempt. *See id.* Accordingly, Judge Cornelius was not required to make a specific finding of improper conduct, and Judge Albright properly denied Defendant's motion to dismiss.

II

[2] Defendant contends Judge Albright erred in allowing "evidence of conversations [occurring] within the confines of the jury deliberation room," as such evidence violates the public policy considerations of Rule 606(b).

Defendant admits, and we agree, that Rule 606 of our Rules of Evidence does not apply in this case because there is no effort to impeach the verdict of the jury. He argues, however, that the same policy considerations are at issue and those considerations would prohibit a fellow juror from testifying about information obtained in the confines of the jury room in a juror contempt proceeding. Assuming the same policy considerations are implicated, an issue we need not decide in this case, Rule 606 has an exception that specifically allows a juror to testify on the question of whether "extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." N.C.G.S. § 8C-1, Rule 606(b) (1992).

In this case, it is undisputed that Judge Cornelius directed the jury not to discuss the case with anyone outside the courtroom and not to conduct their own investigations. Because the jurors' testimony regarding Defendant's statements pertained to whether "extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror," this testimony falls squarely within the exception to Rule 606(b). Thus the policy supporting Rule 606 was not frustrated in this case and we therefore reject Defendant's argument. Accordingly, Judge Albright did not err in denying Defendant's motion *in limine* and his motion to dismiss on this ground.

III

[3] Defendant contends his motion to dismiss should have been granted because the State failed to present evidence, in addition to his own alleged statements, to establish the *corpus delicti* of the offense. We disagree.

When the State relies on a defendant's own admission to obtain a conviction, it needs to corroborate the admission with "substantial independent evidence tending to establish [the admission's] trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime." *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985). "Substantial evidence is that relevant evi-

dence which a reasonable mind would find sufficient to support a conclusion." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72 (1996).

In this case, along with the undisputed testimony from ten of the twelve jurors that Defendant reported to them that he had conducted his own investigation of the Breathalyzer machine, the State also presented evidence that: (1) Defendant ate lunch alone on the second day of jury deliberations, thus supplying the opportunity to conduct the independent investigation; and (2) the jury had several discussions about the Breathalyzer evidence before lunch on the second day of deliberations, yet Defendant only displayed his uncommon familiarity of Breathalyzer machines after lunch on the second day. Because a reasonable person could find this evidence sufficient to support the conclusion that Defendant conducted his own investigation into the operation of a Breathalyzer machine, it corroborated Defendant's jury room admissions. The trial court thus correctly denied Defendant's motion to dismiss on this ground.

Affirmed.

Judges MARTIN and McGEE concur.

ALBERT H. SCHNITZLEIN, PLAINTIFF-APPELLANT v. HARDEE'S FOOD SYSTEMS, INC., CKE RESTAURANTS, INC., DEFENDANT-APPELLEES

No. COA98-1266

(Filed 6 July 1999)

1. Civil Procedure— voluntary dismissal—subsequent 12(b)(6) dismissal

The trial court did not have jurisdiction to enter subsequent orders in an employment termination case where the trial court had notified defendants that it intended to grant their motion to dismiss on 15 June 1998, plaintiff filed a voluntary dismissal on 16 June 1998, and the trial court entered an order on 19 June dismissing the complaint with prejudice pursuant to N.C.G.S.§ 1A-1, Rule 12(b)(6). Although defendants contend that plaintiff rested his case at the close of the motion hearing on 10 June, defendants'

motion to dismiss was based on their argument that plaintiff's claims were preempted by ERISA rather than on allegations set out in the complaint and plaintiff had not argued his case-in-chief. Moreover, plaintiff had a motion to amend his complaint pending when the motion hearing ended.

2. Civil Procedure— summary judgment—motion to dismiss—matters outside the pleadings—motion based upon preemption by federal law

A motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) was not converted to a summary judgment motion by matters outside the pleadings where the motion to dismiss did not address the merits of the allegations but went only to the question of whether plaintiff's claims were governed by ERISA.

Appeal by plaintiff from orders entered 19 June 1998 and 24 June 1998 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 20 May 1999.

Patterson, Harkavy & Lawrence, LLP, by Melinda Lawrence, for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Julie C. Theall and Shannon J. Adcock, for defendant-appellees.

McGEE, Judge.

Defendant Hardee's Food Systems, Inc., (Hardee's) hired plaintiff Albert H. Schnitzlein as executive vice president of operations in April 1997. The "officer compensation and benefits summary" provided in writing by Hardee's to plaintiff included a paragraph with the heading "job security." The paragraph stated: "Should Hardee's decide to terminate you for any reason, other than gross misconduct, you will receive twenty-four (24) months of severance pay and executive outplacement services."

Meanwhile, in early 1997, defendant CKE Restaurants, Inc., (CKE) began negotiating with Imasco Holdings, Inc., Hardee's parent corporation, for the sale of Hardee's to CKE. CKE purchased all of Hardee's capital stock from Imasco in July 1997. The purchase agreement provided that CKE would continue employee severance plans that were in place at the time of the sale of Hardee's to CKE.

A number of Hardee's officers and other employees lost their jobs as of the date of the sale to CKE, but plaintiff was asked to continue

in his position. CKE fired plaintiff in September 1997 and refused to pay him severance benefits.

Plaintiff filed suit in January 1998, seeking twenty-four months' salary and twenty-four months' outplacement services. Defendants filed a motion to dismiss in April 1998, arguing that plaintiff's claims were preempted by the provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 and related sections (ERISA). During a hearing on 10 June 1998 on defendants' motion to dismiss, plaintiff filed a motion to amend his complaint, stating it was his position that his claims arose under an individual contract with defendants, but that if the trial court determined that ERISA governed, plaintiff wanted to amend his complaint to add a cause of action asserting claims under ERISA. Along with his motion to amend, plaintiff presented the trial court with an amended complaint.

On 15 June 1998, the trial court notified defendants that it intended to grant defendants' motion to dismiss and asked defendants' counsel to draft an order. Plaintiff, meanwhile, on 16 June 1998 filed a voluntary dismissal pursuant to Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure. On 19 June 1998, the trial court entered an order "effective June 15, 1988" that dismissed plaintiff's complaint with prejudice pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Realizing that the reference to 1988 was an error, the trial court on 24 June 1998 filed an amended order, dismissing plaintiff's complaint with prejudice "effective June 15, 1998." Plaintiff appeals.

[1] Plaintiff assigns error to the trial court's dismissal of his complaint "effective June 15, 1998," arguing that plaintiff's voluntary dismissal filed on 16 June 1998 stripped the trial court of jurisdiction in the case.

Rule 41 of the North Carolina Rules of Civil Procedure provides in part: "[A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case[.]" N.C. Gen. Stat. § 1A-1, Rule 41 (1990).

Rule 58 of the North Carolina Rules of Civil Procedure states in part: "[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) (effective as to all judgments subject to

entry on or after 1 October 1994). Likewise, "an order is entered 'when it is reduced to writing, signed by the judge, and filed with the clerk of court.' " *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737-38, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997), citing N.C. Gen. Stat. § 1A-1, Rule 58.

The dates in the record before us indicate that plaintiff's voluntary dismissal was filed before the trial court's order granting defendants' motion to dismiss. However, our review does not end there. Defendants argue that plaintiff could not take a voluntary dismissal under Rule 41 once the hearing on defendants' motion to dismiss had ended. Defendants cite the Rule 41 language that a plaintiff may take a voluntary dismissal "at any time *before the plaintiff rests his case.*" N.C. Gen. Stat. § 1A-1, Rule 41 (emphasis added). Defendants contend that plaintiff rested his case at the close of the motion hearing on 10 June 1998 and therefore was not entitled thereafter to take a voluntary dismissal.

We now review pertinent statutes and case law:

"Under the plain language of Rule 41(a)(1) . . . a plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief." *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995) (citation omitted).

" 'Unless the court in its order for dismissal otherwise specifies,' a dismissal for failure to state a claim 'operates as an adjudication upon the merits.' " *Dawson v. Allstate Insurance Co.*, 106 N.C. App. 691, 692, 417 S.E.2d 841, 842 (1992), citing N.C.R. Civ. P. 41(b).

In *Lowe v. Bryant and Lowe v. Bryant*, 55 N.C. App. 608, 610-11, 286 S.E.2d 652, 653 (1982), our Court held that a plaintiff could take a Rule 41 voluntary dismissal after a motion hearing but before the judge had ruled where the "defendants' motion to dismiss dealt with the factual basis for their motion, not with the factual allegations upon which the plaintiffs based their action against the defendants."

In the case before us, defendants' motion to dismiss was based on their argument that plaintiff's claims were preempted by ERISA. Thus, defendants' motion "dealt with the factual basis for their motion," not with the allegations that plaintiff set out in his complaint. *Lowe* at 610, 286 S.E.2d at 653. Plaintiff had not argued his "case-in-chief." *Roberts* at 726, 464 S.E.2d at 83.

Also, the record shows that during the hearing on defendants' motion to dismiss, plaintiff moved to amend his complaint. In the

motion, plaintiff maintained his position that his claims arose under an individual contract with defendants, but said that if the trial court determined the claims were governed by ERISA, he wanted to amend his complaint to add a cause of action asserting ERISA claims. Therefore, even when the motion hearing ended, plaintiff had a motion to amend his complaint pending before the trial court that had not been ruled on by the trial court. This supports our conclusion that, in these particular circumstances, plaintiff had not rested his case.

[2] We have also reviewed the case law as to when a motion to dismiss pursuant to Rule 12(b)(6) converts to a motion for summary judgment pursuant to Rule 56:

> If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]

N.C. Gen. Stat. § 1A-1, Rule 12(b) (1990).

"[A] 'motion to dismiss for failure to state a claim is "converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." ' " *Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 731, 468 S.E.2d 447, 449 (1996) (citations omitted). *See also Ryles v. Durham County Hospital Corp.*, 107 N.C. App. 455, 458, 420 S.E.2d 487, 489 (citations omitted), *disc. review denied*, 332 N.C. 667, 424 S.E.2d 406 (1992).

> Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has "rested his case" within the meaning of Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure. He cannot thereafter take a voluntary dismissal under Rule 41(a)(1)(i). To rule otherwise would make a mockery of summary judgment proceedings.

Maurice v. Motel Corp., 38 N.C. App. 588, 591-92, 248 S.E.2d 430, 432-33 (1978).

In the case at bar, at the hearing on defendants' motion to dismiss, the trial court had before it matters outside the pleadings. These matters included the letter in which Hardee's offered plaintiff

employment, a written summary of benefits, a letter from plaintiff to CKE's chief operating officer, and an affidavit from Hardee's director of human resources. With materials such as these before the trial court, a 12(b)(6) motion for dismissal would, in many cases, convert to a summary judgment. On the facts before us, however, it does not. The distinction here is that, as noted above, defendants' motion to dismiss did not address the merits of the allegations set out in plaintiff's complaint. Defendants' motion went only to the question of whether plaintiff's claims are governed by ERISA. At no time has plaintiff had a hearing on the allegations set forth in his complaint. On these facts, to deny plaintiff an opportunity for hearing on the allegations in his complaint would prevent any consideration of plaintiff's case-in-chief.

Plaintiff filed a timely voluntary dismissal under Rule 41(a)(1)(i). The trial court did not have jurisdiction to enter subsequent orders in the case. The orders of the trial court are vacated.

Vacated.

Judges WALKER and EDMUNDS concur.

SUZANNE M. LORINOVICH AND HUSBAND DAVID A. LORINOVICH, PLAINTIFFS V. K MART CORPORATION, DEFENDANT

No. COA98-1038

(Filed 6 July 1999)

1. Premises Liability— cans stacked above store shelf—summary judgment

The trial court erred by granting summary judgment for defendant in a negligence action which arose from salsa cans hitting plaintiff-Ms. Lorinovich in the face as she reached for cans stacked on the top shelf. Plaintiff was a lawful visitor and, under *Nelson v. Freeland*, 349 N.C. 615, defendant owed her a duty to exercise reasonable care; there is a genuine issue of fact as to whether a reasonably prudent person would stack unsecured 16-ounce cans of salsa on shelves six feet off the floor, with no ladders or personnel available to assist customers in obtaining the salsa and no warnings of the likely danger involved in reach-

ing for the cans, knowing that other people had been injured when cans had been stacked on shelves higher than eye level and that it was store policy not to stack items that high unless secured.

2. **Premises Liability— cans falling from store shelf—obvious danger**

Summary judgment for defendant was improper in an action arising from an injury suffered by plaintiff-Ms. Lorinovich when salsa cans fell from a shelf and struck her in the face and defendant contended that the display of salsa cans presented an obvious danger. There is no duty to protect a lawful visitor against dangers which are either known or so obvious and apparent that they may reasonably be expected to be discovered, but the occupier of land is not absolved from liability when a reasonable occupier of land should anticipate that a dangerous condition will likely cause harm to the lawful visitor, notwithstanding the known and obvious danger. The obviousness of the danger is some evidence of contributory negligence.

3. **Premises Liability— contributory negligence—cans falling from store shelf**

The trial court erred by granting summary judgment for defendant in action arising from an injury suffered by plaintiff when cans of salsa fell from a store shelf and struck her in the face. Although defendant contended that plaintiff was contributorily negligent in attempting to remove the cans from the top shelf, there is a genuine issue of material fact as to whether a reasonable person under the circumstances would have waited until she obtained assistance.

Appeal by plaintiffs from order filed 26 May 1998 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 April 1999.

Richard F. Harris, III, for plaintiff-appellants.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Allen C. Smith and Leslie G. Martell, for defendant-appellee.

GREENE, Judge.

Suzanne M. Lorinovich (Plaintiff) and David A. Lorinovich (Plaintiff husband) appeal from the trial court's order granting K Mart Corporation's (Defendant) motion for summary judgment.

Plaintiffs' complaint alleges Defendant was negligent in creating an unsafe condition by its method of stacking cans on a shelf over six feet high when it knew or should have known that the cans stored overhead might fall on a customer reaching for the merchandise. Plaintiff seeks damages for personal injury and Plaintiff husband seeks damages for loss of consortium. Defendant answered and denied it was negligent in any way, and if it had been negligent, Plaintiff's contributory negligence was a bar to recovery. On 15 January 1997, Defendant moved for summary judgment.

The undisputed evidence at the summary judgment hearing shows that on 19 May 1993, Plaintiff was shopping in the grocery department of Defendant's store for K&W Salsa. In the grocery department there were rows of shelves. The shelves on each row were stacked to a height of six feet, higher than the shelves at other stores in the area. On the top shelf on aisle four, Defendant had stacked sixteen-ounce cans of salsa on top of each other.

Before attempting to obtain the salsa, Plaintiff looked and did not see any ladders or personnel in the area. Because of her height of five feet and four inches, Plaintiff's reach was not sufficient to obtain a firm grasp on the can of salsa. In trying to retrieve the can, Plaintiff dislodged other adjoining cans, causing four or five of them to fall on top of her. One can hit her in the face and caused a laceration, which bled profusely, bruised her to the bone, and required nineteen stitches.

Defendant's store policy was to provide assistance to those needing help in retrieving merchandise off of the shelves and to securely fasten any merchandise displayed above eye level. The salsa cans were stacked above eye level and were not securely fastened.

There was evidence of seven prior incidents, from 1992 through April 1993, of "falling merchandise" injuring customers at the store. Five months before Plaintiff's injuries, another customer, Beth Parrish (Parrish), was injured in Defendant's store when she attempted to obtain a can of green beans stacked on a shelf six feet in height. As she reached for the green beans, other cans fell on top of her. At the time of the Parrish injury, an employee of Defendant completed an accident report describing her injuries as having been caused by "canned goods stacked too high for customer."

The dispositive issues are whether: (I) genuine issues of material fact exist as to Defendant's negligence in causing Plaintiff's injuries;

and (II) genuine issues of material fact exist as to Plaintiff's contributory negligence.

I

Negligence

[1] Traditionally in North Carolina, the standard of care a real property owner or occupier owed to an entrant depended on whether the entrant was an invitee, licensee, or trespasser. *Newton v. New Hanover County Bd. of Education*, 342 N.C. 554, 559, 467 S.E.2d 58, 63 (1996). The liability of the owner to an invitee was founded "upon the principles on which the law of negligence is predicated." *Bohannon v. Stores Company, Inc.*, 197 N.C. 755, 759, 150 S.E. 356, 358 (1929). Thus, the landowner had a duty to "exercise reasonable care to provide for the safety" of the invitee. *Id.*; *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998) (landowner owed "duty of reasonable care" to invitee), *reh'g denied*, 350 N.C. 108, —— S.E.2d —— (1999). This required the landowner to take reasonable precautions to ascertain the condition of the property *and* to either make it reasonably safe or give warnings as may be reasonably necessary to inform the invitee of any foreseeable danger. *See Williams v. Stores Co., Inc.*, 209 N.C. 591, 596, 184 S.E. 496, 499 (1936); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 61, at 425-26 (5th ed. 1984) [hereinafter *Prosser and Keeton on Torts*]; Restatement (Second) of Torts § 343 cmt. b & d (1965). The landowner's duty to a licensee was less than the duty of reasonable care; it was simply to refrain from causing any willful injury and from recklessly exposing the licensee to danger. *McCurry v. Wilson*, 90 N.C. App. 642, 645, 369 S.E.2d 389, 392 (1988).

In *Nelson*, our Supreme Court eliminated the distinctions between licensees and invitees, and established "a standard of reasonable care toward all lawful visitors." *Nelson*, 349 N.C. at 631-32, 507 S.E.2d at 892 (adopting "a true negligence standard"). Thus the landowner now is required to exercise reasonable care to provide for the safety of all lawful visitors on his property, the same standard of care formerly required only to invitees. Whether the care provided is reasonable must be judged against the conduct of a reasonably prudent person under the circumstances. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988).

In this case, Plaintiff was a lawful visitor on Defendant's premises and thus Defendant owed her a duty to exercise reasonable care to provide for her safety. This required Defendant to take reasonable

precautions to ascertain the condition of the property *and* to either make it reasonably safe or give warnings as may be reasonably necessary to inform the invitee of any foreseeable danger. Our review of the evidence reveals a genuine issue of fact as to whether a reasonably prudent person, armed with knowledge that other people had been injured in the store when cans had been stacked on shelves higher than eye level and armed with knowledge that it was store policy not to stack items higher than eye level unless secured, would stack, unsecured, sixteen-ounce cans of salsa on shelves six feet off the floor, with no ladders or personnel available to assist the customers in obtaining the salsa from the shelf and with no warnings of the likely danger involved in reaching for the cans. *See Williams v. Walnut Creek Amphitheater Partnership*, 121 N.C. App. 649, 652, 468 S.E.2d 501, 503, (prior incidents of injury to patrons are proper to consider in determining breach of duty), *disc. review denied*, 343 N.C. 312, 471 S.E.2d 82 (1996). Contributing to this issue of fact is the evidence that other stores in the area did not stack their merchandise as high as Defendant stacked its merchandise. *Leggett v. Thomas & Howard Co., Inc.*, 68 N.C. App. 710, 712, 315 S.E.2d 550, 552 (quoting *Prosser and Keeton on Torts* § 33, at 166) (custom in the community is relevant to show the standard of care), *disc. review denied*, 311 N.C. 759, 321 S.E.2d 137 (1984).

[2] Even if the precautions necessary to protect Plaintiff from harm were not taken by Defendant, it contends there can be no liability because the displaying of the salsa cans six feet from the floor presents an obvious danger. As a general proposition, there is no duty to protect a lawful visitor against dangers which are either known to him or so obvious and apparent that they reasonably may be expected to be discovered.[1] *Wrenn v. Convalescent Home*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967); *see* 62 Am. Jur. 2d *Premises Liability* § 147 (1990) (owner liable only if condition known or should have been known by him and not known or should not have been known by the injured visitor). When a reasonable occupier of land should anticipate that a dangerous condition will likely cause physical harm to the lawful visitor, notwithstanding its known and obvious danger, the occupier of the land is not absolved from liability.[2] *Southern*

1. Although this "no duty" rule for obvious dangers "bears a strong resemblance to the doctrine of contributory negligence," 62 Am. Jur. 2d *Premises Liability* § 149 (1990), it in fact negates the defendant's duty of care and eliminates any occasion for reliance on the defense of contributory negligence.

2. In those instances where the landowner retains a duty to the lawful visitor even though an obvious danger is present, the obvious nature of the danger is some evidence

Railway Co. v. ADM Milling Co., 58 N.C. App. 667, 673, 294 S.E.2d 750, 755, *disc. review denied*, 307 N.C. 270, 299 S.E.2d 215 (1982). In this case, assuming the salsa display presented an obviously dangerous condition, which itself is a question of fact, there is evidence that would support a conclusion that Defendant should have anticipated that its customers could be injured from this type of display. *See Williams*, 121 N.C. App. at 652, 468 S.E.2d at 503-04. Accordingly, summary judgment for Defendant on this issue was improper.

II

Contributory Negligence

[3] Defendant contends that even if it were negligent in displaying the salsa six feet from the floor, and even if any danger in the display was obvious and a reasonable landowner would have anticipated any harm to a customer, Plaintiff was contributorily negligent in attempting to remove the can of salsa from the top shelf because she had to recognize before reaching for the can that it was beyond her reach and she nonetheless reached without asking for assistance. We disagree. There is a genuine issue of material fact regarding Plaintiff's contributory negligence. Whether a reasonable person under the circumstances would have waited until she obtained assistance from Defendant's personnel or asked for assistance from a fellow shopper are questions for the jury in this case.

Accordingly, summary judgment was not proper and must be reversed. N.C.G.S. § 1A-1, Rule 56(c) (1990).

Reversed and remanded.

Judges MARTIN and McGEE concur.

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of contributory negligence on the part of the lawful visitor. If contributory negligence were found, it would bar recovery.

JAMES E. AYCOCK, PLAINTIFF v. MACK PADGETT, JOHN DOE, AND JANE DOE, DEFENDANTS

No. COA98-782

(Filed 6 July 1999)

1. Libel and Slander— libel per se—infamous crime—failure to state a claim

The trial court did not err by dismissing a defamation action for failure to state a claim upon which relief could be granted where plaintiff alleged statements by defendant that plaintiff was not a resident of the town in which he was running for office, a felony, but there is a need for explanatory circumstances for the listener or reader to know that plaintiff had committed an infamous crime. Any interpretation of the comments as given does not rise to the level of an actionable defamation claim.

2. Libel and Slander— libel per quod—town board candidate—not resident in town—failure to state a claim

The trial court correctly dismissed a defamation action for failure to state a claim upon which relief could be granted where plaintiff alleged statements by defendant that plaintiff was not a resident of the town in which he was running for office. The damage plaintiff claims to have suffered is the loss of a seat on the town board; in essence, a suit to recover damages for a lost election. It is not the place of the Court of Appeals to engage in a post-election analysis of the decision made by the voters.

Appeal by plaintiff from order entered 20 May 1998 by Judge Claude S. Sitton in Buncombe County Superior Court. Heard in the Court of Appeals 23 February 1999.

Frank B. Aycock, III, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon and Stephen B. Williamson, for defendant-appellee Padgett.

LEWIS, Judge.

Plaintiff filed a complaint on 10 February 1998 in response to allegedly defamatory comments made by defendant Padgett ("Padgett") at a public meeting of the Black Mountain Board of

Aldermen ("the Board") on or about 13 October 1997. Defendants John Doe and Jane Doe were named as conspirators whose identities were to be revealed through discovery. Plaintiff was unable to complete discovery because on 20 May 1998, the trial court granted Padgett's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The factual background of this case is derived from plaintiff's complaint, which must be taken as true at this stage in the proceedings. *See, e.g., Harris v. NCNB,* 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Plaintiff was one of twelve people seeking election to one of five seats on the Board in 1997. To run for this office, plaintiff had to swear when he filed for election in July of 1997 that he was a resident of Black Mountain.

Plaintiff contends that Padgett, knowing that a reporter from The Black Mountain News would be present at the 13 October 1997 meeting of the Board ("the meeting"), placed his name on the meeting's agenda for the published purpose of speaking on sewer lines. His actual purpose, as alleged in the complaint, was to defame plaintiff in public and the press and thereby damage plaintiff's chances of winning the election.

Plaintiff claims Padgett made the following statements at the meeting: "I know that [plaintiff] was not living in town when he applied to run for the town board"; "A lot of things [plaintiff] said in the paper when he was editor and owner hurt a lot of people running for the board. He said that in his opinion a particular person should not be elected"; and "I feel like [plaintiff] was not living in town at that particular time, when he was running." According to plaintiff, the Black Mountain News published a three-column article on 16 October 1997 entitled "Man alleges filing violations," including a photograph of plaintiff and printing at least one of Padgett's statements from the meeting. On 4 November 1997, plaintiff finished sixth in the race for five seats on the Board. He brought this suit the following February, making three defamation claims, one claim for unfair trade practices, and one claim for punitive damages. From the dismissal of his suit, plaintiff appeals.

[1] Plaintiff first argues that the trial court erred in dismissing his three defamation claims. There are two separate torts encompassed by the term "defamation": libel and slander. Generally, "libel is written while slander is oral." *Phillips v. Winston-Salem/Forsyth County*

Bd. of Educ., 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). Plaintiff's complaint refers to Padgett's remarks as libel, and he argues on appeal that the tort was libel because "[a]lthough defendant's words were oral, he intended to have them published in the Black Mountain News." Without conceding defamation, Padgett states in his brief that because plaintiff alleged that Padgett's communications were oral, they must be analyzed as slander. Our case law addresses this dispute as follows: "[W]hen defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel." *Id.* at 278, 450 S.E.2d at 756 (quoting *Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990)). However, since plaintiff's complaint and appellate arguments are based entirely on libel, we address only libel in our opinion.

This Court has defined libel *per se* as

> a publication which, *when considered alone without explanatory circumstances*: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.

Id. at 277, 450 S.E.2d at 756 (emphasis added). Clearly, Padgett's comments did not address infectious diseases. They did not impeach plaintiff in his trade or profession because he was not a professional politician, was no longer with the Black Mountain News, and was not paid to reside in Black Mountain. They did not subject plaintiff "to ridicule, contempt or disgrace" within the traditional meaning of those terms, either. There is a question, though, as to whether Padgett accused plaintiff of an infamous crime.

"At common law, . . . an infamous crime is one whose commission brings infamy upon a convicted person, rendering him unfit and incompetent to testify as a witness, such crimes being treason, felony, and *crimen falsi*." *State v. Clemmons*, 100 N.C. App. 286, 292, 396 S.E.2d 616, 619 (1990) (quoting *State v. Surles*, 230 N.C. 272, 283-84, 52 S.E.2d 880, 888 (1949) (Ervin, J., dissenting, quoting Burdick: *Law of Crimes*, section 87)). To say that a person was not a resident of the town in which he is running for office at the time he filed for election is to accuse him of a felony. According to our statutes, it is a Class I felony "[f]or any person knowingly to swear falsely with respect

to any matter pertaining to any primary or election." N.C. Gen. Stat. § 163-275(4) (1995); *see also* N.C. Gen. Stat. § 163-275(1) (1995).

Regardless of whether this particular felony rises to the level of an infamous crime, there would seem to be a need for explanatory circumstances for the listener or reader here to know that plaintiff had committed an infamous crime. Any accusation of a crime was made implicitly by Padgett, and it cannot be seriously contended that this particular felony carries with it the infamy accorded to those such as murder and treason. While we need not determine whether there are particular Class I felonies which are also infamous crimes, it is worth noting that there are many Class I felonies of which citizens of this state could be accused that would probably require further explanation before becoming libelous. *See, e.g.*, N.C. Gen. Stat. §§ 14-280 (1993) (throwing rocks at railroad cars); 14-309.14 (Cum. Supp. 1998) (offering a prize of fifty dollars ($50.00) or greater in a beach bingo game); 14-401.11(a)(1) (1993) (distributing Halloween candy which might cause a person mild physical discomfort without any lasting effect); and 113-209 (1997) (taking polluted shellfish at night). Plaintiff's complaint did not make out a valid case of libel *per se*, and the trial court properly dismissed it on that ground.

In his second claim for relief, plaintiff makes the alternative argument that Padgett's comments were "susceptible of two interpretations[,] one of which was defamatory and the other not." We disagree. As noted above, we find that the statements as originally spoken, with no further explanation, are not defamatory. Any interpretation of these comments as they were given does not rise to the level of an actionable defamation claim.

[2] Defendant's third claim for relief is the alternative argument that "the publications were not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances became libelous, [causing] plaintiff general and special damages." This is, in essence, an argument that the comments were actionable *per quod*. *See, e.g., U v. Duke University*, 91 N.C. App. 171, 181, 371 S.E.2d 701, 708, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988). The damage plaintiff claims to have suffered, as required to recover for libel *per quod*, is the loss of a seat on the Board which in turn damaged "his opportunity for employment" and resulted in a "loss of income and benefits derived therefrom."

This is, in essence, a suit to recover damages for a lost election. We do not consider it the place of this Court to engage in a post-

election analysis of the decisions made by the voters of Black Mountain in this or any other election. Although this appears to be the first time this question has been raised in this manner in North Carolina, other jurisdictions have similarly concluded that the notion that the loss of an election constitutes special damages for which a court may grant relief is far too speculative and uncertain to entertain. *See, e.g., Southwestern Publishing Co. v. Horsey,* 230 F.2d 319, 322-23 (9th Cir. 1956) (noting that "[t]here may be not less than a thousand factors which enter into the vagaries of an election"); *Beverly v. Observer Pub. Co.*, 77 S.E.2d 80, 81 (Ga. App. 1953) (holding that "[s]pecial damages for the loss of a public office in an election for that office are too remote and speculative to be recoverable"); *Otero v. Ewing*, 110 So. 648, 650 (La. 1926) (stating that "[i]t is common knowledge that there are many surprises at the result of elections by the people"); *see also* 50 Am. Jur. 2d *Libel and Slander* § 234 ("A plaintiff seeking to show defamation must show more than the fact that a misrepresentation caused the candidate to lose votes; a plaintiff must show that the misrepresentation was defamatory on its face."). In light of the facts and circumstances of this case, plaintiff was not entitled to relief on any of his three defamation claims. The dismissal of these claims is affirmed.

Because we hold that Padgett's statements did not constitute actionable defamation, it follows that plaintiff's fourth and fifth claims for relief, unfair trade practices and punitive damages based on the alleged defamation, are without legal foundation. As such, we need not address plaintiff's two remaining arguments on appeal regarding the trial court's decision to dismiss these claims.

Plaintiff's complaint failed to state a claim upon which relief can be granted. Defendant's motion to dismiss the complaint was properly granted. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990).

Affirmed.

Judges GREENE and HORTON concur.

CBP RESOURCES, INC., PLAINTIFF-APPELLEE v. MOUNTAIRE FARMS OF NORTH CAROLINA, INC., MOUNTAIRE CORPORATION, MOUNTAIRE FARMS OF DELMARVA, INC., MOUNTAIRE FEEDS, INC., MOUNTAIRE FARMS, L.L.C., DEFENDANT-APPELLANTS AND PIEDMONT POULTRY PROCESSING, INC., F/K/A LUMBEE FARMS COOPERATIVE, INC., PIEDMONT POULTRY COMPANY, INC., PIEDMONT FEED MILLS, INC., PIEDMONT POULTRY FARMS, INC. AND PIEDMONT HATCHERIES, INC., DEFENDANTS

No. COA98-1169

(Filed 6 July 1999)

Appeal and Error— appealability—Rule 54(b) certification— not a final judgment—appeal dismissed

An appeal was dismissed where the trial court granted partial summary judgment on a contract action and certified the matter for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b), but the issue of damages remained to be determined. A Rule 54(b) certification is effective to certify an otherwise interlocutory appeal only if the trial court has entered a final judgment with regard to a party or a claim in a case involving multiple parties or claims. The certification here was ineffective because the issue of damages remained to be determined. Moreover, there was no danger of inconsistent verdicts and no substantial right will be affected pending the trial court's consideration of the remaining issue.

Appeal by Mountaire defendants from judgment entered 26 May 1998 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 29 April 1999.

Smith Helms Mulliss & Moore, L.L.P., by Larry B. Sitton and Manning A. Connors, for plaintiff-appellee.

Jordan, Price, Wall, Gray & Jones, L.L.P., by Henry W. Jones, Jr. and Laura J. Wetsch; and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr. and S. Kyle Woosley, for Mountaire defendants-appellants.

WALKER, Judge.

Plaintiff CBP Resources, Inc. (CBP) filed this action on 12 December 1996, alleging breach of contract against Mountaire Farms of North Carolina, Inc., Mountaire Corporation, Mountaire Farms of Delmarva, Inc., Mountaire Feeds, Inc., and Piedmont Poultry

Processing, Inc. f/k/a Lumbee Farms Cooperative, Inc. CBP later amended its complaint to include defendants Mountaire Farms, L.L.C., Piedmont Poultry Company, Inc., Piedmont Feed Mills, Inc., Piedmont Poultry Farms, Inc., and Piedmont Hatcheries, Inc. The Mountaire defendants filed a joint answer to the amended complaint. The Piedmont defendants have not filed any pleading and have not made an appearance in this matter.

CBP's claims arise from a contract made 29 January 1988 between CBP and Lumbee Farms Cooperative in which Lumbee agreed to sell the by-products of its poultry processing operations at its plant in Lumber Bridge, North Carolina to CBP. Lumbee was subsequently purchased by the Piedmont defendants which assumed the contract with CBP. In January 1996, Mountaire Farms of North Carolina, Inc. entered into an asset purchase agreement with the Piedmont defendants wherein it agreed to purchase certain assets including the Lumber Bridge plant. CBP alleges that Mountaire is bound by the contract to sell its poultry by-products to CBP. Mountaire contends that it did not expressly or impliedly assume the contract in the asset purchase agreement.

CBP filed a motion for partial summary judgment on the issue of liability, which was heard by the trial court on 7 May 1998. The trial court granted partial summary judgment for CBP and noted the following in its order:

> The Plaintiff's claims and the Defendants' affirmative defenses are so intertwined with the question of damages that a fair adjudication of these issues cannot be had without a contemporaneous presentment of the other, so that the substantial rights of these Defendants are affected, and immediate appeal pursuant to N.C. Gen. Stat. § 1-277 is warranted.
>
> There is no just reason to delay appeal of this matter, and this matter is therefore certified for immediate appeal pursuant to Rule 54(b); . . . .

We must first consider the issue of whether this appeal is properly before the Court. *See Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980). The trial court granted partial summary judgment for the plaintiff only on the issue of liability. "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677

(1993). "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). The rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978). There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) or (2) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Bartlett v. Jacobs*, 124 N.C. App. 521, 523, 477 S.E.2d 693, 695 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations omitted); N.C. Gen. Stat. § 1-277 (1996); N.C. Gen. Stat. § 7A-27 (1995).

However, a Rule 54(b) certification is effective to certify an otherwise interlocutory appeal only if the trial court has entered a final judgment with regard to a party or a claim in a case which involves multiple parties or multiple claims. *See DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 500 S.E.2d 666 (1998). Rule 54(b) certification of an appeal is reviewable by this Court "because the trial court's denomination of its decree 'a final . . . judgment does not make it so,' if it is not such a judgment." *First Atlantic Management Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (*quoting Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979)) (citations omitted). Thus, we must determine whether the partial summary judgment entered in favor of CBP was final or, in the alternative, whether a substantial right of the defendants will be affected absent immediate appellate review.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). In this case, plaintiffs moved for summary judgment on the issue of liability; however, plaintiff's counsel admitted at the motion hearing that there were issues of material fact regarding damages which made it unsuitable for summary judgment. Because the issue of damages remains to be determined by the trial court, this is not a final judg-

ment and the trial court's Rule 54(b) certification is ineffective. *See, e.g., Cagle v. Teachy*, 111 N.C. App. 244, 431 S.E.2d 801 (1993); *McNeil v. Hicks*, 111 N.C. App. 262, 431 S.E.2d 868 (1993), *disc. review denied*, 335 N.C. 557, 441 S.E.2d 118 (1994).

Next, we determine whether a substantial right would be affected. The substantial right test is more easily stated than applied, and it is usually necessary to consider the facts and circumstances of each case along with its procedural context to apply the test. *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982). The test is satisfied when overlapping issues of fact between decided claims and those remaining create the possibility of inconsistent verdicts from separate trials. *Id.*; *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989).

Here, as the issue of liability has been determined, the only remaining issue is that of damages and there is no danger of inconsistent verdicts. *See, e.g., Industries, Inc.*, 296 N.C. 486, 251 S.E.2d 443; *McNeil*, 111 N.C. App. 262, 431 S.E.2d 868. Therefore, no substantial right will be affected pending the trial court's consideration of the remaining issue.

Furthermore, this case is distinguishable from both *Bartlett* and *DKH Corp.* In *Bartlett*, a substantial right—the possibility of inconsistent verdicts—was affected because the plaintiff's claim and defendant's counterclaim were "sufficiently intertwined so that 'a fair adjudication of one claim cannot be had without a contemporaneous presentment of the other.' " *Bartlett*, 124 N.C. App. at 524, 477 S.E.2d at 695-96. In this case, there is no counterclaim which remains to be determined. The only issue remaining is that of damages. In *DKH Corp.*, our Supreme Court interpreted Rule 54(b) noting it applies to cases which involve multiple claims or multiple parties. *DKH Corp.*, 348 N.C. at 585, 500 S.E.2d at 667. Here, there is but a single claim asserted against parties with interests so similar that they filed joint pleadings. Further, the judgment is not final as to any claims or parties.

In certifying the appeal, the trial court stated that plaintiff's claims and defendants' affirmative defenses were intertwined with the damages issue. However, we do not perceive this to be an impediment in a trial on the issue of damages.

For these reasons, this appeal is dismissed and the case is remanded to the trial court for further proceedings.

Dismissed and remanded.

Judges WYNN and HUNTER concur.

SHEILA P. SWEET AND HUSBAND, RANDY L. SWEET, PLAINTIFFS V. RENA BOGGS, EXECUTRIX OF THE ESTATE OF HARVEY WENTON DAVIDSON, DEFENDANT

No. COA98-1205

(Filed 6 July 1999)

Statute of Limitations— voluntary dismissal—action against wrong party—new summons but complaint not amended—statute of limitations not tolled

The trial court properly dismissed a claim arising from an automobile accident as barred by the statute of limitations where plaintiff filed the claim against Mr. Davidson prior to the expiration of the statute of limitations, being unaware of Davidson's demise; plaintiff issued a summons against the personal representative of his estate when she was advised of his death, but never amended her complaint to allege a cause of action against the personal representative; plaintiff voluntarily dismissed her claim after the statute of limitations had run; and she refiled it within a year. A properly directed summons does not allow a cause of action to survive if the complaint was defective, no amendment of the complaint was ever requested, and the defect was never cured.

Appeal by plaintiffs from order entered 12 June 1998 by Judge Lester P. Martin, Jr., in Alexander County Superior Court. Heard in the Court of Appeals 17 May 1999.

Joel C. Harbinson for plaintiff appellants.

W. Brian Howell, P.A., by W. Brian Howell; and Avery, Crosswhite, Crosswhite & Chamberlain, by William E. Crosswhite, for defendant appellee.

HORTON, Judge.

On 7 May 1993, Sheila P. Sweet (plaintiff) and Harvey Wenton Davidson (Mr. Davidson) were involved in an automobile accident.

Mr. Davidson died on 22 June 1993 of causes unrelated to the accident. On 6 May 1996, plaintiff brought an action for damages based on her personal injuries from the automobile accident. The 1996 action [Sweet I] was filed in Alexander County Superior Court, numbered 96-CVS-160, and styled "Sheila P. Sweet, Plaintiff, vs. Harvey Wenton Davidson, Defendant." A summons was issued on 6 May 1996 and directed to "Harvey Wenton Davidson, Rt. 2, Box 159, Statesville, NC 28677." The summons was forwarded to the Sheriff of Iredell County, but returned with the notation that the address given was on Sloan Road in Alexander County.

An alias and pluries summons was issued on 5 August 1996, directed to "Harvey Wenton Davidson, Rt. 7, Box 19, Taylorsville, NC 28681." The summons was received by the Sheriff of Alexander County on 5 August 1996 and returned unserved on 6 August 1996 by the Sheriff with the notation that Mr. Davidson was deceased. An alias and pluries summons was again issued on 24 October 1996, directed to Mr. Davidson at "Route 7, Box 19, Taylorsville, NC 28681." That third summons does not show receipt by the Sheriff, nor is there any return by the Sheriff. On 4 December 1996, Rena Boggs, the Executrix of Mr. Davidson's Estate (defendant) moved to dismiss the action on the grounds that it was barred by the statute of limitations, that the named defendant was deceased and not the real party in interest, that a claim upon which relief could be based was not stated, and for insufficiency of process.

Yet another alias and pluries summons was issued by plaintiff on 23 December 1996, directed to: "Ms. Rena Boggs Executrix of the Estate of and the Estate of Harvey Wenton Davidson, Route 15, Box 70, Statesville, NC 28677." The summons was received by the Sheriff of Iredell County on 7 January 1997 and served on "William Boggs—Son" on 8 January 1997. On 1 February 1997, the law firm representing plaintiff dissolved, and plaintiff decided to hire present counsel to represent her. Her present counsel then filed a voluntary dismissal without prejudice on 4 November 1997.

On 16 February 1998, plaintiff and her husband, Randy L. Sweet, instituted this action for damages based on her personal injuries and for loss of consortium as a result of those injuries. Defendant was served with process and moved to dismiss because it appeared on the face of the complaint that plaintiffs' claims were barred by the statute of limitations. The trial court dismissed the complaint, and plaintiffs appealed.

Plaintiff's cause of action for personal injuries against Mr. Davidson survived his death. N.C. Gen. Stat. § 28A-18-1(a) (1984) provides that

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person . . . shall survive to and against the personal representative or collector of his estate.

Here, the claim against Mr. Davidson was filed prior to the expiration of the three-year statute of limitations applicable to actions for personal injuries arising from an automobile accident. Apparently, plaintiff was not aware that Mr. Davidson was deceased when the action was instituted. When plaintiff was advised of Mr. Davidson's demise, she issued a summons against the personal representative of his estate, and the summons was served on 23 December 1996. However, plaintiff never amended her complaint to allege a cause of action against the personal representative as defendant. On 1 February 1997, after the statute of limitations had run on plaintiff's claim, plaintiff voluntarily dismissed her claim and then refiled it within a year.

The issue in this case is whether plaintiff's issuance of a *summons* directed to the proper defendant without amending the complaint would make the executrix of Mr. Davidson's estate a party, and validate plaintiff's cause of action. We hold that a properly directed summons does not allow a cause of action to survive if the complaint was defective, no amendment of the complaint was ever requested, and the defect was never cured.

Rule 41(a) of the North Carolina Rules of Civil Procedure provides that, when a claim is voluntarily dismissed without prejudice by a plaintiff, the plaintiff may reinstitute the claim within one year. N.C. Gen. Stat. § 1A-1, Rule 41(a) (1990). The second claim will relate back and avoid the bar of the statute of limitations. *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 365, 344 S.E.2d 302, 304 (1986). However, the first claim must have been valid in order to toll the statute of limitations. *Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986). Indeed, our case law indicates that a "voluntarily[]dismissed suit which is based on defective service does not toll the statute of limitations." *Johnson v. City of Raleigh*, 98 N.C. App. 147, 148, 389 S.E.2d 849, 850, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990). This same principle has applied to voluntarily dismissed suits which were based on defective complaints. " '[I]n order

for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading . . . .' " *Robinson v. Entwistle*, 132 N.C. App. 519, 512 S.E.2d 438, 441 (1999) (quoting *Estrada*, 316 N.C. at 323, 341 S.E.2d at 542). In this case, there was no attempt made to amend the complaint; therefore, plaintiff's action never stated a valid claim against the executrix of Mr. Davidson's estate, and the statute of limitations ran before a proper claim was instituted. As a result, Rule 41(a)(1) cannot be used to revive the action. The order of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge LEWIS concur.

VIRGINIA M. BOGAN, PLAINTIFF v. WILLIAM H. BOGAN, DEFENDANT

No. COA98-943

(Filed 6 July 1999)

1. Child Support, Custody, and Visitation— support—modification sua sponte—reduced payment to purge contempt—authority

The trial court properly entered judgment for a child support arrearage where plaintiff and defendant had entered a consent order on 15 June 1990 which included child support; the court held defendant in contempt on 19 September 1990 for failure to comply with the child support obligation; the court found on 17 October 1990 that defendant was unable to make the payments and ordered defendant to make a partial payment; and plaintiff subsequently filed a motion for a judgment on the arrearage. Although defendant contended that the court's October order constituted a modification of his obligation and that he owed no arrearage, the issue before the court related to defendant's contempt and the record does not indicate that the court intended to modify defendant's obligation. The court was well within its authority to allow defendant to purge himself of contempt upon payment of an amount less than he owed, but

would have been without authority to sua sponte modify an existing order. Moreover, any modification would have applied only prospectively.

2. Child Support, Custody, and Visitation— support—arrearage—failure to pay—willful or without lawful excuse—no finding

The trial court properly entered a judgment for a child support arrearage without evidence that defendant's failure to pay was willful or without lawful excuse. There is no such requirement.

Appeal by defendant from order filed 8 June 1998 and from order filed 12 June 1998 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 20 April 1999.

Morgenstern & Bonuomo, P.L.L.C., by Barbara R. Morgenstern, for plaintiff-appellee.

Craige, Brawley, Liipfert & Walker, L.L.P., by William W. Walker, for defendant-appellant.

GREENE, Judge.

William H. Bogan (Defendant) appeals from the trial court's orders directing Defendant to repay his child support arrears in the amount of $31,202.00 to Virginia M. Bogan (Plaintiff).

Plaintiff and Defendant were married on 29 August 1970 and separated on 28 December 1989. Two children were born of the marriage, one on 27 April 1973 and the other on 11 February 1979. On 18 April 1990, Plaintiff filed a complaint against Defendant seeking, *inter alia*, a divorce from bed and board, permanent alimony, joint legal custody of the children, and child support.

On 15 June 1990, Plaintiff and Defendant entered into a consent order where both parties agreed and the trial court ordered, *inter alia*, that: (1) both parties shall share joint legal custody of both children; (2) Defendant shall pay Plaintiff the sum of $575.00 per month in child support; and (3) Defendant shall reimburse Plaintiff for child related expenses incurred since the date of separation in the amount of $4,025.00.

On 10 September 1990, Plaintiff filed a motion requesting Defendant be held in contempt of court for failure to comply with the

child support obligations of the 15 June order. After a hearing on that motion, on 19 September 1990, the trial court held Defendant in civil and criminal contempt of court, placed him in jail for ten days, and directed that he reappear before the trial court at a later date to "provide the Court with the name and place of his employment and his income."

On 17 October 1990, Defendant reappeared before the trial court pursuant to the 19 September order and the trial court found "that under the present circumstances [Defendant] is unable to make said child support payments [set by the 15 June 1990 order], but he is able to make some payments to [Plaintiff]." Based on this finding, the trial court ordered Defendant to "pay to [Plaintiff] the sum of $40 in partial payment of the child support previously ordered."

On 9 August 1997, Plaintiff filed a motion to reduce the child support arrears, alleged to be $35,742.30, to judgment. After a hearing on that motion, the trial court, on 8 June 1998, entered an order making the following pertinent findings of fact: (1) Defendant's child support arrears pursuant to the 15 June 1990 order amounted to $31,202.00; and (2) Defendant has not filed a motion to modify his child support obligation since the entry of the 15 June 1990 order.

Based on these findings of fact, the trial court concluded that (1) Defendant had a child support arrearage of $31,202.00, which should be reduced to judgment with interest accruing at the legal rate; and (2) the arrearage should be repaid at the rate of $500.00 per month, payable in weekly installments of $115.38, including interest. An order was entered consistent with these conclusions, along with an order to withhold Defendant's wages.

There is no evidence in this record and it is undisputed that Defendant has never made a motion to modify his child support obligation set by the 15 June 1990 order.

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[1] The dispositive issue is whether a trial court, absent a specific motion to modify a child support order, may modify a parent's child support obligation.

Defendant contends the trial court's 17 October 1990 order allowing a partial payment of $40.00 per week constituted a modification of his child support obligation and he therefore owes no arrearage. We disagree.

Our reading of the record does not indicate the trial court intended to modify Defendant's child support obligation set in the 15 June 1990 order. The issue before the trial court related to Defendant's contempt of the 15 June order. The trial court, therefore, was well within its authority to find Defendant in contempt, but allow him to purge himself of contempt upon a payment of some amount less than that owed.

In any event, even if the trial court intended to modify the child support obligation, it was without authority to do so. An order setting child support only may be modified "upon motion in the cause and a showing of changed circumstances by either party." N.C.G.S. § 50-13.7(a) (1995). Accordingly, a trial court is without authority to *sua sponte* modify an existing support order. *See Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (trial court may modify custody only upon a motion by either party or anyone interested). The trial court's jurisdiction is limited to the specific issues properly raised by a party or interested person. *Smith v. Smith*, 15 N.C. App. 180, 182-83, 189 S.E.2d 525, 526 (1972) (it was error for trial court to modify custody or support when only question before court was alimony); *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995) (trial court may not modify child support upon a motion to modify child custody as that issue was not before the court).

In this case, the only issue before the trial court was whether Defendant was in contempt of court for failure to comply with the child support obligation of the 15 June order. There was no pending motion made by anyone seeking to modify the child support obligation. The trial court, therefore, did not have the requisite authority to modify Defendant's obligation. Even if the trial court had the authority to modify the support obligation, it would only apply prospectively and could not reduce the support obligation accrued before 17 October 1990. *Craig v. Craig*, 103 N.C. App. 615, 619, 406 S.E.2d 656, 658-59 (1991).

[2] Defendant makes the alternative argument that the order of the trial court, entering a judgment for the arrearage, must be reversed because Plaintiff presented no evidence that his failure to comply with the 15 June order was willful or without lawful excuse. There is no such requirement. *See Fitch v. Fitch*, 115 N.C. App. 722, 446 S.E.2d 138 (trial court may reduce child support arrears to judgment upon proper motion, a judicial determination of amount properly due, and

final judgment for the proper amount due), *appeal dismissed*, 338 N.C. 309, 452 S.E.2d 309 (1994). Accordingly, the trial court properly reduced Defendant's child support arrears to judgment.

Affirmed.

Judges MARTIN and McGEE concur.

BILLIE RUTH SMITH, EMPLOYEE, PLAINTIFF v. CHAMPION INTERNATIONAL, EMPLOYER, SELF-INSURED/(SEDWICK JAMES OF THE CAROLINAS, SERVICING AGENT,) DEFENDANTS

No. COA98-1226

(Filed 6 July 1999)

Workers' Compensation— disability—aggravation of pre-existing back injury

The Industrial Commission did not err by awarding plaintiff disability benefits for aggravation of a pre-existing back injury. While there may have been conflicting evidence, it was for the Commission to weigh the credibility of the witnesses and decide the issues.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission filed 5 November 1997. Heard in the Court of Appeals 9 June 1999.

The Jernigan Law Firm, by N. Victor Farah and Leonard T. Jernigan, for plaintiff-appellee.

Robinson & Lawing, L.L.P., by Jolinda J. Steinbacher, for defendant-appellants.

HUNTER, Judge.

This workers' compensation case arises from proceedings before the Industrial Commission where plaintiff alleged she exacerbated her pre-existing back condition in an accident occurring on 18 October 1994 while disassembling metal scaffolding at the Champion paper manufacturing facility in Canton, North Carolina. At the

hearing, plaintiff's evidence tended to show that Smith ("plaintiff"), 49-years-old at the time of the alleged incident, first experienced pain immediately after handing a piece of scaffolding down to her co-worker. The pain increased throughout the day, and by the following day, plaintiff was unable to complete her job responsibilities. She reported to the clinic and saw Mr. Stegall, a physician's assistant. Mr. Stegall diagnosed an acute exacerbation of her pre-existing back problems and, along with Albert J. Osbahr III, M.D., the company physician, recommended lighter duty assignments. Plaintiff was assigned lighter responsibilities and performed them until 7 November 1994. Plaintiff was scheduled to start a new position but was prevented from doing so by a supervisor and Dr. Osbahr.

Before and after this incident, plaintiff was treated by a chiropractor and several other physicians at the Champion physical therapy/fitness program but therapy was discontinued when the pain steadily increased. On 19 June 1995, Richard E. Weiss, M.D., a neurosurgeon, performed a L4-5 laminotomy and medial facetectomy which significantly reduced her left hip and leg pain. Her back pain continued and Dr. Weiss performed a L4-5 posterior lateral fusion on 17 October 1995. Dr. Weiss opined that plaintiff was totally disabled.

Defendants' evidence indicated that plaintiff had a long-standing history of back problems which would eventually require surgery. Plaintiff freely admits her pre-existing back condition.

Plaintiff filed a workers' compensation claim with her employer which was denied. The deputy commissioner issued an opinion awarding plaintiff benefits and defendants appealed. The Full Commission affirmed the award and adopted the opinion of the deputy commissioner. Defendants appeal to this Court.

Defendants' primary argument is that the Full Commission erred in concluding that plaintiff's back condition was causally related to a minor alleged work accident and not to a severe, debilitating pre-existing back condition. We disagree.

N.C. Gen. Stat. § 97-86 provides that "[t]he award of the Industrial Commission . . ., as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact . . . ." N.C. Gen. Stat. § 97-86 (Supp. 1998). "The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though

there be evidence that would support findings to the contrary." *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam). *See also Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, — S.E.2d — (1999). "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (*quoting Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Here, the Full Commission's findings of fact included:

> 20. On October 18, 1994 plaintiff sustained a specific traumatic incident of the work assigned which arose out of and in the course of her employment with defendant and which resulted in injury to her pre-existing spondylolisthesis and spinal stenosis and which further, when considered in conjunction with her age, education, and work experience, rendered her unable to earn any wages in any employment beginning November 7, 1994 and which ultimately resulted in the surgeries performed in June 1995 and October 1995. Although the causes of plaintiff's wage earning incapacity and the surgeries performed are multi-factorial, the specific traumatic incident which she experienced on October 18, 1994 significantly exacerbated her pre-existing lumbar spondylolisthesis and spinal stenosis and was thereby a significant causal factor of her wage earning incapacity and her surgeries. She has not reached the end of the healing period and is unable to engage in prolonged standing, prolonged sitting, frequent bending at the waist or heavy lifting.

Clearly, aggravation of a pre-existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state. "The work-related injury need not be the sole cause of the problems to render an injury compensable. If the work-related accident contributed in some reasonable degree to plaintiff's disability, she is entitled to compensation." *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465-66, 470 S.E.2d 357, 359 (1996) (citation omitted) (quotation omitted).

While there may have been conflicting evidence as to the degree of plaintiff's impairment, it was for the Commission to weigh the credibility of the witnesses and to decide the issues. Based on the

recent holding in *Adams*, we conclude there was competent evidence in the record to support the Commission's findings of fact and conclusions of law.

The opinion and award of the Full Commission is affirmed.

Judges JOHN and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 JULY 1999

BARTLETT v. BARTLETT No. 98-1052	Alamance (97CVD375)	Affirmed in part; appeal dismissed in part
BATTEN v. MEDLIN No. 98-907	Jackson (95CVS575)	Affirmed
BRADLEY v. U.S. PACKAGING, INC. No. 98-1268	Guilford (95CVS8986)	Affirmed
CHARLOTTE-MECKLENBURG HOSP. v. BRUTON No. 98-1096	Mecklenburg (97CVS14460)	Affirmed
CHRIST COVENANT PRESBYTERIAN CHURCH v. DS ATLANTIC CORP. No. 98-414	Mecklenburg (97CVS8846)	Reversed
CHRISTOPHER v. N.C. BD. OF OCCUPATIONAL THERAPY No. 98-1010	Wake (96CVS05452) (96CVS10384)	Reversed
CONLEY v. J. C. PENNEY CO. No. 98-1240	Buncombe (97CVS4257)	Reversed and Remanded
FRANCIS v. BEACH MEDICAL CARE No. 98-1586	Dare (94CVS248)	Appeal Dismissed
HARRIS v. UNION CAMP CORP. No. 98-1155	Ind. Comm. (515217)	Affirmed
HASSELL v. GODWIN No. 98-1249	Bertie (97CVS146)	Dismissed
IN RE CREEL No. 99-80	Lenoir (98J3)	Affirmed
IN RE SPINKLE No. 98-1439	Surry (98J25) (98J26)	Affirmed
IN RE TRIPP No. 98-169	Buncombe (97J57) (97J58) (97J59) (97J60)	Affirmed
MILLER v. K-MART CORP. No. 98-1071	Forsyth (96CVS998)	Appeal Dismissed

N.C. DEP'T OF HUMAN RES. ex rel. LERCH v. FRALISH No. 98-509	Watauga (97CVD56)	Affirmed
PETTIFORD v. BROWN No. 98-1167	Buncombe (80CVD1941)	Affirmed
SHEEK v. PENNSYLVANIA NAT'L MUT. CAS. INS. CO. No. 98-1275	Yadkin (97CVS470)	Affirmed
SMITH v. JACKSON No. 98-1427	Durham (93CVD4372)	Affirmed
STATE v. ALDRIDGE No. 98-1425	Beaufort (96CRS6326) (97CRS1352)	No Error
STATE v. ALEXANDER No. 98-1336	Forsyth (97CRS38436) (97CRS38438)	No Error
STATE v. ARMSTRONG No. 98-1632	Gaston (94CRS007662) (94CRS007665) (94CRS007666) (94CRS11047)	No Error
STATE v. AUSTIN No. 98-1016	Guilford (95CRS020664) (95CRS020679) (95CRS929582) (95CRS030326)	No Error
STATE v. BARRINGER No. 98-1075	Guilford (97CRS66764) (97CRS66765) (97CRS67155) (97CRS67156) (97CRS67157) (97CRS67158) (98CRS23201) (98CRS23202)	No Error
STATE v. BATTS No. 98-947	Duplin (97CRS2997) (97CRS3003) (97CRS3742)	No Error
STATE v. BOWKER No. 98-1547	Sampson (98CRS3931) (98CRS3932)	No Error
STATE v. BROWN No. 98-1584	Guilford (97CRS75820)	No Error

STATE v. BUCKNER No. 98-1026	Buncombe (97CRS129) (97CRS130) (97CRS51556) (97CRS51558) 97CRS51559) (97CRS51560)	Dismissed
STATE v. CALDERON No. 98-1384	Wake (97CRS58829) (97CRS58830) (97CRS58831) (97CRS80218)	No error in the trial; Remanded for resentencing
STATE v. EDWARDS No. 98-1592	Lincoln (93CRS6323) (93CRS6324) (94CRS223) (94CRS224) (94CRS407) (94CRS408)	No Error
STATE v. ELLIS No. 98-1434	Catawba (96CRS10852) (96CRS10853)	No Error
STATE v. FERGERSON No. 98-1058	Onslow (97CRS1515)	No Error
STATE v. FRYE No. 99-20	Alexander (98CRS697) (98CRS700)	No Error
STATE v. GALLOP No. 98-1461	Dare (96CRS1082) (96CRS1083) (96CRS1084) (96CRS1085)	No Error
STATE v. GREENE No. 98-948	Brunswick (96CRS4553)	New Trial
STATE v. HEDDERMAN No. 98-1600	Wake (97CRS58686) (97CRS91446)	No Error
STATE v. HERRERA No. 98-1520	Harnett (97CRS14436) (97CRS14437)	No Error
STATE v. JONES No. 98-1187	Robeson (96CRS15939) (96CRS15942)	Reversed

	(96CRS15944) (96CRS15945) (96CRS15946) (96CRS15947)	
STATE v. JONES No. 98-1594	Martin (98CRS38)	No Error
STATE v. MacDONALD No. 98-1258	Currituck (97CRS893) (97CRS894) (97CRS895) (98CRS289)	No Error
STATE v. McCOY No. 98-956	Davidson (96CRS13795)	No Error
STATE v. McMAHAN No. 98-1400	Haywood (97CRS5140) (97CRS5141) (97CRS5142) (97CRS5143) (97CRS5604) (97CRS5605) (97CRS5606) (97CRS5607) (97CRS5608) (97CRS5609) (97CRS5610) (97CRS5611) (97CRS5612)	No Error
STATE v. MESSER No. 98-1294	Buncombe (97CRS66540)	Reversed
STATE v. MIDDLETON No. 98-1259	Rockingham (97CRS3661)	Reversed
STATE v. MURPHY No. 98-1084	Pender (96CRS2276) (96CRS2277)	Affirmed
STATE v. PARKER No. 98-1437	Lenoir (97CRS6893) (97CRS11931)	No Error
STATE v. PHENGDARA No. 98-1464	Wake (97CRS23185) (97CRS29138) (97CRS29139) (97CRS29140)	No Error
STATE v. ROBERTS No. 98-918	Mecklenburg (96CRS47418)	No Error

STATE v. SARTORI No. 98-1560	Buncombe (96CRS06111) (96CRS54809) (96CRS54810) (96CRS59327) (96CRS00003)	96CRS54809 and 96CRS06111—No error. 96CRS54810—Vacated and remanded for resentencing. 96CRS59327 and 97CRS3—Vacated and remanded for resentencing.
STATE v. SCOTT No. 98-958	Brunswick (95CRS4088) (95CRS4089)	No Error
STATE v. SIMS No. 98-1590	Greene (97CRS113) (97CRS114)	No Error
STATE v. TAYLOR No. 98-1381	Beaufort (96CRS2967)	No Error
STATE v. THRASH No. 98-1537	Dare (98CRS0316) (98CRS0322) (98CRS0323)	No Error
STATE v. TRUESDALE No. 98-1368	Mecklenburg (97CRS35436) (97CRS140341)	No Error
STATE v. TYNER No. 98-859	Alamance (97CRS16749) (97CRS16750)	Reversed and Remanded
STATE v. WILSON No. 98-1431	Harnett (97CRS1100)	No Error
STEM v. RICHARDSON No. 97-658-2	Granville (94CVS654)	Reversed in part and affirmed in part
STC, INC. v. ZICKAFOOSE No. 98-464	Mecklenburg (97CVS10268)	Affirmed
TRICO ELEC. CO. v. CITY OF RALEIGH No. 98-128	Wake (95CVS5382)	Affirmed in part, reversed in part and remanded
TYNDALL v. N.C. DEP'T OF TRANSP. No. 98-963	Wayne (96CVS102)	Affirmed

WAGA v. MSAS CARGO INT'L No. 98-1097	Ind. Comm. (652853)	Affirmed
WYNN v. EMPLOYMENT SECURITY COMM'N No. 98-999	Mecklenburg (98CVS5440)	Affirmed

CROWDER CONSTRUCTION COMPANY v. EUGENE P. KISER

No. COA98-949

(Filed 20 July 1999)

1. Corporations— stock buyout agreement—determination of adjusted book value

The trial court did not err by granting summary judgment for plaintiff in an action to force specific compliance with a stock buyout agreement against a terminated employee. Where the value of a closely held corporation is determined by the use of its balance sheet as directed by a buyout agreement and is calculated by the accounting firm normally servicing that corporation in accordance with the terms of the agreement, the value determined by that accounting firm is presumptively correct in the absence of mathematical error, fraud, or evidence of a failure to follow generally accepted accounting practices.

2. Corporations— stock buyout agreement—unconscionability

The trial court did not err by granting summary judgment for plaintiff in an action to force compliance with a stock buyout agreement against a terminated employee where defendant contended that enforcement of the agreement would be unconscionable. A trial court may decline to specifically enforce a stock restriction agreement entered into pursuant to N.C.G.S. § 55-6-27 if there has been a change of circumstances since the execution of the agreement such that enforcement would be unconscionable under the particular circumstances, using the settled definition of unconscionability from contract law. Plaintiff here forecast a reasonable business purpose in terminating defendant, and there was no showing by defendant that his discharge was for a wrongful purpose, even assuming that defendant was promised that he would not be prematurely discharged in order to deprive him of the full value of his stock. Finally, defendant freely entered into the agreement which set out the adjusted book value he now contests as unconscionable.

3. Corporations— stock buyout agreement—timing of tender

The trial court did not err by granting summary judgment for plaintiff in an action to enforce a stock buyout agreement against a terminated employee where the employee, defendant, argued that he was not required to immediately tender his stock options

and that he could wait until the options were fully vested. The agreement's 90-day closing period expressed the parties' intent; moreover the adjusted book value was to be determined by reference to plaintiff's financial statement at the end of its last fiscal year prior to the date of defendant's termination.

4. Corporations— stock buyout agreement—unconscionability—change in tax reporting

The trial court did not err by granting summary judgment for plaintiff in an action to enforce a stock buyout agreement against a terminated employee where the employee contended that a company decision to take a business expense deduction based on a loss arising from employee stock options caused defendant to incur a tax liability and made the stock purchase agreement unconscionable. The Court of Appeals declined to rewrite the buyout agreement; furthermore, defendant was not prejudiced by plaintiff's decision.

Appeal by defendant from order entered 10 March 1998 by Judge Ben F. Tennille in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 May 1999.

Plaintiff Crowder Construction Company (plaintiff, or Company), a closely held North Carolina corporation, seeks to enforce a stock restriction and buy-out agreement against Eugene P. Kiser (defendant, or Kiser), who is a former employee and corporate officer of plaintiff. Defendant pleads a number of equitable defenses to the enforcement of the agreement, and further contends that the value of his shares of Company stock were not calculated correctly.

Crowder Construction Company was founded in the 1940's by O.P. and W.T. Crowder, Sr., and was incorporated as a North Carolina corporation on 28 May 1953. Stock in the Company has always been closely held by members of the Crowder family and by certain key employees. Since at least 1955, a shareholders' restriction agreement has provided that shareholders who wish to sell their shares of stock in the Company must first offer the shares to the Company at a price based on the book value of the shares. The various shareholders' agreements have also included a "buy-out" provision requiring that the Company purchase the shares of stock at book value (later, adjusted book value), except for those shares obtained by employees pursuant to stock option agreements. As to shares obtained pursuant to stock options, the Company has the first option to purchase those

shares, but is not required to do so. Kiser is a certified public accountant (CPA) who was hired by Crowder in 1981 as its corporate Controller. Kiser was elected Vice-President of Finance (later, Chief Financial Officer) and Corporate Secretary in or about 1985, and served in those capacities until his discharge in 1995.

In 1986, the Company developed a stock option plan for key employees. Those employees, including Kiser, were allowed to purchase Crowder stock at $7.00 per share, a substantial discount from the then book value of $31.83 per share. Kiser purchased 2,000 shares under the 1986 plan, an investment of $14,000.00. In 1988, a second stock option plan was adopted. Again, Kiser and other key employees were allowed to purchase Crowder stock at $7.00 per share, again a substantial discount from the book value of $44.83 per share. Kiser purchased 4,750 shares of Company stock at $7.00 per share, for a total investment of $33,250.00. Both stock option plans included a paragraph entitled "Stock Restriction Agreement" which provided that any shares of stock issued pursuant to a stock option plan were subject to the terms of any stock restriction agreement in effect on the date of the stock's issuance.

At the time of the issuance of the optioned shares to Kiser in 1986 and again in 1988, the shareholders' agreements in effect on both dates provided that, if the employment of a shareholder with the Company was terminated "for any reason whatsoever, [the employee] shall offer his shares to the Corporation and the Corporation shall purchase his shares at the price provided [by the formula set out in the agreement]."

Both plans also provided a mechanism for valuation of the stock, and each provided that in order for an employee to receive full book value for his shares, the employee must have maintained an employment relationship with the corporation for at least seven years since the issuance of the stock to the employee pursuant to the stock option plans. A third stock option plan was adopted in 1990, but Kiser purchased no stock under the 1990 plan. In 1991, all shareholders, including Kiser, executed a Revised and Restated Stock Restriction and Purchase Agreement (the 1991 Agreement), superseding all previous agreements. The 1991 Agreement provided in pertinent part that a terminated Company shareholder must offer his shares of stock to the Company, and the Company must purchase the shares at a price determined by use of a formula set out in the agreement. For employees whose shares were not issued pursuant to the provisions

of a Stock Option Agreement, the "price to be paid . . . [was] 100% of adjusted book value at the date of the offer to sell."

The 1991 Agreement further provided that, if the employee's shares had been issued pursuant to the 1986 Stock Option Plan, and had been issued for more than seven years prior to the date of termination, the purchase price was to be "100% of the adjusted book value at the time of the offer to sell." The "adjusted book value" was to be determined by the "certified public accountant then servicing the Corporation," by adjusting the net book value per share at the end of the Company's last fiscal year in order to account for funds to be disbursed to shareholders to cover their tax liability resulting from the Company's Subchapter S status, and to reflect the "Corporation's use of the completed contract or percentage of completion method of accounting, or the use of LIFO or FIFO accounting or similar timing adjustments."

In the case of shares issued pursuant to the 1988 option agreement, and held by an employee less than seven years at the time of termination of the employee's employment with the Company, the 1991 Agreement set out the following formula for determining the price to be paid the terminated employee for those shares:

> D. The purchase price per share of any shares which were originally issued by the Company as a result of the exercise of a stock option granted under the 1988 [S]tock Option Plan shall be determined as follows:
>
> 1. If the stock has been issued for less than seven years, the price shall be 7:00 [*sic*], plus the amount, if any, by which the adjusted book value per share at the date of the offer to sell exceeds $44.83. If, at the date of the offer, the adjusted book value per share is less than $44.83, the purchase price shall be $7.00, less the amount by which $44.83 exceeds the adjusted book value at the date of the offer to sell, but no less than $0.00.
>
> 2. If the shares have been issued for more than seven years at the time of the offer, the purchase price shall be 100% of the adjusted book value at the time of the offer to sell.

It is enforcement of the 1991 Agreement which is at issue here.

The Company's decision to use "adjusted book value" to determine purchase price of a terminated employee's stock, rather than

"book value" as specified in the earlier shareholders' restriction and purchase agreements, was primarily based on the Company's change between 1986 and 1988 from a "C" corporation to a "Subchapter S" corporation. As a "C" corporation, the Company paid corporate income tax on its earnings, and its shareholders paid income taxes on any dividends received by them. The Company elected to become a "Subchapter S" corporation, because net taxable income could then be passed along to the shareholders in proportion to their respective stock interests, and the Company would not be required to pay corporate income tax. Although the change was beneficial to the Company, the shareholders incurred some additional income tax liability during years in which the Company realized net taxable income. For that reason, the Company instituted the practice of making cash distributions to the shareholders to allow them to pay any income tax liability as a result of the change in the Company's tax status.

Between 1990 and 1995, five employee shareholders left the employment of the corporation and had their stock valued in accordance with the terms of the 1991 Agreement. The only adjustment to book value in their individual cases was to account for tax distributions to shareholders due to the corporation's Subchapter S status, as required by the express terms of the 1991 Agreement. In each case, the beginning point for the calculation of adjusted book value was the shareholders' equity as shown by the audited financial statement of the Company for the most recent fiscal year prior to the termination or retirement of the employee.

By the end of 1994, working relations between Kiser and Otis Crowder had become very bad. Otis Crowder and his brother owned about 70% of the outstanding shares of Company stock. In early 1995, the Company decided to terminate Kiser's employment effective 23 January 1995. Kiser's employment was in fact terminated on that date, and he was formally removed as Vice-President and Secretary by the Company's Board of Directors on 3 February 1995.

When he was terminated, the shares of stock issued to Kiser pursuant to the exercise of his 1988 stock options had not fully vested, but his shares issued pursuant to the 1986 stock option plan had been issued more than seven years and had fully vested. On the 1986 shares, Kiser was entitled to receive the full adjusted book value of $56.42 per share, for a total of $112,840.00, a substantial gain over his original investment of $14,000.00. Because the 1988 shares were not

fully vested, however, Kiser was only entitled under the terms of the 1991 Agreement to receive $18.59 per share for a total of $88,302.50, an increase of $55,052.50 over his initial investment. However, had Kiser remained an employee of the corporation an additional seven months, he would have been fully vested in the shares issued to him in 1988, and entitled to receive the full adjusted book value for those shares, an additional $180,000.00. The Company tendered payment, but Kiser refused to sell his stock to the Company in accordance with the 1991 Agreement. The Company then instituted this action to force defendant's specific compliance with the 1991 Agreement. Kiser contested the action, contending that the book value of his shares was not properly calculated, that enforcement of the 1991 Agreement would be unconscionable, and also raised a number of other equitable defenses. On 10 March 1998, the trial court granted the plaintiff Company's motion for summary judgment, and Kiser appealed.

Kennedy Covington Lobdell & Hickman, LLP, by Russell F. Sizemore and William C. Livingston, for plaintiff appellee.

Rayburn, Moon & Smith, P.A., by C. Richard Rayburn, Jr., James B. Gatehouse, and Robert A. Cox, Jr., for defendant appellant.

HORTON, Judge.

Kiser contends that the trial court erred in granting summary judgment for the Company because (I) there were genuine issues of material fact as to whether plaintiff correctly determined the "adjusted book value" of Kiser's stock as required by the 1991 Agreement; (II) enforcement of the 1991 Agreement would be "unconscionable under the circumstances"; and (III) there are genuine issues of material fact as to equitable defenses to specific performance raised by Kiser. After careful consideration of each issue raised by defendant, we disagree and affirm the judgment of the trial court.

The Standard of Review

A grant of summary judgment may be "fully review[ed] by this Court because [in granting summary judgment] the trial court rules only on questions of law." *King v. N.C. Dept. of Transportation*, 121 N.C. App. 706, 707, 468 S.E.2d 486, 488-89, *disc. review denied*, 343 N.C. 751, 473 S.E.2d 617 (1996). It is familiar learning in North Carolina that summary judgment

> is properly granted under North Carolina General Statutes section 1A-1, Rule 56(c) when the pleadings, depositions, answers to interrogatories, and admissions on file, along with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party to the action is entitled to a judgment as a matter of law. . . . Once the moving party has made and supported its motion for summary judgment, section (e) of Rule 56 provides that the burden is then shifted to the non-moving party to introduce evidence in opposition to the motion, setting forth "specific facts showing that there is a genuine issue for trial." At this time, the non-movant must come forward with a forecast of his own evidence.

Ruff v. Reeves Brothers, Inc., 122 N.C. App. 221, 224-25, 468 S.E.2d 592, 595 (1996) (citations omitted).

An issue is only material

> if " 'the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' "

Id. at 225, 468 S.E.2d at 595 (citation omitted).

Thus, on review, this Court must first determine whether there are genuine issues of *material* fact which must be resolved by the trier of fact; if so, the matter must be returned to the trial court for trial. Second, if the material facts are not in dispute, this Court must review the grant of summary judgment to determine whether the trial court correctly applied applicable legal principles to those facts. Here, the parties generally agree about the material facts.

Stock Transfer Restrictions

As with most restrictions on alienation, restrictions on the sale or transfer of shares of stock are not favored and are strictly construed. *Avrett and Ledbetter Roofing and Heating Co. v. Phillips*, 85 N.C. App. 248, 251, 354 S.E.2d 321, 323 (1987); *accord*, *Bryan-Barber Realty, Inc. v. Fryar*, 120 N.C. App. 178, 461 S.E.2d 29 (1995). In family owned corporations, or other corporations in which all shares of stock are held by a relatively small number of shareholders, it is not unusual for all shareholders to agree that the corporation, or the other shareholders, will be given the first opportunity to purchase the shares of a terminated or retiring shareholder. This agreement is valid

under the North Carolina Corporations Act provided it is "reasonable" and is not "unconscionable under the circumstances." N.C. Gen. Stat. § 55-6-27 (1997). These restrictions allow shareholders to choose their business associates, to restrict ownership to family members, and to ensure congenial and knowledgeable associates. Present or potential business competitors are prevented from purchasing shares and thereby becoming familiar with the corporation's financial condition and future plans. There are also important tax planning reasons for the restrictions:

> Share transfer restrictions also are useful and often necessary to come within various legal categories such as: (a) to maintain an exemption from the securities law's requirements of public registration of securities; (b) to retain the favorable tax status under Subchapter S of the Internal Revenue Code; (c) to achieve status as a statutory close corporation or a professional corporation under state law and the additional flexibility that is sometimes made available to those corporations.

1 O'Neal & Thompson, *O'Neal's Close Corporations* § 7.02 (3d ed. 1987) (hereinafter *O'Neal's Close Corporations*).

Since such restrictions make it even more difficult to dispose of minority stock interests in a closely held corporation, these agreements often contain some version of mandatory "buy-out" provisions to ensure shareholders a ready market for their shares where there otherwise might not be one.

> Buy-Out agreements also may be a means to respond to the uncertainty of the value of shares of a close corporation where there is no ready market to which reference might be made. A buy-out agreement may be seen as a way to avoid disagreement about value that could consume a significant portion of the value of the shares.

Id. at § 7.03. For that reason, the buy-out agreement will usually set out a simple formula for determining the price to be paid for the employee's shares in order to ensure a prompt, inexpensive resolution of the question of price. Thus, agreements often set out a formula tied to the "book value" of the corporation because that figure is easily ascertained from the corporation's balance sheet. The "book value" of a corporation is generally understood to mean the value of the corporation's total assets less its total liabilities. The net value realized by the computation is equivalent to the total shareholders'

equity in the corporation. The net book value per share of common stock is then obtained by dividing the shareholders' equity by the total number of shares of stock outstanding. Meigs, Johnson, and Meigs, *Accounting: The Basis For Business Decisions* 611 (4th ed. 1977). The 1991 Agreement provided for a determination of the purchase price per share by providing that the firm of certified public accountants providing accounting services to the corporation would adjust the book value per share to account for several possible contingencies related to the Company's bookkeeping practices. At all times pertinent to this appeal, Deloitte & Touche was the accounting firm servicing the Company's account.

I. Determination of Adjusted Book Value

[1] Article 6.1 of the 1991 Agreement gives a definition of "adjusted book value" and sets out a method for making a determination of adjusted book value:

> Adjusted Book Value: Adjusted book value of the shares of stock of the Corporation for purposes of this agreement shall be defined as the net book value as adjusted as described herein of the shares of stock as of the end of the last fiscal year prior to the death, disability, termination of employment, or offer to sell. The adjusted book value shall be determined by the certified public accountant then servicing the Corporation. In determining the adjusted book value, the certified public accountant shall make any adjustments that may be required to fairly represent the book value of the Corporation, such as adjustments required to reflect funds that need to be distributed to cover the stockholders' tax liability resulting from the Sub[chapter] S distribution of income, the Corporation's use of the completed contract or percentage of completion method of accounting, or the use of LIFO or FIFO accounting or similar timing adjustments. In no even [*sic*] shall the adjusted book value of the Corporation (for the purposes of buying the shares of the Shareholder) include insurance proceeds on the life or disability of the Shareholder whose stock is to be redeemed.

Kiser argues that the adjusted book value of his shares of Company stock was not correctly determined, so that the price offered him for his shares of stock was unconscionably low. Specifically, he contends that the Company's book value, as reported on its 31 March 1994 financial statement, issued at the end of the Company's 1994 fiscal year, should have been adjusted by (A)

increasing shareholders' equity (net book value) by $5,109,906.00 to compensate for alleged over-depreciation of company assets, and (B) increasing net book value by $384,000.00 to reflect the estimated value of the Company's asphalt inventory, and increasing net book value by $221,000.00 to reflect the estimated value of the Company's repair parts inventory. Defendant focuses on the language in the price calculation formula which allows adjustments necessary "to fairly represent the book value of the Corporation, such as adjustments required to reflect funds that need to be distributed to cover the stockholders' tax liability resulting from the Sub[chapter] S distribution of income, the Corporation's use of the completed contract or percentage of completion method of accounting, or the use of LIFO or FIFO accounting or similar timing adjustments."

Having moved for summary judgment, plaintiff has the burden of establishing that there are no genuine issues of material fact on this issue. *Miller Machine Co. v. Miller*, 58 N.C. App. 300, 304, 293 S.E.2d 622, 625, *disc. review denied*, 306 N.C. 743, 295 S.E.2d 478 (1982). In *Miller*, plaintiff corporation sought to meet its burden through the affidavits of two certified public accountants (CPAs), whose credibility was not questioned. The CPAs relied on the most recent audit of the corporate financial statements in forming their opinion as to book value of the corporate shares. The defendant in *Miller* filed the affidavit of Rachel Hailey, a shipping clerk who was employed by the plaintiff corporation. Ms. Hailey averred in her affidavit that prior to the most recent audit of the company books, some $300,000.00 to $400,000.00 of finished goods, as well as a large amount of other inventory, were concealed from the company auditors. This Court indicated that the sworn statement of Ms. Hailey raised a question of fact about the accuracy of the audit upon which the company's book value was based, raising a genuine issue about "the correctness of the review and the book value of the stock." *Id.* at 305, 293 S.E.2d at 625.

Here, Kiser has offered no evidence which raises genuine issues of material fact about the calculation of adjusted book value on the date of his termination from plaintiff corporation. The 1991 Agreement provided that adjusted book value per share was to be determined by beginning with the book value of the corporation as shown on the financial statement at the end of the last fiscal year. Here, the 31 March 1994 financial statement showed a total stockholders' equity of $6,425,958.00 as of 31 March 1994. There were 113,900 shares of stock outstanding at that time, so that the book

value of each share of stock was approximately $56.42. The 31 March 1994 financial statement was audited and approved by Deloitte & Touche in its report issued on 28 June 1994. The Company did not make any adjustments to book value in order to determine adjusted book value, however, because it did not appear that any events requiring adjustments occurred during the 1994 fiscal year.

First, the Company concluded that the tax benefits to stockholders in 1992 and 1993 from the reported losses exceeded their tax liability in 1994 and therefore it made no distributions to them. There being no "Subchapter S" distributions, the Company determined that book value did not need to be adjusted for that reason. Second, the Company determined that no "timing" adjustments were necessary because the Company used the accrual (percentage-of-completion) method for reporting taxable income, the first in-first out (FIFO) method of accounting for inventory, and the straight-line method for depreciation purposes. Subsequently, for the purposes of this litigation, the Company requested Deloitte & Touche to review the calculations of adjusted book value per share of its stock as of 31 March 1994, to be certain that the Company had correctly determined adjusted book value per share of Kiser's stock. Deloitte & Touche concluded that adjusted book value was correctly calculated by adopting the book value amount of $56.42 per share, because no adjustments to book value needed to be made. Deloitte & Touche further determined that the Company's financial statements for the 1994 fiscal year were "prepared in accordance with generally accepted accounting principles customarily employed by construction contractors for external reporting to Company stockholders, banks, bonding companies and others[,]" and agreed that no "timing adjustments" were necessary to fairly reflect adjusted book value.

Defendant assigns error to the calculation of the adjusted book value of his shares of stock, contending that adjustments for (A) asphalt and repair parts inventories and for (B) over-depreciation should have been made.

In determining whether the parties contemplated adjustments of book value by modifying the usual depreciation schedule used by the Company, or by adding adjustments for asphalt and repair parts inventories, we must look to the intent of the parties when the contract in question, the 1991 Agreement, was entered into. In determining the intent of the parties to a contract, we must look to all circumstances surrounding the making of the agreement, including the language of the contract, its purposes and subject matter, and the

situation of the parties at the time the contract was executed. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E.2d 140, 196 (1975). We may also consider the way and manner in which the parties to the contract have carried out the terms of the 1991 Agreement since its execution.

(A) Asphalt and Repair Parts Inventories

Historically, the value of the Company's recycled asphalt products (RAP) material stockpiles or its equipment parts inventory were not reflected on its balance sheet. During fiscal year 1995, the Company inventoried its RAP stockpiles and estimated the value at $425,000.00. The Company also inventoried its stockpile of equipment repair parts, and valued the inventory of those parts at $257,000.00. Defendant argues that, if those inventories were present in fiscal year 1995, they must also have existed in substantial part during the fiscal year 1994, and therefore the total amount of $682,000.00 should have been added to the shareholders' equity, increasing the net book value of each share of stock. While we agree with defendant that the inventories of parts and asphalt were presumably present to some extent during the 1994 fiscal year, we do not believe that the failure to include an allowance for such inventories was prejudicially erroneous.

First, we note that asphalt and repair parts inventories were included in the Company's balance sheet for the first time in 1995. At all earlier times pertinent to this litigation, they were not reflected on the Company's balance sheets. Thus it cannot be said that defendant and other shareholders entered into the 1991 Agreement anticipating that the adjusted book value of the Company's shares would reflect an adjustment for either asphalt or repair parts inventories. Whether or not defendant, in his capacity as Chief Financial Officer, made the decision that those items not be reflected on the Company's balance sheet, defendant certainly would have been aware of the Company's accounting policies and practices. During the period here in question, defendant was a corporate officer, Chief Financial Officer, and was himself a CPA. There is no evidence forecast here that the parties to the 1991 Agreement intended, or expected, that book value would be adjusted by these inventories to arrive at adjusted book value. Second, such adjustments had not been made in the past in calculating the value of the stock of the five persons who left the employ of the Company between 1990 and 1995, either by termination or retirement. The manner in which the parties routinely carried out the terms of the 1991 Agreement is certainly some indication of

their understanding of its terms. Defendant denies that he actually performed the calculations on the amounts to be received by the withdrawing employees, but that is not a *material* question of fact which must be resolved. What is important is that defendant was well aware of the interpretation historically given the language of the 1991 Agreement.

Further, on 1 September 1993 defendant rendered a letter opinion to an attorney in an equitable distribution case in which a Company employee was a party, giving the "current, redeemable value" of the employee's stockholdings in the Company. In doing so, defendant made none of the adjustments which he now complains should have been made in his case. Thus, less than five months before defendant's termination, he calculated adjusted book value per share of Company stock, precisely as was done here. Third, the omission of the asphalt and repair parts inventories from the balance sheet is not prejudicial to defendant. During fiscal year 1995, the Company also made an inventory of the raw materials it stockpiled for use in its asphalt production operation. The raw materials had not been inventoried for years. As a result, the Company found that its normal asphalt inventory was overstated by about $753,000.00. Thus, if the overstated amount of asphalt inventory had been included in the balance sheet, it would have more than compensated for the failure to include $682,000.00 for repair parts and recycled asphalt inventories.

(B) Depreciation Schedule

Defendant also contends that the Company's method of depreciating its equipment unfairly lowers the book value of its stock, reducing the amount to which he is entitled for his shares. He argues that the shareholders' equity of the Company should be adjusted upward in the amount of $5,109,906.00 to compensate for the over-depreciation of the equipment. We disagree with defendant and overrule this assignment of error.

"Book value of a share of stock, in its simplest form, is the corporation's assets minus its liabilities as shown on the corporate books, divided by the number of shares of stock outstanding." 1 *O'Neal's Close Corporations* § 7.27. This method of valuation is frequently used in buy-out agreements because of its simplicity. While book value gives a "snapshot" of the value of a corporation at any point in time, it is not intended to represent the fair market value of a corporation. It does not, for example, reflect the value of company goodwill. The value of the company's assets and equipment as shown

on the balance sheet represents the depreciated value of such assets, not their fair market value. The use of depreciation schedules merely reflects the fact that assets decline in value due to time and use. Rather than making an actual appraisal of the value of a depreciable asset each year, companies spread the asset's initial cost over a period of years estimated to be its useful life, after making an allowance for salvage value. Depreciation is not a process of valuation, however. Particular assets may have a fair market value which is lower or higher than that shown on the depreciation schedule. Thus, if one seeks to determine the fair market value of a company by using its balance sheet as a beginning point, it is necessary to adjust the depreciated value of the company's assets to reflect the fair market value of those assets. Here, the Company used the straight-line method of accounting for the depreciation of assets for purposes of compiling its balance sheet. In the straight-line method, the salvage value (if any) of an asset is first subtracted from its cost, and the balance is then spread equally over the period of its useful life.

Here, defendant seeks to have a value assigned to company assets and equipment which more closely approximates the fair market value of the assets in question. Defendant complains that the salvage value assigned to Company assets is too low, so that assets still retain value and are often sold by the Company at prices greater than the estimated salvage values. Defendant is, in effect, attempting to value the equipment owned by the Company at fair market value, rather than the depreciated value at which it is carried on the Company's books.

> Fixed assets usually are carried on the books at their historical cost (e.g., their purchase price) less depreciation at standardized rates to reflect the wearing out of those assets. However, because of changes in business, the costs of replacing those assets may be much greater or much less than the recorded figures. Inflation may cause great appreciation in the value of some assets, but that will usually not be reflected on the books of the business until there has been a reliable third party transaction to verify the new value. Further, depreciation rates often do not match actual depreciation and great variations result when different criteria are applied to a single fact situation. In many instances, equipment that has been completely depreciated on the books is still in use and can be sold for a substantial sum.

1 *O'Neal's Close Corporations* § 7.27.

In 1991, when the new Stock Purchase Agreement was being negotiated, defendant sought to have the Company value the Company stock at fair market value, rather than tying the redemption value of the stock to its book value. The Company expressly rejected the use of fair market value, and all parties agreed on the use of adjusted book value. The question here is whether the Company departed from generally accepted accounting practices in determining the method of depreciation used by the Company. Further, defendant was in a position during all pertinent times to participate in the financial structuring of the Company, and the depreciation methods used by the Company are exactly the same methods used during the time defendant was Chief Financial Officer of the Company. There is no evidence that there were any changes made in the method of depreciation to devalue the shares of stock owned by defendant. Instead, the Company utilized the same method historically used to value Company assets, matters well known to defendant.

Third, it is not significant that the Company uses different methods of depreciation for tax purposes and for its balance sheet. As Deloitte & Touche pointed out in its review, the Company does not use the accelerated method of depreciation for purposes of its balance sheet, but uses the straight-line method. The quarrel between Deloitte & Touche and the accountant-witness retained by defendant does not involve questions of mathematical errors, but a decision over what type of depreciation methods to use in valuing company equipment. There is no contention that Deloitte & Touche failed to follow generally accepted auditing standards in reviewing the Company's financial statement. Defendant merely wants to use a different method of depreciation so as to make the value of the equipment more closely resemble fair market value, an approach considered and rejected before the agreement in question was entered into. The same method of depreciation was being employed by the Company earlier when each of the five employees of the Company left employment with the Company and had their stock value calculated. There was not at any of those times any suggestion that the Company's method of depreciation of its assets was not in accordance with generally accepted accounting practices, or that it worked an unconscionable injustice to the departing employees.

Where the value of a closely held corporation is determined by the use of its balance sheet as directed by a "buy-out" agreement, and is calculated by the accounting firm normally servicing that corpora-

tion in accordance with the terms of the "buy-out" agreement, we hold that the value determined by that accounting firm is presumptively correct, in the absence of mathematical error, evidence of fraud (such as the willful concealment of assets), or evidence of a failure to follow generally accepted accounting practices. This assignment of error is overruled.

II. Unconscionability of Stock Purchase Agreement

[2] N.C. Gen. Stat. § 55-6-27(a) (Cum. Supp. 1997) provides in part that "an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation." Such restrictions are "valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section, [and] it is not unconscionable under the circumstances . . . ." N.C. Gen. Stat. § 55-6-27(b). We note that the language, "it is not unconscionable under the circumstances," was added to that portion of the 1984 Revised Model Business Corporation Act (Model Act), which is now N.C. Gen. Stat. § 55-6-27, when it was enacted by the 1989 General Assembly. Since the law of unconscionability as a defense to the enforcement of a contract was already well settled in North Carolina at the time of the amendment, we believe the legislative intent was to allow a court called upon to enforce a stock restriction agreement to consider whether the enforcement of the agreement is unconscionable at the time enforcement is sought.

We gain further support for our opinion from the language of the commentary to N.C. Gen. Stat. § 55-6-27. When the 1984 Revised Model Business Corporation Act (now Chapter 55 of our General Statutes) was enacted, the legislation required that:

> The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Comments to the 1984 Revised Model Business Corporation Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

1989 N.C. Sess. Laws ch. 265, § 2.

The North Carolina Commentary to N.C. Gen. Stat. § 55-6-27 explains that the language, "it is not unconscionable under the circumstances," was added to

> address[] a concern that the Model Act's section 6.27 may allow the enforcement of unconscionable restrictions. The drafters

> noted that the Model Act's language in section 6.27 may not allow judicial discretion in a situation where there was initially a reasonable purpose in imposing a restriction but over time the effect of the restriction had become unreasonable because of a change in circumstances. Judicial discretion would allow a court in such a situation to judge the restriction at the time its validity and enforceability are questioned. The amendment does not represent an attempt to change the prior law in North Carolina with respect to unconscionable agreements, but rather to preserve expressly the equitable power of the courts to deny enforcement of agreements that are unconscionable under the circumstances.

N.C. Gen. Stat. § 55-6-27, Commentary.

We are aware that commentaries printed with the North Carolina General Statutes, which were not enacted into law by the General Assembly, are not treated as binding authority by this Court. *See State v. Hosey*, 318 N.C. 330, 337-38 n.2, 348 S.E.2d 805, 809-10 n.2 (1986); *State v. Kim*, 318 N.C. 614, 620 n.3, 350 S.E.2d 347, 351 n.3 (1986) (noting that the Supreme Court gives the commentaries printed with the North Carolina Rules of Evidence "substantial weight" in determining legislative intent). Consistent with the practice of our Supreme Court, we have given the Commentary "substantial weight" and found that the comment supports our conclusion. We hold, therefore, that when considering the enforcement of a stock restriction agreement entered into pursuant to N.C. Gen. Stat. § 55-6-27, a trial court may decline to specifically enforce the agreement if there has been a change of circumstances since the execution of the stock restriction agreement such that its enforcement would be unconscionable under the particular circumstances of the individual case. Defendant advances a variety of additional arguments to support his position that the trial court should determine unconscionability of stock restriction agreements at the time enforcement is sought, but we need not discuss them in light of our holding.

Defendant also argues that he has forecast sufficient evidence to present a question of material fact with regard to the unconscionability of the stock purchase agreement, and that summary judgment for plaintiff was erroneously entered.

The law of unconscionability in the context of a contract dispute is well developed in North Carolina:

> A court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other . . . . In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable.

Brenner v. School House, Ltd., 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (citations omitted). Defendant contends, however, that unconscionability should not be weighed and determined using decisions from the area of contract law, but should be viewed in light of defendant's "reasonable expectations" about being able to complete his employment with the Company and thus realize full value for his shares of stock. As support for this approach, defendant relies on the decision of our Supreme Court in *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983).

As defendant recognizes, *Meiselman* uses language about the "reasonable expectations" of a complaining shareholder in a close corporation, but does so in a case involving the application and interpretation of portions of the corporation law dealing with the dissolution of corporations when necessary to protect the rights of a shareholder. Although *Meiselman* is clearly distinguishable, and does not control our decision in this case, we note that in *Meiselman* the Supreme Court stresses that the key to "reasonable expectations" is "reasonable." "In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not 'reasonable.' " *Id.* at 298, 307 S.E.2d at 563. We decline to adopt a "reasonable expectations" approach here, since such an approach would render the objective language of the written contract nugatory, would be contrary to the express purposes for entering into stock restriction and purchase agreements, and would inevitably lead to uncertainty, delay and expense as the trial courts attempt to determine the "expectations" of a terminated employee, and to further determine whether those expectations were "reasonable." Instead, we conclude that the issue before us is whether defendant's forecast of evidence raises

questions of material fact about the unconscionability of the 1991 Agreement, using the settled definition of unconscionability from our contract law.

Once plaintiff made and supported its motion for summary judgment, the burden shifted to defendant to forecast his own evidence and set forth "specific facts showing that there is a genuine issue for trial." Defendant Kiser contends that he has carried his burden, in that his evidence raises at least three genuine issues of material fact, and that a resolution in his favor on any or all of the three issues would require that the trial court find that the stock purchase agreement was unconscionable, and was therefore invalid and unenforceable. Specifically, defendant contends that there is a genuine issue of fact as to (A) whether the termination of his employment was designed to deprive him of a full return on his investment; (B) whether plaintiff expressly agreed with defendant Kiser that defendant would not be terminated prior to fully vesting under the 1991 stock purchase agreement; and (C) whether the price plaintiff offered him for his stock was unconscionable because it was substantially less than fair market value.

(A) Termination of Defendant Prior to Full Vesting

Defendant was terminated some seven months before his 1988 stock options would have fully vested. Defendant contends that by prematurely terminating him, plaintiff saved $180,000.00 which defendant would have been due, and that defendant's termination only seven months before he would have been fully vested raises a reasonable inference—and thus a triable issue of fact—that the termination was motivated by plaintiff's desire to avoid paying defendant full value for his shares of stock. We disagree.

Plaintiff met its burden by forecasting evidence to show a reasonable business purpose in terminating defendant. Plaintiff's evidence tends to show that defendant was discharged for openly questioning the ability and competence of Company management to guide the affairs of the Company, resulting in an adversarial relationship between Kiser and other members of management. Rather than disputing the evidence of plaintiff and thus raising a genuine issue of material fact, defendant's deposition testimony tends to substantially agree with the situation within the Company. For example, defendant testified as follows during his deposition:

> Q. Did you, from time to time, express the opinion to others in management of the company that Otis Crowder was not doing a

good job as the president of the company?

A. I shared that view as others shared it to me. The context would come up that what can we do about Otis? What are we going to do? Can't—what are you going to do? I'd say, "I don't know what I'm going to go do. He's the president of the Company. He tells me what to go do." "Well, can't you go talk to him?" I'd say, "No." "Well, how you get rid of him? How's he get out of here?" [*sic*] I'd say, "He owns the company. He's the president of the company." There's those that are sitting there right now that were asking me that with the exception of probably one or two. But, that's the gist. It's what do we do?

Q. Did you share with them your opinion that he was not doing a good job?

A. I felt like we needed direction, and, yeah, I told them.

Q. Did you ever make the statement to Mike Wilson that Otis and Bill Crowder were dumber than hell?

A. I don't remember that.

Q. Did you ever say, "Can you believe how stupid those Crowders are?"

A. If I said that, I don't remember.

Q. Did you tell or express an opinion to the people of the company that Otis was incompetent?

A. I probably did.

Q. Did you ever express the opinion that he was not doing his job?

A. Yes.

Q. Did you ever make the statement that he didn't have the balls to make decisions?

A. Yes.

. . . .

Q. Would it be fair to say that your relationship with Otis Crowder deteriorated during the course of the last 12-1 [*sic*] months of your employment there?

A. Yes.

Defendant was at all times an employee at will of plaintiff. Nothing in his employment contract, the 1991 Agreement, or 1986 and 1988 stock option agreements guaranteed defendant continued employment with plaintiff. Even assuming, for the sake of argument, that enforcement of the stock purchase agreement would be inequitable if plaintiff had terminated defendant's employment solely to prevent his stock options from fully vesting, defendant comes forward with no evidence to support his bare assertion that he was discharged for an improper purpose. If we were to adopt defendant's position, every employee holding restricted stock subject to a buy-out agreement who is discharged by his or her company prior to the date the shares are fully vested, would, without further proof of improper motive on the part of that company, have raised an issue of material fact which would have to be submitted to a trier of fact for decision. Other than defendant's argument that an inference of wrongful purpose arises from his termination, defendant does not offer any evidence to show there is a genuine question for trial on the issue of his early termination. Plaintiff having offered competent evidence of a justifiable business purpose motivating defendant's termination, and defendant having failed to offer evidence on this issue in opposition to the motion for summary judgment, the trial court properly entered summary judgment on this issue.

The decision of the New York Court of Appeals in a strikingly similar case, *Gallagher v. Lambert*, 74 N.Y.2d 562, 549 N.E.2d 136 (1989), *reh'g denied*, 75 N.Y.2d 866, 552 N.E.2d 179 (1990), supports our result. Plaintiff Gallagher was employed by defendant corporation. He purchased stock in the corporation pursuant to a stock restriction and buy-out agreement, which provided that, if his employment ended prior to 31 January 1985 for any reason, Gallagher would receive only book value for his shares. However, if plaintiff Gallagher's employment lasted beyond 31 January 1985, he would receive an increased price tied to corporate earnings for his shares. Gallagher was terminated by defendant prior to 31 January 1985, and sued claiming that his at-will employment was terminated in "bad faith" in order to deprive him of a higher price for his shares of stock. The trial court in *Gallagher* denied summary judgment, ruling there was a question of fact as to defendant's motive in firing Gallagher, but the appellate division reversed the trial court, awarding summary judgment to defendant corporation and ordering specific performance of the repurchase agreement. The New York Court of Appeals, after discussing stock restriction agreements, affirmed, stating:

> These provisions, which require an employee shareholder to sell back stock upon severance from corporate employment, are designed to ensure that ownership of all of the stock, especially of a close corporation, stays within the control of the remaining corporate owners-employees; that is, those who will continue to contribute to its successes or failures. These agreements define the scope of the relevant fiduciary duty and supply certainty of obligation to each side. They should not be undone simply upon an allegation of unfairness. This would destroy their very purpose, which is to provide a certain formula by which to value stock in the future . . . .
>
> Gallagher accepted the offer to become a minority stockholder, but only for the period during which he remained an employee. The buy-back price formula was designed for the benefit of both parties precisely so that they could know their respective rights on certain dates and avoid costly and lengthy litigation on the "fair value" issue. Permitting these causes to survive would open the door to litigation on both the value of the stock and the date of termination, and hinder the employer from fulfilling its contractual rights under the agreement. This would frustrate the agreement and would be disruptive of the settled principles governing like agreements where parties contract between themselves in advance so that there may be reliance, predictability and definitiveness between themselves on such matters. There being no dispute that the employer had the unfettered discretion to fire plaintiff at any time, we should not redefine the precise measuring device and scope of the agreement.

Gallagher, 74 N.Y.2d at 567, 549 N.E.2d at 137-38 (citations omitted).

(B) Agreement Not to Terminate Defendant

Defendant argues that he continued his employment with plaintiff, even though he was not being adequately compensated by way of salary, only because defendant was assured by Otis A. Crowder, as President, that he would not be terminated before his stock options vested. Defendant further argues that there is a material issue of fact about the assurances of his continued employment, and that summary judgment should not have been entered for that reason. We do not agree.

The affidavits filed by both defendant Kiser and Otis A. Crowder are in substantial agreement about the conversation in question. In his affidavit, Kiser stated that:

> Eventually I came to realize and perceive scenarios under which the controlling shareholders might cause the Company to terminate shareholders and force them to sell at a disadvantageous time or prior to good economic news. When I raised this possibility with Otis Crowder, he assured me that they "would never do that."

Defendant elaborated on his recollection of the conversation in his deposition:

> There was—There was one potential discussion that Otis and I had and that dealt with—in the context of a purchase, I mean of a sale of the company, that wherein I raised the issue that, "Otis, you can theoretically if you know of an impending sale of this company, you could come in here and terminate everybody that's a non-family member and then sell the company at a substantially higher price and reap the benefits." I know exactly where we were sitting when we said that. And he said, "Oh, we'd never do something like that." I said "Don't you think it'd be important that we do something with it." And he said "No, it ain't never going to happen. Quit worrying about that kind of stuff. Don't worry about it."

Otis A. Crowder's recollection of the conversation is substantially similar to that of defendant. He stated in his deposition that

> the only conversation that I recall where that was brought up as an issue was Mr. Kiser came into my office, and I believed he had the documents finally in hand after—whatever the option document. And he was laughing in a funny way. He came in and said, "You know, Otis, you could really"—excuse the term—"screw these optionees if you had an offer—somebody wanted to buy the company and offered to buy the company, and you terminated them so you could buy their stock and then sell it at a higher price." And my reply is, "I wouldn't do that."

Read together and in context, it is obvious that defendant Kiser was concerned about a situation in which the Crowders, the controlling shareholders, might receive an offer to purchase the Company and might discharge the minority shareholders so as to secure the shares of stock of the minority shareholders at book value and then sell the stock for its higher fair market value. There are no significant differences in the versions of the conversation between defendant and Otis Crowder, and no triable issue of fact is raised. Even assum-

ing for the purpose of argument that Otis Crowder promised defendant he would not be prematurely discharged in order to deprive him of the full value of his stock, there is absolutely no showing by defendant that his discharge was for a wrongful purpose. The unrebutted evidence tends to show that defendant's discharge was for a valid business purpose. The trial court properly entered summary judgment on this issue.

(C) Disparity Between Book Value and Fair Market Value

Defendant argues that it would be unconscionable to require him to accept the adjusted book value tendered by plaintiff for his stock options, because the fair market value of the corporation substantially exceeds its adjusted book value. Defendant made much the same argument in Issue I above.

The parties specifically discussed, but rejected, using a "buy-out" formula based on the fair market value of the shares. Use of fair market value would require an expensive and time-consuming valuation process each time an employee's shares were offered to the corporation under the stock purchase agreement. The delay and uncertainty would be beneficial neither to the Company nor the employee. Further, the fair market value approach was specifically rejected after negotiations and discussions in which defendant was involved. Yet defendant freely entered into the 1991 Agreement which set out the adjusted book value formula which he now contests as unconscionable. The stock purchase agreement was entered into on 21 March 1991, and defendant was terminated on 23 January 1995, less than four years later. Defendant did not forecast evidence of any change in circumstances during that four-year interval which would render the arm's-length agreement between defendant and plaintiff unconscionable and unenforceable, and the trial court properly granted summary judgment on this issue.

III. Other Equitable Defenses

[3] Defendant further argues that (A) the 1991 Agreement did not require him to tender his shares of stock to plaintiff immediately upon termination and that he was entitled to wait for a reasonable time before doing so. Defendant also argues that (B) the Company's decision to take a business expense deduction for tax purposes based on its loss arising from the stock it optioned to its employees caused defendant to incur an unexpected tax liability, and thus made the stock purchase agreement unconscionable.

(A) Timing of the Tender Offer

Defendant argues that he was not required by the terms of the 1991 Agreement to immediately tender his stock options to the Company for purchase. Defendant contends that he could wait a "reasonable time" before tendering his shares, and even until his 1988 options were fully vested before offering them for purchase.

The 1991 Agreement provides in Section 3.2 that:

> In the event that the employment of a Shareholder is terminated with the Corporation for any reason whatsoever, he shall offer his shares to the Corporation and the Corporation shall purchase his shares at the price provided in the paragraph 3.1 above.

Section 3.1 of the Agreement sets out the formula for determining the purchase price of any shares issued by the Company pursuant to the 1986, 1988, and 1990 stock option plans. In every instance, the calculation of the purchase price of an employee's shares is tied directly to the adjusted book value of the Company's stock. Adjusted book value is defined in Section 6.1 of the 1991 Agreement as the net book value as adjusted at the end of the last fiscal year prior to the termination of a shareholder's employment. Further, Section 3.4(C) of the stock purchase agreement provides that the "closing [of the stock repurchase transaction] shall be within 90 days of the offer, death or termination of the employee, *whichever is earlier.*" (Emphasis added.) Therefore, the 90-day period contemplated for closing expresses the parties' intent with regard to timing of the offer and payment.

Moreover, defendant would gain nothing by a long delay in tendering his shares. The adjusted book value will be determined by reference to the Company's financial statement on 31 March 1994, the end of its last fiscal year prior to the date of defendant's termination. This assignment of error is overruled.

(B) Change in Tax Reporting

[4] When defendant and other employees of the Company exercised their stock options and purchased shares of Company stock, they understood that they would be liable ultimately pursuant to Section 83 of the Internal Revenue Code for any income tax liability arising from the increase in value of the Company stock over the option price of $7.00 per share. Defendant contends that, when he exercised his options in 1986 and 1988, the opinion of Deloitte & Touche was that an employee would not actually incur any tax

liability until the employee sold the stock he obtained by exercising his stock options.

In July 1994, however, Deloitte & Touche expressed the revised opinion that the Company employees who received stock under the stock option plans would realize taxable income when the shares were fully vested, that is, on the seventh anniversary of the exercise of their options. Deloitte & Touche advised the Company that revised W-2 forms for the calendar year 1993 should be issued to employees holding shares they obtained from the exercise of the 1986 stock option plan. The revised W-2 forms would reflect the Section 83 "income" from the increase in value of the Company's shares. Otherwise, the Company might be penalized for failure to report income and failure to withhold income taxes. Deloitte & Touche further advised the Company that the additional "income" received by the shareholders would result in a business expense deduction to the Company.

Defendant argues that the business expense deduction directly benefitted the Company's majority shareholders because they did not receive their shares from the stock option plans, and their taxable incomes would be reduced as a result. Defendant vigorously disputed the advice of Deloitte & Touche, and the matter was referred to the national office of Deloitte & Touche in Washington. The Deloitte & Touche national office advised the Company in December 1994 that, although there would be a taxable event on the seventh anniversary of the exercise of the 1986 stock options, the Company did not have to report the Section 83 income at that time unless it intended to claim a business deduction based on that event. Thereafter, the Company elected to issue amended W-2 forms to the affected employees reflecting the Section 83 income from the increase in their shares, and the Company then took a corresponding business expense deduction to account for its paper "loss" as a result of the income to the employees.

A meeting was scheduled for 24 January 1995 to explain the situation to the affected employees, but defendant was terminated by the Company on 23 January 1995. The Company subsequently made interest-free loans to its employees who held shares resulting from the exercise of the 1986 stock options and who thus had Section 83 income as a result. Because defendant's employment had been terminated, he did not receive an interest-free loan to pay his tax liability from the gain on his shares of stock. Under the terms set out in the 1991 Agreement, defendant is not entitled to receive the entire price

for his shares of stock in a lump sum, but will receive an initial payment of $47,355.00, with the balance of $153,788.00 spread over seven years and secured by a promissory note from the Company.

Defendant argues that it would be unconscionable to require him to sell his shares for less than their fair market value, and then to structure payment of the purchase price in such a way that his "down payment" would be consumed in large part by income taxes. We have previously discussed—and rejected—defendant's contention that some sort of fair market value standard should be substituted for the adjusted book value standard agreed upon by defendant and the other shareholders in 1991. Defendant now also contends that the manner of payment for his stock should be different from the written agreement. However, we decline to rewrite the 1991 Agreement and thereby substitute our judgment for that of the contracting parties. Further, defendant is not prejudiced by the Company's decision to report defendant's gain on his stock, since in any event defendant will have to report for income tax purposes he gain on his shares as a result of their sale to the Company under the 1991 Agreement. This assignment of error is overruled.

Despite the volume of the evidence, the parties are in substantial agreement on the material facts which give rise to this dispute. Although the language of the 1991 Agreement is clear and unequivocal and was intended to provide a simple and foreseeable result upon the termination of an employee, this litigation has delayed the resolution of this matter for more than four years since defendant's termination in January 1995. We have carefully considered the arguments and positions advanced by defendant, but find an insufficient forecast of evidence to raise a genuine issue of material fact. The trial court properly entered summary judgment for plaintiff.

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

SHELL ISLAND HOMEOWNERS ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION; CHARLES B. CASTEEN AND WIFE BARBARA M. CASTEEN; AND RICHARD R. SCHNABEL AND WIFE DOROTHY L. SCHNABEL, PLAINTIFFS V. EUGENE B. TOMLINSON, CHAIRMAN NORTH CAROLINA COASTAL RESOURCES COMMISSION; NORTH CAROLINA COASTAL RESOURCES COMMISSION; DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES FOR THE STATE OF NORTH CAROLINA; WAYNE MCDEVITT, SECRETARY OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES; AND THE STATE OF NORTH CAROLINA, DEFENDANTS, AND NORTH CAROLINA COASTAL FEDERATION, INC., INTERVENOR-DEFENDANT

No. 98-961

(Filed 20 July 1999)

1. Jurisdiction— subject matter—failure to exhaust administrative remedies

The trial court did not err by dismissing plaintiffs' claims for lack of subject matter jurisdiction in an action challenging Coastal Resources Commission rules where plaintiffs failed to exhaust all available administrative remedies prior to filing this action. Although plaintiffs argued the futility of administrative remedies, they pointed to no authority for the premise that an agency's rules prohibiting a certain activity render the administrative remedies to contest that prohibition inadequate and futile.

2. Jurisdiction— subject matter—constitutional claims—exhaustion of administrative remedies—not required

Dismissal of constitutional claims arising from coastal management rules and regulations for lack of subject matter jurisdiction due to failure to exhaust administrative remedies was not proper. Exhaustion of administrative remedies was not required as to these claims.

3. Constitutional Law— coastal management rules—equal protection and due process

Plaintiffs' due process and equal protection challenges to coastal management rules were properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs acknowledged in their complaint that they sought, received, and took full advantage of a variance granted pursuant to the challenged regulatory scheme. One who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Moreover, the

protection of lands of environmental concern is a legitimate interest of government, as is the need for public access and use of ocean beaches, and the hardened structure rules are clearly rationally related to a legitimate government end.

4. Constitutional Law— taking without compensation— coastal management rules—hardened structures

The trial court properly dismissed plaintiffs' takings challenge to coastal management rules regarding hardened structures where plaintiffs failed to identify in the complaint any legally cognizable property interest which has been taken by defendants. The invasion of property and reduction in value which plaintiffs allege clearly stems from the natural migration of an inlet and plaintiffs did not cite any persuasive authority for the proposition that a littoral or riparian landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion and migration. Additionally, hardened structure rules were contained in the regulatory scheme under which the original permit was issued, so that there can be no claim of a compensable taking by reason of the regulations.

5. Constitutional Law— coastal management rules—no violation of procedural and substantive due process

There was no violation of procedural and substantive due process in the denial of permits for plaintiffs to construct hardened erosion control structures to protect their property from the migration of an ocean inlet. Plaintiffs have shown no established right to construct hardened structures in areas of environmental concern and the allegations of the complaint detail the administrative process through which plaintiffs have been provided an ample opportunity to be heard and to seek review of defendant's decisions.

Appeal by plaintiffs from order entered 14 July 1998 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 11 May 1999.

Shanklin & McDaniel, L.L.P., by Kenneth A. Shanklin and Susan J. McDaniel; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by C.C. Harness, III, for plaintiff-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General J. Allen Jernigan, Special Deputy Attorney General

Robin W. Smith, and Associate Attorney General Mary Penny Thompson, for defendant-appellees.

Southern Environmental Law Center, by Donnell Van Noppen, III, and Derb S. Carter, Jr., for intervenor-appellee.

MARTIN, Judge.

Plaintiffs Casteen and Schnabel are owners of units at the Shell Island Resort Hotel Condominium ("Shell Island Resort"); plaintiff Shell Island Homeowners Association, Inc., is an association of all unit owners at Shell Island Resort, which is located at the north end of Wrightsville Beach, North Carolina, just south of Mason's Inlet. Plaintiffs filed this action on 7 January 1998 against Eugene B. Tomlinson, Chairman of the North Carolina Coastal Resources Commission, the North Carolina Coastal Resources Commission ("CRC"), the Department of Environment and Natural Resources for the State of North Carolina ("DENR"), Wayne DcDevitt, Secretary of DENR, and the State of North Carolina (hereinafter "defendants"), challenging the "hardened structure rule" and variance provision adopted by the CRC and codified at 15A NCAC 7H.0308 and 7H.0301. The rule provides:

> Permanent erosion control structures may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach, and, therefore, are prohibited. Such structures include, but are not limited to: bulkheads; seawalls; revetments; jetties; groins and breakwaters.

15A NCAC 7H.0308(a)(1)(B) (Specific Use Standards for Ocean Hazard Areas); see also 15A NCAC 7H.0310(a)(2) ("Permanent structures shall be permitted at a density of no more than one commercial or residential unit per 15,000 square feet of land area on lots subdivided or created after July 23, 1981").

The factual history giving rise to this controversy is summarized in our opinion in *Shell Island Homeowners Assoc., Inc. v. Tomlinson*, 134 N.C. App. 286, 517 S.E.2d 401 (1999). Briefly, plaintiffs have sought permits to construct various hardened erosion control structures to protect Shell Island Resort from the southward migration of Mason's Inlet; defendants, enforcing the "hardened structure rule," have denied those applications and refused plaintiffs' requests for variances. Plaintiffs did not seek administrative review

of any of defendants' decisions enforcing the hardened structure rules, and they have not applied for a permit for a permanent erosion control structure since their application for a variance was originally denied on 6 February 1996. Instead, on 7 January 1998, over two years after plaintiffs submitted their original permit request, plaintiffs filed the complaint in this action alleging twelve claims for declaratory and injunctive relief by which they (1) challenge the validity and enforcement of the hardened structure rules; (2) seek a declaration that plaintiffs have the right to build a permanent hardened erosion control structure of unspecified design; and (3) seek damages for a taking of their property without just compensation by reason of defendants' denial of their application for a CAMA permit for construction of a permanent erosion control structure.

The North Carolina Coastal Federation ("intervenor-defendant") was permitted to intervene as a party defendant on 4 March 1998. Defendants moved to dismiss plaintiff's complaint pursuant to G.S. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6). On 14 July 1998, the trial court entered an order dismissing plaintiffs' complaint pursuant to Rule 12(b)(1) because plaintiffs "lack standing to claim that the Court has jurisdiction of the subject matter and the person because they have not made a showing of futility as to seeking full administrative remedy as provided by law," and pursuant to Rule 12(b)(6) for failure of the complaint to state a claim upon which relief may be granted. Plaintiffs appeal.

I.

We must first consider whether the trial court had subject matter jurisdiction to consider the claims alleged in plaintiffs' complaint. Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy, *Harris v. Pembaur*, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

A.

[1] Plaintiffs argue that the trial court erred when it dismissed plaintiffs' claims for lack of subject matter. An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies. *Bryant v. Hogarth*, 127 N.C. App. 79, 488 S.E.2d 269, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997); *Concerned Citizens v. N.C. Environmental Management Comm'n.*, 89 N.C. App. 708, 367 S.E.2d 13 (1988). "[W]here the legislature has provided by statute an

effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979); *Jackson v. NCDHR*, 131 N.C. App, 179, 183, 505 S.E.2d 899, 903-04 (1998), *disc. review denied*, 350 N.C. 594, —— S.E.2d —— (1999); *Bryant* at 83, 488 S.E.2d at 271. Under the Administrative Procedure Act ("APA"),

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute . . . .

N.C. Gen. Stat. § 150B-43 (1998).

Thus, in order to seek judicial review of an adverse administrative decision, a party must show: (1) the party is an aggrieved party; (2) there is a contested case; (3) there has been a final agency decision; (4) all administrative remedies have been exhausted; and (5) no other adequate procedure for judicial review is provided by another statute. *Huang v. N.C. State University*, 107 N.C. App. 710, 421 S.E.2d 812 (1992). Moreover, this Court has stated,

> [t]he policy of judicial restraint acquires the status of a jurisdictional prerequisite when the legislature has explicitly provided the means for a party to seek effective judicial review of a particular administrative action. This procedure is particularly efficient when the subject of inquiry is of a very technical nature or involves the analysis of many records. Accordingly, a statute under which an administrative board has acted, which provides an orderly procedure for appeal to the superior court is the exclusive means for obtaining such judicial review. Furthermore, the policy of requiring exhaustion of administrative remedies does not require merely the initiation of the prescribed procedures, but that they should be pursued to their appropriate conclusion and final outcome before judicial review is sought. We read G.S. § 113A-121.1 to require that a party entitled to its provisions must first challenge a decision to deny or grant a permit by way of a petition to the Coastal Resources Commission.

Leeuwenburg v. Waterway Inv. Ltd. Partnership, 115 N.C. App. 541, 545, 445 S.E.2d 614, 617 (1994) (citations omitted).

In the present case, plaintiffs have not pursued any of the options available to them under CAMA and the APA for timely administrative review of defendants' decisions to deny the permit and variance requests pursuant to the hardened structure rules. Plaintiffs could have sought administrative review of the permit denials pursuant to G.S. § 113A-121.1, and filed for a contested case hearing under G.S. § 150B-23 within 20 days after a denial, thereby obtaining an administrative hearing in which a full record could have been developed to determine whether "the agency (1) exceeded its authority or jurisdiction, (2) acted erroneously, (3) failed to use proper procedure, (4) acted arbitrarily or capriciously, or (5) failed to act as required by law or rule." N.C. Gen. Stat. § 150B-23. Moreover, plaintiffs could have obtained a hearing on any of their applications for a variance pursuant to G.S. § 113A-120.1, or they could have brought an action under G.S. § 113A-123(b) alleging a regulatory taking, and seeking relief from application of the rule. Under this provision, a person may obtain superior court review as to whether the CRC decision,

> so restricts the use of his property as to deprive him of the ractical uses thereof, being not otherwise authorized by law, and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of taking without compensation.

N.C. Gen. Stat. § 113A-123(b). If it were determined, upon such review, that the hardened structure rules effect an unconstitutional taking of plaintiffs' property, plaintiffs would be granted relief from application of the rules. *Id.* Plaintiffs could have also sought a declaratory ruling from the CRC applying and interpreting its rules. N.C. Gen. Stat. § 113A-124(c)(7); N.C. Gen. Stat. § 150B-4. Indeed, plaintiffs have not even applied for a permit for the erosion control structure requested in their amended complaint in this action. Clearly, plaintiffs have failed to exhaust all available administrative remedies prior to filing this action.

Nevertheless, plaintiffs argue they should not be required to exhaust their administrative remedies because the remedies provided by CAMA and the APA are inadequate to provide the relief sought, and therefore, seeking such remedies would be futile. Where the remedy established by the APA is inadequate, exhaustion is not required. *Jackson* at 186, 505 S.E.2d at 904 (citing *Huang, supra*). " 'The remedy is considered inadequate unless it is "calculated to give relief more or less commensurate with the claim," ' " *Id.* (quoting *Huang* at

715, 421 S.E.2d at 815). The plaintiffs have the burden of showing, by allegations in the complaint, that the particular remedy is inadequate. *Id.*

Here, plaintiffs have argued the "practical and legal futility of applying for the hardened structure sought in the Complaint" on the grounds that the hardened structure rules are firm rules, the rigidity of which is demonstrated by the 5 August 1996 and 10 October 1996 final orders of the CRC, as well as the denial of three of the four variance requests. However, plaintiffs point to no authority for the premise that an agency's rules prohibiting a certain activity render the administrative remedies to contest the prohibition inadequate and futile. The means enumerated above by which CAMA and the APA afford review of plaintiffs' claims provide plaintiffs with relief more or less commensurate with their claims; if they are correct in their allegations, plaintiffs could have obtained a determination that they are entitled to construct a hardened erosion control structure; that they are entitled to a variance from the hardened structure rules; that defendants have acted beyond authority or failed to act in accordance with rule or law; or that the regulations themselves are invalid. In *Jackson, supra*, we stated:

> The procedures available through the NCAPA are calculated to require, if plaintiff is correct, the provision of [the care which plaintiff seeks]. . . and, thus, "to give relief more or less commensurate" with her claim. We do not believe plaintiff's insertion of a prayer for monetary damages in this case renders administrative relief inadequate so as to relieve her from the requirement that she exhaust available administrative remedies before resorting to the courts.

Jackson at 189, 505 S.E.2d at 905. Likewise, plaintiffs' assertion in this case that defendants rigorously enforce the hardened structure rules is insufficient to relieve plaintiffs of the requirement that they attempt to avail themselves of administrative remedies prior to seeking relief in superior court.

Plaintiffs also argue that the trial court ignored relevant evidence which was properly before it in ruling on defendants' Rule 12(b)(1) motion, because it did not consider affidavits submitted by plaintiffs in opposition to the motion. Plaintiffs correctly argue that the trial court is not limited to a consideration of the pleadings in ruling upon a motion to dismiss pursuant to Rule 12(b)(1), and may properly consider evidence such as affidavits. *Smith v. Privette*, 128 N.C. App.

490, 495 S.E.2d 462 (1998). The record is unclear as to whether the trial court refused to consider the affidavits, which plaintiffs contend establish the futility of administrative review, for any purpose or only as to defendants' motion to dismiss pursuant to Rule 12(b)(6). Assuming, however, that the trial court refused to consider the affidavits for any purpose, we have nonetheless considered them and we remain unpersuaded by the contentions expressed therein that administrative appeal would be futile because of the time period involved. Plaintiffs waited approximately two years after the original denial of their application of a hardened structure permit to seek any type of review, and only then by the filing of this action. Plaintiffs' failure to exhaust administrative remedies of the non-constitutional claims contained in their complaint renders such claims subject to dismissal for lack of subject matter jurisdiction; we affirm the order dismissing plaintiffs' claims denominated as their Third, Fifth, Eighth, Ninth, Tenth and Eleventh claims for relief, which challenge the application of the hardened structure rules on non-constitutional grounds, pursuant to G.S. § 1A-1, Rule 12(b)(1).

B.

[2] By claims denominated plaintiffs' First, Second, Fourth, Sixth, and Seventh claims for relief, plaintiffs challenge the constitutionality of CAMA and various rules and regulations promulgated thereunder and contend that defendants' policies and actions taken pursuant thereto have violated various of their rights under the constitutions of North Carolina and the United States. By their Twelfth claim, they seek damages for such violations. Where an aggrieved party challenges the constitutionality of a regulation or statute, administrative remedies are deemed to be inadequate and exhaustion thereof is not required. *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998). In that case, the North Carolina Department of Agriculture ("NCDA") argued that the superior court lacked subject matter jurisdiction where the plaintiffs had failed to exhaust administrative remedies by seeking a declaratory judgment from the agency as to the constitutionality of the regulations at issue. The Supreme Court stated:

> The NCDA's argument, however, ignores our well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board. *See Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961); *see also Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *disc. rev.*

> *denied*, 312 N.C. 508, 329 N.C. 392 (1985). Because it is the province of the judiciary to make constitutional determinations, any effort made by Meads to have the constitutionality of the buffer-zone regulations determined by the Pesticide Board would have been in vain. Accordingly, given the constitutional nature of this issue, the NCDA options were inadequate, and therefore Meads was not required to exhaust them.

Id. at 670, 509 S.E.2d at 174.

In this case, exhaustion of administrative remedies was not required as to the claims alleged as plaintiffs' First, Second, Fourth, Sixth, Seventh, and Twelfth claims for relief and dismissal of those claims pursuant to G.S. § 1A-1, Rule 12(b)(1) was not proper. We must, therefore, consider whether the trial court's dismissal of those claims pursuant to G.S. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief may be granted, was correct.

II.

By their First, Second and Fourth claims for relief, plaintiffs allege violations of their constitutional rights to equal protection of the law, to due process, and to just compensation for a taking of their property; by their Sixth and Seventh claims, they challenge the constitutional validity of the hardened structure rules and the regulatory scheme under which the rules are promulgated. Finally, in their Twelfth claim for relief, plaintiffs seek damages for these alleged violations.

In determining whether a complaint is sufficient to survive a motion to dismiss under G.S. § 1A-1, Rule 12(b)(6), the question presented is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Isenhour v. Hutto*, 129 N.C. App. 596, 598, 501 S.E.2d 78, 79, *review allowed*, 349 N.C. 360, 517 S.E.2d 895, (1998) (citing *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). "A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citing *Forbis v. Honeycutt*, 301 N.C. 699, 273 S.E.2d 240 (1981)).

A.

[3] Plaintiffs' complaint alleges facts which necessarily defeat their Sixth and Seventh claims for relief, as well as their First claim for relief to the extent it challenges the hardened structure rules on equal protection and due process grounds. Plaintiffs allege that they applied for, received, and accepted a variance permit under the rules which they now challenge, and that, pursuant to the variance permit, they were able to construct a sandbag revetment which has protected the Shell Island Resort since 17 September 1997. " 'The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens.' " *Bailey v. State of North Carolina*, 348 N.C. 130, 147, 500 S.E.2d 54, 64 (1998) (quoting *Convent of Sisters of St. Joseph v. City of Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956)); *see also, e.g., Ratcliff v. County of Buncombe*, 81 N.C. App. 153, 343 S.E.2d 601 (1986); *Goforth Properties, Inc. v. Town of Chapel Hill*, 71 N.C. App. 771, 323 S.E.2d 427 (1984). The principle is an application of the broader doctrine of quasi-estoppel, which states that " '[w]here one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.' " *Carolina Medicorp, Inc. v. Board of Trustees*, 118 N.C. App. 485, 492-93, 456 S.E.2d 116, 120 (1995) (quoting *Redevelopment Com'n of Greenville v. Hannaford*, 29 N.C. App. 1, 4, 222 S.E.2d 752, 754 (1976)); *see also Meehan v. Meehan*, 116 N.C. App. 622, 448 S.E.2d 851 (1994); *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991); *One North McDowell Assoc. of Unit Owners, Inc. v. McDowell Development Co.*, 98 N.C. App. 125, 389 S.E.2d 834, *disc. review denied*, 327 N.C. 432, 395 S.E.2d 687 (1990). Moreover, the acceptance of benefits precludes a subsequent inconsistent position, even where acceptance is involuntary, arises by necessity, or where, as in the case *sub judice*, a party voluntarily accepts a benefit in order to avoid the risk of harm. *Carolina Medicorp* at 493, 456 S.E.2d at 121.

In *Franklin Road Properties v. City of Raleigh*, 94 N.C. App. 731, 735, 381 S.E.2d 487, 490 (1989), this Court held that the plaintiff was precluded from attacking the validity of a zoning ordinance after the plaintiff had procured a variance under the ordinance. We stated:

> [P]laintiff has clearly requested, obtained and accepted the benefits of a variance from § 10-2063(b) of the City Code, allowing

> plaintiff to have parking and driveways in the fifty-foot unusable yard area. Plaintiff is therefore precluded from attacking the validity of this zoning ordinance . . . through its complaint seeking declaratory judgment.

Id.; *See Convent* at 325, 90 S.E.2d at 885 (accepting the benefits of a provision of a zoning ordinance precludes right to contest ordinance's validity); *see also, e.g., In re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974) (county which exercised delegated tax power could not challenge constitutionality of certain exemptions); *Utilities Comm. v. Electric Membership Corp.*, 276 N.C. 108, 171 S.E.2d 406 (1970) (application for territorial rights precludes challenge to constitutionality of statute authorizing Utilities Commission to assign such rights); *City of Durham v. Bates*, 273 N.C. 336, 160 S.E.2d 60 (1968) (property owners precluded from challenging eminent domain statute after accepting payment, even though owners claimed reservation of rights); *Ramsey v. Veterans Commission*, 261 N.C. 645, 135 S.E.2d 659 (1964) (applicant for scholarship provided by statute precluded from challenging constitutionality of statute's eligibility requirements).

Here, because plaintiffs acknowledge in their complaint that they sought, received, and took full advantage of the variance granted pursuant to the regulatory scheme which they challenge, we hold, consistent with the above authority, that plaintiffs may not now assert a claim that the hardened structure rules and regulatory scheme under which the rules are promulgated are invalid and unconstitutional. Plaintiffs' Sixth and Seventh claims for relief, as well as the First claim for relief, to the extent it asserts claims of equal protection and due process, were properly dismissed pursuant to G.S. § 1A-1, Rule 12(b)(6).

B.

[4] The remaining issue for decision is whether plaintiffs' First, Second, and Fourth claims for relief in which they essentially allege that the hardened structure rules have effected a regulatory taking of plaintiffs' property without just compensation, for which taking they seek damages, state claims upon which relief can be granted. We hold these claims were also properly dismissed.

In their First claim for relief, plaintiffs allege that the rules both facially and as applied violate the Fifth and Fourteenth amendments of the Federal Constitution and similar state constitutional provisions in that the rules effect a taking of plaintiffs' property without

just compensation. Plaintiffs' Second claim for relief seeks a declaratory judgment that defendants' actions constitute an inverse condemnation of their property, and damages. Their Fourth claim for relief alleges that defendants' permit and variance denials were contrary to G.S. § 113A-128, which provides that "[n]othing in this Article authorizes any governmental agency to adopt a rule or issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States."

However, plaintiffs have failed to identify, on the face of the complaint, any legally cognizable property interest which has been taken by defendants. The invasion of property and reduction in value which plaintiffs allege clearly stems from the natural migration of Mason's Inlet, and plaintiffs have based their takings claim on their need for "a permanent solution to the erosion that threatens its property," and the premise that "[t]he protection of property from erosion is an essential right of property owners . . . ." The allegations in plaintiffs' complaint have no support in the law, and plaintiffs have failed to cite to this Court any persuasive authority for the proposition that a littoral or riparian landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion and migration. The courts of this State have considered natural occurrences such as erosion and migration of waters to be, in fact, natural occurrences, a consequence of being a riparian or littoral landowner, which consequence at times operates to divest landowners of their property. Our Supreme Court has stated that when the location of a body of water constituting the boundary of a tract of land,

> is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the stream or body, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly. The owner of the riparian land thus loses title to such portions as are so worn or washed away or encroached upon by the water. Thus the lots of the plaintiff were gradually worn away by the churning of the ocean on the shore and thereby lost. Its title was divested by "the sledge-hammering seas the inscrutable tides of God."

Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 304, 177 S.E.2d 513, 517 (1970) (citations omitted).

In *Adams Outdoor Advertising of Charlotte v. North Carolina Dept. of Transp.*, 112 N.C. App. 120, 434 S.E.2d 666 (1993), this Court

held that allegations of mere incidental or consequential interferences with property rights are insufficient to maintain an action for inverse condemnation. In *Adams*, a billboard owner sued the State for inverse condemnation, alleging that the State's planting of vegetation within its right-of-way adjacent to premises upon which plaintiff's billboards stood was a taking of the owner's property. This Court held that the plaintiff's action was properly dismissed pursuant to Rule 12(b)(6), stating,

> A plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental.
>
> While Black's Law Dictionary does not define the word consequential, it does define the term consequential damages, and from this definition, we may determine what the Supreme Court meant when it wrote of "injuries which are not merely consequential." Consequential damages means "[s]uch damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." Black's Law Dictionary 390 (6th ed. 1990). Black's Law Dictionary defines incidental as "[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose." Black's Law Dictionary 762. Using these definitions, we conclude that plaintiff's complaint fails to state a claim of inverse condemnation.
>
> . . .
>
> Defendant's planting of trees as part of its beautification project was defendant's primary act, of which the obscuring of plaintiff's billboards was only a consequential or incidental result. Moreover, we note that defendant's use of its right-of-way to plant trees is consistent with its statutory powers.

Id. at 122-23, 434 S.E.2d at 667-68 (citing *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982)).

Similarly, in the present case, plaintiffs' complaint does not allege that the migration of Mason's Inlet and the resulting erosion of plaintiffs' property have been caused by any regulatory action taken by defendants, and these naturally occurring phenomena are the primary causes of any loss sustained by plaintiffs. Defendants' consistent enforcement of the hardened structure rules, consistent with its

statutory powers, is merely incidental to these naturally occurring events. Plaintiffs' complaint fails to allege any right supported by law to construct a hardened erosion control structure in an area designated by statute as one of environmental concern, nor does it allege that plaintiffs have lost all economically beneficial or productive use of their property; rather, plaintiffs have merely asserted that they have "experienced a significant reduction in use/value of the Hotel," which is insufficient to support a takings claim. *See, e.g., JWL Investments, Inc. v. Guilford County Board of Adjustment*, 133 N.C. App. 426, 515 S.E.2d 715 (1999) (quoting *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)) ("An interference with property rights amounts to a taking where the plaintiffs are deprived of 'all economically beneficial or productive use.'"); *Williams v. Town of Spencer*, 129 N.C. App. 828, 832, 500 S.E.2d 473, 475 (1998) (no taking where "petitioners are not deprived of 'all economically beneficial or productive use' of their land as it can be used for any of the uses allowed in an industrial zoned area."). Plaintiffs' takings claim therefore cannot survive a Rule 12(b)(6) motion.

In addition, plaintiffs' complaint specifically alleges that the hardened structure rules which they challenge were adopted in 1982, three years prior to issuance of the original CAMA permit for construction of the Shell Island Resort. The hardened structure rules were contained in the very regulatory scheme under which the original permit was issued, and the land upon which the hotel was constructed was subject to the restrictions at the time the permit was issued.

In *Bryant v. Hogarth, supra*, owners of an exclusive franchise to cultivate shellfish in a submerged tract of land sought a declaration that the Marine Fisheries Division's ("MFD") designation of the tract as a primary nursery area ("PNA"), and refusal to allow use of mechanical harvesting therein rendered their interest in the tract worthless, constituting a regulatory taking. This Court stated,

> plaintiffs' franchise was not acquired free of government regulation. See *State v. Sermons*, 169 N.C. 285, 287, 84 S.E. 337, 338 (1915) (shellfish come well within police power of State and "are subject to rules and regulations reasonably designed to protect them and promote their increase and growth"). Indeed, the very statute granting the franchise to plaintiffs' predecessor in interest

also gave the shellfish commissioners exclusive jurisdiction and control over shell-fisheries covered by the legislation.

In addition, we note the tract was designated a PNA 1 November 1977 and that the administrative rules prohibiting mechanical harvesting of shellfish in such waters were adopted the same date. Plaintiffs' deed for purchase of the franchise was filed 25 August 1982, more than five years later. *Accordingly, plaintiffs' complaint failed to allege a claim of compensable taking under G.S. § 113-206(e) in consequence of the tract being subject to the challenged PNA restriction at the time of acquisition.* See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798, 821 (1992) (existing regulation distinguished from future regulation for purposes of a "taking"; "newly legislated or decreed" regulation which prohibits all economically beneficial use of land without compensation constitutes a taking, but latter does not occur and no compensation required when one is barred by rules existing at time title to property acquired); see also *Hughes v. North Carolina State Hwy. Comm.*, 275 N.C. 121, 130, 165 S.E.2d 321, 327 (1969) (purchaser with notice is chargeable with knowledge he would have acquired had he exercised ordinary care to ascertain truth concerning matters affecting his property interest).

. . .

Because plaintiffs have not exhausted nor properly pled justifiable avoidance of the legislatively established administrative remedies for denial of permit applications, they may not in the instant separate action mount a collateral attack by claiming such denial constituted a taking of the franchise . . . .

127 N.C. App. at 84-87, 488 S.E.2d at 272-73 (emphasis added). Similarly, in this case, because plaintiff's tract was subject to the challenged restrictions at the time the original permit was issued and the hotel was constructed, there can be no claim of compensable taking by reason of the regulations. *Id.*; *see also*, *Lucas v. South Carolina Coastal Council*, at 1027, 120 L.Ed.2d at 820 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *Adams Outdoor Advertising of Charlotte* at 123-24, 434 S.E.2d at 668 (takings claim based on obstruction of view of

plaintiff's billboards due to vegetation planted by DOT for highway beautification project properly dismissed on 12(b)(6) where "statute [authorizing DOT to plant vegetation] was enacted prior to 1981, when plaintiff's predecessors in interest first entered into agreements for the lease of the property at issue. Therefore, plaintiff was charged with notice at the time it erected the billboards that DOT might plant trees and shrubs in the right-of-way near its leased premises.").

Because plaintiffs have failed to state a viable claim for relief for a regulatory taking, their Second claim for relief alleging an inverse condemnation of their property also necessarily fails. *See Adams Outdoor Advertising of Charlotte* at 122, 434 S.E.2d at 667 (citing *Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 153-54, 272 S.E.2d 920, 922 (1980)) ("An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose.").

[3] Moreover, even assuming *arguendo* that plaintiffs had the ability to challenge the hardened structure rules on equal protection and due process grounds, the allegations in plaintiffs' complaint nevertheless fail to state a claim upon which relief can be granted. In *Town of Beech Mountain v. Watauga County*, 91 N.C. App. 87, 370 S.E.2d 453 (1988), *affirmed*, 324 N.C. 409, 378 S.E.2d 780, *cert. denied*, 493 U.S. 954, 107 L.Ed.2d 351 (1989), this Court upheld a Rule 12(b)(6) dismissal of an equal protection claim where, on the face of the complaint, the challenged statute bore a rational basis to a legitimate government interest. We stated:

> The Equal Protection Clause is not violated merely because a statute classifies similarly situated persons differently, so long as there is a reasonable basis for the distinction. When a statute is challenged on equal protection grounds, it is subjected to a two-tiered analysis. The first tier, or "strict scrutiny" provides the highest level of review and is employed only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. To survive this level of review, the government must demonstrate that the classification created by statute is necessary to promote a compelling government interest. A class is suspect "when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." If a statute does not burden the exercise of a

> fundamental right or operate to the peculiar disadvantage of a suspect class, the statute is analyzed under the second tier and the government need only show that the classification in the challenged statute has some rational basis. A statute survives analysis under this level if it bears some rational relationship to a conceivable, legitimate interest of government. Statutes subject to this level of review come before the Court with a presumption of constitutionality.

Id. at 90-91, 370 S.E.2d at 454-55 (citations omitted).

Here, plaintiffs have not alleged their classification in any suspect class such as race, religion, or alienage, nor have they alleged that the hardened structure rules discriminate on such a basis. Furthermore, plaintiffs have not alleged that the rules burden any recognized fundamental personal right, and we discern none from the allegations of the complaint. Thus, in reviewing whether plaintiffs have stated an equal protection claim upon which relief may be granted, we must determine whether the hardened structure rules have a "rational relationship to a conceivable, legitimate interest of government," reviewed under a presumption of constitutionality. We hold that they do; the protection of lands of environmental concern is a conceivable and legitimate government interest, as is the preservation of value and enjoyment of adjacent properties and the need for the public to have access and use of the State's ocean beaches. The hardened structure rules, which prevent permanent structures from being erected in environmentally sensitive areas which may adversely impact the value of the land and adjacent properties, as well as the right to public enjoyment of such areas are clearly rationally related to the legitimate government end.

[5] Plaintiffs' allegations that the hardened structure rules "deprive the Plaintiff of property without procedural and substantive due process of law" also fail to state a claim upon which relief can be granted. As earlier noted, plaintiffs have shown no established right to construct hardened structures in areas of environmental concern, thus, they have failed to plead a legally cognizable right to support a claim of due process. In addition, the allegations of the complaint detail the administrative process through which plaintiffs have been provided an ample opportunity to be heard and to seek review of defendants' permit and variance application decisions.

For the foregoing reasons, we affirm the dismissal of the First, Second, Fourth, Sixth, and Seventh claims for relief alleged in plain-

tiffs' complaint for their failure to state claims upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). It follows that plaintiffs' Twelfth claim for relief, for damages by reason of the matters alleged in the other claims, was also appropriately dismissed.

III.

We have considered plaintiffs' remaining assignments of error which are directed to the denial of their motion to amend their complaint to add three additional claims for relief, and we find no merit to their argument. Such motions are addressed to the sound discretion of the trial court, and plaintiffs have shown no abuse of such discretion. *See Members Interior Construction, Inc. v. Leader Construction Co., Inc.*, 124 N.C. App. 121, 124, 476 S.E.2d 399, 402 (1996), *disc. review denied*, 345 N.C. 754, 485 S.E.2d 56 (1997) (motion to amend within sound discretion of trial court; "denial of such a motion will not be disturbed on appeal absent a clear showing that the trial court abused its discretion.").

The order dismissing plaintiffs' complaint is affirmed.

Affirmed.

Judges GREENE and WYNN concur.

MARKET AMERICA, INC., PLAINTIFF v. ROBIN CHRISTMAN-ORTH, DEFENDANT

No. COA98-1118

(Filed 20 July 1999)

1. Libel and Slander— qualified privilege—summary judgment

The trial court did not err in an action arising from defendant working with two multi-level sales companies by granting summary judgment for plaintiff-Market America on defendant's counterclaim for libel where the communication was protected by a qualified privilege and defendant did not come forward with any evidence of actual malice or excessive publication.

2. Libel and Slander— employer not vicariously liable for torts of independent contractor—uncertainty as to what was said

The trial court did not err in action arising from defendant working with two multi-level sales companies by granting summary judgment for plaintiff-Market America on defendant's counterclaim for slander relating to independent distributors for Market America. An employer is not vicariously liable for the torts of an independent contractor and defendant could not recall when she listened to the voicemail in question, she did not remember whose voicemail she listened to, she could not remember precisely what was said, and she had no witnesses or recordings.

3. Unfair Trade Practices— non-competition clause—valid

The trial court did not err by granting summary judgment for plaintiff-Market America on defendant's counterclaim that a non-competition clause violated N.C.G.S.§ 75-1. Although defendant contended that the covenant did not apply to her because she was an independent distributor, non-competition clauses are applicable to independent contractor relationships. Although there was language in the covenant which referred to resignation or termination as an independent distributor and defendant had neither resigned nor been terminated, an agreement encompasses implied provisions necessary to effect the intention of the parties and plaintiff certainly intended to prohibit competition by those still working as distributors for the company. Finally, although defendant contended that there was no legitimate business purpose for restricting participation in other ventures which used a similar matrix marketing system, plaintiff's interest in protecting the integrity and viability of its business is legitimate.

4. Unfair Trade Practices— libel—qualified privilege—no damages

The trial court did not err by granting summary judgment for plaintiff on defendant's counterclaim for an unfair and deceptive trade practice based upon libel where defendant's reliance on *Ellis v. Northern Star Co.*, 326 N.C. 219, was unfounded because the communication here was protected by a qualified privilege and there was no evidence that defendant suffered actual injury.

5. Wrongful Interference— summary judgment—no business relationship—no malice

The trial court properly granted summary judgment for plaintiff on defendant's counterclaim for tortious interference with business relations in an action arising from defendant working with two multi-level sales companies. Defendant maintained throughout the litigation that her involvement with the second company (CAT) was as an assistant to her husband and she thus had no CAT business with which plaintiff could interfere. As to her Market America business, defendant did not show how the publication in question interfered with her economic relationship with Market America, and the prior conclusion that defendant failed to show any actual malice by Market America in distributing the bulletin necessarily causes defendant's counterclaim to fail.

Appeal by defendant from order entered 2 June 1998 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 9 June 1999.

Womble Carlyle Sandridge & Rice, PLLC, by Keith W. Vaughan, Pressly M. Millen, and Christine Sandez, for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by Jon Berkelhammer and John J. Korzen, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Robin Christman-Orth (defendant) appeals from an order granting summary judgment to Market America, Inc. (Market America) on defendant's counterclaims for libel, slander, unfair trade practices, tortious interference with business relations, and restraint of trade. In addition, defendant challenges the trial court's ruling which permitted Market America to amend its reply to include various affirmative defenses. Having judiciously examined the record before us, we affirm the order of the trial court.

Market America, a North Carolina corporation, is a multi-level product brokerage company which distributes approximately 300 consumer products through a network of approximately 75,000 independent distributors. The distributors earn money by purchasing products from Market America at wholesale prices and then selling those products to consumers at retail prices. Distributors also build sales organizations of other independent distributors and earn com-

missions from training and managing those sales organizations. Market America's distribution system is based on a binary matrix marketing plan whereby each distributor recruits, trains, and manages two sales organizations of other independent distributors.

Defendant is a citizen and resident of Pennsylvania. Prior to working for Market America, defendant operated a travel agency and worked as a regional sales representative for J&J Snack Food Corporation. On 18 March 1995, defendant executed an Independent Distributor Application and Agreement (the Agreement) with Market America defining the relationship between the company and its independent distributors. Under Paragraph 21 of the Agreement, defendant accepted the following terms:

> I agree that the marketing plan, genealogy reports, distributor list and official literature are proprietary information and are considered trade secrets of the company as construed [in] N.C.G.S. § 66-152. I agree not to enter into competition with Market America by participating as a[n] Independent Contractor, consultant, officer, shareholder, director, employee or participant of another company or direct sales program using a similar matrix marketing structure or handling similar products to that of Market America or involving a Distributor of Market America in such a program for a period of six months from my written resignation or termination as an Independent Distributor of Market America. I agree that if I breach this covenant that Market America shall be entitled to a restraining order in a court of competent jurisdiction and I shall be liable to pay no less than $2,000.00 in damages per breach and legal cost.

When this lawsuit arose, defendant had not resigned, nor had she been terminated as an Independent Distributor of Market America.

Club Atlanta Travel, Inc. (CAT) is also a multi-level sales company using a binary marketing plan. CAT sells travel services such as vacations and airline flights. In September of 1996, defendant's husband became an independent distributor for CAT, and while defendant did not become a CAT distributor, she admittedly participated in marketing the company's travel products and encouraged other Market America distributors to take advantage of CAT's business opportunities. On 13 December 1996, general counsel for Market America sent a letter to defendant stating that her involvement with CAT's commercial enterprise violated the terms of the Agreement. Defendant, through her attorney, replied that she had done nothing in

contravention of the Agreement by participating in the CAT venture, because CAT did not market any of the same products as did Market America. Defendant further indicated that she would continue to engage in CAT business.

On 29 January 1997, Market America filed a complaint against defendant seeking a temporary restraining order, a permanent injunction, and money damages for breach of contract and misappropriation of Market America's trade secrets. A temporary restraining order requiring defendant to refrain from recruiting Market America distributors into other business ventures was issued that same day. On 7 February 1997, Market America's President and Chief Executive Officer, J.R. Ridinger, sent a Follow-Up Bulletin (the bulletin) to Market America's Advisory Counsel Members, which consisted of the company's top twenty independent distributors, and the Certified Trainers, which consisted of approximately sixty-five independent distributors who were responsible for training other distributors. The bulletin stated that defendant was one of two individuals against whom Market America had prevailed in North Carolina's courts. Although the bulletin mistakenly referred to the temporary restraining order against defendant as an injunction, a copy of the actual order was attached to and distributed with the bulletin.

On 8 April 1997, defendant filed an answer asserting, in addition to her defenses, counterclaims for (1) libel, (2) slander, (3) unfair trade practices under section 75-1.1 of the North Carolina General Statutes, (4) interference with business relations, (5) restraint of trade in violation of section 75-1 of the General Statutes, and (6) money owed in the amount of $200. The libel claim is based on the bulletin, which defendant contends defamed her by allegedly likening her to "termites," "parasites," and "vermin," by stating that she "had been attempting to dissuade Distributors from Market America into CAT," and by stating that Market America had obtained an injunction, as opposed to a temporary restraining order, against defendant.

The counterclaim for slander is based on two voicemail messages. The first message is one allegedly left by Scott Tucker, an independent distributor for Market America. According to defendant, Tucker contacted individuals within his business organization and stated that defendant was involved with CAT but would end such involvement within six months and go on to something else. The message also discouraged other distributors from becoming involved in CAT, stating that defendant was only motivated by self-interest and

greed. The second voicemail message is one allegedly left by Ridinger which supposedly "compared Defendant to members of the recently departed Heaven's Gate cult in California."

As to defendant's unfair trade practices claim, she generally contends that Market America's alleged libel of defendant and its attempt to enforce Paragraph 21 of the Agreement constituted unfair and deceptive acts or practices under section 75-1.1 of the General Statutes. Similarly, defendant's counterclaim for interference with business relations alleges that Market America prevented people from doing business with defendant by threats and intimidation. Lastly, defendant's claim for restraint of trade asserts that Market America had no legitimate business purpose for attempting to use Paragraph 21 of the Agreement to prevent defendant from entering into other business ventures which do not involve competing products.

Market America's original reply, filed 10 June 1997, averred only that defendant's counterclaims failed to state claims for relief. Then, on 7 May 1998, Market America filed a motion to amend its reply to add several affirmative defenses, including (1) truth, (2) qualified privilege, and (3) lack of effect on any North Carolina business operations of defendant. Plaintiff moved for summary judgment as to defendant's counterclaims on 22 May 1998. Both motions were heard on 1 June 1998, and on 2 June 1998, the trial court entered an order granting the motions. Defendant appeals.

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[1] By her first assignment of error, defendant contends that the trial court improvidently entered summary judgment for Market America on defendant's libel claim. We cannot agree.

The device known as summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c). For a defending party to prevail on a motion for summary judgment, the party must demonstrate that " '(1) an essential element of [the claimant's] claim is nonexistent . . . [2] [the claimant] cannot produce evidence to support an essential element of [her] claim, or . . . [3] [the claimant] cannot surmount an affirmative defense which would bar the claim.' " *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37, (quoting *Shuping v. Barber*, 89 N.C. App. 242, 244, 365 S.E.2d 712, 714

(1988)) *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990), *quoted in Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 286, 465 S.E.2d 56, 58 (1996). In determining whether summary judgment is proper, the trial court, and the reviewing court, must construe the evidence in the light most favorable to the non-moving party, who must be given the benefit of all favorable inferences regarding the evidence. *Id.* Therefore, the question confronting us is whether, taken in the light most favorable to defendant, the evidence sufficiently established any genuine issue of fact as to whether Market America libeled defendant. We hold that it did not.

Defendant contends that statements made by Ridinger in the 7 February 1997 bulletin were libelous *per se*, in that they impeached defendant in her profession and otherwise subjected her to contempt. The statements in question include insinuations that by participating in the CAT enterprise, defendant behaved in a manner that constituted unfair competition and was "blatantly unethical and illegal." Defendant further takes exception to statements that allegedly compared her to termites, parasites, and vermin who act out of "pure greed." Equally offensive to defendant was the statement that she "had been attempting to dissuade Distributors from Market America into CAT." Market America, on the other hand, argues that assuming, without conceding, that the challenged statements were libelous *per se*, the same were qualifiedly privileged.

Libel is defined as written defamation. *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994).

> "[A] publication is libelous *per se*, or actionable *per se*, if, when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession."

Martin Marietta Corp. v. Wake Stone Corp., 111 N.C. App. 269, 276, 432 S.E.2d 428, 433 (1993) (quoting *Ellis v. Northern Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990)). However, even where a statement is found to be actionable *per se*, the law regards certain communications as privileged. A qualified privilege will prevent liability for a defamatory statement, when the statement is made:

> "(1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest."

Phillips, 117 N.C. App. at 278, 450 S.E.2d at 756 (quoting *Clark*, 99 N.C. App. at 262, 393 S.E.2d at 138). "The essential elements for the qualified privilege to exist are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a proper manner and [to] the proper parties only." *Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 602, 439 S.E.2d 797, 800 (1994). Whether a communication is privileged is a question of law for the court to resolve, unless a dispute concerning the circumstances of the communication exists, in which case it is a mixed question of law and fact. *Phillips*, 117 N.C. App. at 278, 450 S.E.2d at 756. Where the privilege is applicable, a presumption arises "that the communication was made in good faith and without malice." *Id.* The burden then falls upon the claimant to show either actual malice on the part of the declarant or excessive publication. *Harris v. Proctor & Gamble*, 102 N.C. App. 329, 332, 401 S.E.2d 849, 851 (1991).

In the instant case, the record indicates that Ridinger, as President of Market America, had legitimate interests in protecting the company against unfair competition through the unauthorized use of its trade secrets, encouraging company loyalty, and reassuring independent distributors that the company had been actively working to protect the integrity of their organizations. To apprise managing distributors of the threat posed by individuals seeking to recruit Market America distributors into CAT and the steps taken to eliminate the threat, Ridinger forwarded a bulletin to Market America's Advisory Counsel Members and Certified Trainers describing the relevant circumstances while attempting to boost morale. Defendant contends that the bulletin could have been distributed to as many as 500 people. She bases this contention on the testimony of Marc Ashley, Market America's Vice President of Administration, that he did not recall whether the bulletin was sent to anyone other than the named recipients. Defendant, however, has not presented any evidence to show that the bulletin was forwarded to anyone outside of the 85 Advisory Council Members and Certified Trainers. We conclude that under these circumstances, the communication was protected by a qualified privilege, and since defendant has failed to come

forward with any evidence of actual malice or excessive publication, the trial court did not err in entering summary judgment for Market America on defendant's libel claim.

[2] Defendant further argues that the trial court erred in granting Market America's motion for summary judgment with regard to her slander claim. We must disagree.

"Slander is defined as 'the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood.' " *Lee v. Lyerly*, 120 N.C. App. 250, 252, 461 S.E.2d 775, 777 (1995) (quoting *Long*, 113 N.C. App. at 601, 439 S.E.2d at 800), *rev'd on other grounds*, 343 N.C. 115, 468 S.E.2d 60 (1996). Slander is actionable either *per se* or *per quod*. *Id.* Statements that are slanderous *per se* include "accusation[s] of crimes or offenses involving moral turpitude, defamatory statements about a person with respect to [her] trade or profession, and imputation[s] that a person has a loathsome disease." *Gibby v. Murphy*, 73 N.C. App. 128, 131, 325 S.E.2d 673, 675 (1985). To fall within the class of slander *per se* as concerns a person's trade or profession, the defamatory statement "must do more than merely harm a person in [her] business. The false statement '(1) must touch the plaintiff in [her] special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on [her] business.' " *Lee*, 120 N.C. App. at 253, 461 S.E.2d at 777 (quoting *Tallent v. Blake*, 57 N.C. App. 249, 253, 291 S.E.2d 336, 339 (1982)).

Defendant contends that voicemail messages left by Mike Davis and Scott Tucker, both independent distributors for Market America, constituted slander *per se*. The trial court, however, was correct in granting summary judgment to Market America on defendant's claim as it related to these individuals, because the rule is well settled in North Carolina that an employer is not vicariously liable for the torts of an independent contractor. *Hartrick Erectors, Inc. v. Maxson-Betts, Inc.*, 98 N.C. App. 120, 389 S.E.2d 607 (1990). Moreover, regarding defendant's claim that Ridinger, Market America's President, left voicemail messages comparing her to members of the Heaven's Gate cult, defendant's evidence was fatally insufficient to establish a genuine issue of fact. The evidence consists of defendant's claim that at some point in time (she could not recall when), she listened to someone's voicemail (she could not recall whose) and heard Ridinger compare her to "the man from Mars what had all the people killed." She could not remember precisely what was said, and she had no witnesses or recordings to verify the existence of the message.

Accordingly, we hold that the trial court committed no error in allowing summary judgment for Market America on defendant's slander claim.

[3] Defendant additionally assigns as error the trial court's grant of Market America's motion for summary judgment on defendant's claim for restraint of trade. Defendant contends that the non-competition clause contained in the Agreement violates section 75-1 of the General Statutes. We disagree.

Under section 75-1 of the North Carolina General Statutes, contracts in restraint of trade are illegal. N.C. Gen. Stat. § 75-1 (1994).

> However, our courts have recognized the rule that a covenant not to compete is enforceable in equity if it is: (1) in writing; (2) entered into at the time and as part of the contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory embraced in the restrictions; (5) fair to the parties; and (6) not against public policy.

Starkings Court Reporting Services v. Collins, 67 N.C. App. 540, 541, 313 S.E.2d 614, 615 (1984). Even if the covenant not to compete is permissible in all other respects, "the restraint is unreasonable and void if it is greater than is required for the protection of the promisee or if it imposes an undue hardship upon the person who is restricted." *Id.* To be enforceable, a covenant not to compete " 'must be no wider in scope than is necessary to protect the business of the employer.' " *Hartman v. Odell and Assoc., Inc.*, 117 N.C. App. 307, 316, 450 S.E.2d 912, 919 (1994) (quoting *Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979)). If the covenant restraining competition "is too broad to be a reasonable protection to the employer's business it will not be enforced." *Whitaker General Medical Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989).

Defendant challenges Market America's covenant not to compete on three grounds: First, defendant contends that the covenant is void as to her because she was not an employee of Market America, but an independent distributor. However, this Court has held that non-competition clauses are applicable to independent contractor relationships. *See Starkings*, 67 N.C. App. 540, 313 S.E.2d 614 (finding that although otherwise permissible, covenant not to compete was unreasonable restraint of trade because provided for greater restraint than reasonably required for protection of promisee); *see also Baker v.*

Hooper, No. 03A01-9707-CV-00280, 1998 WL 608285 (Tenn. App. Aug. 6, 1998) (relying on *Starkings* decision, found that covenants not to compete apply to independent contractor relationships); *Renal Treatment Centers v. Braxton*, 945 S.W.2d 557 (Mo. App. E.D. 1997) (citing our decision in *Starkings*, concluded that non-compete clauses valid against independent contractors).

Secondly, defendant argues that the covenant was factually inapplicable to her because at the time of the actions giving rise to this litigation, she had neither resigned nor been terminated from her distributorship with Market America. Relying on the language that reads, "I agree not to enter into competition with Market America . . . for a period of six months from my written resignation or termination as an Independent Distributor of Market America[,]" defendant takes the position that the covenant would become operative only after termination or resignation and, thus, did not apply while she was still a distributor. This construction of the Agreement is contrary to reason, as Market America certainly intended to prohibit competition by those still working as distributors for the company. In North Carolina, an agreement " 'encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion.' " *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 569, 500 S.E.2d 752, 755-56, (quoting *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973)) *disc review denied*, —— N.C. ——, 514 S.E.2d 274 (1998). Inasmuch as the non-compete provision was impliedly operative while defendant remained a distributor with Market America, defendant's argument is without merit.

Lastly, defendant contends that there can be no legitimate business purpose for restricting distributors from participating in a business venture with a "similar matrix marketing system." Market America, however, asserts that this provision of the Agreement serves three basic goals:

> [F]irst, independent distributors of Market America simply cannot divide their efforts by working for more than one direct sales company. Second, by using a binary marketing structure itself, market America is vulnerable to distributors leaving and going to another binary company and removing not only themselves, but the critical parts of their sales organization as well. Third, many companies in the direct sales industry have regulatory problems and problems with legal compliance and Market America does

not want to see its distributors and all or parts of their sales organizations going to companies that do not comply with the law.

Unquestionably, Market America's interest in protecting the integrity and viability of the business is legitimate. Moreover, we note that the covenant expired six months from the date of termination or resignation. Thus, we hold that the non-competition clause was valid, and the court did not err in granting Market America's motion for summary judgment on defendant's claim for restraint of trade.

[4] With her next assignment of error, defendant asserts that the trial court improperly entered summary judgment for Market America on defendant's claim for unfair and deceptive trade practice. Again, we disagree.

Pursuant to section 75-1.1 of the North Carolina General Statutes, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1 (1994). "To prevail on a claim of unfair and deceptive trade practice a [claimant] must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the [claimant] or to his business." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). " 'A [trade] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' " *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 69, 344 S.E.2d 68, 76 (1986) (quoting *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980)), *quoted in Bolton Corp. v. T.A. Loving Co.*, 94 N.C. App. 392, 411, 380 S.E.2d 796, 808 (1989). Additionally, " '[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.' " *Opsahl*, 81 N.C App. at 69, 344 S.E.2d at 76 (quoting *Johnson*, 300 N.C. App at 264, 266 S.E.2d at 622), *quoted in Bolton*, 94 N.C. App. at 411-12, 380 S.E.2d at 808. The question of whether a particular practice is unfair or deceptive is a legal one, reserved for the court. *Wake Stone*, 111 N.C. App. at 282-83, 432 S.E.2d at 436.

Defendant contends that pursuant to our Supreme Court's holding in *Ellis*, 326 N.C. 219, 388 S.E.2d 127, libel *per se* directed toward a claimant in regards to the conduct of his business constitutes an unfair and deceptive trade practice in violation of section 75-1.1. Defendant, therefore, argues that because the 7 February 1997 bul-

letin was libelous *per se*, summary judgment for Market America on defendant's claim for unfair and deceptive trade practice was unwarranted.

In *Ellis*, the plaintiff, Ellis Brokerage Company, Inc., was a food broker whose function was "to convince large-quantity food buyers, such as hospitals and school systems, to place orders with the company's clients who [were] in the business of selling foods." *Id.* at 221, 388 S.E.2d at 128. The defendant, Northern Star Company, was one of the plaintiff's clients. After the defendant terminated its brokerage contract with the plaintiff, the defendant's president sent the following letter to several buyers who had received an earlier price list from the plaintiff:

> Dear Sir:
>
> We have recently received copies of a price list sent to you from Ellis Brokerage Company regarding pricing on Northern Star potato products. These prices were noted for *bids only*, delivered by Northern Star.
>
> We at Northern Star Company did not authorize such a price list and therefore cannot honor the prices as quoted[.]

Id. at 222, 388 S.E.2d at 129. The plaintiff instituted an action against the defendant alleging that the letter was libelous *per se* and constituted an unfair and deceptive trade practice affecting commerce under section 75-1.1. At the close of the plaintiff's evidence, the trial court granted the defendant's motions for directed verdicts on all claims but libel. The libel claim was submitted to the jury, which found that the defendant had maliciously libeled the plaintiff and awarded compensatory and punitive damages.

On appeal, the defendant argued that the "letter [was] not defamatory at all or, alternatively, it [was] susceptible of both defamatory and nondefamatory interpretations." *Id.* at 224, 388 S.E.2d at 130. The Court held that the letter was libelous *per se*, because under any reasonable interpretation, it impeached the plaintiff in its trade as a food broker. The Court further held that "a libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of N.C.G.S. § 75-1.1, which will justify an award of damages under N.C.G.S. § 75-16 for injuries proximately caused." *Id.* at 226, 388 S.E.2d at 131. "To recover, however, a plaintiff must have 'suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation.' " *Id.* (quoting

Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986)).

The holding in *Ellis* has no bearing on the present set of facts. Unlike the 7 February 1997 bulletin in the case *sub judice*, the defamatory letter was not determined to be protected by a qualified privilege. In fact, the defendant in *Ellis* did not even assert that such a privilege existed; instead, the defendant argued that the communication was not libelous. Furthermore, the record in the instant case contains no evidence to show that defendant " 'suffered actual injury as a proximate result of [the Follow-Up Bulletin].' " *Id.* Accordingly, we hold that defendant's reliance on *Ellis* is unfounded.

Defendant also argues that Market America inequitably asserted its power and position by seeking to enforce a non-competition clause which defendant contends was legally void. Given our determination that the non-competition clause was valid and enforceable, we reject defendant's contention as unpersuasive. Furthermore, because defendant has presented no facts to show any "immoral, unethical, oppressive, unscrupulous, or substantially injurious" conduct on the part of Market America, we hold that defendant failed to establish a triable issue of fact as to her claim for unfair or deceptive trade practice. *See Bolton*, 94 N.C. App. at 411, 380 S.E.2d at 808. This assignment of error, then, fails.

[5] By her next assignment of error, defendant argues that the trial court erroneously awarded summary judgment to Market America with respect to defendant's claim for tortious interference with business relations. Again, we cannot agree.

" 'As a general proposition any interference with free exercise of another's trade or occupation, or means of livelihood, by preventing people by force, threats, or intimidation from trading with, working for, or continuing [her] in their employment is unlawful.' " *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945) (quoting *Kirby v. Reynolds*, 212 N.C. 271, 281, 193 S.E. 412, 418 (1937)), *quoted in Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917 (1982). Typically, "a [defending party's] motive or purpose is the determining factor as to liability in actions for interference with economic relations, 'and sometimes it is said that bad motive is the gist of the action.' " *Id.* at 439, 293 S.E.2d at 916 (quoting Prosser § 129, pp. 927-28). Therefore, "to maintain an action for interference with business relations in North Carolina, [the complainant] must show that [the defending party] 'acted with malice and

for a reason not reasonably related to the protection of a legitimate business interest of [the defending party].' " *Id.* (quoting *Smith v. Ford Motor Co.*, 289 N.C. 71, 94, 221 S.E.2d 282, 296 (1976)).

Defendant contends that the threatening and intimidating tone of the 7 February 1997 bulletin prevented unnamed individuals from transacting business with her. Defendant asserts that as a result of the publication, her Market America business and her husband's CAT enterprise suffered. Throughout this litigation, however, defendant has maintained that she herself was not an independent distributor for CAT and that her only involvement with the organization was as an assistant to her husband. Thus, she had no CAT business with which Market America could interfere, and her claim in that regard fails. As to her Market America business, defendant has not shown how the 7 February 1997 publication interfered with any such economic relations. Furthermore, our prior conclusion that defendant failed to show any actual malice on the part of Market America in distributing the bulletin necessarily causes defendant's claim to fail. The trial court correctly granted summary judgment to Market America on her claim for wrongful interference with business practice.

For the foregoing reasons, the order of the trial court is affirmed.

Affirmed.

Judges JOHN and HUNTER concur.

JOY E. SCHMIDT, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL ANTHONY SCHMIDT, PLAINTIFF v. LAURIE BREEDEN, JENNIFER OWENS AND THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, DEFENDANTS

No. COA98-422

(Filed 20 July 1999)

1. Governmental Immunity— Board of Education—after school program

The trial erred by failing to direct partial summary judgment for the Board of Education in a personal injury action arising from an after-school enrichment program. Application of the principles in *Britt v. Wilmington*, 236 N.C. 446, and *Kiddie Korner v. Board of Education*, 55 N.C. App. 134, compels the

inclusion of the program within the class of activities regarded as traditional governmental functions; however, plaintiff does not dispute the assertion that the Board had no insurance coverage applicable to the first million dollars and the trial court should have directed partial summary judgment for the Board on claims below that amount.

2. Governmental Immunity— after-school program—staff members—sued in individual capacity

The trial court did not err in a personal injury action arising from an after-school program by not granting summary judgment for staff members based on governmental immunity. Although the complaint did not specify whether these defendants were sued in their official or individual capacities, the action was filed prior to *Meyer v. Walls*, 347 N.C. 97, and *Mullis v. Sechrest*, 347 N.C. 548, and the Court of Appeals examined the course of the proceedings and the allegations in the pleadings, which reflected an intent to sue these defendants in their individual capacities.

3. Public Officers and Employees— after school program—staff as public employees

The trial court did not err in a negligence action arising from an after-school enrichment program by denying summary judgment for two program staff members in their individual capacities. These defendants were properly designated public employees and not public officials and they may be held personally liable for negligent acts in the performance of their duties. However, the court erred by denying partial summary judgment on claims against these defendants in their official capacities for less than one million dollars, for which the Board of Education had no insurance coverage.

Appeal by defendants from order entered 6 February 1998 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 November 1998.

Justice & Eve, P.A., by David L. Edwards, for plaintiff-appellee.

Charles G. Monnett III, for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by James G. Middlebrooks and Elizabeth Baker Scanlan, for defendants-appellants.

JOHN, Judge.

Defendants appeal the trial court's denial of their motion for partial summary judgment predicated upon governmental immunity. We affirm in part and reverse in part.

Pertinent facts and procedural history include the following: On 15 January 1992, Michael Anthony Schmidt (Michael) was a six year old student enrolled in a voluntary after-school enrichment program operated and controlled by defendant Charlotte-Mecklenburg Board of Education (the Board) at the Idlewild Elementary School (hereinafter the Program). The Program was not included within the regular school curriculum, but rather was conducted between 2:00 and 6:00 P.M. each weekday afternoon. It provided:

> recreation for . . . children, a nutritious snack, homework time, . . . tutoring in areas that they may [have] need[ed] help . . . , hands-on type[s] of learning, science activities and music activities, language arts . . . [and] all kinds of different activities by way of play.

Michael's mother, plaintiff Joy E. Schmidt, was charged a thirty-five dollar ($35.00) per week enrollment fee for her son's participation in the Program.

According to plaintiff's complaint, Michael suffered a head injury 15 January 1992 while participating in the Program and in the care of Program staff members defendants Laurel Jeanne Breeden (Breeden) and her assistant Jennifer Owens (Owens). At home, Michael subsequently developed a headache, became nauseated and began to vomit. According to plaintiff, she did not realize the medical significance of these symptoms because no one from the Program had disclosed Michael's injury. As a consequence, appropriate medical treatment was delayed, exacerbating Michael's condition which ultimately included permanent brain and vision impairment.

On 8 October 1996, plaintiff filed the instant suit claiming Michael's injuries were caused by the negligence of defendants. The latter answered, generally denying plaintiff's allegations, and moved for partial summary judgment (defendants' motion) upon grounds that

> the Board of Education ha[d] not purchased a contract of insurance for the first $1,000,000 of exposure and thus ha[d] not

> waived its governmental immunity for any claim . . . below that threshold.

In opposing defendants' motion, plaintiff did not contest the absence of liability insurance covering claims up to $1,000,000.00. Rather, plaintiff asserted

> [t]he After-School Enrichment Program was, in effect, a private day care facility which operated and was located within a building ow[n]ed by the [d]efendant School Board.

Therefore, plaintiff concluded, the Board was not entitled to governmental immunity because operation of the Program constituted a proprietary function. The trial court denied defendants' motion 4 February 1998 and the latter timely appealed.

Preliminarily, we note that orders denying motions for summary judgment are interlocutory and generally not immediately appealable. *See Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978). Notwithstanding, our courts have established that denial of a summary judgment motion grounded upon governmental immunity affects a substantial right and is thereby immediately appealable pursuant to N.C.G.S. § 1-277(a) (1996) and N.C.G.S. § 7A-27(d) (1995). *See Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996); *see also Moore v. Evans*, 124 N.C. App. 35, 39, 476 S.E.2d 415, 420 (1996) (defendants' appeal proper where trial court denied defendants' partial summary judgment motion predicated upon governmental immunity). As defendants' motion relied upon the defense of governmental immunity, we address the merits of their appeal.

Summary judgment is appropriately granted if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C.G.S. § 1A-1, Rule 56(c) (1990). A summary judgment movant bears the burden of establishing the lack of any triable issue, and may do so by showing

> that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot . . . surmount an affirmative defense which would bar the claim. . . . All inferences of fact from the proofs offered at the

> hearing must be drawn against the movant and in favor of the party opposing the motion.

Boudreau v. Baughman, 322 N.C. 331, 342-43, 368 S.E.2d 849, 858 (1988) (citations omitted).

[1] Defendants assert the trial court erred in that

> operation and control of the [Program] by the Board is a governmental function . . . and therefore, the Board is entitled to partial summary judgment on the ground of governmental immunity.

We conclude defendants' argument has merit.

The liability of a county for torts of its officers and employees is dependent upon whether the activity in which the latter are involved is properly designated "governmental" or "proprietary" in nature, "a county [being] immune from torts committed by an employee carrying out a governmental function" and "liable for torts committed [by an employee] while engaged in a proprietary function." *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

Our Supreme Court has delineated the distinction between governmental and proprietary functions as follows:

> When a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers. In either event it must be for a public purpose or public use.
>
> So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security, or general welfare of the residents of the municipality.

Britt v. Wilmington, 236 N.C. 446, 450-51, 73 S.E.2d 289, 293 (1952).

In applying the foregoing test, our courts have focused upon the "commercial aspect of the definition." *Hickman v. Fuqua*, 108 N.C.

App. 80, 83, 422 S.E.2d 449, 451 (1992), *disc. review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993). "Charging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary." *Hare*, 99 N.C. App. at 698, 394 S.E.2d at 235. Nonetheless,

> a 'profit motive' is not the sole determinative factor when deciding whether an activity is governmental or proprietary. Using the *Britt* test, courts look to see whether an undertaking is one 'traditionally' provided by the local governmental units.

Hickman, 108 N.C. App. at 84, 422 S.E.2d at 451-52 (citations omitted).

Certain activities qualify as "clearly governmental such as law enforcement operations and the operation of jails, public libraries, county fire departments, public parks and city garbage services." *Hare*, 99 N.C. App. at 698, 394 S.E.2d at 235. "Non-traditional governmental activities such as the operation of a golf course or an airport are usually characterized as proprietary functions." *Id.* at 699, 394 S.E.2d at 235.

In advocating designation of the Program as a traditional governmental activity, defendants rely upon *Kiddie Korner v. Board of Education*, 55 N.C. App. 134, 285 S.E.2d 110 (1981), *disc. review denied*, 305 N.C. 300, 291 S.E.2d 150 (1982), wherein this Court viewed an after-school program as a "supplemental educational experience" and as an operation within the defendant school board's "[legislatively granted] power and authority." *Id.* at 140, 285 S.E.2d at 114. In *Kiddie Korner*, the Charlotte-Mecklenburg Board of Education had established a committee to operate an after-school program at Dilworth Elementary School (the Dilworth program). *Id.* at 135-36, 285 S.E.2d at 112. The Dilworth program was designed to "alleviate the problem of the 'latch key' child," *i.e.*, a child "left without supervision between the time school closes and the time [the child's] parents come home from work." *Id.* at 135 n.1, 285 S.E.2d at 112 n.1.

> Instead of leaving school at the end of the regular school day, the students enrolled in the [Dilworth] program remain[ed] at school where, under the supervision of program staff, they d[id] homework or study, and engage[d] in athletic or artistic activities.

Id. at 136, 285 S.E.2d at 112. "[T]he program [wa]s self-sufficient, the operating costs being covered by the $15.00 per week tuition charged to the participants." *Id.*

In similar vein, plaintiff testified she placed Michael in the Program because he "needed a safe place . . . to stay after school until [his parents] could pick him up after work," thereby resolving plaintiff's "latch key" child situation. Further, like the Dilworth program, the Program herein did not constitute part of the regular school curriculum, charged a fee, and provided

> recreation for . . . children, a nutritious snack, homework time, . . . tutoring in areas that they may [have] need[ed] help . . . , hands-on type[s] of learning, science activities and music activities, language arts . . . [and] all kinds of different activities by way of play.

Careful comparison leads to the conclusion that the Program is indistinguishable from that reviewed in *Kiddie Korner*. Under *Kiddie Korner* and the test enunciated in *Britt*, therefore, the Program is properly characterized as "an undertaking . . . 'traditionally' provided by the local governmental units," *Hickman*, 108 N.C. App. at 84, 422 S.E.2d at 452 (citation omitted), and correctly classified as a "supplemental educational experience," *Kiddie Korner*, 55 N.C. App. at 140, 285 S.E.2d at 114.

Plaintiff concedes that "governments in North Carolina have traditionally engaged in activities involving the education of children." However, plaintiff advances the further contention that the Program is more accurately described as a day-care facility, and thus a non-traditional governmental activity, in that it is subject to N.C.G.S. § 110-85 *et seq.* and the rules and regulations established by the Child [Day] Care Commission. Plaintiff is mistaken.

Significantly, plaintiff cites no legal authority, and our research has disclosed none, supporting her contention. To the contrary, similar to our conclusion in *Kiddie Korner* that the Dilworth program was not subject to G.S. § 110-85 *et seq.* and attendant day-care regulations, *see Kiddie Korner*, 55 N.C. App. at 137, 285 S.E.2d at 113, we observe the Program fails to meet the statutory definitional requirement that it operate "for more than four hours per day." *See* G.S. § 110-86(3) (defining day-care facility as "any day-care center or child-care arrangement which provides day care on a regular basis for *more than four hours per day* . . . .) (emphasis added); *cf.* 60 N.C. Op. Atty. Gen. 36 (1990) ("the General Assembly intended all programs operated by public schools under the authority conferred upon them by the General Assembly and the State Board of Education to be exempt from licensure and regulation by the Day Care

Commission"). Plaintiff's reliance on G.S. § 110-85 *et seq.* is thus unfounded.

In addition, plaintiff places great weight upon the circumstance that she is charged a weekly fee for Michael's participation in the Program. This Court has observed that "[c]harging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary." *Hare*, 99 N.C. App. at 699, 394 S.E.2d at 235. However, no evidence in the record *sub judice* reveals the profit, if any, derived by the Board from the weekly fees collected from participants in the Program.

Moreover, taking into consideration the twenty hour per week operation of the Program, simple mathematical calculation places plaintiff's weekly fee payment at less than two dollars per hour for Michael's enrollment. It is doubtful that such a fee structure, which must account for costs of activities, materials, staff compensation and refreshments, may fairly be described as "substantial." *Id.* at 699, 394 S.E.2d at 235.

In short, application of *Kiddie Korner* and the principles enunciated in *Britt* compels inclusion of the Program within the class of activities regarded as traditional governmental functions. *See Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 10, 418 S.E.2d 648, 654-55 (1992) ("[e]ducation is a governmental function so fundamental in this state that our constitution contains a separate article entitled 'Education' " [and] "the construction and maintenance of local public schools by a local school board is . . . a governmental function"); *see also Hickman*, 108 N.C. App. at 84, 422 S.E.2d at 452 ("[t]he creation and operation of . . . recreation programs are legitimate and traditional functions of government"); *cf. Dollar v. Dalton Public Schools*, 233 Ga. App. 827, 828, 505 S.E.2d 789, 790 (1998) ("after-school program, for which [plaintiff] paid a fee, . . . operated by a school district [on school premises] . . . is . . . a governmental activity"); *Abrams v. City of Rockville*, 88 Md. App. 588, 604, 596 A.2d 116, 124 (1990) (after-school program "designed to provide an educational and socialization program to children in the city as well, no doubt, to safeguard and supervise them while their parents were at work . . . . [is] of a governmental nature"). Under N.C.G.S. § 115C-42 (1997), therefore, the Board is entitled to governmental immunity to the extent it has not been waived by the purchase of liability insurance. *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 24, 348 S.E.2d 524, 527 (1986).

Plaintiff does not dispute defendants' assertion that "the Board had no insurance coverage in effect on [the date of Michael's injury] that might be applicable to the first $1,000,000 in damages." The trial court thus erred by failing to direct partial summary judgment in favor of the Board for plaintiff's claims below that amount, *see Boudreau*, 322 N.C. at 342-43, 368 S.E.2d at 858, and this matter must be remanded for entry of such order.

[2] Defendants next argue that because Breeden and Owens were "sued only in their official capacity," they were "entitled to partial summary judgment to the same extent as the Board." We cannot agree.

Our Supreme Court examined the distinction between official and individual capacity claims in *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997):

> The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. . . . If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Id. at 110, 489 S.E.2d at 887 (citation omitted).

Further,

> It is true that it is often not clear in which capacity the plaintiff seeks to sue the defendant. In such cases it is appropriate for the court to either look to the allegations contained in the complaint to determine plaintiff's intentions or assume that the plaintiff meant to bring the action against the defendant in his or her official capacity.

Mullis v. Sechrest, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998) (citation omitted).

In the case *sub judice*, plaintiff has sought monetary damages, but failed to specify in the caption of her complaint whether Breeden and Owens were being sued in their official or individual capacities. It is now clear that "in order for defendant[s] . . . to have an opportu-

nity to prepare a proper defense, [a] pleading should . . . clearly state[] the capacity in which [defendants are] being sued." *Id.* at 552, 495 S.E.2d at 724.

As noted in *Mullis*:

> It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words "in his official capacity" or "in his individual capacity" after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity.

Id. at 554, 495 S.E.2d at 724-25.

Notwithstanding, as the instant suit was filed prior to the decisions in *Meyer* and *Mullis*, we decline defendants' invitation to reverse the trial court upon the ground that plaintiff's complaint failed to meet the requirements thereof. Rather, we proceed to examine the "course of the proceedings and allegations contained in the pleading to determine the capacity in which defendant[s] [Breeden and Owens have] be[en] sued." *Mullis*, 347 N.C. at 553, 495 S.E.2d at 724.

Defendants suggest the "only indication that might possibly lead to the conclusion that [Breeden] and [Owens] were sued in their individual capacit[ies]" is found in plaintiff's prayer for relief "jointly and severly [sic]." We conclude the language of plaintiff's request for relief indeed implies that "damages [we]re [being] sought from the . . . pocket[s]" of Breeden and Owens in their individual capacities, *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887, but find further indications supporting this conclusion as well.

For example, in the section of her complaint identifying "Parties, Jurisdiction and Venue," plaintiff alleged that Breeden and Owens were "citizen[s] and resident[s] of Charlotte, Mecklenburg County, North Carolina," and only in a subsequent paragraph linked them to the Board as agents. By contrast, the allegations of residency and agency in *Mullis* were included in a single paragraph. *See Mullis*, 347 N.C. at 553, 495 S.E.2d at 724.

More significantly, plaintiff's complaint posited two separate causes of action, the first asserting "Negligence of Defendant Board of Education," and the second "Negligence of Defendants Breeden and Owens." *See id.* (circumstance that plaintiffs "only set forth one claim for relief" relevant in determining intended capacity of defendants).

Thus, in view of the "course of the proceedings and the allegations contained in the [pleading]," *id.*, plaintiff's complaint adequately reflected "an intent . . . to sue defendant[s]" Breeden and Owens in their individual capacities such that defendants had an "opportunity to prepare a proper defense." *Id.* at 554, 495 S.E.2d at 725.

[3] Our courts have long recognized that public officers and public employees are generally afforded different protections under the law when sued in their individual capacities. Having determined Breeden and Owens to have been sued individually, we therefore next consider whether each qualifies as a public officer or public employee.

"An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power." *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965).

> A public officer is shielded from liability unless he engaged in discretionary actions which were allegedly: (1) corrupt, *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985); (2) malicious, *id.*; (3) outside of and beyond the scope of his duties, *id.*; (4) in bad faith, *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236; or (5) willful and deliberate, *Harwood v. Johnson*, 92 N.C. App. 306, 310, 374 S.E.2d 401, 404 (1988).

Reid v. Roberts, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119, *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993).

A public employee, on the other hand, "is personally liable for negligence in the performance of his or her duties proximately causing an injury," *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236, "even though his employer is clothed with immunity and not liable on the principle of *respondeat superior*." *Pharr v. Worley*, 125 N.C. App. 136, 138, 479 S.E.2d 32, 34 (1997) (citation omitted).

In light of the foregoing authorities, we believe Breeden and Owens are properly designated public employees and not public officials. Their duties as staff members of the Program when the alleged negligence occurred cannot be considered in the eyes of the law to involve the exercise of the sovereign power. To the contrary, a schoolteacher "is an employee and not an officer and is therefore not entitled to governmental immunity as [his or] her duties are purely ministerial. . . ." *Daniel v. City of Morganton*, 125 N.C. App. 47, 55, 479 S.E.2d 263, 268 (1997). Accordingly, defendants Breeden and Owens may be held personally liable for negligent acts in the performance of their duties, *see id.*, and the trial court did not err in denying defendants' motion as it pertained to plaintiff's claims against Breeden and Owens in their individual capacities.

However, Breeden and Owens were entitled to partial summary judgment to the same extent as the Board for claims against them in their official capacities. *See Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (official-capacity suits merely another means of pleading an action against the governmental entity), and the trial court erred by denying this portion of defendants' motion.

In sum, the trial court's denial of defendants' motion as to the Board and to Breeden and Owens in their official capacities is reversed and this matter remanded for entry of partial summary judgment in favor of said defendants on plaintiff's claims below $1,000,000.00. The trial court's denial of defendants' motion as it pertained to the claims of plaintiff against Breeden and Owens in their individual capacities is affirmed.

Reversed and remanded in part; affirmed in part.

Judges WALKER and McGEE concur.

JOHN WINSTON, PLAINTIFF v. MAURICE ANTONIO BRODIE, LACHELLE WYCHE AND AUTO RENTAL SYSTEMS, INC., DEFENDANTS

No. COA98-592

(Filed 20 July 1999)

1. Evidence— chiropractor's testimony—injuries to extremities

The trial court did not err in a personal injury action arising from an automobile accident by allowing a chiropractor to testify concerning injury to plaintiff's bodily extremities. Extremities, including the hand and arm, constitute parts of the body to which nerves radiate from the spine and which are therefore encompassed within the scope of chiropractic medicine.

2. Evidence— chiropractor's testimony—causation and permanency of injuries

The trial court did not err in a personal injury action arising from an automobile accident by allowing a chiropractor to testify as to the causation and permanency of plaintiff's injuries.

3. Agency— leased automobile—personal injury action—liability of lessee for another driver

The trial court erred by failing to grant defendant Wyche's motion for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a) in a negligence action arising from an automobile accident where Wyche leased a vehicle which was being driven by another (Brodie) when the accident occurred. Although proof of ownership under N.C.G.S. § 20-71.1 creates a prima facie case of agency that permits but does not compel a finding for plaintiff, there was no persuasive evidence or authority supporting classification of a lessee as owner or vicarious owner of the leased vehicle. Moreover, although Wyche has listed Brodie as an additional driver, there was no evidence that she exercised control over his use or operation of the vehicle and no evidence that tended to show that Brodie was acting as Wyche's agent or employee.

4. Agency— leased autobobile—negligence action—liability of rental agency

The trial court erred in a personal injury action arising from an automobile accident by denying defendant-Auto Rental's motion for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a) where defendant had stipulated that it owned and had registered a leased vehicle involved in the accident, which prima facie

established agency under N.C.G.S. § 20-71.1(b), but defendant presented positive, contradicting evidence tending to show that it had no agency relationship with the driver. Defendant was entitled to a peremptory instruction that the jury must find for defendant on the agency issue if it believed Auto Rental's evidence.

Appeal by defendants from judgment entered 17 December 1997 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 12 January 1999.

David R. Cockman, for plaintiff-appellee.

Alison A. Erca, for defendant-appellant Auto Rental Systems, Inc.

Robert E. Ruegger, for defendant-appellant Lachelle Wyche.

Vance C. Kinlaw, for North Carolina Board of Chiropractic Examiners, amicus curiae.

JOHN, Judge.

Defendants Lachelle Wyche (Wyche) and Auto Rental Systems, Inc. (Auto Rental) appeal, contending the trial court erred by allowing certain medical testimony and denying their motions for directed verdict pursuant to N.C.G.S. § 1A-l, Rule 50(a) (1990) (Rule 50(a)). We disagree as to the first contention, but conclude denial of the Rule 50(a) motions constituted error.

Relevant facts and procedural history include the following: On 19 July 1995, Wyche leased a vehicle from Auto Rental and listed Maurice Brodie (Brodie) as an additional driver on the "Rental Agreement for Temporary Substitute Automobile Replacement Only" form. On 19 August 1995, Brodie, unaccompanied by Wyche, was operating the leased vehicle when it collided with an automobile driven by plaintiff John Winston (Winston). Winston, injured in the collision, was treated by Dr. Gregory Baldy (Dr. Baldy), a chiropractor, for neck, back, head, arm, elbow, wrist, hand and finger injuries.

Winston filed suit against Brodie, Auto Rental and Wyche, which action came to trial 15 December 1997 before a jury. At the close of all evidence, Wyche and Auto Rental moved for directed verdict, claiming no grounds existed to hold either vicariously liable for Brodie's negligence. The trial court denied the motions.

Additionally, the court informed the jury in pertinent part that the parties had stipulated in a Pre-trial Conference Order to the following:

> E. . . . Wyche rented . . . [an] automobile from Auto Rental and listed Brodie as an additional driver of said vehicle . . . .
>
> . . . .
>
> G. . . . Auto Rental Systems[,] Inc., was the owner of [the] . . . automobile . . . leased to [Wyche] and . . . operated by [Brodie].
>
> H. That the automobile . . . bore . . . registration [named to Auto Rental].
>
> I. Defendants admit that Defendant Brodie was negligent and said negligence was the proximate cause of any damages . . . .
>
> The trial court then related to the jury that
>
> [d]ue to the stipulations . . . the court ha[d] answered the first issue in term of the negligence of one or more of the defendants as "yes" in favor of the plaintiff.

The foregoing determination by the trial court subjected all defendants to liability for Winston's injuries, leaving only the issue of damages for the jury. The issue was framed as follows:

> What amount, if any, is the plaintiff, John Winston, entitled to recover for personal injuries from the defendants Maurice Antonio Brodie, Lachelle Wyche, and Auto Rental Systems, Inc.?

The jury returned a verdict awarding plaintiff $32,000.00, and the three defendants thereupon moved jointly to set aside the verdict and for new trial. On 23 December 1997, the trial court denied the motions and entered judgment against defendants jointly and severally. All defendants timely appealed; however, only the appeals of Wyche and Auto Rental (defendants) are presently before us.

[1] Defendants first contend the trial court erred by allowing Dr. Baldy to testify concerning the condition, treatment, causation and permanency of Winston's arm, hand and finger injuries. Dr. Baldy was qualified as an expert in the field of chiropractic medicine and testified he performed chiropractic, orthopedic and neurological examinations when Winston initially presented to him on 11 September 1995. According to Dr. Baldy, he released Winston after three months

of treatment, but the latter returned once in 1996 and four times in 1997 due to injury "flare-ups."

The challenged testimony from Dr. Baldy essentially related to injuries involving Winston's arm, elbow and "muscles that tie into the wrists." Dr. Baldy explained that he examined Winston's arm region to determine "whether the pain in the arms [wa]s coming from the neck region . . . because the spine contains the nerves that go out into the arm." Dr. Baldy also related that Winston had pain in his right hand and a permanent joint injury to one finger. Defendants maintain testimony concerning extremity injuries is beyond the scope of chiropractic as set forth in N.C.G.S. § 90-157.2 (1997). We do not agree.

The statute permits testimony by a doctor of chiropractic as to:

> (1) The etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic, as defined in G.S. 90-151; and
>
> (2) The physiological dynamics of contiguous spinal structures which can cause neurological disturbances, the chiropractic procedure preparatory to, and complementary to the correction thereof, by an adjustment of the articulations of the vertebral column and other articulations.

G.S. § 90-157.2. Articulation is defined as the "connection of bones or joints." *New Lexicon Illustrated Medical Encyclopedia and Guide to Family Health* 575 (1988).

Chiropractic medicine is the:

> science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body.

N.C.G.S. § 90-143(a) (1997).

In *Thomas v. Barnhill*, 102 N.C. App. 551, 403 S.E.2d 102 1991), this Court held testimony regarding the diagnosis, treatment and disability rating of a muscle injury was within the scope of chiropractic medicine under subsection (2) of G.S. § 90-157.2. We observed that

> legislative history suggests . . . the General Assembly intended "to allow chiropractors to testify as to the spinal column and the physical structures that support and/or complement it."

Thomas, 102 N.C. App. at 554, 403 S.E.2d at 103 (quoting Minutes of the House Judiciary Committee (June 29, 1989)). This Court has also recognized that certain spinal injuries may cause neurological and muscular complaints affecting the brain, nerves and surrounding muscles, resulting in pain at various sites, including the hand. *See Wooten v. Warren*, 117 N.C. App. 350, 356, 451 S.E.2d 342, 346 (1994).

Based on the foregoing, we hold that extremities, including the hand and arm, constitute parts of the body to which nerves radiate from the spine and which are therefore encompassed within the scope of chiropractic medicine. In addition, bodily extremities are properly considered "physical structures that support and/or complement," *Thomas*, 102 N.C. App. at 554, 403 S.E.2d at 103, functions of the spinal cord based upon nerve and muscle connections central to both, *see generally Wooten*, 117 N.C. App. at 356, 451 S.E.2d at 346 (testimony related to nerve and muscle connections with spinal column within chiropractic expertise). Accordingly, the trial court did not err in allowing Dr. Baldy's testimony concerning injury to Winston's bodily extremities.

[2] Defendants also argue the trial court erred in permitting Dr. Baldy to testify as to the causation and permanency of Winston's injuries. Dr. Baldy expressed the opinion that "based on the history, the examination, and the findings from that examination," Winston's injuries were the "result of that accident on 19 August, 1995" and would require treatment entailing "maybe 20 visits a year." In light of the decisions cited above, suffice it to state Dr. Baldy's testimony concerning the permanency and cause of Winston's injuries was likewise within the scope of G.S. § 90-157.2 and properly allowed for consideration by the jury. *See Thomas*, 102 N.C. App. at 554, 403 S.E.2d at 103 (testimony of chiropractor proper to support jury charge relating to permanency of injury), and *Wooten*, 117 N.C. App. at 356, 451 S.E.2d at 346 (testimony that accident caused muscle injury within scope of chiropractic).

[3] Defendants next attack the trial court's denial of their respective Rule 50(a) motions. Wyche and Auto Rental argue that no basis was provided in the evidence to impute the admitted negligence of Brodie to either. We conclude the trial court erred in denying the motions of both Wyche and Auto Rental.

A motion for directed verdict under Rule 50(a) "tests the legal sufficiency of the evidence, considered in the light most favorable to the nonmovant, to take the case to the jury." *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). When the evidence is insufficient to support a verdict in the nonmovant's favor, the motion must be granted. *Stanfield v. Tilghman*, 342 N.C. 389, 394, 464 S.E.2d 294, 297 (1995). The grounds in support and opposition of the directed verdict motion must be specifically stated, Rule 50(a), and in reviewing the trial court's ruling, an appellate court will not consider grounds other than those presented to the trial court, *La Grenade v. Gordon*, 60 N.C. App. 650, 653, 299 S.E.2d 809, 811-12 (1983).

Winston responds to defendants' argument by asserting that Wyche, as "vicarious" owner of the leased vehicle, and Auto Rental, the registered owner, were indeed liable for damages resulting from the admitted negligence of Brodie because each expressly allowed Brodie to operate the vehicle. For example, Winston alleged in his complaint:

> 6) . . . [Auto Rental] was the owner of a . . . vehicle which was being operated by the individual defendant, [Brodie,] and was being driven and used with the permission, authority, consent, and knowledge of the owner of the said vehicle, Auto Rental, and control, express or implied, and was also being operated with the permission, authority, consent and knowledge of Wyche.
>
> . . . .
>
> 12) That the defendant, Brodie, was negligent, which negligence is imputed to Auto Rental and Wyche, in that he drove Auto Rental's car into the rear of the automobile plaintiff was driving . . . .

Winston in his pleadings as well as argument at trial thus relied entirely upon the principles enunciated in N.C.G.S. § 20-71.1 (1993), which provides:

> (a) In all actions to recover damages for injury to the person or to property . . . arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be *prima facie* evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.

> (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be *prima facie* evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

G.S. § 20-71.1.

The purpose of the section is "to facilitate proof of ownership and agency where a vehicle is operated by one other than the owner." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 756, 325 S.E.2d 223, 228 (1985). Proof of ownership under G.S. § 20-71.1 creates a *prima facie* case of agency that "permits, but does not compel a finding for plaintiff." *Id.* Essentially, the statute enables plaintiff to "submit a *prima facie* case of agency to the jury which it can decide to accept or reject." *Scallon v. Hooper*, 49 N.C. App. 113, 117, 270 S.E.2d 496, 499 (1980), *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982).

Once a plaintiff satisfactorily presents an evidentiary showing of agency under G.S. § 20-71.1, the defendant may offer positive, contradicting evidence which, if believed, would establish the absence of an agency relationship. *See DeArmon*, 312 N.C. at 759, 325 S.E.2d at 230. Presentation of such evidence entitles the defendant

> to a peremptory instruction that if the jury does believe the contrary evidence, it must find for defendant on the agency issue.

Id.

The provisions of G.S. § 20-71.1 constitute a rule of evidence and not substantive law. *Duckworth v. Metcalf*, 268 N.C. 340, 343, 150 S.E.2d 485, 488 (1966). The plaintiff thus continues to carry the burden of proving an agency relationship between the driver and owner at the time of the driver's negligence. *Id.*; *see also Parker v. Underwood*, 239 N.C. 308, 310, 79 S.E.2d 765, 766 (1954) (plaintiff maintains burden of alleging ultimate facts on which to base a cause of actionable negligence). The defendant may choose to present evidence contrary to the plaintiff's *prima facie* showing, but at no point carries the burden of proof. *See DeArmon*, 312 N.C. at 756, 325 S.E.2d at 228.

As to Wyche, Winston argues Brodie's negligence would be imputed to her because as lessee she "vicariously" owned the leased

vehicle and Brodie was acting as her agent pursuant to expressed consent. We do not agree.

Winston presented no persuasive evidence at trial nor argues any authority to this Court supporting classification of Wyche, a lessee, as owner or "vicarious" owner of the leased vehicle. *See Brown v. Ward*, 221 N.C. 344, 347, 20 S.E.2d 324, 326 (1942) (mere "relationship of a lessor and lessee is not that of principal and agent"). Without proof of such ownership, G.S. § 20-71.1 may not be applied. *See Freeman v. Biggers Brothers, Inc.*, 260 N.C. 300, 302, 132 S.E.2d 626, 628 (1963) (absent evidence to support allegation defendant was owner of vehicle, plaintiff not entitled to benefit of G.S. § 20-71.1).

Although Wyche listed Brodie as an additional driver on the lease agreement, there was no evidence she exercised control over his use or operation of the vehicle. *See DeArmon*, 312 N.C. at 753, 325 S.E.2d at 226-27 (bailor "not responsible to third parties for the bailee's negligent use . . . where all control of the equipment has been relinquished to the bailee"). Indeed, it is uncontradicted in the record that Wyche gratuitously loaned the vehicle to Brodie and was not accompanying him when the collision occurred. *See Bramlett v. Overnite Transport*, 102 N.C. App. 77, 82, 401 S.E.2d 410, 413, *disc. review denied*, 329 N.C. 266, 407 S.E.2d 830 (1991) (bailor who gratuitously loaned equipment to bailee not liable for bailee's negligent use of bailed equipment over which bailee had sole custody and control). Finally, no evidence tended to show Brodie was acting as Wyche's agent or employee, but rather that Brodie was using the vehicle for his own purposes at the time in question. The trial court therefore erred by failing to grant Wyche's Rule 50(a) motion for directed verdict, and this matter must be remanded with the directive that such order be entered.

[4] Auto Rental on the other hand stipulated in the Pre-Trial Conference Order that it owned and had registered the leased vehicle in its name. Such evidence *prima facie* established agency under G.S. § 20-71.1(b), entitling Winston to present argument to the jury that Auto Rental was responsible for Brodie's negligence. *See* G.S. § 20-71.1(a)&(b) (proof of ownership is *prima facie* evidence vehicle was being operated with authority and consent of owner so as to hold latter responsible for driver's conduct during operation thereof).

Nonetheless, in response to the *prima facie* showing in consequence of Auto Rental's stipulations, the latter presented positive,

contradicting evidence tending to show it had no agency relationship with Brodie. Auto Rental claimed Brodie was not its employee, that it had no control over Brodie's use or operation of the vehicle, and that Brodie had sole custody of the vehicle at the time of the collision. Our Supreme Court has observed that "the operator of a [leased vehicle] is not thereafter the agent of the owner if . . . the owner relinquishes all right to control the [vehicle's] operation." *DeArmon*, 312 N.C. at 753, 325 S.E.2d at 227.

In addition, Auto Rental's lease with Wyche explicitly provided that the "[r]enter or the driver of [the] vehicle shall in no event be deemed the agent or employee of Auto Rental Systems, Inc., in any manner or for any purpose." As pointed out in *DeArmon*, lease terms expressly relinquishing control over a leased vehicle may be considered in determining whether the operator was the agent of the owner-lessor. *Id.* at 754, 325 S.E.2d at 227; *see Peterson v. Trucking Co.*, 248 N.C. 439, 442-43, 103 S.E.2d 479, 481-82 (1958) (lease terms giving lessee all control and financial responsibility over leased tractor indicated lessee was not agent of lessor). Auto Rental's evidence, if believed by the jury, thus tended to establish that Brodie was not its agent at the time of the collision.

Following Winston's *prima facie* showing under G.S. § 20-71.1 and Auto Rental's presentation of contrary evidence, Auto Rental was entitled to a peremptory instruction that if the jury "believe[d] the contrary evidence, it must find for [Auto Rental] on the agency issue." *DeArmon*, 312 N.C. at 759, 325 S.E.2d at 230. However, the trial court not only failed to give such an instruction, but withdrew the issue of agency from the jury when it informed the jury the court had decided the first issue and that the sole remaining issue was that of damages. By its own accord, the trial court held Auto Rental liable for Brodie's negligence based upon the Pre-Trial Stipulation Order, which did not resolve, but rather reiterated argument, on the issue of agency. In doing so, the trial court erred and Auto Rental is entitled to a new trial.

Reversed and remanded for entry of directed verdict as to defendant Wyche; new trial as to defendant Auto Rental.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. COASTLAND CORPORATION, DEFENDANT

No. COA98-1067

(Filed 20 July 1999)

1. **Eminent Domain— Dept. of Administration condemnation—authority**

The trial court did not err by concluding that the State was authorized to condemn defendant's undivided one-fifth interest in land used for mosquito control and wildlife management (an ownership arrangement resulting from a prior judicial decision). The Department of Administration can act to condemn land using either its own authority, N.C.G.S. § 146-22.1(1) (Board of Transportation procedures) or the authority of the requesting agency. It is clear that here the State utilized Transportation procedures, that the trial court could reasonably determine from the affidavits, exhibits, and the Secretary of Administration's findings that the DOA properly investigated all aspects of the requested acquisition as required by the statute, and that each of the necessary elements was included in the complaint and declaration.

2. **Eminent Domain— statement of public use—wildlife management lands**

The statement of public use in a condemnation action was sufficient where it stated that the lands were an integral part of Wildlife Resources Commission facilities and N.C.G.S. § 146-22.1 specifically authorizes the Department of Administration to take title to lands necessary or convenient to the operation of state owned facilities.

3. **Eminent Domain— interest acquired—less than fee simple**

The State may acquire less than a fee simple interest in property.

Appeal by defendant from judgment entered 24 April 1998 by Judge James E. Ragan, III, in Pamlico County Superior Court. Heard in the Court of Appeals 21 April 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Roy A. Giles, Jr., for the State.

Henderson, Baxter, Alford & Taylor, P.A., by David S. Henderson, for defendant-appellant.

LEWIS, Judge.

Defendant appeals from the trial court's order denying its motion to dismiss the State's declaration of taking and notice of deposit. Defendant contends that the trial court lacked subject matter jurisdiction because "plaintiff has sought to condemn property for a purpose which is beyond their statutory authority." Defendant also asserts that the State failed to state a claim upon which relief could be granted because the taking was not for a public purpose. The trial court concluded that the State was authorized to take defendant's property pursuant to N.C. Gen. Stat. sections 146-22.1(1) and (10) (1991), and that the State might alternatively take the property pursuant to N.C. Gen. Stat. section 113-306(a) (1997). Defendant made fourteen assignments of error, and argues six of them in one massive contention that the "State's attempt to take real property of the defendant is not a taking for a public purpose."

Defendant and the State own approximately 1000 acres as tenants in common, with defendant owning a one-fifth undivided interest and the State owning the remaining four-fifths. This unusual ownership arrangement exists pursuant to a North Carolina Supreme Court decision. *See Taylor v. Johnston*, 289 N.C. 690, 224 S.E.2d 567 (1976). The State, using public funds, constructed impoundments on the property in 1963. The impoundments were intended to provide mosquito control and a management area for wildlife, including waterfowl, shorebirds, wading birds, turtles, and other creatures. The twelve miles of dikes that make up the impoundments, together with their pumping stations, pumps, sheds and utility buildings, have been maintained continuously by the State since the 1960's. The area serves as a habitat and/or breeding area for numerous species, including the endangered peregrine falcon and the threatened bald eagle. The land is available for public wildlife-based recreations such as fishing, birdwatching, and photography. Hunting is permitted in the impoundments an average of 20 days per year and in the marsh area approximately 60 days per year. Maintenance of the facility structures and equipment requires 124 man-days per year, habitat management requires 40 man-days per year, and regulation of the area requires 60 man-days per year. Average annual costs for operation of the facility since 1962 have been $30,030, not including labor which currently requires approximately $11,000 per year.

In 1985, defendant purchased its one-fifth undivided interest from John "Jack" Taylor, a party to the case establishing shared own-

ership with the State. The record indicates that defendant and the State have negotiated unsuccessfully to resolve the joint ownership situation since 1985. Defendant was willing to pay the State approximately $800,000 for the State's 80% interest in the land; however, an offer by the State to purchase defendant's 20% interest for $200,000 was refused by defendant. The State declined to physically partition the property, claiming such a division would adversely affect the management and operation of the impoundment facility. At various times the parties considered land trades, a sale by defendant if the State could secure a permit so defendant could build impoundments on adjacent property, and donation of the land to the State, all without agreement.

In 1991, the Wildlife Resources Commission asked the State Property Office, a division of the Department of Administration ("DOA"), to assess alternatives to the joint ownership. In October of 1995, the Wildlife Commission adopted a resolution requesting that DOA acquire defendant's interest by condemnation since all prior negotiations had failed. On 24 June 1996, defendant filed a petition for partition against the State. The Governor and the Council of State approved an action of condemnation as requested by DOA on 6 August 1996, and on 29 August 1996, the State, through DOA, filed a Complaint and Declaration of Taking and Notice of Deposit for defendant's one-fifth interest. The State deposited $200,000 in Pamlico County Superior Court, and title in the one-fifth interest thereby immediately vested in the State, as provided by N.C. Gen. Stat. section 136-104 (1993).

The State moved to dismiss defendant's partition proceeding on grounds of sovereign immunity and mootness on 16 September 1996. On 27 September 1996, defendant voluntarily dismissed its partition proceeding; defendant reinstituted the partition action on 26 September 1997. The State again filed a motion to dismiss on grounds of mootness and sovereign immunity on 21 October 1997. The State's motion to dismiss the partition suit was granted on 24 April 1998, but defendant still contests the validity of the taking by eminent domain.

Defendant asserted in the trial court that the taking was improper because it was beyond statutory authority and was not for a public purpose. The trial court denied defendant's motion to dismiss, and from this order defendant appeals. An opinion filed concurrently with this one, *Coastland Corporation v. N.C. Wildlife Resources Comm'n*,

134 N.C. App. 343, —— S.E.2d —— (1999), addresses the issues of mootness and sovereign immunity raised by the partition proceeding. Here we address defendant's arguments regarding the propriety of the taking.

[1] Defendant assigns error to the trial court's conclusions of law that the State was authorized to condemn the undivided one-fifth interest pursuant to N.C. Gen. Stat. sections 146-22.1 (1) and (10) (1991) and pursuant to N.C. Gen. Stat. section 113-306 (1997). The DOA's authority to condemn land is found in Chapter 146, Article 6 of our General Statutes.

> In carrying out the duties and purposes set forth in Chapters 143 and 146 of the General Statutes, the Department of Administration is vested with the power of eminent domain . . . . The power of eminent domain herein granted is supplemental to and in addition to the power of eminent domain which may be now or hereafter vested in any State agency. . . and [DOA] may exercise on behalf of such agency the power vested in said agency or the power vested in [DOA] herein.

N.C. Gen. Stat. § 146-24.1 (1991). The duties of DOA include acquiring land for state agencies. *See* N.C. Gen. Stat. § 143-341 (4)(d) (1999); *State v. Club Properties*, 275 N.C. 328, 331, 167 S.E.2d 385, 387 (1969). In acquiring property, "the Department of Administration may follow the procedure set forth in G.S. 146-24 or the procedure of such agency, at the option of the Department of Administration." G.S. § 146-24.1. Therefore, DOA can act to condemn land using ***either*** its own authority, here alleged to be found in section 146-22.1(1) and (10), ***or*** the authority of the requesting agency, here alleged to be section 113-306. Procedurally, DOA can act to condemn defendant's land ***either*** under section 146-24, which directs DOA to use the Board of Transportation procedures found in Chapter 136, Article 9 ("Transportation procedures"), ***or*** under Chapter 40A, which dictates the Wildlife Resources Commission's procedure to take property. *See* N.C. Gen. Stat. §§ 146-24 (1991); 113-306(a).

It is clear that the State utilized the Transportation procedures in condemning defendant's land. Both the complaint and the declaration of taking definitively state that "the Department of Administration by virtue of G.S. 146-24 and G.S. 146-24.1 is authorized to exercise the power of eminent domain and acquire said lands by condemnation in the same manner as provided for by the Board of Transportation by Chapter 136, Article 9." This statement refers to section 146-24,

which gives DOA power to condemn using Transportation procedures, and section 146-24.1, which allows DOA to choose between Transportation procedures and agency procedures. The statement of authority in the complaint indicates that DOA has chosen to use Transportation procedures rather than agency procedures. Furthermore, the Resolution of the Council of State authorizing eminent domain in this case provides that DOA is authorized to acquire the property "in the manner prescribed by Chapter 146 Article 9, Chapter 136 of the General Statutes of North Carolina." Chapter 136, Article 9 is the Transportation procedure. No mention is made of section 113-306 or Chapter 40A in the complaint, the declaration, or the authorization. Finally, in a taking under the Wildlife Resources Commission's procedure, the State must include a statement regarding the timber, buildings, structures or fixtures on the property, and no such recitation appears in the complaint here. *See* N.C. Gen. Stat. § 40A-41 (1984). As such, the procedural propriety of the taking must rise or fall on the Transportation procedure.

N.C. Gen. Stat. section 146-23 (1991) requires that a state "agency desiring to acquire land . . . shall file with [DOA] an application setting forth its needs." When DOA receives the application, it must "investigate all aspects of the requested acquisition" and determine (1) the actual need for the property; (2) availability of other land already owned by the State; (3) availability of other land not owned by the State but which might meet the agency's needs; and (4) the availability of funds to buy the requested land. G.S. § 146-23; *Club Properties*, 275 N.C. at 331, 167 S.E.2d at 387. After this full investigation, DOA "may make acquisitions at the request of the Governor and Council of State." G.S. § 146-23.

The trial court made the following finding of fact:

> The State followed the usual procedures set forth in Chapter 146 of the General Statutes to effect the condemnation of Defendant's interest in the land. The Commission requested the Department of Administration to acquire Defendant's interest in the subject property and recommended that it be acquired by condemnation, if necessary. The Department of Administration determined: that acquisition of the property was necessary as an integral part of the Pamlico Point Waterfowl Impoundment and Marshes; that there was no land already owned by the State or any State agency available for this purpose and that there were no other lands available either by purchase, condemnation, lease or rental

> which would meet the needs of the Commission, (although other impoundment property was for sale in Pamlico County.) that the Department had been unable to obtain the property through negotiations; that funds necessary for the acquisition are available in the budget of the Commission; that the acquisition was in the best interest of the State and it recommended to the Governor and Council of State that the property be condemned.

Defendant contends there is no evidence in the record to support the trial court's finding of fact. We disagree.

The record indicates that as early as 1989 the Wildlife Commission asked DOA to become involved in negotiations regarding defendant's interest in the property. Affidavits indicate that DOA determined "[i]n order to continue [the State's] operation of these governmental facilities unhindered," the State needed to acquire defendant's interest. This assertion is further supported by correspondence from defendant's former counsel dated 18 July 1996 in which defendant threatens to "lease his undivided interest to a private group." The record contains testimony from a DOA employee and wildlife biologists that no other land would allow the continuing operation of these state-owned impoundments and that outright ownership by the State of such impoundments "is in the public's interest." Furthermore, there is testimony that funds were available with which to purchase defendant's interest. Finally, there is testimony from the Acting Director of the State Property Office division of DOA that employees of DOA "ha[d] thoroughly investigated all aspects of the requested acquisition." From the affidavits and exhibits, together with the Secretary of Administration's findings denoting that each requirement of the statute was addressed, the trial court could reasonably determine that DOA properly investigated "all aspects of the requested acquisition" as required under section 146-23. This assignment of error is overruled.

As we stated above, once compliance with section 146-23 is established and DOA determines "that it is in the best interest of the State that land be acquired," DOA must negotiate with the owners of the desired land. N.C. Gen. Stat. § 146-24(a) (1991). If these negotiations are unsuccessful, DOA may request permission from the Governor and the Council of State to exercise its right of eminent domain "in the same manner as is provided for the Board of Transportation by Article 9 of Chapter 136." N.C. Gen. Stat. § 146-24(c) (1991).

The Transportation procedures require that the condemnor file a complaint and a declaration of taking in the superior court of the county where the land is located. *See* N.C. Gen. Stat. § 136-103(a) (Cum. Supp. 1998). The complaint must contain:

> (1) A statement of the authority under which and the public use for which said land is taken.
>
> (2) A description of the entire tract . . . .
>
> (3) A statement of the estate or interest in said land taken for public use . . . .
>
> (4) The names and addresses of those persons who the Department of Transportation is informed and believes may have or claim to have an interest in said lands . . . .
>
> (5) A statement as to such liens or other encumbrances . . . upon said real estate . . . .
>
> (6) A prayer that there be a determination of just compensation in accordance with the provisions of this Article.

N.C. Gen. Stat. § 136-103(c) (Cum. Supp. 1998). The declaration of taking must contain or have attached:

> (1) A statement of the authority under which and the public use for which said land is taken.
>
> (2) A description of the entire tract . . . .
>
> (3) A statement of the estate or interest in said land taken for public use . . . .
>
> (4) The names and addresses of those persons who . . . may have or claim to have an interest in said lands . . . .
>
> (5) A statement of the sum of money estimated by said Department of Transportation to be just compensation for said taking.

N.C. Gen. Stat. § 136-103(b) (Cum. Supp. 1998). The filing of the complaint and declaration must be accompanied by a deposit of the amount of money listed in subsection (b)(5). N.C. Gen. Stat. § 136-103(d) (Cum. Supp. 1998). Upon the filings and deposit, title vests in the Department of Transportation. *See* G.S. § 136-104. We have reviewed the State's filings, and we hold that each of the necessary elements was included in the complaint and declaration.

[2] Defendant next contends that the statement of public use is defective. This essentially is defendant's argument that the State lacked statutory authority to take defendant's property. We hold the statement of public use is sufficient and the State had authority to take defendant's interest by eminent domain.

DOA "is authorized and empowered to acquire by purchase, gift, condemnation or otherwise: . . . (10) Utility and access easement, rights-of-way, estates for terms of years or fee simple title to lands necessary or convenient to the operation of state-owned facilities." G.S. § 146-22.1. Both the complaint and the declaration state that "[s]aid lands are an integral part of the Wildlife Resources Commission governmental facilities at the Pamlico Point waterfowl impoundments and marshes." We believe this sufficiently invokes a public use since G.S. § 146-22.1(10) specifically authorizes DOA to take "fee simple title to lands necessary or convenient to the operation of state-owned facilities."

Defendant does not assign error to the trial court's findings of fact that the State incurs expense to manage the property and that the primary purpose of the management is to provide "food and winter habitat for migrating waterfowl, which in turn, provides waterfowl hunting opportunities to waterfowl hunters." The State owns the impoundments and is operating them with the necessary outbuildings, pumps, and pump stations. The legislature has determined that lands "necessary or convenient to the operation of state-owned facilities" may be taken by condemnation, G.S. § 146-22.1(10), and "only the legislative [branch] can authorize the exercise of the power of eminent domain and prescribe the manner of its use." *Club Properties*, 275 N.C. at 334, 167 S.E.2d at 389. Substantial evidence was received that these state-owned facilities are operated by the State for both hunting and conservation endeavors. The purpose of the taking is statutorily authorized by section 146-22.1 (10), the State complied fully with the Transportation procedures, and defendant's protestations to the contrary are overruled.

[3] The second power under which DOA may institute a taking is under the requesting agency's authority. *See* G.S. § 146-24.1. The Wildlife Resources Commission's powers of condemnation are set forth in section 113-306, providing that "[i]n the overall best interests of the conservation of wildlife resources, the Wildlife Resources Commission may . . . condemn lands in accordance with the provisions of Chapter 40A." The trial court held as a matter of law that DOA was authorized to take defendant's interest under this agency

authority, as well as under section 146-22.1(10). Defendant contests this determination.

We decline to reach this question since we already have determined that the State properly condemned defendant's property under DOA authority in G.S.146-22.1(10), using the Transportation procedures in Chapter 136. The State may acquire less than a fee simple interest in property, as evidenced by the statutory requirement that the complaint and declaration denote the estate or interest sought. *See* G.S. §§ 136-103(b)(3); 136-103(c)(3). Furthermore, we see no reason why the State should not be able to condemn an undivided partial interest in property when it could condemn a fee simple interest in the entire parcel. Though we are inclined to agree with the State, we need not decide whether hunting is "[f]or the public use or benefit," N.C. Gen. Stat. § 40A-3 (Cum. Supp. 1998), under agency authority because we find express statutory authority to condemn defendant's interest as necessary and convenient for the operation and maintenance of the government-owned impoundments. *See* G.S. § 146-22.1 (10).

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

BALI COMPANY, A DIVISION OF SARA LEE CORPORATION; COMMERCIAL INTERTECH CORPORATION; FIRESTONE FIBERS AND TEXTILES COMPANY, A DIVISION OF BRIDGESTONE/ FIRESTONE, INC.; H & W SYSTEMS CORPORATION D/B/A TURBO D/B/A TURBO CONVEYOR; AND METAL FABRICATING LEASING, INC., PETITIONERS V. CITY OF KINGS MOUNTAIN, N.C., RESPONDENT

BALI COMPANY, A DIVISION OF SARA LEE CORPORATION, PETITIONER V. CITY OF KINGS MOUNTAIN, N.C., RESPONDENT

No. COA98-388

(Filed 20 July 1999)

1. Cities and Towns— annexation—requirements—burden of proof

Reports and annexation ordinances reflecting adherence to the applicable requirements of N.C.G.S. § 160A-45 et seq. establish prima facie that an annexing authority has substantially com-

plied with the statute and the burden lies with an annexation challenger to demonstrate the contrary.

2. Cities and Towns— annexation—requirements—residential purposes—mobile homes

An area being annexed qualified as being developed for urban purposes under N.C.G.S. § 160A-53(2) where petitioners maintained that some of the lots relied upon by the City were not used for residential purposes as required by the statute because they were occupied by mobile homes which were not "constructed" on the lots. The testimony of the City's consultant provided support for the court's findings that the mobile homes required necessary construction and improvements on-site after delivery.

3. Cities and Towns— annexation—requirements—residential purposes—condemned home

The trial court did not err when affirming an annexation in its finding regarding residential purposes where petitioners contended that the City included a condemned home as a "habitable" residence. The trial court properly noted in its judgment that the structure had been destroyed by fire, but provided that deletion of that structure from the calculation of the "urban purposes" percentage under N.C.G.S. § 160A-48(c)(3) did not affect the City's compliance with the section.

4. Cities and Towns— annexation—requirements—use of topographic features

There was no error in an annexation challenge where petitioners contended that the City neglected to utilize topographic features in fixing interior boundaries contrary to N.C.G.S. § 160A-48(e). The statute speaks of municipal boundaries rather than interior boundaries and the record shows that the properties taken as a whole form exterior municipal boundaries properly denominated by topographic features wherever practical.

5. Cities and Towns— annexation—requirements—police and fire protection

An annexation plan satisfied the requirements of N.C.G.S. § 160A-47(3)(a) where petitioners contended that the plan was defective in failing to provide additional police and fire services, but the court found that petitioners would receive services on a basis at least substantially equal to the current inhabitants and the record sustains the court's findings. The precise details of the extension of police and fire protection are not required.

Appeal by petitioners from judgments filed 4 December 1997 by Judge J. Marlene Hyatt in Cleveland County Superior Court. Heard in the Court of Appeals 19 November 1998.

Kilpatrick Stockton, L.L.P., by Jackson N. Steele, Charles H. Rabon, Jr. and Spencer H. Kelly, for petitioner-appellants.

Corry, Cerwin & Luptak, by Clayward C. Corry, Jr. and Todd R. Cerwin, for respondent-appellee.

JOHN, Judge.

Petitioners appeal the trial court's essentially identical judgments "denying the[ir] petition seeking review of annexation and affirming the Annexation Ordinance" (the Ordinance) adopted by the Governing Board of respondent City of Kings Mountain (the City). According to petitioners, the trial court erred in that: 1) annexation Area 97-A (Area 97-A) was not "developed for urban purposes" as defined in N.C.G.S. § 160A-48(c) (1994), 2) the City failed to use topographic features in fixing interior boundaries of annexation Area 97-B (Area 97-B), and 3) the City's Annexation Services Plan (the Plan) failed to demonstrate "that municipal services can and will be provided to the annexation area" in the same manner as to the remainder of the City prior to annexation. We affirm the trial court.

Pertinent facts and relevant procedural history include the following: Petitioners Bali Company (Bali), a division of Sara Lee Corporation, Commercial Intertech Corporation (Commercial), Firestone Fibers and Textiles Corporation (Firestone), a division of Bridgestone/Firestone, Inc., H & W Systems Corporation, d/b/a Turbo Conveyor (H & W), and Metal Fabricating Leasing, Inc. (Metal), each own real property in Kings Mountain, North Carolina. On 28 May 1996, the City, a municipal corporation with a population greater than 5,000, adopted the Ordinance providing for annexation of two property areas designated as Area 97-A, comprising two hundred nineteen acres, and Area 97-B, comprising five hundred fifty-five acres. Under the Plan, each Area was divided into portions categorized as an "urban area" under G.S. § 160A-48(c)(3) and a "non-urban area" under N.C.G.S. § 160A-48(d)(1)&(2) (1994). In adopting the Ordinance, the City considered and relied upon a report (the Report), analyzing in detail the effects of annexation prepared by the City's consultant, F. Richard Flowe (Flowe).

On 27 June 1996, Bali, a property owner in Area 97-A, filed a "Petition Seeking Review of Annexation" referencing Area 97-A. On

that same date, Bali, Commercial, Firestone, H & W and Metal, all property owners in Area 97-B, filed a similar petition for purposes of jointly appealing annexation of Area 97-B. The two petitions were consolidated for trial and heard at the 27 October 1997 Civil Session of Cleveland County Superior Court, whereupon the trial court entered judgments affirming the Ordinance. Petitioners timely appealed.

[1] Initially, we note that reports and annexation ordinances reflecting adherence to the applicable requirements of N.C.G.S. § 160A-45 *et seq.* (1994), establish *prima facie* that an annexing authority, the City herein, has substantially complied with the statute, and that the burden lies with an annexation challenger to demonstrate the contrary. *In re Annexation Ordinance*, 255 N.C. 633, 642, 122 S.E.2d 690, 697 (1961). Further, the trial court's findings of fact are binding on appeal if supported by evidence, notwithstanding evidence to the contrary, but "[c]onclusions of law drawn . . . from [those] findings of fact are reviewable *de novo*." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 25-26, 265 S.E.2d 123, 126-27 (1980). We hold the trial court's findings *sub judice* are, in each instance challenged by petitioners, supported by competent evidence and that the court did not err in concluding petitioners had failed "to overcome the presumption that the [City] . . . complied with the statutory procedures or that the statutory requirements were not met."

[2] In their first argument, petitioners contend Area 97-A did not qualify as being "developed for urban purposes" under G.S. § 160A-48(c)(3). Petitioners maintain that eleven lots relied upon by the City were not "used for residential purposes" as required by N.C.G.S. § 160A-53(2) (1994).

G.S. § 160A-48(c)(3) requires part of an annexed area to have been developed for "urban purposes," and that

> (3) . . . at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes. . . .

In addition:

> (2) "Used for residential purposes" shall mean any lot or tract five acres or less in size on which is constructed a habitable dwelling unit.

G.S. § 160A-53(2).

Petitioners insist the mobile homes at issue fail the statutory test in that they were not "constructed" on lots, but rather were built in factories. We believe the City has the better of this argument and, upon review of the record and the Ordinance, conclude that it established *prima facie* substantial compliance with applicable statutory provisions, including G.S. § 160A-48(c)(3).

The term "constructed" is not defined under G.S. § 160A-53, but Black's Law Dictionary sets forth the following definition:

> [t]o build; erect; put together; make ready for use. To adjust and join materials, or parts of, so as to form a permanent whole.

Black's Law Dictionary 312 (6th ed. 1990).

In its findings of fact, the trial court provided that the manufactured homes *sub judice*, upon delivery to the lots in question,

> were not . . . habitable, and that . . . construction [including utility connections and a foundation, would be] necessary . . . to make them habitable.

The court further noted the mobile homes not only required necessary construction on the lots for habitability purposes, but that many also underwent additional construction to add porches, additional rooms and other permanent improvements.

Flowe was the City's sole witness before the trial court. He testified there was no analytical distinction between structures built completely on-site and those built partially off-site, and that determination of whether a dwelling is "constructed" on a lot under G.S. § 160A-53(2) is based upon whether the structure is habitable at delivery. According to Flowe, the mobile homes herein were not habitable upon delivery, but required at a minimum construction of: footings and support systems for a foundation effect, anchoring systems, a closure system to shut off movement of air beneath the unit, ingress or egress to the unit, and connections to a water supply, waste disposal system and electrical supply.

Flowe's testimony provided support in the record for the trial court's findings that the mobile homes required necessary construction and improvements on-site after delivery, and that "G.S. § 160A-53(2) does not require one hundred (100%) percent construction of a habitable dwelling unit to occur on-site."

[3] In this first argument, petitioners also maintain the City improperly included a condemned home as a "habitable" residence. To comply with the residential use provision within G.S. § 160A-48(c)(3), a structure must be habitable upon the date an annexation report is submitted. *Food Town Stores*, 300 N.C. at 36-37, 265 S.E.2d at 133.

Flowe testified that one house incorporated into the "urban purposes" calculation was indeed condemned on the date he submitted the Report. The trial court properly noted in its judgment that the structure had been destroyed by fire, but provided that deletion of that single structure from calculation of the "urban purposes" percentage under G.S. § 160A-48(c)(3) did not affect the City's compliance with the section. The trial court's finding is supported by the record and its mathematical computation was accurate.

In short, petitioners failed to overcome the presumption that the City substantially complied with G.S. § 160A-48(c)(3), *see In re Annexation Ordinance*, 255 N.C. at 642, 122 S.E.2d at 697, and the trial court did not err in rejecting petitioners' first challenge to the Ordinance.

[4] Petitioners' second argument is that the City neglected to utilize topographic features in fixing interior boundaries of Area 97-B contrary to the policy underlying N.C.G.S. § 160A-48(e) (1994). The trial court found as fact that

> the external boundaries of the newly annexed area do, wherever practical, use natural topographic features . . . ; and wherever such would be impractical, the external boundary lines do follow property lines and man-made physical barriers.

The foregoing findings, which refute petitioners' second argument, were not assigned as error in the record on appeal and thus will not be reviewed by this Court. *See Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) ("appellate review is limited to the issues presented by assignments of error set out in the record on appeal"). Petitioners' second argument is therefore unavailing. Moreover, the record reveals petitioners' contention is in any event unfounded.

G.S. § 160A-48(e) provides:

> In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries, and may use streets as boundaries.

Petitioners assert the

> City arbitrarily divided Area 97-B into three areas, identified as 97-B.c.1—the "urban area"; and 97-B.d.1 and 97-B.d.2—the two "non-urban areas." None of these areas would qualify for annexation alone, but . . . the City manipulated the boundaries of each, and then applied different sections of the Annexation Statute [G.S. § 160A-48(c)(3) and G.S. § 160A-48(d)(1)or(2)] to qualify each area

for annexation under G.S. § 160A-48(e).

It is well established

> that in order to establish non-compliance with N.C. Gen. Stat. § 160A-36(d) [now G.S. § 160A-48(e)], petitioners must show two things: (1) that the boundary of the annexed area does not follow natural topographic features, and (2) that it would have been practical for the boundary to follow such features.

Weeks v. Town of Coats, 121 N.C. App. 471, 474, 466 S.E.2d 83, 85 (1996) (citations omitted).

The purpose of the non-urban/urban designation subsection is to

> permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.

G.S. § 160A-48(d).

Petitioners' argument in the instant case is not that exterior boundaries failed to follow topographic features, but rather that the City did not use such features to establish interior urban and non-urban boundaries. This contention is inapposite. The statute, in addressing the division between urban and non-urban areas does not speak to interior boundaries, but rather speaks of "fixing municipal boundaries," G.S. § 160A-48(e), the exterior boundaries of the municipality as annexed.

Moreover, careful examination of the record indicates the non-urban divisions within Area 97-B connect the municipality to urban

areas, and the properties taken as a whole form an exterior municipal boundary properly denominated by topographic features wherever practical. *See In re Annexation Ordinance*, 255 N.C. at 643, 122 S.E.2d at 698 ("[w]here an area to be annexed, when considered as a whole, meets the [statutory] requirements . . . a portion of the area may not, as a matter of right, be excluded from annexation merely because it, taken alone, does not meet the[] requirements").

[5] Lastly, petitioners contend the Plan violated N.C.G.S. § 160A-47(3)(a) (1994) in failing "to demonstrate that municipal services can and will be provided" to the City's twenty-two percent (22%) increased geographic area in the same manner as provided prior to annexation. According to petitioners, the Plan was defective by virtue of failing to provide for additional police officers, firefighters, police or fire equipment, or assurances that the City would contract volunteer fire departments. We do not agree.

G.S. 160A-47(3)(a) requires that police and fire protection to an annexed area be on "substantially the same basis and in the same manner as such services [we]re provided within the rest of the municipality prior to annexation." *Id.* At a minimum the section mandates that

> the City provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services.

In re Annexation Ordinance, 304 N.C. 549, 554, 284 S.E.2d 470, 474 (1981). The underlying legislative purpose is to assure that annexed residents receive all major city services in return for the additional burden of city taxes. *Id.*

The requisite information must include (1) the current level of services within the City, (2) a commitment to provide substantially the same level of services in the annexed areas, and (3) the methodology for financing the extension of services. *Id.* at 555, 284 S.E.2d at 474. Precise details of the extension of police and fire protection, *Parkwood Ass'n., Inc. v. City of Durham*, 124 N.C. App. 603, 607-08, 478 S.E.2d 204, 207 (1996), *disc. review denied*, 345 N.C. 345, 483 S.E.2d 175 (1997), or the exact number of additional personnel to be hired or equipment to be purchased, *In re Annexation Ordinance*,

300 N.C. 337, 343, 266 S.E.2d 661, 664 (1980) (report meets minimum statutory plan requirements even absent number of additional personnel to be hired), are not required. We conclude the Plan at issue satisfied the foregoing requirements.

With respect to police protection services, the Plan recited that the City would redefine patrol zones in consequence of the twenty-two percent (22%) increase in geographic area and re-assign existing police personnel to those new zones. Neither additional officers nor equipment were deemed necessary because the 1.4 per cent increase in population did not affect the City's current officer to citizen ratio. Twenty-four hour patrol protection provided within the existing City limits was likewise to be afforded to the areas proposed for annexation, any additional costs being paid from the City's General Fund.

Further, fire protection under the Plan was to be maintained in the annexed areas initially through contracts with affected volunteer fire districts, and, in the event such contracts could not be obtained, service was to be provided by the City Fire Department. Moreover, capital improvements for new water lines were set out in the Plan, which also provided that funding for such improvements was to take effect within two years of the effective date of the Ordinance.

The trial court found that petitioners would receive services on a basis "at least substantially equal to the current inhabitants of the City . . . prior to . . . annexation," and that an increase in *ad valorem* taxes was an ordinary consequence of annexation. The record sustains the court's findings, and the court therefore properly concluded petitioners had not overcome the presumption that the Plan complied with G.S. § 160A-47(3)(a). *See In re Annexation Ordinance*, 255 N.C. at 642, 122 S.E.2d at 697-98.

Based on the foregoing, the judgment of the trial court is affirmed.

Affirmed.

Judges WALKER and McGEE concur.

SHELL ISLAND HOMEOWNERS ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF v. EUGENE B. TOMLINSON, CHAIRMAN NORTH CAROLINA COASTAL RESOURCES COMMISSION; NORTH CAROLINA COASTAL RESOURCES COMMISSION; DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES FOR THE STATE OF NORTH CAROLINA; AND STATE OF NORTH CAROLINA, DEFENDANTS

No. COA98-1197

(Filed 20 July 1999)

1. Jurisdiction— subject matter—mootness

The trial court did not err by granting defendants' motion to dismiss for lack of subject matter jurisdiction under N.C.G.S § 1A-1, Rule 12(b)(1) where the essence of the relief sought by plaintiff was a determination that the denial of plaintiff's requests for variances under N.C.G.S.§ 113A-123(b) effected a regulatory taking of plaintiff's property, but the granting of plaintiff's fourth variance request rendered moot the issues relating to the earlier variance requests.

2. Appeal and Error— preservation of issues—argument first raised on appeal

Plaintiff's argument that the physical invasion of its property by inlet waters constituted a taking was not considered where the argument was raised for the first time on appeal. Plaintiff based its claims on the denial of its variance requests; a compensable taking based on a theory of physical invasion is an altogether separate category of regulatory taking.

3. Constitutional Law— arguments hypothetical and abstract—not considered

Plaintiff's constitutional arguments relating to the denial of variances for hardened coastal erosion control structures were hypothetical and abstract in the context of the dispute and were not ruled upon.

4. Appeal and Error— mootness—exception—capable of repetition yet evading review

The trial court properly dismissed as moot claims arising from the denial of variances to coastal erosion regulations following the eventual granting of a variance where plaintiff argued that the claims fell within the exception to mootness commonly known as capable of repetition yet evading review. There was no

evidence that plaintiff's grievances evaded review; to the contrary, plaintiff has had ample opportunity to seek review through CAMA and the APA.

5. Appeal and Error— mootness—exception—voluntary cessation of illegal conduct

The trial court properly dismissed as moot claims arising from the denial of variances to coastal erosion regulations where a variance was eventually granted and plaintiff argued that its claims fell within the exception to mootness for cases in which a defendant voluntarily ceases its illegal conduct during the pendency of the appeal. Rather than ceasing an illegal practice, defendants have continually and consistently enforced CAMA regulations with respect to erosion control structures.

6. Jurisdiction— subject matter—claim included in general motion

The trial court did not err by dismissing a claim for relief added in an amendment where the dismissal was pursuant to a motion "to dismiss the above captioned action pursuant to Rule 12(b)(1) . . . ." The motion was addressed to all of the claims alleged in plaintiff's original and amended complaints; moreover, subject matter jurisdiction may be raised at any time, even on appeal.

7. Civil Procedure— consolidation of actions—denial not prejudicial

No prejudice resulted to plaintiff from the allegedly premature denial of its motion to consolidate actions where the trial court properly dismissed the claims in this action as moot.

Appeal by plaintiff from order entered 12 August 1998 by Judge James D. Llewellyn in New Hanover County Superior Court. Heard in the Court of Appeals 11 May 1999.

Shanklin & McDaniel, L.L.P., by Kenneth A. Shanklin and Susan J. McDaniel, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General J. Allen Jernigan and Special Deputy Attorney General Robin W. Smith, for defendant-appellees.

MARTIN, Judge.

Plaintiff Shell Island Homeowners Association, Inc., is an association of all unit owners of the Shell Island Resort Hotel Condominium located at the north end of Wrightsville Beach, North Carolina, just south of Mason's Inlet. Plaintiff filed this action on 7 November 1996 against Eugene B. Tomlinson, Chairman of the North Carolina Coastal Resources Commission, the North Carolina Coastal Resources Commission ("CRC"), the Department of Environment, Health, and Natural Resources for the State of North Carolina ("DEHNR"), and the State of North Carolina (hereinafter collectively "defendants"), challenging the constitutionality of regulations within the Coastal Area Management Act, G.S. § 113A-100, *et seq.*, ("CAMA") pertaining to the construction of erosion control structures, and claiming that defendants' denials of plaintiff's requests to build erosion control structures constitutes a taking of plaintiff's property without just compensation.

The facts pertinent to the issues on appeal are as follows. On 25 May 1985, the State of North Carolina, through a local permitting officer, issued a CAMA Minor Development Permit to plaintiff's predecessor for construction of the Shell Island hotel. However, issuance of the permit was based on an error in the location of the regulatory construction line on Wrightsville Beach, and the hotel, which exceeded development standards under CAMA's Inlet Hazard Areas of Environmental Concern, should not have been built at the permitted location. At the time the CAMA permit was issued, the CRC had already adopted regulations prohibiting the use of hardened erosion control structures on ocean and inlet beaches, and the hotel's CAMA permit specifically noted the restrictions on use of such structures.

Since the hotel's construction, Mason's Inlet has migrated to the south, causing the shoreline around Shell Island to erode. On 25 September 1995 plaintiff applied for a CAMA Minor Development Permit to erect a steel sheetpile inlet migration barrier to protect its property from the waters of Mason's Inlet. The Division of Coastal Management ("DCM") denied the permit, and on 27 October 1995 plaintiff applied to the CRC for a variance from the size limitations in the regulations pursuant to G.S. § 113A-120.1 and 15A NCAC 7J.0700, *et seq.* The CRC denied the variance request on 6 February 1996. On 12 June 1996 New Hanover County, as agent for plaintiff, applied for an emergency CAMA general permit to construct a temporary sandbag revetment on private property located adjacent to Mason's Inlet.

The DCM denied the request, and again, on 5 August 1996 the CRC denied the county's request for a variance from the application of the erosion control structure regulations.

On 30 August 1996, New Hanover County and the Town of Wrightsville Beach, acting as agents for plaintiff, jointly submitted an emergency CAMA permit application to construct a slightly smaller sandbag revetment on private property. The redesigned revetment still exceeded dimensions allowed under the regulations, and the permit was denied. On 5 September 1996 a variance from the regulations was sought, and by final order dated 10 October 1996, the CRC denied the request. Plaintiff did not seek administrative review of any of the agency decisions denying permits or variances, but filed the present action in the Superior Court of New Hanover County on 7 November 1996 seeking (1) a declaration that the statutory remedy for a regulatory takings claim under CAMA, G.S. § 113A-123(b), is unconstitutionally vague and denies plaintiff due process; (2) alternatively, a judgment pursuant to G.S. § 113A-123(b) that the CRC's 5 August 1996 denial of plaintiff's variance request for construction of a sandbag revetment constitutes a taking without just compensation; and (3) a declaration that CAMA regulations pertaining to the construction of erosion control structures for the protection of private property are unconstitutional. On 6 January 1997, plaintiff amended its complaint to include a fourth claim for relief, alleging that the CRC's denial, on 10 October 1996, of the 5 September 1996 variance request was also a taking of plaintiff's property without just compensation.

On 20 December 1996, in response to defendants' consistent recommendations that plaintiff reduce the size and scope of its permit applications for a sandbag revetment such that the revetment would not, in effect, act like a permanent hardened structure prohibited by CRC rules, plaintiff submitted an emergency permit application for construction of a smaller and re-engineered revetment. This was the first CAMA permit application which proposed that the revetment be at least partially located on hotel property. Following denial of the permit by the DCM, plaintiff applied for a variance, and on 4 February 1997 the CRC granted plaintiff's variance request. Construction of the 410-foot sandbag revetment was completed on 17 September 1997 and currently protects the hotel. Under the terms of the CAMA permit the revetment must be removed in September 1999.

On 31 October 1997 defendants moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil

Procedure on the grounds that the granting of plaintiff's variance request has mooted plaintiff's claims. Plaintiff moved to consolidate this case with another action pending in the Superior Court of New Hanover County, case no. 98 CvS 38, in which plaintiff and others seek declaratory, injunctive, and monetary relief from defendants. On 12 August 1998, the trial court entered an order denying plaintiff's motion to consolidate and granting defendants' motion to dismiss all of plaintiff's claims as moot. Plaintiff appeals.

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[1] The dispositive issue is whether the trial court erred by granting defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction on the grounds that plaintiff's claims are moot. Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *Harris v. Pembaur*, 84 N.C. App. 666, 353 S.E.2d 673 (1987). "Whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citing *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978)). "If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action." *Id.* "The issue of mootness is not determined solely by examining facts in existence at the commencement of the action." *North Carolina Press Ass'n, Inc. v. Spangler*, 87 N.C. App. 169, 170-71, 360 S.E.2d 138, 139 (1987) (citing *Peoples*, 296 N.C. at 147-48, 250 S.E.2d at 912).

The essence of the relief sought by plaintiff in this action is a determination that defendants' denials of plaintiff's requests for variances under G.S. § 113A-123(b) have effected a regulatory taking of plaintiff's property. Plaintiff's second and fourth claims for relief allege that the CRC's 5 August 1996 and 10 October 1996 denials of plaintiff's variance requests, respectively, deprive plaintiff of the practical use of its land, thereby constituting a taking. Plaintiff's first and third claims for relief seek declaratory rulings as to the constitutionality of the statute involved.

The action of the CRC on 4 February 1997, granting plaintiff's fourth variance request, renders moot the issues relating to the earlier variance requests. Plaintiff sought variances to construct an erosion control structure, plaintiff was granted permission to construct

such a structure, and did in fact, complete construction of the revetment on 17 September 1997. Issuance of the variance provided plaintiff with the relief originally sought in the complaint.

[2] Plaintiff argues that the physical invasion of its property by inlet waters during the time period in which its variance requests were denied constitutes a compensable taking, a claim that was not mooted by the granting of the subsequent variance. Plaintiff makes this constitutional argument for the first time on appeal, however, and will not be allowed to do so. *See Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 502 S.E.2d 404, *disc. review denied*, 349 N.C. 355, —— S.E.2d —— (1998) (citation omitted) (where record does not affirmatively indicate constitutional issue was both raised and passed upon in the trial court, appellate court will not consider the claim for the first time on appeal). Here, in both its original and amended complaints, plaintiff based its claims of a compensable taking on defendants' denial of its variance requests. Plaintiff alleged that such denials restricted "the use of [p]laintiff's property as to deprive it of the practical uses thereof." But, a compensable taking based on a theory of physical invasion is an altogether separate category of regulatory takings. *See King By and Through Warren v. State*, 125 N.C. App. 379, 385, 481 S.E.2d 330, 333-34, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 548 (1997) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L.Ed.2d 798 (1992)) ("[T]here are two separate categories of regulatory action that require a finding of a compensable taking: regulations that compel physical invasions of property and regulations that deny an owner all economically beneficial or productive use of property."). Neither plaintiff's original complaint nor its amended complaint allege facts sufficient to support a claim of taking by physical invasion. Because the issue was not before the trial court, we will not consider it on appeal. *See Croker*, *supra*.

[3] The granting of a variance for, and subsequent construction of, the revetment, which is the relief sought in plaintiff's complaint, has rendered moot the substance of this action. The constitutional arguments contained in plaintiff's remaining claims for relief are hypothetical and abstract in the context of this dispute, and we therefore will not rule upon them. *See Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920 (1998) (citation omitted) ("Courts have no jurisdiction to determine matters that are speculative, abstract, or moot, and they may not enter anticipatory judgments, or provide for contingencies which may arise thereafter.").

[4] Plaintiff argues, in the alternative, that its claims fall within two established exceptions to the doctrine of mootness. First, plaintiff argues that the claims fall within the exception to mootness commonly known as "capable of repetition yet evading review." An otherwise moot claim falls within this exception where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Ballard v. Weast*, 121 N.C. App. 391, 394, 465 S.E.2d 565, 568, *disc. review denied*, 343 N.C. 304, 471 S.E.2d 66 (1996) (citing *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989)). Plaintiff argues that the same controversy not only is likely to arise again, but did in fact arise again in the form of the related action with which it sought to consolidate this case.

Assuming *arguendo* that the claims are capable of repetition, there is no evidence to suggest that plaintiff's grievances have evaded review. To the contrary, plaintiff has had ample opportunity to seek review of any of the denials of its permit requests through CAMA and the Administrative Procedure Act ("APA"). Under CAMA § 113A-121.1, plaintiff could have, but did not, file for a contested case hearing under the APA, G.S. § 150B-23, within 20 days of any of the permit denials, thereby obtaining an administrative hearing in which a full record could have been developed to determine whether "the agency (1) exceeded its authority or jurisdiction, (2) acted erroneously, (3) failed to use proper procedure, (4) acted arbitrarily or capriciously, or (5) failed to act as required by law or rule." N.C. Gen. Stat. § 150B-23. Moreover, plaintiff could have, but did not, seek relief by alleging a regulatory taking pursuant to G.S. § 113A-123(b). In addition, plaintiff could have, but did not, seek a hearing on its application for a variance pursuant to G.S. § 113A-120.1, instead choosing to accept the variance for, and complete construction of, the smaller revetment. Where plaintiff has failed to seek review of its claims, voluntarily accepted the variance, and simply filed an action in superior court over two years after the denial of the original permit, it may not now assert that its claims have evaded effective review.

[5] Plaintiff also argues that its claims fall within an exception to mootness "which provides for review of cases where a defendant voluntarily ceases its illegal conduct during the pendency of the appeal." *Thomas v. North Carolina Dept. of Human Resources*, 124 N.C. App. 698, 706, 478 S.E.2d 816, 821 (1996), *affirmed*, 346 N.C. 268, 485 S.E.2d 295 (1997) (citing *Quern v. Mandley*, 436 U.S. 725, 731-32, 56

L.Ed.2d 658, 665-66 (1978)). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice." *Id.* (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 71 L.Ed.2d 152, 159 (1982)).

Plaintiff asserts that defendants' granting of the variance for the sandbag revetment constitutes a "voluntary cessation of the State's illegal practice of enforcing the hardened structure rule," enabling defendants to "cease the offending practices in time to avoid meaningful review, and then be free to return to their old ways." It is clear, however, that rather than ceasing an illegal practice, defendants have continually and consistently enforced CAMA regulations with respect to erosion control structures, both before and throughout the duration of the present litigation. The trial court correctly dismissed plaintiff's action for lack of subject matter jurisdiction on the grounds that all claims are moot.

[6] In a separate assignment of error, plaintiff contends its fourth claim for relief was erroneously dismissed because defendants' motion neither specifically addressed the claim nor sought its dismissal. We disagree. Defendants' motion to dismiss, filed 31 October 1997 after plaintiff had amended its complaint to add the fourth claim for relief, sought "to dismiss the above-captioned action pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure on the grounds that Plaintiff's claims are moot;" defendants prayed for "an order dismissing Plaintiff's claims as moot." Clearly, the motion was addressed to all of the claims alleged in plaintiff's original and amended complaints. Moreover, "the question of subject matter jurisdiction may be raised at any time, even on appeal." *Transcontinental Gas Pipe Line Corp. v. Calco Enter.*, 132 N.C. App. 237, 241, 511 S.E.2d 671, 675 (1999) (citing *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986)). " 'If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case . . . .' " *Id.* (quoting *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988)). This assignment of error is overruled.

[7] Finally, our decision to affirm the order dismissing plaintiff's claims as moot renders it unnecessary to consider plaintiff's final argument directed to the denial of its motion to consolidate this action with the related action then pending in New Hanover County

Superior Court. Even if the trial court's denial of the motion to consolidate was premature as contended by plaintiff, *see Oxendine v. Catawba County Dept. of Social Services*, 303 N.C. 699, 281 S.E.2d 370 (1981), no prejudice has resulted to plaintiff in view of our decision.

The trial court's order dismissing this action is affirmed.

Affirmed.

Judges GREENE and WYNN concur.

MICHAEL G. STALEY AND MELODY H. STALEY, PLAINTIFFS V. L.K. LINGERFELT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER OF THE LOWELL POLICE DEPARTMENT, AND THE CITY OF LOWELL, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANTS

No. COA98-1293

(Filed 20 July 1999)

1. Appeal and Error— appealability—partial summary judgment—qualified immunity—substantial right

Although partial summary judgment is not immediately appealable in most circumstances, a substantial right is affected when qualified immunity is pled as a defense to summary judgment and such an interlocutory order is immediately appealable.

2. Statute of Limitations— voluntary dismissal—new claims

The trial court did not err by granting summary judgment for defendants based upon the statute of limitations in an action arising from a confrontation at the scene of an automobile accident where plaintiffs' first complaint was filed within the statute of limitations but alleged only a section 1983 claim and a claim for loss of consortium and plaintiffs did not assert their additional claims until more than four years after the incident, following a voluntary dismissal and a new filing. Although the claims arose from the same events, defendants were not placed on notice that they would be asked to defend these claims within the time required by the statute of limitations.

3. Damages— punitive—action against police officer— capacity

The trial court correctly granted summary judgment in favor of a police officer in his official capacity on a punitive damages claim in a section 1983 action, but erred by granting summary judgment for the officer in his individual capacity. Punitive damages may not be awarded in a section 1983 action against either a municipality or a municipal officer acting in an official capacity.

4. Civil Rights— action against police officer—alleged unreasonable seizure and due process violation—material issue of fact

In an action against a police officer in his individual capacity arising from a confrontation at an automobile accident, the trial court correctly denied the defendants' motion for summary judgment on the issues of section 1983 violations and loss of consortium where the officer claimed qualified immunity. There are material issues of fact as to defendant's conduct and the actions of plaintiff.

5. Police Officers— 1983 action—official capacity

A municipality may be sued for section 1983 violations only if there are allegations that the unconstitutional action implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers and the municipality may not be held liable on the sole basis of respondeat superior. In this case, there was no valid claim against the City or against the police officer in his official capacity.

Appeal by plaintiffs from judgment entered 24 July 1998 by Judge Marvin K. Gray in Gaston County Superior Court. Heard in the Court of Appeals 10 June 1999.

Bailey, Patterson, Caddell, Hart, Milliken & Bailey, P.A., by H. Morris Caddell, Jr. and Helen Ruth Harwell, for plaintiffs-appellants.

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

WALKER, Judge.

On 11 June 1993, plaintiff Michael Staley's mother was involved in an automobile collision in Lowell, North Carolina. Defendant L.K. Lingerfelt, a police officer for the City of Lowell (the City), investi-

gated the collision. As the investigation proceeded, plaintiff Michael Staley arrived at the scene to find out how his mother was doing. There, he became involved in a shouting altercation with the driver of the other vehicle involved in the collision. Officer Lingerfelt asked him to leave the scene so that his investigation could continue. Plaintiff agreed, but later confronted the other driver again. Officer Lingerfelt warned plaintiff that if he did not leave, he would be arrested for interfering with an investigation. Plaintiff again agreed to leave. However, he returned to yell at the driver a third time. Officer Lingerfelt then placed plaintiff under arrest and charged him with a violation of N.C. Gen. Stat. § 14-223—unlawfully resisting, delaying, or obstructing a public officer in the discharge of his duty. The criminal charge against plaintiff was later dismissed.

On 4 August 1995, plaintiffs filed an action against defendants alleging a violation of plaintiff's civil rights pursuant to 42 U.S.C. § 1983 and a loss of consortium claim on behalf of plaintiff Melody Staley, Michael Staley's wife. The City was named as a defendant in the complaint but the only allegation regarding the City was as the employer of Lingerfelt and a second unnamed police officer. The plaintiffs dismissed their complaint without prejudice on 9 September 1996.

On 5 September 1997, plaintiffs filed the current action in which they alleged, in addition to the claims set forth in the first complaint, assault and battery, false arrest and imprisonment, malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, trespass by a public officer, violations of the North Carolina Constitution, and a claim for punitive damages. Plaintiffs also alleged for the first time in the second complaint that the City formulated policies and practices that proximately caused the deprivation of plaintiff's civil rights. Defendants jointly answered the complaint and then filed a motion for summary judgment on 10 July 1998, attaching the affidavits of defendant Lingerfelt and Officer Rodney Young, of the Cramerton Police Department, who assisted with the arrest. Plaintiffs filed a response and incorporated several affidavits from witnesses. The trial court granted summary judgment for the City on all claims and granted summary judgment for defendant Lingerfelt on all claims except those for section 1983 violations and loss of consortium.

[1] Initially, we note that a grant of partial summary judgment is not a final judgment, is interlocutory, and is not immediately appealable in most circumstances. *Liggett Group v. Sunas*, 113 N.C. App. 19, 437

S.E.2d 674 (1993). This appeal has not been certified for immediate review pursuant to Rule 54(b), so we must determine whether a substantial right will be affected such that immediate appellate review is necessary. *Bartlett v. Jacobs*, 124 N.C. App. 521, 477 S.E.2d 693 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997); N.C. Gen. Stat. § 1-277 (1996). Plaintiffs argue that there is a danger of inconsistent verdicts if the appeal is not heard before the remaining issues go to trial, and defendants have made cross-assignments of error based on the defense of qualified immunity. When qualified immunity is pled as a defense to summary judgment, a substantial right is affected and such an interlocutory order is immediately appealable. *Rousselo v. Starling*, 128 N.C. App. 439, 495 S.E.2d 725, *appeal dismissed*, 348 N.C. 74, 505 S.E.2d 876 (1998). Thus, the appeal is properly before us.

[2] Plaintiffs assign as error the trial court's decision granting summary judgment for the City and partial summary judgment for defendant Lingerfelt. They argue that there were material issues of fact remaining to be determined, which made summary judgment improper. Plaintiffs also argue that the statute of limitations for the additional claims asserted in the second complaint had not expired as the re-filing provision contained in Rule 41 provided an additional year from the time of the voluntary dismissal to bring those claims.

The statute of limitations for the state law claims brought in plaintiffs' second complaint is three years. *See, e.g.*, N.C. Gen. Stat. § 1-52(5) (Cum. Supp. 1998) (negligent infliction of emotional distress, violations of North Carolina Constitution which lead to injury to the person); *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992) (intentional infliction of emotional distress); *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982), *overruled on other grounds*, *Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993) (malicious prosecution); N.C. Gen. Stat. § 1-52 (13) (Cum. Supp. 1998) (trespass by a public officer). Although the statute of limitations for assault and false imprisonment is usually one year as prescribed in N.C. Gen. Stat. § 1-54 (1996), three years is the limitation period for claims of assault and battery and false arrest or imprisonment when brought against a police officer. *Fowler*, 334 N.C. 345, 435 S.E.2d 530.

Rule 41 of the North Carolina Rules of Civil Procedure is unique and varies from its federal counterpart by the addition of the following: "If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsec-

tion, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990). The effect of this provision is to extend the statute of limitations by one year after a voluntary dismissal. *Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 198 S.E.2d 741 (1973). However, the rule may not be used to avoid the statute of limitations by taking a dismissal in situations where the initial action was already barred by the statute of limitations. *Ready Mix Concrete v. Sales Corp.*, 36 N.C. App. 778, 245 S.E.2d 234, *disc. review allowed*, 295 N.C. 552, 248 S.E.2d 725 (1978).

In this case, plaintiffs' first complaint arose out of the incident on 11 June 1993, but alleged only a section 1983 claim and a claim for loss of consortium. This complaint was properly filed within the statute of limitations. Plaintiffs made no allegations dealing with the City other than that it employed defendant Lingerfelt and another officer. Plaintiffs did not assert the additional claims until 5 September 1997—more than four years after the incident. The issue before us then is whether these additional claims can be made for the first time pursuant to the Rule 41 savings provision more than a year after the statute of limitations expired.

In *Holley v. Hercules, Inc.*, 86 N.C. App. 624, 359 S.E.2d 47 (1987), this Court held that a claim for punitive damages could be made for the first time in a complaint made during the one year re-filing period but after the statute of limitations had expired. The Court reasoned that, because a claim for punitive damages was not a cause of action but was derivative of the negligence claim which was properly re-filed, the punitive damages claim could go forward. *Id.* at 628, 359 S.E.2d at 50. Similarly, in *Sloan v. Miller Building Corp.*, this Court held that a claim for loss of consortium, which was made for the first time in a complaint filed during the Rule 41 savings period after the statute of limitations expired, was proper because the loss of consortium claim "must be joined with the other spouse's claim for personal injury." *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 40, 493 S.E.2d 460, 462 (1997). However, in *Stanford v. Owens*, 76 N.C. App. 284, 332 S.E.2d 730, *disc. review denied*, 314 N.C. 670, 336 S.E.2d 402 (1985), a claim of fraud, first alleged during the re-filing period, was dismissed as time-barred by the statute of limitations. In that case, plaintiffs argued that because the fraud claim arose out of the same events that precipitated the original negligence claim, the facts which support the fraud claim had been in existence since the

initial filing of the action. This Court disagreed, finding that "a claim for fraud is fundamentally different from a claim for negligence" and that plaintiff's allegations of negligence did not substantially allege fraud. *Id.* at 289, 332 S.E.2d at 733.

Here, we conclude that the state law claims first made in the second complaint, with the exception of the claim for punitive damages, come within the rule set out in *Stanford.* Each claim is an independent cause of action with unique elements which must be proven by plaintiffs. Although the claims arise from the same events as the section 1983 and loss of consortium claims, the defendants were not placed on notice that they would be asked to defend these claims within the time required by the statute of limitations.

The statute of limitations is "inflexible and unyielding," and the defendants are vested with the right to rely on it as a defense. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 573, 174 S.E.2d 870, 872 (1970). Further, the purpose of the statute of limitations is to "afford security against stale demands," even when they may "bar the maintenance of meritorious causes of action." *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957). The trial court has no discretion when considering whether a claim is barred by the statute of limitations. *Congleton*, 8 N.C. App. at 573, 174 S.E.2d at 872.

Therefore, with regard to all claims against the City and the claims against defendant Lingerfelt for assault and battery, false arrest and imprisonment, malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, trespass by a public officer and violations of the North Carolina Constitution, the trial court did not err in granting summary judgment for the defendants as these claims were barred by the statute of limitations.

[3] Plaintiffs' claim for punitive damages is similar to that found in *Holley*, 86 N.C. App. 624, 359 S.E.2d 47. Punitive damages may be awarded in a section 1983 action under appropriate circumstances to punish violations of constitutional rights. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 69 L. Ed. 2d 616 (1981). However, punitive damages may not be awarded against either a municipality or a municipal officer acting in his official capacity because suing an officer in his official capacity has the effect of suing the municipality itself. *Id.*; *Barnett v. Karpinos*, 119 N.C. App. 719, 460 S.E.2d 208, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 232 (1995). Here, defendant Lingerfelt has been sued in both his official and individual

capacities. Thus, the claim for punitive damages against defendant Lingerfelt in his individual capacity may proceed.

[4] Next, we address defendant Lingerfelt's cross-assignments of error. Defendant Lingerfelt contends that the trial court erred in denying his motion for summary judgment on the claims of section 1983 violations and loss of consortium. He argues that he is entitled to qualified immunity in his individual capacity.

The standard for determining whether an officer may claim qualified immunity was stated by this Court in *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 670, 449 S.E.2d 240, 244 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995), and *Barnett*, 119 N.C. App. at 725-26, 460 S.E.2d at 211:

> 'The test of qualified immunity for police officers sued under [section 1983] is whether [the officers' conduct violated] clearly established statutory or constitutional rights of which a reasonable person would have known.' *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994) (citations omitted). In ruling on the defense of qualified immunity we must: (1) identify the specific right allegedly violated; (2) determine whether the right allegedly violated was clearly established at the time of the violation; and (3) if the right was clearly established, determine whether a reasonable person in the officer's position would have known that his actions violated that right. *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). The first two determinations are questions of law for the court and should always be decided at the summary judgment stage. *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992); *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994). However, 'the third [determination] . . . require[s] [the factfinder to make] factual determinations [concerning] disputed aspects of the officer[s'] conduct.' *Lee v. Greene*, 114 N.C. App. at 585, 442 S.E.2d at 550 (citations omitted).

Plaintiff Michael Staley claims his right to be free from unreasonable search and seizure was violated along with his due process rights. These rights have been "clearly established" through decisions of both the state and federal appellate courts. *See Barnett*, 119 N.C. App. at 726, 460 S.E.2d at 212. However, we conclude that there are material issues of fact as to defendant Lingerfelt's conduct and the actions of plaintiff which make this determination unsuited to summary judgment. The parties have submitted conflicting affidavits

purporting to describe the events of 11 June 1993, and the resolution of these conflicts is left to the finder of fact. For these reasons, we affirm the trial court's denial of defendants' motion for summary judgment on the issues of section 1983 violations and loss of consortium.

[5] Finally, we address the capacities in which defendant Lingerfelt is being sued. In the first complaint, Lingerfelt was sued for section 1983 violations in both his individual and official capacities. As noted above, suing a municipal official in his official capacity accomplishes the same effect as suing the municipality itself. *See Barnett*, 119 N.C. App. at 725, 460 S.E.2d at 211. A municipality may be sued for section 1983 violations only if there are allegations that the unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 635 (1978). The municipality may not be held liable on the sole basis of respondeat superior. *Id.* Plaintiffs made no allegations against the City that comply with the holding in *Monell* in the first complaint. Therefore, no valid claim was made against defendant Lingerfelt in his official capacity or the City within the time allowed by the statute of limitations in the initial action. For that reason, no claims remain against defendant Lingerfelt in his official capacity since the loss of consortium claim must be accompanied by a viable claim which alleged injury.

In summary, plaintiffs' claims for section 1983 violations, loss of consortium and punitive damages may proceed against defendant Lingerfelt in his individual capacity. The trial court's order granting summary judgment for defendant Lingerfelt in his individual capacity as to the plaintiffs' claim for punitive damages is reversed; otherwise, the trial court's order is affirmed.

Affirmed in part, reversed in part, and remanded.

Judges McGEE and EDMUNDS concur.

TED A. RIVIERE, PLAINTIFF v. CATHERINE SCISCENTI RIVIERE, DEFENDANT

No. COA98-635

(Filed 20 July 1999)

1. Divorce— alimony—voluntary dismissal—recoupment of pendente lite payments

A voluntary dismissal of a counterclaim for permanent alimony after alimony pendente lite was paid was not a sham or a fraudulent manipulation of the Rules of Civil Procedure as contended by plaintiff in his effort to recoup the payments. The plain language of N.C.G.S. § 1A-1, Rule 41(a)(1) vests parties with the absolute authority to dismiss any of their claims at any time before they rest their case, plaintiff had filed no reply, there was no pending matter, and defendant was free to file her voluntary dismissal without permission of the court or notice to plaintiff.

2. Divorce— alimony pendente lite—motion to recoup—final alimony judgment—factors considered

The trial court erred by denying a motion to recoup alimony pendente lite payments following a voluntary dismissal of an alimony claim where the court appeared to base its decision on the misapprehension that a voluntary dismissal with prejudice was not a final judgment. When defendant voluntarily dismissed with prejudice her claim for permanent alimony based on adultery and abandonment, she conceded that none of the grounds entitling her to permanent alimony pursuant to N.C.G.S. § 50-16.2 existed. Such a dismissal was a final judgment on the merits.

Appeal by plaintiff from judgment entered 24 February 1998 by Judge Larry J. Wilson in Cleveland County District Court. Heard in the Court of Appeals 13 January 1999.

Lamb Law Offices, P.A., by William E. Lamb, Jr. and Wendy Joyce Terry, for plaintiff-appellant.

Mann, Vonkallist and Young, P.A., by Christy T. Mann, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Ted A. Riviere ("plaintiff") appeals from a judgment filed 26 February 1998 in Cleveland County District Court, denying his

motion to require his former wife, Catherine Sciscenti Riviere ("defendant") to return the alimony pendente lite paid to her and the attorneys' fees. Because the trial court erred when it concluded that no final judgment had been entered denying alimony, we reverse the trial court's order.

On 31 August 1992, plaintiff filed a complaint for divorce from bed and board from defendant. Subsequently, defendant filed an answer and counterclaim on 13 October 1992, seeking equitable distribution, permanent alimony, alimony pendente lite, and attorneys' fees. Defendant alleged two grounds for alimony: (1) adultery and (2) abandonment. Plaintiff never filed a reply to defendant's counterclaim.

A hearing regarding alimony pendente lite was held on 26 October 1992. After an in chambers meeting, the parties stipulated in open court that grounds existed for alimony pendente lite and the trial court ordered plaintiff to pay defendant alimony pendente lite in the amount of $1,000.00 per month. On 2 July 1993, plaintiff filed a motion to reduce his alimony pendente lite payments. This motion was denied on 16 July 1993.

When the equitable distribution matter was called for trial on 14 October 1996, the parties announced to the court that they had resolved the issue and consented to the court entering an order based upon their agreement. The court examined plaintiff and defendant individually about their understanding of the agreement, their satisfaction with counsel, and their willingness to be bound by the agreement. Following the examination of the parties, the court approved the agreement as a fair and equitable distribution of all marital property.

On 9 December 1996, the date defendant's motion for permanent alimony was to be heard, defendant filed a voluntary dismissal with prejudice, pursuant to North Carolina General Statutes section 1A-1, Rule 41(a) (1990), of her alimony claim. More than one year later, plaintiff filed a motion for recoupment of approximately $50,000.00 in pendente lite payments pursuant to North Carolina General Statutes section 50-16.11 (1995).

On 24 February 1998, the trial court denied plaintiff's motion, stating that plaintiff was not entitled to relief because there was "no final judgment entered . . . denying alimony because none of

the grounds specified in North Carolina General Statute Section [sic] 50-16.2 exist." Plaintiff appeals the order.

The issues presented by this appeal are: (i) whether defendant's voluntary dismissal with prejudice of her permanent alimony counterclaim was invalid because it was a fraudulent manipulation of the rules of civil procedure; and (ii) whether the trial court had the authority to determine whether recoupment of pendente lite payments was appropriate following a voluntary dismissal with prejudice by defendant of her permanent alimony counterclaim.

[1] Plaintiff in his first assignment of error argues that defendant's voluntary dismissal with prejudice should not have been allowed as it was a sham and a fraudulent manipulation of the rules of civil procedure. As a result, plaintiff argues that he should have been returned to the status quo mandating a recoupment of his alimony pendente lite payments. Defendant counters that the voluntary dismissal was not fraudulent because she was merely applying the currently existing statutes and rules of law. We agree with defendant.

Rule 41(a)(1) of the Rules of Civil Procedure, provides in pertinent part that "an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990). Where the language of a statute is clear and unambiguous, this Court is bound by the plain language of the statute. *Utilities Comm. v. Edmisten Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). The plain language of Rule 41(a)(1) vests a party with the absolute authority to dismiss any of his claims at any time before he rests his case. That is exactly what defendant did in this matter. She dismissed her counterclaim for permanent alimony after she and plaintiff had by consent settled the issue of equitable distribution. Defendant may have no longer considered herself "dependent" or thought she was unlikely to qualify as a "dependent spouse" based on the recent division of marital property. In any event, there is no evidence to support plaintiff's allegation of fraudulent manipulation or bad faith on the part of defendant.

We acknowledge that under *McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976), defendant could not voluntarily dismiss her action for permanent alimony without plaintiff's consent if plaintiff had a pending action which arose out of the same transaction. We

reject plaintiff's argument that his appearance in court to litigate the case, his requests to reduce alimony pendente lite, and the reservation of funds in the equitable distribution judgment were sufficient to establish grounds to have his recoupment claim heard. Here, at the time defendant filed the voluntary dismissal of her counterclaim for permanent alimony, plaintiff had filed no reply nor was there any other pending matter. Therefore, defendant was free to file her voluntary dismissal of the permanent alimony counterclaim without permission of the court or notice to plaintiff. This assignment of error is overruled.

[2] Plaintiff next argues that the trial court erred in ruling that plaintiff's alimony pendente lite payments were not refundable for "[t]here was no final judgment entered . . . denying alimony because none of the grounds specified in North Carolina General Statute Section [sic] 50-16.2 exist." Defendant counters that a voluntary dismissal was not a final judgment since there was no determination of whether any of the fault grounds stated in North Carolina General Statutes section 50-16 existed. We agree with plaintiff.

Alimony pendente lite is defined as a court ordered "payment for the support and maintenance of a spouse" pending "the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce." *Wyatt v. Hollifield*, 114 N.C. App. 352, 356, 442 S.E.2d 149, 152 (1994) (quoting N.C. Gen. Stat. §§ 50-16.1(1),(2) (1995)). "At the pendente lite hearing, both parties must be given an opportunity to offer evidence 'orally, upon affidavit, verified pleading, or other proof,' and the trial judge is to 'find the facts from the evidence so presented.' " *Id.* (quoting N.C. Gen. Stat. § 50-16.8(f) (1995)). The spouse seeking alimony pendente lite, if he or she also claims an entitlement to "absolute divorce, divorce from bed and board, annulment, or alimony without divorce," has the burden of showing that (1) he or she is a "dependent spouse" as defined in North Carolina General Statutes section 50-16.1(3) (1995); (2) that there is a "likelihood of success on the merits" with regard to his or her action for "absolute divorce, divorce from bed and board, annulment, or alimony without divorce" under North Carolina General Statutes section 50-16.3(a)(1) (1995); and (3) he or she has, pursuant to North Carolina General Statutes section 50-16.3(a)(2) (1995), "[i]nsufficient means whereon to subsist during the prosecution . . . of the suit and to defray the necessary expenses thereof." *Id.* at 357, 442 S.E.2d at 153 (citations omitted).

Plaintiff seeks reimbursement pursuant to section 50-16.11 of the alimony pendente lite he paid defendant. Section 50-16.11, in pertinent part, states:

> upon motion by the supporting spouse, if a final judgment is entered in any action denying alimony because none of the grounds specified in G.S. 50-16.2 exists, the court may enter a judgment against the spouse to whom the payments were made for the amount of alimony pendente lite paid by the supporting spouse to that spouse pending a final disposition of the case.

N.C. Gen. Stat. § 50-16.11 (1987) (repealed by 1995 N.C. Sess. Laws ch. 319, § 1).

It is within the discretion of the trial court to determine whether or not to order recoupment of alimony pendente lite payments. *Hollifield*, 114 N.C. App. at 358, 442 S.E.2d at 153. Appellate review of matters left to the discretion of the trial court is limited to a determination of whether there was a clear abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). A trial court has abused its discretion if its ruling is "so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Rule 41(a)(1) states that plaintiff may voluntarily dismiss his action without permission of the court by filing a notice of dismissal at any time before resting his case. N.C.G.S. § 1A-1, Rule 41(a)(1). The rule further provides that dismissal is without prejudice, unless otherwise stated, allowing plaintiff to commence a new action based on the same claim within one year. *Id.* A dismissal taken with prejudice indicates a disposition on the merits which precludes subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication. *Johnson v. Bollinger*, 86 N.C. App. 1, 8, 356 S.E.2d 378, 383 (1987). Thus, it is well settled in this state that a voluntary dismissal with prejudice is a final judgment on the merits. *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998); *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 712, 306 S.E.2d 513, 515 (1983); *Barnes v. McGee*, 21 N.C. App. 287, 290, 204 S.E.2d 203, 205 (1974).

Based on the foregoing principles, we conclude that when defendant voluntarily dismissed with prejudice her claim for permanent alimony based on adultery and abandonment, she conceded that none of the grounds entitling her to permanent alimony pursuant to section 50-16.2 existed. Such a dismissal was a final judgment on the

merits with res judicata implications. The trial court should have conducted a hearing and considered evidence relating to whether in his discretion plaintiff should recoup the alimony pendente lite paid. *See Hollifield*, 114 N.C. App. 352, 442 S.E.2d 149.

The record appears to indicate that the trial court made its decision to deny plaintiff's motion for the return of alimony pendente lite payments based on the misapprehension of the law that a voluntary dismissal with prejudice was not a final judgment. This was error and in contradiction to the laws of this state. Therefore, we conclude that the trial court's decision amounted to an abuse of discretion.

Based on the foregoing, we reverse the holding of the trial court and remand this matter for further proceedings consistent with this opinion.

REVERSED.

Judges LEWIS and WALKER concur.

SOUTH MECKLENBURG PAINTING CONTRACTORS, INC., PLAINTIFF v. THE CUNNANE GROUP, INC., DEFENDANT

No. COA98-881

(Filed 20 July 1999)

1. Corporations— corporate charter—revenue suspension—action on contract entered during

The trial court correctly granted summary judgment for defendant in an action for breach of a contract entered during a time when plaintiff's corporate charter was suspended under N.C.G.S. § 105-230. Although the effect of N.C.G.S. § 105-230 is not absolute, it prevents a corporation from conducting business as usual; plaintiff had no statutory right to enter into a contractual relationship with defendant and may not bring suit to enforce a contract entered into during the period of revenue suspension. Reinstatement is not relevant.

2. Corporations— corporate charter—revenue suspension—contract entered during—dissolution statute

The trial court correctly granted summary judgment for defendant in an action on a contract entered during a revenue suspension of the corporate charter where plaintiff argued that N.C.G.S. § 55-14-05 permits the action. That statute mandates that a corporation may not carry on any business except as appropriate to wind up and liquidate its affairs during the period of dissolution.

3. Appeal and Error— authority not cited—contention abandoned

A contention concerning the ability of a corporation to enter into a contract during a period in which its charter was suspended was deemed abandoned where no authority was cited.

Appeal by plaintiff from judgment entered 20 May 1998 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 March 1999.

Wilson & Bos, by Gerard A. Bos, for plaintiff-appellant.

The Bishop Law Firm, P.A., by A. Todd Capitano, for defendant-appellee.

JOHN, Judge.

Plaintiff South Mecklenburg Painting Contractors, Inc. (SMPC), appeals the trial court's grant of summary judgment in favor of defendant Cunnane Group, Inc. (Cunnane). In the main, SMPC contends the court erred in ruling that N.C.G.S. § 105-230 (1997) and N.C.G.S. § 55-14-04 (1990) barred SMPC's action against Cunnane. We affirm the trial court.

Relevant factual and procedural background includes the following: SMPC is "in the business of supplying painting labor and materials to general contractors on commercial projects." Cunnane is a general contractor operating in Charlotte, North Carolina.

On 20 May 1997, representatives of SMPC and Cunnane met to discuss a painting contract for the Bonnie Briar Townhouses (the project), whereby SMPC would "provide labor and materials" in exchange for agreed compensation. On 22 May 1997, a document was executed reflecting the parties' agreement and SMPC began purchas-

ing materials and making preparations to commence work at the project. Thereafter, SMPC became aware that another painting contractor was painting the project.

On 21 August 1997, SMPC brought the instant action alleging breach of contract and breach of quasi contract, seeking *inter alia*, "actual and consequential damages in a sum . . . exceed[ing] $10,000." Cunnane answered 27 October 1997 denying a contractual relationship with SMPC. Specifically, and as grounds for its subsequent 6 August 1998 motion for summary judgment, Cunnane asserted that because SMPC's "Articles of Incorporation were under revenue suspension" pursuant to G.S. § 105-230 at the time of the alleged contract, SMPC was without authority to conduct its normal business. SMPC's articles of incorporation had been suspended 1 October 1991 and administratively dissolved 9 March 1993 by the Secretary of State for failure to pay annual franchise fees. On 20 May 1998, the trial court granted Cunnane's motion as to all SMPC's claims and the latter 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(c) (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. *See Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994).

[1] SMPC first contends the trial court erred in

> its decision to grant [Cunnane's] motion for summary judgment on the sole basis that [SMPC's] corporate charter had been sus-

> pended and administratively dissolved . . . for the period of time that [plaintiff's] causes of action against [defendant] accrued and [its] action . . . commenced.

We do not agree.

It is well established that when a corporate charter has been suspended for failure to pay franchise taxes, the corporation under revenue suspension "loses its state-granted privileges." *Pierce Concrete, Inc. v. Cannon Realty & Construction Co.*, 77 N.C. App. 411, 412, 335 S.E.2d 30, 31 (1985).

G.S. § 105-230 provides in pertinent part:

> If a corporation . . . fails to file any report or return or to pay any tax or fee required by this Subchapter for 90 days after it is due, the Secretary shall inform the Secretary of State of this failure. The Secretary of State shall suspend the articles of incorporation . . . . *The powers, privileges, and franchises conferred upon the corporation . . . by the articles of incorporation . . . terminate upon suspension.*

Further, N.C.G.S. § 105-231 (1997) states:

> A person who exercises or by any act attempts to exercise any powers, privileges, or franchises under articles of incorporation . . . after it has been suspended under G.S. § 105-230 shall pay a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) to be recovered in an action to be brought by the Secretary in the Superior Court of Wake County. *Any act performed or attempted to be performed during the period of suspension is invalid and of no effect.*

Id. (Emphasis added).

Although the effect of G.S. § 105-230 is not absolute, *see, e.g., Mica Industries v. Penland*, 249 N.C. 602, 606, 107 S.E.2d 120, 124 (1959), *Swimming Pool Co. v. Country Club*, 11 N.C. App. 715, 716, 182 S.E.2d 273, 274 (1971), and *Ionic Lodge v. Masons*, 232 N.C. 252, 259, 59 S.E.2d 829, 834-35, *rev'd on other grounds*, 232 N.C. 648, 62 S.E.2d 73 (1950) (corporation under revenue suspension may bring lawsuit); *see also Parker v. Homes, Inc.*, 22 N.C. App. 297, 299, 206 S.E.2d 344, 345 (1974) (approving purchase and sale of property by suspended corporation) and *Page v. Miller*, 252 N.C. 23, 26, 113 S.E.2d 52, 55 (1960) (G.S. § 105-230 not intended to deprive corporation of its property or to penalize innocent third parties), it indis-

putably prevents a corporation from "continuing to conduct [its] business as usual." *Pierce Concrete*, 77 N.C. App. at 413, 335 S.E.2d at 31.

In *Pierce Concrete*, this Court observed that the

> individual defendant, to the extent he was involved, was acting in his capacity as president and agent of the corporation. His authority as agent of the corporation extended only to matters within the ordinary scope of the corporation's business. *As discussed above, the suspended corporation had no statutory right to conduct as part of its ordinary business . . . [the] transactions which [occurred subsequent to its suspension].*

Pierce Concrete, 77 N.C. App. at 413, 335 S.E.2d at 31 (citations omitted) (emphasis added). We then held that, in consequence of the suspension of the corporate charter, the individual defendant was liable for the indebtedness sued upon because

> [t]he law will not permit a corporate officer to create obligations in the name of the corporation, knowing the acts are without authority and invalid, and then be permitted to use the corporate name as shield against the creditors.

Id. at 414, 335 S.E.2d at 32.

In the case *sub judice*, the ordinary business of SMPC as alleged in its complaint included "supplying painting labor and materials to general contractors on commercial projects." In addition, the parties do not dispute that SMPC's corporate charter had been suspended during the time it allegedly entered into the agreement to provide painting services to Cunnane. Accordingly, at the time of the alleged contract, SMPC had "los[t] its state-granted privileges" to conduct "[its] business as usual." *Pierce Concrete*, 77 N.C. App. at 412-13, 335 S.E.2d at 31.

Moreover, G.S. § 105-231 explicitly mandates that any "act performed or attempted to be performed" by SMPC "during [its] period of suspension is invalid and of no effect." G.S. § 105-231. Consequently, SMPC "had no statutory right . . . as part of its ordinary business," *Pierce Concrete*, 77 N.C. App. at 413, 335 S.E.2d at 31, to enter into a contractual relationship with Cunnane.

Notwithstanding, SMPC cites the holding in *Mica*, 249 N.C. 602, 107 S.E.2d 120, that "revenue suspension does not end a corporation's capacity to sue." Therefore, SMPC concludes, the circumstance of

revenue suspension would not operate to preclude its suit against Cunnane. *Mica* is distinguishable.

The corporation's suit in *Mica* was based upon transactions occurring while operation of the company was statutorily valid, *see Mica*, 249 N.C. 602, 107 S.E.2d 120 (corporation may bring action regarding transactions consummated before suspension), and a corporation may sue to enforce rights acquired prior to its suspension, *see Swimming Pool*, 11 N.C. App. at 716, 182 S.E.2d at 273-74 (corporation had legal capacity to bring suit to enforce contract entered into before suspension, notwithstanding suspension of corporation's articles of incorporation prior to commencement of suit), and *Page*, 252 N.C. at 26, 113 S.E.2d at 55 (corporation's transfer of property not invalid where judicial sale to corporation was confirmed but articles of incorporation suspended prior to corporation's assignment of its bid to judgment creditor and joining with creditor to convey the property, because G.S. § 105-230 was not intended to "deprive a corporation of its properties nor penalize innocent [third] parties").

In the instant case, however, SMPC sought to enforce contract rights allegedly acquired *during* a period of suspension. The present circumstance is thereby distinct from case-law grounded upon the rationale that suspension of a corporate charter

> "while depriving the corporation of the power to engage in the ordinary business for which it has been chartered, [does not] take[] away . . . the incidental powers necessary to [the corporation's] survival [*i.e.*,] the power to protect its property in a court of law, either by assertion or defense of right."

Swimming Pool, 11 N.C. App. at 716, 182 S.E.2d at 274 (citation omitted); *see also Mica*, 249 N.C. at 606, 107 S.E.2d at 124; *Ionic Lodge*, 232 N.C. at 259, 59 S.E.2d at 834 (corporation may defend action brought against it during period of suspension); *Trust Co. v. School for Boys*, 229 N.C. 738, 743, 51 S.E.2d 477, 480 (1949) (corporation may take property under a will during suspension). Although our courts have not specifically addressed the issue *sub judice* prior to the instant appeal, our reading of G.S. § 105-230 and G.S. § 105-231, as well as of the case-law cited above, compels the conclusion that a corporation may not bring suit to enforce a contract entered into during a period of revenue suspension.

SMPC vigorously points to the reinstatement of its articles during the pendency of this action.[1] We respectfully respond that such reinstatement is not relevant to our inquiry. Rather we conclude the statute and case law direct our focus to the circumstance that SMPC's suit against Cunnane was instituted to enforce a contract allegedly entered into while SMPC's articles of incorporation were suspended. We reiterate that once suspended, a corporation simply may not "conduct . . . business as usual," *Pierce Concrete*, 77 N.C. App. at 413, 335 S.E.2d at 31, and "[a]ny act performed or attempted to be performed during [a] period of suspension is invalid and of no effect." G.S. § 105-231.

[2] SMPC also argues that portions of the Business Corporation Act, N.C.G.S. §§ 55-1-01 through 55-17-05 (1997), permit the instant action. SMPC specifically points to G.S. § 55-14-05 which provides in pertinent part:

> **Effect of dissolution**
>
> (a) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:
>
> (1) Collecting its assets;
>
> (2) Disposing of its properties that will not be distributed in kind to its shareholders;
>
> (3) Discharging or making provision for discharging its liabilities;
>
> (4) Distributing its remaining property among its shareholders according to their interests; and
>
> (5) Doing every other act necessary to wind up and liquidate its business and affairs.
>
> (b) Dissolution of a corporation does not:
>
> (1) Transfer title to the corporation's property;

1. Plaintiff does not contend on appeal that reinstatement of SMPC's charter related back to the date of its 9 March 1993 administrative dissolution so as to allow SMPC to enter into the alleged contract on 20 May 1997. We therefore do not address this argument save to note SMPC did not seek reinstatement of its charter within two years of dissolution thereof as required by N.C.G.S. § 55-14-22 (1997) (corporation administratively dissolved may apply for reinstatement within two years after effective date of dissolution and, if allowed, reinstatement "relates back to and takes effect as of the effective date of the administrative dissolution").

(2) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;

(3) Subject its directors or officers to standards of conduct different from those prescribed in Article 8;

(4) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;

(5) Prevent commencement of a proceeding by or against the corporation in its corporate name;

(6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(7) Terminate the authority of the registered agent of the corporation.

G.S. § 55-14-05.

We do not quarrel with SMPC's assertion that G.S. § 55-14-05 allows a corporation to "commence[] . . . a proceeding by . . . the corporation in its corporate name." *Id.* However, the statute also mandates that a corporation "may not carry on any business except that appropriate to wind up and liquidate its business and affairs" during the period of dissolution. *Id.* As SMPC's articles of incorporation were dissolved 9 March 1993, there remains no legal basis upon which to validate the alleged 22 May 1997 contract with Cunnane occurring during the period of SMPC's suspension and dissolution so as to permit suit upon the alleged contract. SMPC's reliance upon the Business Corporation Act is unavailing.

[3] Finally, SMPC contends the trial court committed reversible error in that there was no "evidence of [SMPC's] actual intent or knowledge concerning the suspension or administrative dissolution [of its charter] in the record." However, plaintiff cites no authority in support of this contention and it is deemed abandoned. *See* N.C.R. App. P. 28(b)(5) ("assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

In sum, SMPC had no statutory authority to enter into a contractual relationship with Cunnane while the former's corporate charter was in a state of administrative suspension and dissolution. *See* G.S.

§ 105-231 ("[a]ny act performed or attempted to be performed during [a] period of suspension is invalid and of no effect"). Accordingly, there existed no basis upon which to allow SMPC to seek enforcement of the alleged contract, and the trial court did not err in granting summary judgment in favor of Cunnane.

Affirmed.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. CRAIG DARRYL GRIGSBY, DEFENDANT

No. COA98-944

(Filed 20 July 1999)

1. Indictment and Information— spelling of defendant's name—correction

The trial court did not err in a prosecution for robbery and assault by allowing the State to amend the indictment on the first day of the trial to correct the spelling of defendant's last name. Although a change in the name of the victim is a substantial change, a change in the spelling of defendant's name to add one letter is not a substantial alteration. Defendant cannot seriously argue that he was unaware of the charges against him.

2. Evidence— cross-examination—impeachment of credibility—cumulative

The trial court did not abuse its discretion in a prosecution for robbery and assault by not allowing defendant to cross-examine a witness for the State regarding the witness's dismissal from the restaurant which was subsequently robbed. Defendant had cross-examined the witness and the jury had before it evidence with which to evaluate his credibility. The court properly exercised its broad discretion in limiting the scope of cross-examination.

3. Assault— intent to kill—instructions

The trial court's instruction in a prosecution for assault with a deadly weapon with intent to kill did not lessen the State's burden of proof where the instruction stated that the State must

prove that defendant assaulted the victim by stabbing him or "intentionally causing him to be cut." The jury was asked to and did find specific intent to kill separate from any finding of the manner in which the victim came to be stabbed.

4. Assault— intent to kill—sufficiency of evidence

The charge of assault with a deadly weapon with intent to kill was improperly submitted to the jury, but assault with a deadly weapon inflicting serious injury was properly submitted, where defendant sneaked into a restaurant before it opened and ambushed the victim; defendant threatened the victim with a knife, repeating, "If you don't give me what I want," and, "You're going to give me what I want"; defendant put down the knife, picked up lighter fluid, and threatened to burn the victim; the victim grabbed the knife and the two struggled; defendant was slightly injured and the victim was stabbed in the chest; and defendant ran from the scene. Entering the premises without attempting to hide his identity does not lead to the conclusion that defendant intended to kill the victim and leave no witnesses, and subsequently telling a State's witness that he would have gotten away with it if he had had a gun only allows conjecture by a jury that defendant intended to kill.

Appeal by defendant from judgment entered 30 October 1997 by Judge William C. Gore, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 17 May 1999.

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

Nora Henry Hargrove for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 27 October 1997 Session of New Hanover County Superior Court for the 10 January 1996 attempted robbery of TGI Friday's and assault on the manager, David Love. Charges of assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, and attempted robbery with a dangerous weapon were submitted to the jury. The jury convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury and attempted robbery with a dangerous weapon; defendant appeals.

[1] Defendant first contends that the trial court erroneously allowed the prosecution to amend the indictment on the first day of the trial to correct the spelling of defendant's last name. Defendant contends that this action was in violation of N.C. Gen. Stat. § 15A-923(e) (1997), which prohibits amendment of indictments. Defendant claims that the amendment changed his defense "from 'that is not me' to something else." We find this argument unpersuasive.

It is well established that amendments " 'which would substantially alter the charge set forth in the indictment' " are prohibited. *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)). *See also State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994); *State v. Colvin*, 92 N.C. App. 152, 156, 374 S.E.2d 126, 130 (1988), *disc. review denied*, 324 N.C. 249, 377 S.E.2d 758 (1989). A change in the spelling of defendant's last name is a mere clerical correction of the truest kind; defendant cannot seriously argue that he was unaware of the charges against him because one letter was missing from his last name. *See Colvin, id.* Although defendant's defense was that he was not the perpetrator of the crime, he did not claim that the perpetrator was a man named Craig *Grisby*, as his name was spelled on the indictment. Defendant was identified at trial by witnesses as the man who discussed robbing the store and as the man who indeed assaulted David Love; defendant was aware that he was the man on trial for the crimes charged. Although a change in the name of the *victim* is a substantial change, *see State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994), a change in the spelling of defendant's name, adding one letter, is not such a substantial alteration. "We conclude the amendment to the indictment was permissible because it did not substantially alter the charge in the original indictment." *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824. This assignment of error is overruled.

[2] Defendant next argues that he should have been allowed to cross-examine Raymond Bates, a witness for the State, regarding Bates's dismissal from employment at TGI Friday's. The testimony was as follows:

> Q: And Mr. Bates, you were fired for stealing ribs, is that right, sir?
>
> MS. EDWARDS: Objection, Your Honor.

THE WITNESS: Allegedly.

THE COURT: Sustained.

MS. EDWARDS: Move to strike.

THE COURT: Motion to strike is allowed. Disregard the last question from counsel, please.

Rule 608(b) allows cross-examination regarding specific acts of misconduct if the purpose of such questions is to show conduct indicating character for truthfulness, the questions in fact are probative of truthfulness, the act did not result in a criminal conviction, and the acts are not too remote in time. *See State v. Bell*, 338 N.C. 363, 382, 450 S.E.2d 710, 720 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). "[I]t is within the trial court's discretion to allow or disallow cross-examination of a witness about his specific acts if the acts are relevant to his character for truthfulness or untruthfulness." *State v. Hunt*, 339 N.C. 622, 658, 457 S.E.2d 276, 297 (1994), *reconsideration denied*, 339 N.C. 741, 457 S.E.2d 304 (1995). Our Supreme Court has held that questions regarding alleged larceny and conspiracy to commit larceny "without more, are not necessarily probative of [the witness's] propensity for truthfulness." *Bell*, 338 N.C. at 382-83, 450 S.E.2d at 721.

The trial court did not abuse its discretion in preventing defendant from cross-examining Bates about any alleged theft of ribs. Defendant had cross-examined Bates and impeached him with evidence that Bates waited four months before admitting he knew about the robbery, experienced a messy break-up with defendant's sister, and had "bad blood" with defendant. Defendant concedes in his brief that the ribs-related questions were designed "to *further* impeach Bates" (emphasis added). As such, he indicates that the jury had evidence before it with which to evaluate Bates' credibility. *See id.* at 383, 450 S.E.2d at 721. The trial court properly exercised its broad discretion in limiting the scope of cross-examination. *See State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998). This assignment of error is overruled.

[3] Defendant next argues that the instructions given to the jury lessened the State's burden of proof. Defendant objected to the italicized portions of the following instructions:

Now, I charge that for you to find the defendant guilty of assault with a deadly weapon with intent to kill, inflicting serious injury,

> the state must prove four things, beyond a reasonable doubt: First, that the defendant assaulted the victim by stabbing him *or intentionally causing him to be cut.* Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. . . . Third, the state must prove that the defendant had the specific intent to kill the victim.
>
> . . . .
>
> Fourth, ladies and gentlemen, the state must prove that the defendant inflicted serious injury upon the victim.
>
> So I charge you that if you find from the evidence, beyond a reasonable doubt, that on or about the alleged date, the defendant intentionally stabbed *or caused the victim to be cut with a knife* and that the knife was a deadly weapon and that the defendant intended to kill the victim and did seriously injure him, it would be your duty to return a verdict of guilty of assault with a deadly weapon with the intent to kill, inflicting serious injury; however, if you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty . . . and you must consider whether the defendant is guilty of assault with a deadly weapon inflicting serious injury.

(Emphasis added). Defendant contends on appeal that the addition of the language "causing him to be cut" lightened the State's burden in proving intent to kill. We disagree. Defendant cites case law that is inapposite to his position, and the instructions clearly indicate that the jury was asked to and did find specific intent to kill separate from any finding of the manner in which the victim came to be stabbed. Instructions are to be read as a whole, *see State v. Lynch*, 340 N.C. 435, 464-65, 459 S.E.2d 679, 693 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996), and we find no error in these.

[4] Defendant's final contention is that the trial court erred in denying his motion to dismiss at the close of the State's evidence. He argues that "the evidence was insufficient to show that the defendant assaulted David Love with the intent to kill."

> In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt

> may be drawn therefrom, and the test is the same whether the evidence is direct or circumstantial.

State v. Gainey, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996) (citation omitted). Defendant contends that the trial court allowed "the fact that an injury was inflicted [to] prove specific intent to kill."

Defendant is correct that intent to kill is an essential element of the offense of which he was convicted. *See State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). He is also correct that the injury to Love, standing alone, does not establish his intent to kill. *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982). Moreover, the State must show that defendant had an actual intent to kill in assaulting Love, rather than an intention merely to intimidate. *See State v. Irwin*, 55 N.C. App. 305, 309-10, 285 S.E.2d 345, 349 (1982) (holding charge of assault with a deadly weapon with intent to kill improperly submitted to jury since defendant threatened to kill the victim only if she and others failed to comply with his demands and thus had no intent to kill in his assault of her). "[T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *White*, 307 N.C. at 49, 296 S.E.2d at 271.

The State's evidence tended to show that defendant sneaked into TGI Friday's before it opened and ambushed David Love. Defendant threatened Love with a knife, repeating, "If you don't give me what I want," and, "You're going to give me what I want." Defendant put down the knife, picked up lighter fluid, and threatened to burn Love. Love grabbed the knife, and defendant jumped on Love's back. The two struggled for the knife; defendant was slightly injured and Love was stabbed in the chest. Defendant ran from the scene.

Viewing this evidence, as we must, in the light most favorable to the State, *see State v. Moore*, 335 N.C. 567, 604, 440 S.E.2d 797, 818, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994), we hold that sufficient evidence was not presented from which a jury could find defendant assaulted Love with the intent to kill him. " 'When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *Id.* at 603, 440 S.E.2d at 818 (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). Substantial evidence in this context must be "real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

The State argues that defendant entered the premises without attempting to hide his identity and that this leads to the conclusion that he intended to leave no witnesses to his crime and therefore intended to kill Love. We believe this leap of inference is more than the evidence will support and more than our law allows. The State also argues that defendant told one of the State's witnesses that he would have "got [sic] away with it" if he had had a gun. This, too, allows conjecture by the jury that defendant intended to kill Love; it provides no substantial evidence to support such a determination. The charge of assault with a deadly weapon with intent to kill inflicting serious injury was improperly submitted to the jury.

The lesser included offense of assault with a deadly weapon inflicting serious injury was properly submitted, however. Each of the elements of assault with a deadly weapon inflicting serious injury was necessarily found in defendant's conviction for the greater crime of assault with a deadly weapon with intent to kill inflicting serious injury. *See Irwin*, 55 N.C. App. at 310, 285 S.E.2d at 350. We hold only that there was not sufficient evidence of defendant's intent to kill. Therefore, this case is remanded for entry of a verdict of guilty on the lesser included offense of assault with a deadly weapon inflicting serious injury and for resentencing. We find no error in defendant's conviction for attempted robbery with a dangerous weapon. A new trial is not warranted.

No error in part; vacated and remanded in part.

Chief Judge EAGLES and Judge HORTON concur.

HAZEL S. ALVAREZ, PLAINTIFF-APPELLANT v. ANTONIO ALVAREZ, DEFENDANT-APPELLEE

No. COA98-1133

(Filed 20 July 1999)

1. Divorce— alimony—relevant factors

The trial court did not err by denying a claim for permanent alimony where plaintiff contended that the court based its decision on the sole factor of her constructive abandonment of her husband. The 1995 statute which replaced fault-based alimony with a need-based approach mandates consideration of listed relevant factors, with marital misconduct as only one of a number

to be considered. The record shows that the court here considered the other relevant factors. N.C.G.S. § 50-16.3A (b).

2. Divorce— alimony—findings supported by evidence—weight of unsupported findings not determined

The trial court erred by denying permanent alimony where three of the court's findings were not supported by the evidence; the matter was remanded where the weight the court assigned to those findings could not be determined.

3. Divorce— alimony pendente lite—credit

The statute which allowed a court to give a party credit for alimony pendente lite payments made prior to the denial of an award of permanent alimony was repealed by the 1995 amendments to the North Carolina alimony law. Any determination of credit for post-separation support payments must be calculated from the entry of the court's judgment.

Appeal by plaintiff from judgment entered 17 March 1998 by Judge Alexander Lylerly, District Court, Mitchell County. Heard in the Court of Appeals 22 April 1999.

Legal Services of Blue Ridge, Inc., by Attorney Samuel F. Furgiuele, Jr. for the plaintiff.

Attorney Jack L. Wilson, Jr. for the defendant.

WYNN, Judge.

On 5 March 1997, Hazel S. Alvarez brought an action to divorce her husband, Antonio Alvarez, after nearly twenty-one years of marriage. Earlier, the parties separated when Mrs. Alvarez—with the help of several members of her family—ordered Mr. Alvarez to leave their marital residence. She contended that she directed her husband to leave because he had sexually molested her three minor granddaughters five years earlier and had refused to seek marital counseling during the interim.

Following a hearing on her claim for post-separation support, District Court Judge Kyle D. Austin awarded post-separation support to her in the amount of $550 per month. However, after a trial on her claims for alimony and divorce from bed and board, District Court Judge Alexander Lyerly denied her claim for alimony and gave Mr. Alvarez credit for any post-separation support paid after 11

December 1997—the date of the hearing. Mrs. Alvarez appealed to this Court.

I.

[1] Mrs. Alvarez first contends on appeal that the trial court erred in denying her claim for permanent alimony because it failed to consider all the relevant factors under N.C. Gen. Stat. § 50-16.3A (b). We disagree.

The decision to award alimony is a matter within the trial judge's sound discretion and is not reviewable on appeal absent a manifest abuse of discretion. *See Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966). When considering the amount of alimony, however, we must review whether the trial judge followed the requirements of the applicable statutes. *See Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982).

Prior to 1 October 1995, North Carolina alimony law was governed by a fault-based approach that consisted of a laundry list of misconduct required to prove a dependent spouse's entitlement to alimony. *See* Act of June 21, 1995, ch. 319, 1995 N.C. Sess. Laws 641 (codified at N.C. Gen. Stat. § 50-16.1A to 16.9 (1995)) (repealing several portions of chapter 50 including § 50-16.2's grounds for alimony, plus adding several new sections including § 50-16.3A). Under the former alimony law, the supporting spouse could also claim that the dependent spouse had committed any of these acts of misconduct as a defense to a claim for alimony. *See Skamarak v. Skamarak*, 81 N.C. App. 125, 343 S.E.2d 559 (1986).

However, on 1 October 1995, this fault-based approach was replaced by a need-based alimony statute. *See* N.C. Gen. Stat. § 50-16.3A (1995). The new statute mandates that in determining the appropriateness of an alimony award, the trial court must: (1) find that one spouse is a dependent spouse; (2) find that the other is a supporting spouse; and (3) consider all of the following relevant factors set forth in N.C. Gen. Stat. § 50-16.3A (b):

> (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
>
> (2) The relative earnings and earning capacities of the spouses;

(3) The ages and the physical, mental, and emotional conditions of the spouses;

(4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;

(5) The duration of the marriage;

(6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;

(7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;

(8) The standard of living of the spouses established during the marriage;

(9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;

(10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;

(11) The property brought to the marriage by either spouse;

(12) The contribution of a spouse as homemaker;

(13) The relative needs of the spouses;

(14) The federal, state, and local tax ramifications of the alimony award;

(15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.

Id.

Thus, under this need-based approach, marital misconduct is only one factor to be considered when determining the amount and duration of a potential alimony award. *See id.*

In this case, Mrs. Alvarez argues that the trial court based its decision to deny her claim for permanent alimony on a sole factor of mar-

ital misconduct—the constructive abandonment of her husband. Ostensibly, she asserts that the trial court improperly failed to consider any of the other relevant factors in its determination of permanent alimony—thereby comporting with this State's prior fault-based approach rather than with its current need-based approach.

The record, however, shows that the trial court considered other factors when making its decision to deny her claim for alimony. Under finding number twenty-seven, the trial court stated:

> 27) In addition to the above findings, the Court has considered the following factors set forth in N.C. Gen. Stat. § 50-16.3A(b):
>
> a) The 'marital misconduct' of the Plaintiff as set forth in paragraph 25. (N.C. Gen. Stat. 50-16.3A(b)(1). Plaintiff's 'marital misconduct' was the direct cause of the separation of the parties and was done with the knowledge of her immediate family.
>
> b) The relative earnings and earning capacities of the parties (N.C. Gen. Stat. § 50-16.3A(b)(2). Both parties are capable of earning an income. The Plaintiff, as set forth above, possesses the ability to work and earn an income.
>
> c) The ages and physical, mental and emotional condition of the parties (N.C. Gen. Stat. § 50-16.3A(b)(3). The parties are in their 60s and each has medical conditions, although not debilitating, that affect them physically and impacts upon their present and future employment ability.
>
> d) The amount and sources of earned and unearned [income] of both spouses. (N.C. Gen. Stat. 50-16.3A(b)(4). The earnings and expenses of the parties that have been set forth hereinabove.
>
> e) The duration of the marriage. (N.C. Gen. Stat. § 50-16.3A(b)(5).
>
> f) The standard of living of the parties established during the marriage. (N.C. Gen. Stat. § 50-16.3A(b)(8). The Plaintiff continues to reside in the marital residence and has presented no evidence showing a change in her standard of living since she instructed the Defendant to leave the home. In contrast, Defendant's standard of living has decreased. He resides in an apartment where he has no telephone and has incurred additional expenses.
>
> g) The relative education of the spouses. (N.C. Gen. Stat. § 50-16.3A(b)(9). The Plaintiff has a degree as a nursing assistant

and has worked in that capacity within a relevant time in the past. Defendant has no formal education above the high school level.

h) The relative needs of the spouse. (N.C. Gen. Stat. § 50-16.3A(b)(13). Plaintiff's evidence failed to show any existing needs she has incurred, except transportation.

Because the trial court, in addition to considering its finding that the wife constructively abandoned the husband, also considered the other relevant factors under G.S. § 50-16.3A(b), we reject Mrs. Alvarez's first assignment of error.

II.

[2] Nonetheless, Mrs. Alvarez asserts, even if the trial court properly considered other factors in denying her claim for alimony, its judgement is still flawed because at least three of the findings of fact used to support its conclusions of law are not supported by competent evidence. With that contention, we agree.

Our law requires the trial court to consider all the competent evidence and not ignore relevant issues of fact. *See Long v. Long*, 71 N.C. App. 405, 322 S.E.2d 427 (1984).

> 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).

The record reveals that the trial court made at least three findings of fact which were not supported by the evidence presented at the trial.

First, finding of fact number twelve states that "[t]he Plaintiff testified that she was not taking any medication prescribed by a treating physician; that she suffered from no injuries and had no major medical problems." However, the record shows that the wife testified, *inter alia*, that: (1) she was taking Effexor—a medication for depression prescribed by her doctor and (2) she suffered from numerous medical problems including arthritis, a bleeding ulcer, a hiatal hernia, and a recent mastectomy.

Secondly, finding of fact number fifteen states that "[t]here is no evidence before the Court, which demonstrated the Plaintiff's inability to work and earn an income with which she can support herself." Yet, the record shows that Mrs. Alvarez testified that she was unable to work as a result of the aforementioned medical problems. Because this competent evidence was before the court, we must conclude that the trial court erred in finding that no evidence was introduced as to that issue. *See Long*, 71 N.C. App. at 407-08, 322 S.E.2d at 430.

Third, finding of fact number twenty states that "[t]he Defendant's monthly expenses, together with the above marital debts nearly exceeds his net monthly income." The husband's counsel, however, conceded during oral argument that this finding was erroneous. Therefore, we must find that this finding was also in error.

Given our inability to determine the weight that the trial court assigned to these erroneous findings of facts, its use of these findings to support the apparent conclusions of law under finding number twenty-seven requires the reversal and remand of its judgment. *See Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997). For example, subpart (b) of number twenty-seven—pertaining to the court's consideration of each parties' relative earning capacity—appears to have been based on the unsupported findings of fact numbers twelve and fifteen. Further, subpart (d) of number twenty-seven—involving its consideration of the amount and sources of both spouses' earned and unearned income—and part (f)—involving the spouses' established standard of living during the marriage—appear to have been based on the unsupported finding of fact number twenty.

Accordingly, we reverse and remand this matter to allow the trial court to make proper findings of fact and base its new alimony decision thereon.

[3] We further note that upon remand, the trial court should consider that N.C. Gen. Stat. § 50-16.11—which allowed a court to give a party credit for *alimony pendente lite* payments made prior to the denial of an award of permanent alimony—was repealed by the 1995 amendments to North Carolina's alimony law. *See* Act of June 21, 1995, ch. 319, 1995 N.C. Sess. Laws 641. Thus, any determination of credit for post-separation support payments must be calculated from the entry of the trial court's judgment. *See West v. Marko*, 130 N.C. App. 751, 755, 504 S.E.2d 571, 573-74 (1998) (holding that a judgment is not enforceable until it is entered which occurs when the judgment is

"reduced to writing, signed by the judge, and filed with the clerk of the court").

Reversed and remanded.

Judges WALKER and HUNTER concur.

IN THE MATTER OF K.R.B., JUVENILE

No. COA98-658

(Filed 20 July 1999)

1. **Appeal and Error— appealability—juvenile—finding of probable cause—not a final order**

An appeal from a finding of probable cause that a juvenile had committed first-degree murder was not immediately appealable and was dismissed. A finding of probable cause clearly does not fall within any of the four categories of final orders specified in N.C.G.S. § 7A-666 (1995).

2. **Juveniles— murder—transfer to superior court—trial as adult—petition adequate**

The trial court did not err by transferring a juvenile to superior court for trial as an adult on a charge of first-degree murder without a transfer hearing following a finding of probable cause. The juvenile petition adequately charged the offense in a clear and concise manner and informed the juvenile of the charge against him; if he needed further clarification of the charge, he could have filed a motion for a bill of particulars. The court properly transferred the juvenile automatically without a juvenile transfer hearing. N.C.G.S. § 7A-608.

Appeal by juvenile from order entered 23 February 1998 by Judge Elaine M. O'Neal in Durham County District Court. Heard in the Court of Appeals 13 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General T. Brooks Skinner, Jr., for the State.

Brian Michael Aus for juvenile-appellant.

TIMMONS-GOODSON, Judge.

On 13 January 1998, a juvenile petition was filed alleging that the juvenile, K.R.B. ("juvenile"), was delinquent as defined by North Carolina General Statutes section 7A-517(12) (1995) in that on or about 30 December 1997 he "unlawfully, willfully and feloniously did of malice aforethought kill and murder Tracy Price" in violation of North Carolina General Statutes section 14-17 (1993).

At the 23 February 1998 probable cause hearing, the only evidence presented by the State was the testimony of Detective Vincent Bynum ("Detective Bynum") of the Durham Police Department. Detective Bynum testified that he was the investigating officer assigned to investigate the homicide of a taxi cab driver, Tracy Price ("victim"), who died as a result of a single gun shot wound to the neck.

Based on leads provided by an informant, interviews were conducted with Eric, Anthony and Judge Bobbitt. At the police headquarters, Eric, Anthony and Judge gave written statements. Detective Bynum testified that he interviewed and took a written statement from Eric, while Sergeant Carter interviewed and took a written statement from Anthony. Detective Bynum further testified that the statements were identical except they differed as to who made the call for the cab that picked them up. Eric and Anthony were subsequently charged with murdering the victim. Judge was not charged with murder.

Over juvenile's objection, Detective Bynum was allowed to testify at the probable cause hearing about the statements given to the police by Eric and Anthony. The statements given by the Bobbitt brothers tended to show that Eric and Anthony were "hanging out on the block" when juvenile approached them. They began talking about girls they had met earlier on Buchanan Street. They called a cab from a pay phone across the street and gave Eric and Anthony's former address, 1615 Sedgefield Court, Apartment 11. The taxi pulled up to the parking lot at 1615 Sedgefield Court and blew the horn. Eric, Anthony and juvenile got into the taxi cab and directed victim to drive to North Buchanan Street. Once they arrived at the designated location, the cab meter read three dollars and thirty-five cents. Anthony reached into his pocket to give victim the money for the fare and victim said, "[j]ust give me two dollars, because it was a short ride." As Anthony was giving victim the money for the fare, he heard a gun shot and saw juvenile with a gun in his hand. As Anthony ran,

he looked back and saw juvenile going through victim's pockets in the front seat. He ran to juvenile's address on Hillcrest. Juvenile came up behind him and showed him the money he had taken from victim's pockets, which consisted of a twenty and some other bills. On cross-examination, Detective Bynum acknowledged that juvenile's name had not come up in the investigation until given to him by the Bobbitt brothers. As of the time of the probable cause hearing, Detective Bynum had no information implicating juvenile other than the Bobbitt brothers' statements.

The trial court found that there was probable cause to believe that, indeed, a murder had been committed and that juvenile had committed the offense of first degree murder. The trial court further found that the offense was a class A felony for which transfer to Superior Court was mandatory pursuant to North Carolina General Statutes section 7A-608 (1995) and ordered the case transferred to Superior Court for trial as an adult. Juvenile appeals.

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[1] Juvenile's first argument relates to evidentiary rulings of the trial court in conducting the probable cause hearing. Specifically, juvenile argues that Detective Bynum's testimony at the probable cause hearing regarding statements made to him by Eric and Anthony was inadmissible hearsay. The State counters that these rulings are not properly before this Court because a finding of probable cause in a juvenile proceeding is not immediately appealable. We agree with the State.

Section 7A-666 of the North Carolina Juvenile Code states the following:

> *Right to appeal.* Upon motion of a proper party as defined in G.S. 7A-667, review of any *final order* of the court in a juvenile matter under this Article shall be before the Court of Appeals . . . . A *final order* shall include:
>
> (1) Any order finding absence of jurisdiction;
>
> (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
>
> (3) Any order of disposition after an adjudication that a juvenile is delinquent, undisciplined, abused, neglected, or dependent; or
>
> (4) Any order modifying custodial rights.

N.C. Gen. Stat. § 7A-666 (1995) (emphasis added).

A finding of probable cause by the trial court clearly does not fall within any of the four categories of final orders specified in the statute. *In re Ford*, 49 N.C. App. 680, 683, 272 S.E.2d 157, 159 (1980). "Nor do we believe [a finding of probable cause] to be within the purview of the legislative intent to permit judicial augmentation of the list which may be inferred from the use of the word 'include' preceding the specified categories." *Id.* A finding of probable cause is not a final order "because it merely binds the juvenile over for trial and makes no ultimate disposition of the charges against him." *Id.* Based on these principles, we must conclude that this argument is not properly before us and, therefore, must be dismissed.

[2] Juvenile next argues that the trial court erred by automatically transferring his case to Superior Court, without conducting a transfer hearing, because the petition lacked all of the elements of first degree murder. The State counters that the petition was sufficient to allege first degree murder and, consequently, that transfer of the case to Superior Court was mandatory. Once again, we agree with the State.

North Carolina General Statutes section 7A-560 (1995) provides:

> A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the accusation.

First degree murder is defined as "the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991); N.C. Gen. Stat. § 14-17 (1993). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836.

The juvenile petition alleged the following:

> That the juvenile is a delinquent as defined by G.S. 7A-517(12) in that in Durham County and on or about December 30, 1997 the

above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder Tracy Price. G.S. 14-17.

In the case *sub judice*, the petition properly alleges first degree murder and satisfies the requirements of section 7A-560. The petition adequately charged the offense in a clear and concise manner and informed juvenile of the charge against him so he could adequately prepare a defense. If juvenile needed further clarification on the charge, he could have filed a motion for a bill of particulars pursuant to North Carolina General Statutes section 15A-925 (1997). Additionally, we note that juvenile failed to object to the indictment before the trial court.

Section 7A-608 requires upon a finding of probable cause in a class A felony that the court transfer the case to Superior Court for trial as in the case of adults. Here, the court properly transferred juvenile automatically to Superior Court without a juvenile transfer hearing.

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

Judges LEWIS and WALKER concur.

ANGELA LINDER JOHNSON, PLAINTIFF v. MICHAEL W. YORK AND ROY KEITH ROGERS, DEFENDANTS

No. COA98-954

(Filed 20 July 1999)

1. Appeal and Error— appealability—motion for summary judgment—governmental immunity

An appeal from an order denying summary judgment was immediately appealable as affecting a substantial right where the motion for summary judgment was based on the defense of governmental or public official immunity.

2. Governmental Immunity— capacity not stated in complaint—presumed official

The trial court erred by denying summary judgment for defendants on the basis of governmental immunity where there was no statutory waiver, no waiver by the purchase of insurance, plaintiff did not state in the complaint that the suit was against defendants in their individual capacities, and the pleading contains numerous allegations which plainly indicate that defendants are being sued in their official capacities.

Appeal by defendants from order entered 21 April 1998 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 31 March 1999.

Billy R. Craig for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General J. Philip Allen, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Michael W. York ("York") and Roy Keith Rogers ("Rogers") (collectively, "defendants") appeal from an order denying their motion for summary judgment as to the claims filed by Angela Linder Johnson ("plaintiff") for invasion of privacy and intentional infliction of emotional distress. Defendants contend that the trial court erroneously denied summary judgment, because plaintiff's claims are barred by the doctrines of governmental and public official immunity. Having carefully considered defendants' arguments, we reverse the order of the trial court and remand for further disposition.

The relevant factual and procedural background is as follows: At the time of the events about which plaintiff complains, defendant York was the Administrator of the South Piedmont Area of the North Carolina Department of Correction ("DOC"). Defendant Rogers was the Correctional Administrative Services Manager and reported directly to York. Plaintiff was an employee of the DOC, along with her former husband, Joel Threatt ("Threatt"), and her current husband, Mitchell Johnson ("Johnson").

On the morning of 25 April 1994, Threatt contacted York and told him that he had reason to believe that plaintiff, then his wife, was having an affair with Johnson, her supervisor. Threatt informed York that he planned to confront plaintiff with the information later that

evening, and he requested that someone from DOC be present at their home to witness the exchange. Based on his perception of Threatt's emotional state, York believed that the confrontation could be dangerous and that the situation could adversely affect DOC's operations. Thus, after consulting his supervisors, Boyd Bennett, Geographic Command Manager for the Piedmont Region; Joseph Hamilton, Deputy Director of Prisons; and Lynn Phillips, Director of Prisons, York authorized Rogers to go to the couple's house on behalf of DOC to ensure that Threatt and plaintiff did not endanger themselves or discredit DOC.

At approximately 6:45 that evening, Threatt telephoned Rogers and told him that plaintiff had arrived home. Rogers then drove to the couple's house, where Threatt met him at the door and escorted him into the den. Threatt also asked plaintiff into the den, and the three sat down to talk. Threatt accused plaintiff of having an affair and told her to leave the house or he would take out a warrant against her for adultery. Over the next couple of hours, Threatt and plaintiff engaged in an emotional and angry discussion. Several times, plaintiff asked if she could be left alone with Threatt, but Threatt made it clear to her and Rogers that he did not want Rogers to leave. Rogers took no sides in the argument but stated repeatedly that he was present only as a representative of DOC, to make sure that Threatt and plaintiff did not endanger themselves or discredit DOC. At approximately 9:15 p.m., plaintiff left the house with some of her belongings and spent the night with her parents.

The following morning, 26 April 1994, plaintiff met with York and Rogers in York's office. York informed plaintiff that she would be temporarily reassigned to another duty station pending an investigation into whether the situation involving her, Threatt, and Johnson was disrupting DOC operations. York also informed plaintiff that Threatt did not want her to return to the house to retrieve the rest of her belongings unless a DOC representative accompanied her. When plaintiff stated that she wanted to return to the house by herself, York directed Rogers to call Threatt and ask him if he would permit plaintiff to do so safely. Rogers called Threatt, who consented to let plaintiff in to remove her things, and Rogers conveyed Threatt's response to plaintiff.

Plaintiff brought an action against York, Rogers, and the DOC for invasion of privacy, malicious interference with contractual rights, defamation, and infliction of emotional distress. Following a motion

by defendants to dismiss the complaint, the trial court dismissed all causes of action against the DOC. In addition, the court dismissed all claims against defendants York and Rogers except invasion of privacy and intentional infliction of emotional distress. Defendants moved for summary judgment on the grounds of governmental immunity and public official immunity. The trial court denied the motion. In so ruling, the court concluded that plaintiff had sued defendants York and Rogers in their individual capacities and that there were genuine issues of fact as to whether they were acting outside the scope of their official authority or with malice. From the order denying summary judgment, defendants appeal.

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[1] As a preliminary matter, we note that defendants' appeal is interlocutory. Ordinarily, an order denying summary judgment is not immediately appealable; however, where, as here, the motion for summary judgment was based on the defense of governmental or public official immunity, the order is immediately reviewable as affecting a substantial right. *Kephart v. Pendergraph*, 131 N.C. App. 559, 562, 507 S.E.2d 915, 918 (1998). Thus, we will examine the merits of defendants' appeal.

[2] Summary judgment is appropriate if the pleadings and other documentary evidence show that there is no triable issue of fact and that the moving party is entitled to judgment as a matter of law. *Id.* Upon a motion for summary judgment, it is the moving party's burden to show one of the following: "(1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of [her] claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of [her] claim." *Id.* Defendants, who are public officers of the State of North Carolina, contend that they have satisfied their burden under the third standard. It is defendants' position that summary judgment in their favor was appropriate because they are protected from tort liability under the doctrine of governmental immunity.

"Governmental immunity shields municipalities and the officers or employees thereof sued in their official capacities from suits based on torts committed while performing a governmental function." *Id.* at 563, 507 S.E.2d at 918. However, a plaintiff may maintain such a suit if the General Assembly has specifically provided for a cause of action against a governmental entity, its officers, or its employees, or if the entity itself consents to be sued by purchasing insurance. *Slade v. Vernon*, 110 N.C. App. 422, 426, 429 S.E.2d 744, 746 (1993). In the

instant case, we find no statutory waiver of governmental immunity, nor do we find that the governmental entity itself waived its immunity by the purchase of liability insurance.

At the hearing on defendants' motion for summary judgment, plaintiff argued that, because she sued defendants in their individual capacities, the doctrine of governmental immunity does not apply. Defendants, on the other hand, pointed out that nowhere in the caption or in the body of the complaint does plaintiff state that she maintains her suit against defendants in their individual capacities. Thus, it is presumed that plaintiff's action against defendants is in their official capacities.

In *Warren v. Guilford County*, 129 N.C. App. 836, 500 S.E.2d 470, *disc. review denied*, 349 N.C. 379, 516 S.E.2d 610 (1998), this Court visited the issue of whether a complaint that does not specify the capacity in which a defendant is being sued sufficiently states a claim against a public employee in his or her individual capacity. Relying on our Supreme Court's decision in *Mullis v. Sechrest*, 347 N.C. 548, 495 S.E.2d 721 (1998), we stated the following:

> [A] pleading should "clearly" state the "capacity in which [a defendant] [i]s being sued." This statement of "capacity" should be included in the caption, the allegations, and the prayer for relief. Such clarity, as noted by our Supreme Court, is a "simple matter for attorneys," will provide defendants with "an opportunity to prepare a proper defense," and avoids litigation that necessarily arises when the capacity is not clearly specified. In the absence of such clarity, it will be presumed that the defendant[s] [are] being sued in [their] official capaci[ties].

Warren, 129 N.C. App. at 839, 500 S.E.2d at 472 (quoting *Mullis*, 347 N.C. at 554, 495 S.E.2d at 724-25).

Warren controls the facts of the present case. In plaintiff's complaint, the caption, the allegations, and the prayer for relief contain no clear statement that defendants are being sued in their individual capacities. Conversely, the pleading contains numerous allegations which plainly indicate that plaintiff is suing defendants in their official capacities. For instance, under plaintiff's First Cause of Action, plaintiff alleges that Rogers "is a resident of Mecklenburg County" and that he "is employed by the State of North Carolina, Department of Corrections . . . in the capacity of Administrative Services

Manager." Similarly, plaintiff alleges that York "is a resident of Cabarrus County" and that he "is employed by the State of North Carolina, Department of Corrections . . . in the capacity of Area Administrator." Plaintiff further avers that "[a]t all times referred to [in the complaint] Plaintiff was and is an employee of Defendant, State of North Carolina, Department of Corrections, and the Defendant Rogers was her colleague; York was her Area Administrator." Plaintiff alleges that "Rogers evicted Plaintiff from her own home [on 25 April 1994] and did so, according to his statement[,] in his official capacity for the NCDOC." She also avers that "York, by his statements and by his demands on Plaintiff on April 26, 1994, ratified Rogers' intrusion on the night of April 25, 1994."

In view of these allegations and the absence of any clear indication that defendants are being sued in their individual capacities, we treat plaintiff's complaint as a suit against defendants solely in their official capacities. Hence, the trial court erred in denying their motion for summary judgment, as defendants are shielded from liability in tort under the doctrine of governmental immunity. *See Kephart*, 131 N.C. App. 559, 507 S.E.2d 915. Based on our holding, we need not address the remaining issue of whether defendants are entitled to assert the affirmative defense of public official immunity. Thus, we need not consider whether defendants acted maliciously or outside the scope of their duties.

For the foregoing reasons, the order of the trial court is reversed and this matter remanded for entry of summary judgment in favor of defendants.

Reversed and remanded.

Judges LEWIS and HORTON concur.

STATE OF NORTH CAROLINA v. TROY ANTHONY WHITE, DEFENDANT-APPELLANT

No. COA98-990

(Filed 20 July 1999)

1. **Criminal Law— subject matter jurisdiction—failure to instruct jury**

   The trial court did not err in a heroin trafficking prosecution by not instructing the jury on subject-matter jurisdiction where the State's evidence tended to show that defendant became involved in drug dealing between New York City and Durham and was arrested in New York in possession of heroin. While defendant contended that the only drugs admitted into evidence were those in his possession when he was arrested in New York, the only crimes with which defendant was charged indisputably took place in North Carolina, the primary evidence against defendant was an accomplice's testimony, and defendant's possession of drugs in New York was introduced to corroborate the accomplice's testimony.

2. **Constitutional Law— double jeopardy—heroin trafficking—prior conviction in federal court—not raised at trial**

   A heroin trafficking defendant's contention that prosecution in North Carolina following a federal conviction constituted double jeopardy was waived where not raised in the trial court.

Appeal by defendant Troy Anthony White from judgment entered 23 October 1997 by Judge Robert L. Farmer, in Superior Court, Wake County. Heard in the Court of Appeals 18 May 1999.

Michael F. Easley, Attorney General, by W. Dale Talbert, Special Deputy Attorney General, for the State.

Manning & Crouch, by James A. Crouch, for defendant-appellant.

WYNN, Judge.

Defendant Troy Anthony White appeals his convictions for trafficking in heroin by possession, transportation and manufacture of 28 grams or more of heroin. We find no error in either his trial or the sentence awarded to him.

At trial, the State's evidence tended to show that in 1991 White met Roberto Arroyo while working as a contractor in New York. At some point thereafter, the two men discussed and eventually entered the drug-dealing business. On at least four occasions, Arroyo supplied White with at least four hundred grams of heroin. Although these deliveries were made in New York, White told Arroyo that he was selling the drugs in North Carolina.

In August 1993, Derrick Johnson, an acquaintance of White, moved to North Carolina and began working for him in the drug-dealing business. Johnson testified that on numerous occasions he was involved in a cutting and bagging operation led by White. Further, he stated that each cutting and bagging session yielded over eight-thousand bags of heroin, each containing about one sixteenth of a gram. Johnson also testified that he was involved in the distribution end of the drug-dealing business. Specifically, he stated that he would sell the drugs in Durham, North Carolina on Reservoir Street, and in or around a house located on Primitive Street—both areas known for the high number of heroin sales that have taken place there.

After an extensive investigation into White's activities, New York authorities, working in conjunction with North Carolina authorities, arrested White in New York while he was in possession of 365.7 grams of heroin. Thereafter, White was charged and tried for the aforementioned crimes in North Carolina.

Prior to and during trial, White moved to dismiss the charges for lack of subject matter jurisdiction contending that the State failed to produce sufficient evidence showing that he committed the crimes within the territorial boundaries of North Carolina. The trial court denied these motions. Further, the trial court denied White's request to instruct the jury on lack of subject matter jurisdiction. Following his conviction on all counts. This appeal ensued.

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[1] On appeal, White first argues that the trial court erred in failing to instruct the jury on lack of subject-matter jurisdiction. We disagree.

It is well settled law that an act must have occurred within the territorial boundaries of the state to be punishable as a crime in this state. *State v. Jones*, 227 N.C. 94, 96, 40 S.E.2d 700, 701 (1946). Accordingly, North Carolina courts have jurisdiction over a crime if any of the essential acts forming the offense occurred in this

State. *See State v. Vines*, 317 N.C. 242, 250-51, 345 S.E.2d 169, 174 (1986).

When a defendant moves to challenge the State's jurisdiction over a particular crime, the burden is placed upon the State to prove beyond a reasonable doubt that the crime occurred in North Carolina. *See State v. Rick*, 342 N.C. 91, 99, 463 S.E.2d 182, 186 (1995). Further, in those cases where jurisdiction is contested, if "the trial court makes a preliminary determination that sufficient evidence exists upon which a jury could conclude beyond a reasonable doubt that the [crime] occurred in North Carolina, the trial court must instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the [crime] occurred in North Carolina, a verdict of not guilty should be returned". *Id.* at 100-01, 463 S.E.2d at 187. Moreover, the jury should also be instructed that if it is not so satisfied, it must return a special verdict indicating lack of jurisdiction. *See State v. Batdorf*, 293 N.C. 486, 497, 238 S.E.2d 497, 504 (1977). However, when the facts upon which the court finds jurisdiction are not in dispute, a jury instruction regarding jurisdiction is not warranted. *See State v. Callahan*, 77 N.C. App. 164, 169, 334 S.E.2d 424 (1985).

In the case *sub judice*, White contends that North Carolina did not have jurisdiction over this crime because there was insufficient evidence that he trafficked heroin in this State. In support of this argument, White notes that the only drugs that were admitted into evidence were those found in his possession when he was arrested in New York. This argument is misplaced.

First, the confiscated drugs introduced into evidence were not used as part of the State's substantive evidence. Significantly, the trial court informed the jury that "you cannot take into account any amount of heroin that the Defendant had in his possession outside of North Carolina." Thus, the jury was specifically instructed not to consider any of White's alleged criminal acts that took place outside of this State.

Further, the only crimes for which White was being charged indisputably took place in North Carolina. The State's primary evidence against White was Johnson's testimony to the effect that he saw White cut, bag, and sell heroin *in North Carolina*. The State referred to White's possession of drugs in New York not as a means of trying him for that crime, but rather to corroborate Johnson's testimony.

Additionally, we note that White improperly relied on *State v. Bright*, 131 N.C. App. 57, 505 S.E.2d 317 (1998) and *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977) to support his argument. In those cases, the respective courts held that a jury instruction regarding jurisdiction was warranted because it was unclear whether the crime was committed in this State. For example, in *Bright* the defendant was charged with rape and other sex offenses and the question was whether those unlawful acts took place in this State. Similarly, in *Batdorf* the defendant was charged with murder and it was unclear whether the murder itself was committed in North Carolina. In the instant case, however, it is undisputed that heroin trafficking took place in North Carolina; rather, the sole question is whether White was the perpetrator of that crime. Therefore, *Bright and Batdorf* are distinguishable.

Indeed, this case is more analogous to *State v. Callahan*, 77 N.C. App. 164, 334 S.E.2d 424 (1985), where the defendant was charged with certain drug offenses and the question was not whether the particular drug sale took place in North Carolina, but whether the defendant, an undisputed drug dealer in South Carolina, was the perpetrator of the North Carolina drug offense. That is, unlike *Bright and Batdorf*, the question was not whether the crime itself took place in North Carolina, but whether the defendant was the perpetrator of that crime in this State. In *Callahan*, we ruled that in that circumstance, an instruction on jurisdiction was properly denied. We see no reason to depart from the precedent of that case.

In sum, we find that the State sought to prosecute White for a crime that took place in this State. This case does not involve a situation whereby a crime occurred that might not have taken place in North Carolina. The trafficking at issue in the case *sub judice* undoubtedly occurred here; the only issue was whether White committed that offense. Any reference to White's alleged criminal activity outside of this State was not used as a substantive part of the State's evidence. Since North Carolina was the only location where the crime White was charged with could take place, White's first assignment of error is without merit.

White's next two assignments of error involve contentions that the trial court improperly denied his motion to dismiss and improperly allowed evidence concerning his arrest in New York. We hold that these assignments of error are wholly without merit and teeter on the edge of being frivolous. Accordingly, we summarily reject them.

[2] Lastly, White contends that the State's prosecution for the substantive offenses of trafficking more than 28 grams of heroin by sale, delivery, manufacture, transportation or possession violated both N.C. Gen. Stat. § 90-97 and the Double Jeopardy Clause of the United States and North Carolina Constitutions. Specifically, White contends that the acts for which he was prosecuted in North Carolina were "the same acts" for which he was previously prosecuted and convicted in federal court. White concedes that he failed to raise this issue at the trial court level and accordingly first sets forth this alleged error on appeal.

"The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived." *State v. Hopkins*, 279 N.C. 473, 475, 183 S.E.2d 657, 659 (1971). To avoid waiving this right, a defendant must properly raise the issue of double jeopardy before the trial court. *See State v. McKenzie*, 292 N.C. 170, 175, 232 S.E.2d 424, 428 (1977). Failure to raise this issue at the trial court level precludes reliance on the defense on appeal. *Id.* Simply put, "double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court." *Id.* at 176, 232 S.E.2d at 428.

In the case *sub judice*, White failed to bring his double jeopardy defense to the attention of the trial court. Therefore, he has waived his right to this defense and we refuse to address it on appeal.

No error.

Judge GREENE concurs.

Judge MARTIN concurs in the result.

COASTLAND CORPORATION, PETITIONER v. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION, RESPONDENT

No. COA98-1068

(Filed 20 July 1999)

1. **Partition— proceeding against State—subsequent eminent domain filing by State—partition moot**

A petition to partition land jointly owned with the State was rendered moot where the State subsequently filed an eminent domain proceeding (determined in a companion case to be a proper exercise of the State's condemnation powers).

2. **Governmental Immunity— partition proceeding—not barred by sovereign immunity**

Though not necessary to the decision, the Court of Appeals held that sovereign immunity does not bar a suit for partition against the State. Partition proceedings are in rem and, although the statutes seem to address in rem jurisdiction as separate from personal jurisdiction, the case law comports with the general understanding that in rem is but one type of personal jurisdiction. Sovereign immunity is a defense to a claim of personal jurisdiction; however, rather than suing the State, petitioner here is merely seeking through a special proceeding to have what already belongs to him. A petition for partition in its initial stages is not a suit against the State such that the doctrine of sovereign immunity applies.

Appeal by petitioner from order entered 24 April 1998 by Judge James E. Ragan, III, in Pamlico County Superior Court. Heard in the Court of Appeals 21 April 1999.

Henderson, Baxter, Alford & Taylor, P.A., by David S. Henderson, for petitioner.

Attorney General Michael F. Easley, by Special Deputy Attorney General Roy A. Giles, Jr., for respondent.

LEWIS, Judge.

This case is the companion to *State v. Coastland Corp.*, 134 N.C. App. 269, — S.E.2d — (1999), and they are filed concurrently. Pursuant to a Supreme Court decision and a later sale of one party's interest, petitioner owned a one-fifth undivided interest and the State

owned a four-fifths undivided interest in approximately 1000 tidewater acres containing dikes, impoundments, marshes, low islands, and a few outbuildings. *See Taylor v. Johnston*, 289 N.C. 690, 224 S.E.2d 567 (1976). On 24 June 1996, Coastland Corporation, the petitioner in this case and defendant in the companion eminent domain case, filed a petition to partition the land owned jointly by it and the State. The State moved to dismiss the petition on the ground of sovereign immunity. The State then filed a complaint and a declaration of taking on 29 August 1996. On 16 September 1996 the State moved to dismiss the partition proceeding as moot since title immediately vested in the State upon filing and deposit in the eminent domain proceeding. On 27 September 1996, petitioner voluntarily dismissed its partition proceeding, but on 26 September 1997 it reinstituted partition proceedings. On 21 October 1997, the State again filed a motion to dismiss on the grounds of sovereign immunity and mootness.

The trial court granted the State's motion to dismiss and made the following conclusions of law:

> 2. Not being expressly mentioned in Chapter 46 as an entity against which partition proceedings may be filed, the sovereign State of North Carolina and its agencies are not bound by the provisions of Chapter 46 of the General Statutes. Had the legislature intended to waive the sovereign immunity of the State or one of its agencies with regard to partition proceedings it could have done so in plain language. It did not. There is no waiver of the State's sovereign immunity in Chapter 46 of the General Statutes.
>
> 3. Even if this Court had jurisdiction over a partition proceeding filed against the State, or an agency thereof, this action would be moot because the State lawfully acquired all right, title and interest of the Petitioner in the land in question by virtue of the eminent domain proceeding pending in Pamlico County Superior Court (96-CVS-164).

From the granting of the State's motion to dismiss, petitioner appeals. We consider first whether the partition proceeding was rendered moot by the eminent domain action and second whether sovereign immunity bars a petition for partition against the State.

[1] Petitioner contends that "[t]he State cannot moot partition by instituting a condemnation to take the property when it is not for a public purpose." Because we have determined that the taking of peti-

tioner's interest in the subject property was a proper exercise of the State's condemnation powers, *see State v. Coastland Corp.*, 134 N.C. App. 269, — S.E.2d — (1999), we reject petitioner's argument. The taking was proper, and because title vested immediately in the State, *see* N.C. Gen. Stat. § 136-104 (1993), the partition proceeding was rendered moot. The State could have waited until partition proceedings had been completed and condemned petitioner's undivided interest. We see no reason why the State may not exercise its eminent domain authority before the partition proceedings are completed, provided such taking is proper.

[2] Though not necessary to our decision in this case, we choose to address briefly petitioner's other argument that partition proceedings against the State are not barred by sovereign immunity. Our Courts have long recognized that partition proceedings are proceedings in rem. *See Armstrong v. Kinsell*, 164 N.C. 125, 126, 80 S.E. 235, 236 (1913); *Hinnant v. Wilder*, 122 N.C. 149, 152, 29 S.E. 221, 222 (1898). *See also Stevens v. Cecil*, 214 N.C. 217, 218, 199 S.E. 161, 162 (1938). In in rem proceedings, " 'the court already has jurisdiction of the res, . . . and the judgment has no personal force, not even for the costs, being limited to acting upon the property.' " *Stevens*, 214 N.C. at 218, 199 S.E. at 162 (quoting *Bernhardt v. Brown*, 118 N.C. 701, 705, 24 S.E. 527, 528 (1896)).

Our statutes seem to recognize personal jurisdiction as distinct from jurisdiction in rem. N.C. Gen. Stat. § 1-75.3 (1996) provides:

> (b) Personal Jurisdiction.—A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 or G.S. 1-75.7. . . .
>
> (c) Jurisdiction in Rem or Quasi in Rem.—A court of this State having jurisdiction of the subject matter may render a judgment in rem or quasi in rem upon a status or upon a property or other things pursuant to G.S. 1-75.8 and the judgment in such action may affect the interests in the status, property or thing of all persons served pursuant to Rule 4(k) of the Rules of Civil Procedure.

See also N.C. Gen. Stat. § 1-75.11 (1996). In discussing the basis for a distinction between in rem and in personam personal jurisdiction, this Court said:

> [*Pennoyer v. Neff*] recognized that the states must comply with the standards of due process but perceived the requirements for jurisdiction over property as conceptually distinct from those applicable to personal jurisdiction. The mere presence of property was sufficient for *in rem* jurisdiction, whereas the presence of the defendant's person within the state was essential for *in personam* jurisdiction. These bifurcated jurisdictional standards have been maintained over the years, with the state courts exercising jurisdiction based on the presence of property in actions *in rem* and *quasi in rem* and exercising personal jurisdiction based on the presence of the person.

Balcon, Inc. v. Sadler, 36 N.C. App. 322, 325, 244 S.E.2d 164, 166 (1978). The U.S. Supreme Court held in *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683 (1977) that the same standards of fairness and minimum contacts which govern in personam jurisdiction must apply to in rem actions. In *Shaffer*, the legal location of property in Delaware was used as a basis to assert jurisdiction over the nonresident directors and officers; the action was quasi in rem. "Where real property has some relation to the controversy, the interest of the State in realty within its borders, and the defendant's substantial relationship with the forum[,] should support jurisdiction." *Balcon* at 326, 244 S.E.2d at 167. Thus, although our statutes seem to address in rem jurisdiction as a separate type of jurisdiction from personal jurisdiction, our case law comports with the general understanding that in rem is but one type of personal jurisdiction and as such is subject to fairness and minimum contacts Constitutional safeguards.

Sovereign immunity is a defense to a claim of personal jurisdiction. *See Zimmer v. N.C. Dept. of Transportation*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 116 (1987). Sovereign immunity is a common law doctrine with specific, legislatively created exceptions, *see State v. Taylor*, 322 N.C. 433, 436, 368 S.E.2d 601, 603, *reh'g denied*, 322 N.C. 838, 371 S.E.2d 284 (1988); it mandates that "[t]he State of North Carolina is immune from suit unless and until it expressly consents to be sued." *Id.* at 435, 368 S.E.2d at 602. In this case, however, petitioner is not suing the State. Petitioner merely seeks, through a "special proceeding," *see* N.C. Gen. Stat. § 46-1 (1984), to have what already belongs to him by virtue of an opinion of our own Supreme Court.

Were petitioner contesting the ownership of certain betterments to the property, as was the case in *Taylor*, the State could effectively

claim sovereign immunity. In *Taylor*, petitioner claimed betterments on a parcel of property he had occupied but which had been judicially determined to actually belong to the State. Our Supreme Court held that although the State had waived its sovereign immunity for suits involving title to land, it had not waived its immunity for suits "demanding payment for *permanent improvements* to the land over and above the value of the use and occupation of the land." *Taylor* at 435, 368 S.E.2d at 602 (emphasis in original). Petitioner here makes no demand for any such contested property; instead, petitioner seeks to have his judicially-determined ownership interest in severalty rather than jointly. Petitioner seeks not to affirmatively change ownership, but rather to rearrange ownership, to have and to hold its own part.

We do not believe that a petition for partition in its initial stage is a suit against the State such that the doctrine of sovereign immunity applies. The petitioner requests first that the lands be divided physically and second that if no division is possible the lands be sold and the money divided. We do not answer the question of whether sovereign immunity might bar partition proceedings in which the property could not be divided and would be subject to a sale. Such may indeed be a situation in which sovereign immunity would prevent petitioner from seeking a change in ownership of state-owned lands.

We reverse the trial court on this issue, dicta though it be, and hold that sovereign immunity does not bar a suit for partition against the State. *Accord*, *Ex rel State Park Bd. v. Tate*, 295 S.W.2d 167 (Mo. 1956). We note that to hold otherwise would allow the State to essentially seize an entire property by obtaining an undivided interest. Our concern does not affect the ultimate outcome of this case, though and the trial court's determination that the partition action is moot is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

AMY D. BARNETT, PLAINTIFF v. WALTER EUGENE KING, DEFENDANT

No. COA98-1234

(Filed 20 July 1999)

1. Notice; Process and Service— notice of hearing—not mailed to last known address

The trial court erred by granting plaintiff's motion for summary judgment where notice of the summary judgment hearing was never provided. An earlier notice of a continued default hearing was ineffective and could not be the basis for notice of the summary judgment hearing because it was mailed to the street address at which the complaint had been served even though the pro se defendant had responded with a single sentence which included a different address. Where a defendant, especially one acting pro se, provides a mailing address in a document filed in response to a complaint and serves a copy on opposing counsel, he or she should be able to rely on receiving later service at the same address; by the some token, opposing counsel (or a pro se party) may also rely on that address for service of all subsequent process and other communications until a new address is furnished.

2. Pleadings— pro se answer—sufficient

A one sentence pro se response to a complaint, though minimal in the extreme, denied the substance of the claim and sufficed as an answer.

Appeal by defendant from order entered 29 May 1998 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 13 May 1999.

Robbins May & Rich L.L.P., by P. Wayne Robbins, for plaintiff-appellee.

Holshouser and Suggs, L.L.P., by Paul B. Trevarrow, for defendant-appellant.

EDMUNDS, Judge.

Plaintiff's mother died on 26 February 1992. In her will, plaintiff's mother bequeathed insurance benefits under her Teacher's Insurance and Annuity Association's College Retirement Equity Fund account

(TIAA-CREF) to defendant, who is plaintiff's stepfather. Plaintiff, however, was the named beneficiary of the insurance policy. In order to honor her mother's wishes, plaintiff, in July 1992, voluntarily endorsed over to defendant TIAA-CREF benefit checks totaling $303,988.36. Defendant used the insurance proceeds to purchase land in Pinehurst, North Carolina. At the time, plaintiff apparently did not consider the tax consequences of her selflessness.

In 1993, plaintiff received a 1099 tax form from TIAA-CREF, which informed her that she was responsible for $100,368.00 in state and federal taxes arising from her receipt of the insurance proceeds. In her affidavit, plaintiff alleged she notified defendant, who agreed to reimburse plaintiff within a year if she would pay the taxes. Plaintiff thereupon paid the amount due. Plaintiff's affidavit further stated that in May 1993, defendant made a $20,000.00 partial payment to her and promised that he would soon pay the remaining amount. In her complaint, plaintiff alleged that defendant failed to pay an additional unrelated $5,000.00 debt, which is based on a subsequent loan from plaintiff to defendant.

In October 1997, plaintiff filed this action seeking recovery of $85,368.00, plus interest. The Moore County Sheriff's Department served defendant with the complaint on 30 October 1997 at 760 West Baltimore Avenue, Pinebluff, North Carolina. On 26 November 1997, defendant, acting *pro se*, filed with the court a single-sentence statement that, "The PLAINTIFF, Amy Barnett assured me that I was under no obligation to reimburse her for any sum as per her complaint." Although signed and dated by a witness and a notary, the statement contained no indication whether plaintiff made it under oath. Defendant's response was directed to plaintiff, in care of her legal counsel, and provided defendant's mailing address, P.O. Box 4120, Pinehurst, North Carolina 28374.

On 3 April 1998, plaintiff filed a "Motion For Entry Of Default Or In The Alternative Motion For Judgment On The Pleadings" (Motion for Default). According to the accompanying certificate of service, the motion was mailed to 760 West Baltimore Avenue, Pinebluff, North Carolina, where the original complaint had been served. Notice that the hearing would take place on 4 May 1998 was also sent to the Pinebluff address, and the courtroom calendar for 4 May 1998 also shows defendant's address as 760 West Baltimore Avenue, Pinebluff, North Carolina. On 15 April 1998, plaintiff filed an affidavit supporting her Motion for Default. According to the certificate of service for

the affidavit, plaintiff mailed the affidavit to defendant at "31 Barton Hill Court, Pinehurst, N.C." Defendant was not present for the 4 May 1998 hearing, and the trial court continued the matter in open court to 26 May 1998. On 5 May 1998, plaintiff filed a Motion for Summary Judgment. Plaintiff mailed a service copy of this motion to defendant at the Pinehurst post office box, which defendant set out in his response to the initial complaint; however, no notice of hearing accompanied the motion nor was such notice later served on defendant. The courtroom calendar for 26 May 1998 shows defendant's address as 760 West Baltimore Avenue, Pinebluff, North Carolina. On 29 May 1998, the trial court granted plaintiff's Motion for Summary Judgment at a hearing that defendant did not attend. On 29 June 1998, defendant, for the first time acting through counsel, filed or attempted to file a verified answer to plaintiff's complaint, an affidavit, a "Defendant's Motion To Set Aside Order Granting Summary Judgment" and supporting brief, and notice of appeal from the trial court's grant of summary judgment. On 15 July 1998, the trial court denied defendant's motion to set aside the order of summary judgment. Defendant appeals.

[1] Defendant contends that the trial court's grant of plaintiff's Motion for Summary Judgment was erroneous because defendant's absence from the hearing resulted from plaintiff's failure to provide notice. Adequacy of notice is a question of law. See *Benton v. Mutual of Omaha Ins. Co.*, 500 N.W.2d 158 (Minn. Ct. App. 1993), and the cases cited therein. Motions for summary judgment are governed by Rule 56 of the North Carolina Rules of Civil Procedure. Rule 56 states, "The motion shall be served at least 10 days before the time fixed for the hearing." N.C. Gen. Stat. § 1A-1, Rule 56 (1990). Although Rule 56 makes no direct reference to notice of hearing, this Court has held that such notice also must be given at least ten (10) days prior to the hearing. *See Calhoun v. Wayne Dennis Heating & Air Cond.*, 129 N.C. App. 794, 800, 501 S.E.2d 346, 350 (1998), *disc. review dismissed ex mero motu*, 350 N.C. 92, — S.E.2d — (1999).

Here, plaintiff properly served her Motion for Summary Judgment by mailing a copy to the address provided by defendant in his only filing with the court up to that time. She failed, however, to serve defendant with the required notice of the hearing on the motion. Defendant contends this failure was prejudicial, depriving him of property without notice, contrary to the Due Process Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. Plaintiff disagrees, reasoning that

because she mailed notice of the hearing on her earlier Motion for Default to the Pinebluff address where defendant originally had been served by the sheriff, defendant received notice of and should have attended the hearing of 4 May 1998. Had he done so, he would have received actual notice that the trial court continued the hearing on plaintiff's Motion for Default until 29 May, when the Motion for Summary Judgment was heard. We find plaintiff's reasoning unpersuasive.

Plaintiff's certificate of service shows that on 3 April 1998, plaintiff mailed notice of the 4 May 1998 hearing on her Motion for Default to defendant's Pinebluff street address, where defendant had been served originally on 30 October 1997. However, on 26 November 1997, defendant filed his *pro se* statement purporting to respond to plaintiff's complaint. Defendant's statement included a post office box address, which plaintiff used on 5 May 1998 to serve her Motion for Summary Judgment. Nevertheless, plaintiff contends that as of 3 April 1998, approximately four months after defendant filed his statement, defendant's Pinebluff street address was his "last known address." *See* N.C. Gen. Stat. § 1A-1, Rule 5(b) (Cum. Supp. 1998). We disagree. Where a defendant, especially one acting *pro se*, provides a mailing address in a document filed in response to a complaint and serves a copy of that filing on opposing counsel, he or she should be able to rely on receiving later service at that address; by the same token, opposing counsel (or a *pro se* party) may also rely on that address for service of all subsequent process and other communications until a new address is furnished. *See id.* Here, plaintiff sent material meant for defendant to three different addresses after defendant filed his statement responding to plaintiff's complaint. Because plaintiff mailed notice of the 4 May 1998 hearing on her Motion for Default to an address other than that provided on defendant's filed response, the notice was ineffective and cannot be the basis for notice of the 29 May 1998 hearing on her Motion for Summary Judgment. *See Town of Cary v. Stallings*, 97 N.C. App. 484, 488, 389 S.E.2d 143, 145 (1990).

[2] Plaintiff further contends that defendant was not entitled to any notice when plaintiff filed her Motion For Summary Judgment. She argues that defendant was in default because the response he filed after being served with plaintiff's complaint was not an "Answer" as contemplated by the North Carolina Rules of Civil Procedure. While it is true that "[a] party who is in default for failure to appear is ordinarily not entitled to notice of additional pleadings in the case," *First*

Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 628, 351 S.E.2d 117, 119 (1986), this Court has held that

> the general policy of the Rules of Civil Procedure is to disregard technicalities of form and determine the rights of litigants on the merits. . . .
>
> [A] letter, or in fact *any document, that is* filed *with the court and substantively responds to a complaint may constitute an answer,* notwithstanding its failure to comply with all of the technical requirements of the Rules of Civil Procedure.

Brown v. American Messenger Services, Inc., 129 N.C. App. 207, 211-12, 498 S.E.2d 384, 387, *disc. review denied,* 348 N.C. 692, 511 S.E.2d 644 (1998) (emphasis added) (citations omitted). In response to plaintiff's complaint, defendant timely filed a statement, which denied the substance of her claim. We hold that his statement, though minimal in the extreme, suffices as an answer. Defendant was not in default and therefore was entitled to adequate notice of the hearing on plaintiff's Motion for Summary Judgment. Because plaintiff did not give the required notice of the hearing for this motion, we vacate the order of the trial court and remand this case for further proceedings. Upon remand, it lies within the sound discretion of the trial court whether to allow any amendment to defendant's 26 November 1997 filing. *See News & Observer Publishing Co. v. Poole,* 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992).

In light of this holding, we need not address defendant's other assignments of error.

Vacated and remanded.

Judges WALKER and McGEE concur.

CRUMP v. SNEAD

[134 N.C. App. 353 (1999)]

MONTY RUSSELL CRUMP, AND GWYN LEACH SOWDERS, PETITIONERS V. JUNE L. SNEAD, RESPONDENT

No. COA98-1424

(Filed 20 July 1999)

1. Constitutional Law— State—change of city council term—office not mandated by constitution—not unconstitutional

The trial court did not err by dismissing a claim that the General Assembly acted unconstitutionally in extending a city council term from two years to four years. The office is not mandated by the North Carolina Constitution and the General Assembly was within its authority in extending the term.

2. Constitutional Law— State—exclusive emolument—extension of city council term

Respondent did not receive an exclusive emolument under Article I, section 32 of the North Carolina Constitution where the General Assembly extended the term of his seat on the Rockingham City Council from two to four years. There was a reasonable basis for the legislature to conclude that the bill served the public interest and did not solely benefit respondent.

3. Constitutional Law— State—extension of city council term—participation in political process

The trial court did not err by concluding that a General Assembly bill extending a city council term from two to four years did not infringe upon petitioners' right to participate in the political process. Petitioners had the privilege of running for office, not the right, and neither petitioners' nor the public's rights were infringed.

Appeal by petitioners from judgment entered 16 October 1998 by Judge Sanford L. Steelman, Jr., in Richmond County Superior Court. Heard in the Court of Appeals 9 June 1999.

Bruce T. Cunningham, Jr. for petitioner-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr., for respondent-appellee.

HUNTER, Judge.

The facts as stipulated by the parties show that prior to 26 June 1996, the charter of the City of Rockingham ("Rockingham") specifically provided for staggered terms in its city council elections, with two candidates being elected for four-year terms and one candidate being elected for a two-year term, every two years. On 14 March 1995, the Rockingham City Council ("city council") adopted a resolution requesting that the North Carolina General Assembly provide that the one two-year term be changed to a four-year term. The fact that the city council adopted this resolution was published on the front page of the *Richmond County Daily Journal* on 15 March 1995.

At the 7 November 1995 general election, respondent June L. Snead defeated petitioner Gwyn Leach Sowders for the two-year term on the city council. On 21 June 1996, the General Assembly enacted Senate Bill 540 ("SB 540"), which deleted the provision in the Rockingham City Charter requiring one seat on the city council to be for a two-year term, essentially making all five seats on the city council four-year terms. The provision applied retroactively. The retroactive application of SB 540 had the effect of extending the term of Snead from two to four years. It was stipulated by the parties that Sowders expressed interest in filing for the former two-year seat in the November 1997 election.

On 9 December 1997, the city council went into closed session at the request of Snead to discuss the termination of petitioner Russell Crump. As a result of the meeting, Crump agreed to resign as city manager of Rockingham in exchange for a lump-sum severance payment.

On 23 December 1997, petitioners Crump and Sowders (hereinafter "petitioners") instituted this action by filing for a declaratory judgment against respondents Rockingham and Snead alleging that SB 540 was unconstitutional and thus respondent Snead was not a lawful member of the city council. On 30 January 1998, petitioners dismissed Rockingham as a respondent. Both parties agreed to the stipulated facts. On 23 September 1998, the matter came for hearing before Judge Sanford L. Steelman, Jr., in the Richmond County Superior Court. On 16 October 1998, Judge Steelman issued a judgment finding SB 540 constitutional and dismissing petitioners' action by concluding that SB 540 did not confer an exclusive emolument upon Snead (hereinafter "respondent") nor did it violate Article I,

§§ 9, 14, 35, or 36 of the North Carolina Constitution. Petitioners filed a notice of appeal on 27 October 1998.

[1] First, petitioners assert that the trial court erred in dismissing their action with prejudice by finding SB 540 constitutional. We disagree.

In reviewing legislation, the North Carolina Supreme Court "reviews acts of the state legislature with great deference; a statute cannot be declared unconstitutional under the State Constitution unless that Constitution clearly prohibits the statute." *Brannon v. N.C. State Board of Elections*, 331 N.C. 335, 339, 416 S.E.2d 390, 392 (1992). "[A] statute enacted by the General Assembly is presumed to be constitutional." *Wayne County Citizens Ass'n v. Wayne County Bd. of Com'rs.*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991). "A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Id.* at 29, 399 S.E.2d at 315 (citation omitted); *see also Brannon*, 331 N.C. 335, 416 S.E.2d 390.

Petitioners further contend that the trial court's reliance on *Penny v. Board of Elections*, 217 N.C. 276, 7 S.E.2d 559 (1940), is misplaced, and that case should be limited to its specific facts. We disagree.

Penny presents an identical factual scenario to the case at bar. In *Penny*, the Harnett County Register of Deeds was elected to a two-year term in November of 1938, and took office in December of 1938. During the two-year term, the General Assembly enacted a statute that "extend[ed] the term of the incumbent of the office of register of deeds of Harnett County for a term which will not expire until the first Monday of December, 1942." *Id.* at 277, 7 S.E.2d at 560. The effect of this statute was to extend the term of the register of deeds from two-years to four-years. A would-be candidate for that office filed suit claiming that the extension of the term was unconstitutional. In *Penny*, our Supreme Court held that the statute that changed the length of term of the register of deeds was constitutional. Here, a city council term was extended from two to four years by the General Assembly just as the register of deeds' term was extended in *Penny*. *Penny* is directly on point.

More recently, in *State ex Rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989), the Supreme Court approved an act of the General Assembly which had the effect of extending the terms of a

number of superior court judges, who were constitutionally elected officials. In that case, the Court cited with approval the language of *Penny*. *Id.* at 454-455, 385 S.E.2d at 482.

Furthermore, the North Carolina Constitution states:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1. This section does not "forbid altering or amending charters of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them." *Holton v. Mocksville*, 189 N.C. 144, 149, 126 S.E. 326, 328 (1925). "[W]hen . . . there is no constitutional limitation to the contrary, . . . 'the legislature has full power to amend the charter of a municipal corporation . . . at its pleasure . . . .' " *Bethania Town Lot Committee v. City of Winston-Salem*, 126 N.C. App. 783, 786, 486 S.E.2d 729, 732 (1997) (*citing* 56 Am. Jur. 2d *Municipal Corporations* § 51 (1971)), *aff'd*, 348 N.C. 664, 502 S.E.2d 360 (1998). Thus, in the case *sub judice*, the General Assembly was acting within its authority when it amended Rockingham's charter.

With regards to this city council seat, the office is not mandated by the North Carolina Constitution. "Where the office is purely statutory the Legislature may either shorten or lengthen the term and make the act apply to those in office at the time when the act becomes effective." *Penny*, 217 N.C. at 278, 7 S.E.2d at 561 (citation omitted). Therefore, the General Assembly was acting within its authority in extending the city council term of office. Petitioners' assignment of error is overruled.

[2] Next, petitioners contend that the trial court erred by finding as a fact and concluding as a matter of law that SB 540 did not confer an exclusive emolument on respondent. Again, we disagree.

An emolument is defined as "[t]he profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites." Black's Law Dictionary 524 (6th ed. 1990). The

North Carolina Constitution states, "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32. The constitutional limitation contained in § 32 has often been invoked by the Supreme Court to strike down legislation conferring special privileges not in consideration of public service. *Brumley v. Baxter*, 225 N.C. 691, 696, 36 S.E.2d 281, 285 (1945). However, when the legislation is for a public purpose and in the public interest, and does not confer exclusive privilege, it has been upheld. *Id.* Here, respondent received $3,000.00 in salary and $3,228.00 in benefits per year. Petitioners contend that the amount earned by respondent during the additional two years in office amounted to double compensation and thus, an exclusive emolument.

Our Supreme Court has held that an item will not be considered an exclusive emolument within the meaning of § 32 if the statute meets two requirements: "(1) the exemption [or benefit] is intended to promote the general welfare rather than the benefit of the individual; and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption [or benefit] serves the public interest." *Town of Emerald Isle v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987). Here, the stated purpose of SB 540 was "to provide for election of all the members of the Rockingham City Council for four-year terms." 1995 N.C. Sess. Laws ch. 698. Petitioners argue that there were alternative ways to achieve the same result as SB 540. Assuming, *arguendo*, that there may be other alternatives, petitioners present no precedent stating that the General Assembly cannot choose from several alternatives to accomplish its desired result. There was a reasonable basis for the legislature to conclude that SB 540 served the public interest and did not solely benefit respondent. Respondent received the $3,000.00 salary and $3,228.00 benefits as compensation in consideration for public service as an elected official of the city council. Therefore, we hold that respondent did not receive an exclusive emolument in violation of Article I, § 32 of the North Carolina Constitution. Petitioners' assignment of error is overruled.

[3] Finally, petitioners argue that the trial court erred in finding as a fact and concluding as a matter of law that SB 540 did not violate their rights under Article I, §§ 9, 14, 35, and 36 of the North Carolina Constitution. Petitioners contend that SB 540 infringed upon their right to participate in the political process while also infringing upon the rights of voters. We disagree.

In *Penny*, the Court held:

> [T]he public has no vested right in the election of any officer except as that mode of selection may be guaranteed by the Constitution, under provisions which are unalterable by legislative action. The right of plaintiff to stand for election to an office is a political privilege and not inalienable, and certainly when a different method of selection has been provided, consistent with the Constitution, the fact that his aspiration has been thwarted by a nondiscriminatory change of the law gives him no cause of action.

Penny, 217 N.C. at 279, 7 S.E.2d at 561. Petitioners did not have a right, but did have a privilege to run for office. In fact, petitioners still had the opportunity to run for either of two four-year city council seats in the 1997 election and did not do so. As to voters' rights, "[t]he right to vote *per se* is not a fundamental right under our Constitution; instead, once the right to vote is conferred, the *equal* right to vote is a fundamental right." *Martin*, 325 N.C. at 454, 385 S.E.2d at 481 (citation omitted) (emphasis in original). As neither the petitioners' nor the public's rights were infringed, petitioners' assignment of error is overruled.

For the foregoing reasons, we hold that SB 540 as enacted by the General Assembly is constitutional and thus respondent is a lawful member of the Rockingham City Council.

Affirmed.

Judges JOHN and TIMMONS-GOODSON concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. ROBERT BOYD WEAVER, JR. AND WEAVER'S AUTO PARTS AND GARAGE, INC., DEFENDANTS

No. COA98-1310

(Filed 20 July 1999)

Insurance— garage—shooting during repossession—no coverage

Summary was properly granted for plaintiff in a declaratory judgment action to determine whether there was coverage under a "garage operations" policy for acts alleged in a wrongful death action which arose from a shooting during the recovery of a car which had been held until payment of a repair bill. Since defendants had available legal remedies but instead attempted to repossess the car by means not authorized by law, defendants' actions were not necessary or incidental to the garage operations.

Appeal by defendants from judgment entered 30 June 1998 and filed 1 July 1998 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 June 1999.

Caudle & Spears, P.A., by Harold C. Spears and Christopher J. Loebsack, for plaintiff-appellee.

Bailey, Patterson, Caddell, Hart, Milliken & Bailey, P.A., by Martha L. Ramsay, for defendants-appellants.

WALKER, Judge.

Defendant Weaver and his father own an automotive parts and repair company, Weaver's Auto Parts and Garage, Inc. (the Garage), located in Charlotte, North Carolina. Defendant Weaver was in charge of managing and operating the Garage on a daily basis. On 23 June 1993, James Lee Grice contacted defendant Weaver about getting repair work done on his 1986 Camaro. The Camaro was towed to the Garage and the repair work was completed. Grice attempted to retrieve the Camaro on several occasions, but failed to pay the bill for the complete repairs and was informed that the Camaro would not be released until full payment was made. On 14 October 1993, Grice tricked an employee of the Garage into giving him the Camaro without having paid the repair bill. Defendant Weaver called the police and reported the Camaro stolen.

At approximately 11:00 p.m. on 17 October 1993, Dan Constance, defendant Weaver's friend, arrived at defendant Weaver's house and told him he had located the Camaro in Mt. Holly, North Carolina. Defendant Weaver decided to go to Mt. Holly that night to retrieve the Camaro because he believed his chances of recovering the Camaro would be greatly reduced if he waited until the morning. Defendant Weaver then assembled a group of seven people to accompany him to recover the Camaro. Only one of the people was an employee of the Garage. Defendant Weaver had in his possession a .357 Magnum revolver when they went to Mt. Holly. Two of the other men accompanying defendant Weaver also carried weapons. The group left in two pick-up trucks and defendant Weaver's wrecker.

The Camaro was found parked off the road where it had been seen earlier by Constance, near an abandoned house trailer. Without any headlights or warning lights on, the wrecker was backed up to the Camaro. An employee of defendant Weaver started to hook up the Camaro and defendant Weaver walked to the front of the wrecker with the gun in his hand. Grice then emerged from the trailer and ran towards defendant Weaver. Grice pushed and threatened defendant Weaver. Defendant Weaver raised his gun over his head as he blocked Grice from getting into the Camaro. Defendant Weaver demanded that Grice pay the repair bill that was owed on the Camaro and a struggle ensued. At some point, defendant Weaver cocked the hammer on his revolver and yelled to Grice that the gun was cocked. Grice continued to push and struggle with defendant Weaver. Grice then managed to get to the Camaro and unlock and open the driver's side door. Defendant Weaver reached across the Camaro door with his right hand and grabbed Grice's left shoulder. Grice swung around and grabbed defendant Weaver's left hand. The two men struggled and defendant Weaver's gun fired, killing Grice.

On 17 October 1995, Grice's estate brought a wrongful death action against defendants. On 11 October 1996, plaintiff filed a declaratory judgment action against defendants to determine whether there was coverage under the terms of the insurance policy it issued to defendants for "garage operations" for the acts complained of in the wrongful death action. Plaintiff and defendants both filed motions for summary judgment. On 1 July 1998, the trial court granted summary judgment for plaintiff. The trial court concluded "the definition of 'garage operations' contained in the policy is controlling" and "[p]laintiff's contract of insurance does not provide coverage. . . ." The trial court did not address whether coverage under the

policy was excluded because Grice's "bodily injury" and subsequent death were "expected or intended." On appeal, defendants contend the trial court erred in denying defendants' motion for summary judgment and granting plaintiff's motion.

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, 344, 469 S.E.2d 583, 585 (1996) (*quoting* N.C. Gen. Stat. § 1A-1, Rule 56(c)). The burden of proving the lack of a triable issue of fact is on the party moving for summary judgment. *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). Defendants do not contend there remain triable issues of fact; however, they contend they were entitled to summary judgment as a matter of law.

The Garage policy provided coverage for liability resulting from "garage operations" which are defined as follows:

> [T]he ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. "Garage operations" includes the ownership, maintenance or use of the "autos" indicated in SECTION I of this Coverage Form as covered "autos." "Garage operations" also includes all operations necessary or incidental to a garage business.

Defendant Weaver argues that his actions to recover the Camaro were necessary to the business of the Garage and that he could not afford the lost profits from stolen property. Defendants further contend that under the policy, a finding that an employee was within the scope of his employment at the time of the accident requires that the employee was engaged in garage operations as defined by the policy. Thus, as a result, the actions taken to retrieve Grice's Camaro were "necessary or incidental to garage business."

We first look to see if the actions of defendant Weaver in attempting to retrieve the Camaro were "necessary" to the operations of the Garage. "Necessary" has been defined by our Supreme Court as a

thing that is "indispensable to some purpose; something that one cannot do without; a requisite, an essential." *Pierson v. Insurance Co.*, 249 N.C. 580, 583, 107 S.E.2d 137, 139 (1959) (*quoting Storm v. Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17, 18 (1925)). Defendant Weaver had a valid possessory lien on the Camaro pursuant to N.C. Gen. Stat. § 44A-2(d) (Cum. Supp. 1998) since Grice owed the repair bill. Defendant Weaver continued to have a valid possessory lien on the Camaro since he did not voluntarily relinquish possession of the Camaro. *See* N.C. Gen. Stat. § 44A-3 (1995). However, N.C. Gen. Stat. § 44A-6.1(a) (1995) addresses steps to be taken by a lienor where possession of a vehicle was not voluntarily released:

> When a lienor involuntarily relinquishes possession of the property and the property upon which the lien is claimed is a motor vehicle or vessel, the lienor may institute an action to regain possession of the motor vehicle or vessel in small claims court any time following the lienor's involuntary loss of possession and following maturity of the obligation to pay charges.

Plaintiff contends that the forcible repossession of a car by a group of men armed with deadly weapons does not, as a matter of law, fall within the policy definition of "garage operations." Plaintiff cites *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 285, 444 S.E.2d 487, 489, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994) (where the auto dealer employer permitted dealer tags to be affixed to an employee's vehicle which was subsequently involved in a collision). In *McLeod*, 115 N.C. App. at 291, 444 S.E.2d at 492-93, the employer had a policy with the defendant covering "garage operations." The employee's vehicle was neither used nor owned by the dealership and this Court determined that placing dealer tags on an employee's car was not "necessary" to garage operations. *Id.* at 292, 444 S.E.2d at 493. This Court noted that those actions were, in fact, a criminal misdemeanor. *Id.* Similar to *McLeod*, defendant was not acting in a manner authorized by law when he attempted to repossess the Camaro.

Defendant Weaver also argues that his actions in retrieving the Camaro were "incidental" to "garage operations" and cites *Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 70 N.C. App. 742, 321 S.E.2d 10 (1984) for support. In that case, a service station employee of the defendant aided a customer in starting a stalled truck along a highway. *Id.* at 744, 321 S.E.2d at 11. As a result of the assistance, an employee of the plaintiff was struck by the

truck and injured. *Id.* The policy defined garage operations as "the ownership, maintenance or use of the premises for the purposes of a garage and all operations necessary or incidental thereto." *Id.* This Court found that the accident was "a natural consequence" of the business of operating a service station and that it would be "patently unreasonable to expect that a service station owner would not help a customer start a vehicle the owner had just serviced." *Id.* at 746, 321 S.E.2d at 12. Based on the plain meaning of the word "incidental," this Court upheld the determination of the trial court that the policy issued by the defendant provided coverage for an employee assisting a customer, despite the fact that the aid was rendered to "obtain or maintain good will" and for no extra charge. *Id.*

However, we conclude that since defendants had available legal remedies, but instead attempted to repossess the Camaro by means not authorized by law, defendants' actions were not "necessary or incidental" to the "garage operations." Thus, the trial court properly determined that plaintiff's contract of insurance did not provide coverage for the conduct complained of in the wrongful death action. We affirm the order granting summary judgment for the plaintiff.

Affirmed.

Judges McGEE and EDMUNDS concur.

HELEN P. JARVIS, EMPLOYEE, PLAINTIFF v. FOOD LION, INC., SELF-INSURED, EMPLOYER, DEFENDANT

No. COA98-1325

(Filed 20 July 1999)

1. Workers' Compensation— medical testimony—consideration and weight

There was no error in a workers' compensation action involving carpel tunnel syndrome where plaintiff argued that the Commission erred by giving no weight to a doctor's testimony, but it was clear that the Commission considered the testimony.

2. Workers' Compensation— occupational disease—carpel tunnel syndrome

There was competent evidence to support the Industrial Commission's decision in a workers' compensation action that plaintiff had failed to demonstrate that her carpel tunnel syndrome was an occupational disease. Although a doctor testified to the contrary, the Commission determined that there was ample evidence indicating that he did not have a complete set of facts upon which to determine causation.

Appeal by plaintiff from Opinion and Award entered 6 May 1998 and filed 8 June 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 June 1999.

Herman L. Stephens for plaintiff-appellant.

Morris York Williams Surles & Barringer, LLP, by John F. Morris and John T. Maheras, for defendant-appellee.

WALKER, Judge.

On 8 June 1994, plaintiff filed a claim with the Industrial Commission seeking workers' compensation for carpal tunnel syndrome due to repetitive use of her hands while employed by defendant. On 9 April 1997, the deputy commissioner filed an Opinion and Award denying plaintiff's claim based on a finding that she had failed "to establish that her condition was characteristic of and peculiar to her employment and to which the general public is not equally exposed outside of the employment." The deputy commissioner also concluded that the plaintiff's claim was barred by her failure to give written notice within thirty days after being advised by a medical authority that she had contracted an occupational disease which she alleged was related to her employment and by her failure to file the claim within two years of the disability of the alleged occupational disease.

The Commission affirmed the decision of the deputy commissioner. The Commission found that plaintiff was employed as a customer service manager for defendant when she left in 1993. Prior to this position, plaintiff worked as a front-end assistant and cashier for nearly ten years. Plaintiff performed a variety of tasks at her job which included the following: working on the register, bagging groceries, lifting bags of groceries, hiring and training cashiers, using computers, writing frequently, making out schedules for cashiers and

baggers by hand, completing evaluations, using an adding machine, and keeping the books. Plaintiff testified that during the last six months she worked for defendant she experienced pain in her wrists as a result of picking up heavy items which caused her the greatest pain. Her hands would also go numb while adding checks.

In May 1992, plaintiff sought treatment from physician's assistant Gail Marion as a result of a tendon injury suffered ten years earlier. At that time, plaintiff was diagnosed with tendinitis in both wrists. Plaintiff also sought treatment from Dr. Peter Donofrio on 1 October 1992. She told him that she had suffered for a year from pain in her wrists and in the fourth and fifth fingers of her left hand. Plaintiff attributed these symptoms to the repetitive activity of moving grocery items across a scanner. The EMG and nerve conduction studies ordered by Dr. Donofrio were normal. Plaintiff left her employment with defendant on 21 March 1993 as a result of a nervous breakdown. While working for defendant, plaintiff did not miss any time from work due to carpal tunnel syndrome.

The Commission also found:

> 9. On April 12, 1994, the plaintiff saw Dr. Anthony J. DeFranzo at the Outpatient Rehabilitation Center at Bowman Gray School of Medicine. At the visit, the plaintiff related a history of having a repetitive motion job for about sixteen years. Dr. DeFranzo noted that the plaintiff had been told more than two years prior that she had bilateral carpal tunnel syndrome. The plaintiff further related that nothing on the job aggravated her hands or wrists. Although nerve conduction studies were reported as normal, Dr. DeFranzo recommended surgery for both wrists.
>
> 10. Plaintiff was advised by Dr. DeFranzo on April 12, 1994 that she had carpal tunnel syndrome; therefore, her claim before the Industrial Commission was timely filed pursuant to N.C. Gen. Stat. § 97-58.
>
> 11. The plaintiff underwent right carpal tunnel release surgery in May of 1994, and on the left in July of 1994. . . .
>
> 12. The Full Commission gives no weight to Dr. DeFranzo's opinion that the problems that plaintiff complained of were work-related and that her job was at least aggravating her pain in her arms and wrist. He did not have a demonstration, a video or a written description of the job that plaintiff performed. Instead,

Dr. DeFranzo based his opinion solely on the testimony of the plaintiff and his personal observations while in the grocery stores.

13. Plaintiff's primary duties while employed by defendant-employer were supervisory. There is insufficient medical evidence of record to prove by its greater weight that plaintiff's job duties were repetitive in nature and caused her carpal tunnel syndrome.

14. There is insufficient evidence of record from which to prove by its greater weight that plaintiff's carpal tunnel syndrome is an occupational disease which was due to the causes and conditions characteristic of and peculiar to her employment with defendant-employer and which excluded all ordinary diseases to which the general public was equally exposed.

The Commission then concluded:

1. The plaintiff has failed to carry the burden of proof to establish by competent evidence that she contracted an occupational disease which was characteristic of and peculiar to her employment, within the meaning of N.C. Gen. Stat. § 97-53(13).

2. Plaintiff is, therefore, not entitled to any compensation under the provisions of the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-53(13).

On appeal, plaintiff contends the Commission erred: (1) when it gave "no weight" to Dr. DeFranzo's opinion; (2) by finding there was insufficient medical evidence to prove that plaintiff's carpal tunnel syndrome is an occupational disease; and (3) by failing to address the issue of timely notice to the defendant of plaintiff's carpal tunnel syndrome.

[1] Plaintiff argues that the Commission erred when if gave "no weight" to Dr. DeFranzo's opinion. The Commission "is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *disc. review denied*, 350 N.C. 310, —— S.E.2d —— (1999) (*quoting Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997)). However, as plaintiff points out, the Commission may not "wholly disregard or ignore competent evidence" and must consider

and evaluate all the evidence before it is rejected. *Id.* However, it is clear that the Commission considered the testimony of Dr. DeFranzo. The Commission stated that it gave no weight to his testimony because: "He did not have a demonstration, a video or a written description of the job that plaintiff performed. Instead. . . [he] based his opinion solely on the testimony of the plaintiff and his personal observations while in the grocery stores." Thus, we find this assignment of error to be without merit.

[2] A review of an appeal from the Commission is limited to a determination of 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). If the Commission's findings are supported by any competent evidence, they are conclusive on appeal even if there is evidence to support contrary findings. *Carroll v. Burlington Industries*, 81 N.C. App. 384, 387-88, 344 S.E.2d 287, 289 (1986), *affirmed*, 319 N.C. 395, 354 S.E.2d 237 (1987). Therefore, this Court is limited to determining: (1) whether competent evidence exists to support the Commission's findings, and (2) whether those findings justify its conclusions of law. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996).

There are three elements which are necessary for the plaintiff to prove in order to show the existence of a compensable occupational disease under N.C. Gen. Stat. § 97-53(13): (1) the disease must be characteristic of persons engaged in a particular trade or occupation in which the plaintiff is engaged; (2) the disease must not be an ordinary disease of life to which the public is equally exposed; and (3) there must be a causal connection between the disease and the plaintiff's employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981).

In this case, the Commission considered plaintiff's testimony along with the testimony of three physicians who evaluated plaintiff: Dr. Peter D. Donofrio of the Department of Neurology, Bowman Gray School of Medicine; Dr. Anthony J. DeFranzo of the Outpatient Rehabilitation Center of Bowman Gray School of Medicine; and Dr. Stephen J. Naso of Southern Surgical Associates, Carolina Hand Center.

Dr. Donofrio only saw plaintiff twice and ordered EMG and nerve conduction studies done on plaintiff which were normal. Dr.

DeFranzo testified that plaintiff's occupation was the cause of her carpal tunnel syndrome. However, he admitted that he based his opinion on his visit to defendant's store and from what plaintiff told him about her job duties. The Commission determined that there was ample evidence to indicate that Dr. DeFranzo did not have a complete set of facts upon which to make a determination regarding causation. Dr. Naso was of the opinion that plaintiff's carpal tunnel syndrome was unrelated to her employment with defendant. Dr. Naso's diagnosis and opinions were based on plaintiff's description of her job duties along with a job description provided by defendant. Dr. Naso also noted that according to latest statistics, forty-seven percent of carpal tunnel syndrome cases are due to repetitive motion and fifty-three percent are due to other causes as well as "idiopathic" causes for which there is no known reason.

After considering the testimony of plaintiff's physicians, along with plaintiff's testimony, the Commission determined that plaintiff failed to demonstrate that her carpal tunnel syndrome was an occupational disease "which was characteristic of and peculiar to her employment within the meaning of N.C. Gen. Stat. § 97-53(13)." The Commission is the sole judge of the weight and credibility to be given testimony and its findings will only be set aside on appeal if there is a complete lack of evidence to support them. *Thompson v. Tyson Foods, Inc.*, 119 N.C. App. 411, 414, 458 S.E.2d 746, 748 (1995). Thus, we find there was competent evidence to support the Commission's decision.

Finally, plaintiff argues the Commission erred by failing to address the issue of timely notice to defendant of plaintiff's carpal tunnel syndrome. Since we affirm the Commission's decision denying plaintiff's claim for compensation, we need not address this assignment of error.

Affirmed.

Judges McGEE and EDMUNDS concur.

LUTHER LEE KEY, PLAINTIFF v. BARBARA M. BURCHETTE AND TIMOTHY C. BURCHETTE, DEFENDANTS

No. COA98-1229

(Filed 20 July 199)

Collateral Estoppel and Res Judicata— negligence action— prior declaratory judgment on insurance coverage—negligence claim not precluded

The trial court erred by granting summary judgment for defendants based upon collateral estoppel in a negligence action arising from a shooting at defendants' house where a trial court had previously concluded in a declaratory judgment action that a homeowner's policy did not provide coverage because plaintiff's injury was "expected or intended."

Appeal by plaintiff from judgment entered 29 June 1998 by Judge Julius A. Rousseau, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 13 May 1999.

Vannoy, Colvard, Triplett, McLean & Vannoy, P.L.L.C., by J. Gary Vannoy, Jay Vannoy, and James E. Creamer, for plaintiff-appellant.

Cunningham & Gray, P.A., by George G. Cunningham; and Max F. Ferree, for defendants-appellees.

WALKER, Judge.

On 21 January 1995, defendant Timothy Burchette and his wife, defendant Barbara Burchette, had been arguing throughout the day. Defendant Timothy Burchette went twice to the home of plaintiff in order to purchase cocaine. When he returned home at approximately 11:00 p.m. after the second trip to plaintiff's house, he noticed that defendant Barbara Burchette had been drinking. Plaintiff then arrived at defendants' house, and while all three were in the kitchen, defendant Barbara Burchette picked up a pistol from the counter, pointed it toward the floor and fired it. The bullet struck plaintiff in the leg and he was seriously injured.

Defendants were insured by North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) under a homeowner's policy. Farm Bureau brought a declaratory judgment action in 95 CVS 1228 to determine if the policy provided coverage for this injury. An exclu-

sionary provision in the policy prevented coverage to persons for bodily injury or property damage which was "expected or intended by the insured." In depositions, both defendants testified that the shooting was accidental. In his affidavit, plaintiff asserted he did not believe the shooting was intentional. Judgment was entered after the jury determined that the policy did not provide coverage for the injury.

On 3 August 1995, defendant Barbara Burchette pleaded "no contest" in 95 CRS 2160 to the charge of misdemeanor assault with a deadly weapon with regard to the shooting on 21 January 1995.

On 16 January 1998, plaintiff filed this action against the defendants. The complaint alleged: (1) that the defendants had been arguing, and that while intoxicated, defendant Barbara Burchette initially pointed the pistol "at the ground but then started moving the [pistol] around and pointing it in a negligent manner;" and (2) that the pistol went off and plaintiff was shot in the leg. Further, defendant Burchette's "negligent handling of a loaded gun while intoxicated contributed to the accidental shooting which resulted in serious injury to the Plaintiff." On 26 May 1998, defendants moved for summary judgment. Following a hearing, the trial court entered summary judgment for defendants finding "there is no genuine issue as to any material fact, and that the defendants are entitled to a judgment as a matter of law."

On appeal, plaintiff contends the trial court erred in granting summary judgment. 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, 344, 469 S.E.2d 583, 585 (1996) (*quoting* N.C. Gen. Stat. § 1A-1, Rule 56 (c)). The burden of proving the lack of a triable issue of fact is on the party moving for summary judgment. *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).

In contending there is a genuine issue of fact, plaintiff points to deposition testimony of both plaintiff and defendants which indicate that the shooting was accidental. During the deposition taken for the

declaratory judgment action, defendant Barbara Burchette testified as follows:

> And as I walked over, I noticed the gun laying there and I just picked the gun up and then I pointed it. . .I just turned around and . . . I pointed it at the floor—and the next thing I knew it went off. . . . When I realized that he [plaintiff] had been shot . . . I got hysterical.

Defendant Timothy Burchette also testified that his wife "did not point the gun at anyone" and that "somehow or another it [the pistol] just went off." In his affidavit, plaintiff also testified that he did not believe he was shot "intentionally."

However, defendants contend plaintiff is collaterally estopped from bringing this negligence action as the trial court already decided in the declaratory judgment action that defendant Barbara Burchette's actions were "expected or intended" and the plaintiff only has a claim for assault and battery which is now barred by the one-year statute of limitations. Collateral estoppel or issue preclusion is to be applied when the following requirements are met:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Johnson v. Smith, 97 N.C. App. 450, 452-53, 388 S.E.2d 582, 583-84, *disc. review denied*, 326 N.C. 596, 393 S.E.2d 878 (1990) (*quoting King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)). The issue in this case and the issue in the declaratory judgment action are distinguishable. The issue in the declaratory judgment action concerned the interpretation of an insurance policy with regard to coverage and focused on whether the actions of defendant Barbara Burchette were "expected or intended." In determining whether the injury was "expected or intended," the trial court looked to "the resulting injury, not merely the volitional act, which must be intended for the exclusion to apply." *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 703-04, 412 S.E.2d 318, 322 (1992). Thus, a determination that the act was "expected or intended" does not preclude a claim that the injury resulted from an act of negligence on the part of defendant Barbara Burchette.

This Court has previously stated, "[t]here are situations where the evidence presented raises questions of both assault and battery and negligence." *Vernon v. Barrow*, 95 N.C. App. 642, 643, 383 S.E.2d 441, 442 (1989) (*quoting Lail v. Woods*, 36 N.C. App. 590, 592, 244 S.E.2d 500, 502, *disc. review denied*, 295 N.C. 550, 248 S.E.2d 727 (1978)). In *Lail*, 36 N.C. App. at 591-92, 244 S.E.2d at 501-02, it was determined that only an action for assault and battery was proper since the evidence showed that the injury resulted from the defendant's intentional act of throwing a rock at the plaintiff. In *Vernon*, 95 N.C. App. at 642, 383 S.E.2d at 441-42, the plaintiff was injured when the defendant pointed a gun toward the floor and one of the bullets ricocheted and hit the plaintiff in the leg. This Court determined that the defendant's conduct in firing the gun gave rise to actions for assault and battery as well as for negligence. *Id.* at 643, 383 S.E.2d at 443. Thus, the trial court's determination in the declaratory judgment action that defendant Barbara Burchette's actions were "expected or intended" is not controlling in this action and plaintiff is not estopped from asserting a negligence claim. The trial court erred in granting summary judgment for defendants.

Reversed.

Judges McGEE and EDMUNDS concur.

ROBERT D. ADAMS, PLAINTIFF-APPELLANT v. PHILLIP J. SAMUELS AND VISCO GROUP, INC., DEFENDANTS-APPELLEES

No. COA98-1159

(Filed 20 July 1999)

1. Appeal and Error— appealability—summary judgment denial

An appeal from the denial of a summary judgment was dismissed where appellant did not argue that the denial of his motion affected a substantial right.

2. Appeal and Error— appealability—summary judgment denial—claim preclusion not involved—dismissed

An appeal from the denial of summary judgment was dismissed where defendants contended that their appeal was based

upon claim preclusion based upon an earlier decision to permanently enjoin plaintiff from sending this matter to arbitration. Although the same parties are involved, the claims are different in that the earlier action involved the timeliness of the attempt to arbitrate and this action involved a claim of default on a promissory note.

Appeal by plaintiff Robert D. Adams and cross-appeal by defendants Phillip J. Samuels and Visco Group, Inc. from judgments entered 9 July 1998 by Judge James U. Downs, in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 May 1999.

Robert D. McDonnell, for plaintiff-appellant.

The Bishop Law Firm, P.A., by J. Daniel Bishop, for defendants-appellees.

WYNN, Judge.

Plaintiff Robert D. Adams, owner of Visco, Inc., negotiated with defendant Phillip J. Samuels for the sale of that company. During the negotiations, Samuels formed a corporation known as Visco Group that eventually entered into an asset-purchase agreement with Adams and Visco, Inc.

The asset-purchase agreement provided, inter alia, that Visco Group would make a promissory note in favor of Visco, Inc. This note was made, personally guaranteed by Samuels, and ultimately assigned to Adams.

Both the asset-purchase agreement and the promissory note contained "set-off" provisions. The asset-purchase agreement provided in pertinent part that "[u]pon the breach of any . . . agreement made by [Visco, Inc.] under this Agreement, [Visco Group] shall, at its option, have a right to set-off." Similarly, the promissory note provided that "[u]pon the breach of any . . . agreement made by [Visco, Inc.] or Robert D. Adams under the [agreement], [Visco Group] shall have a right of set-off against payments due under this Note." Significantly, the promissory note continued: "[a]ll claims or disputes arising between the parties as to the amount of the set-off, if any, under this section shall be decided by arbitration . . . . Notice of the demand for arbitration shall be filed in writing . . . within thirty (30) days after the dispute has arisen."

On or around 10 April 1997, Visco Group exercised its right to set off damages after contending that Visco, Inc. allegedly breached certain warranties and representations. Visco, Inc. and Adams, however, failed to demand arbitration to decide the set-off claim within the thirty-day period required under the promissory note. Indeed, Adams did not commence arbitration until 27 October 1997.

Prior to the commencement of arbitration, defendants moved in District Court, Mecklenburg County under N.C. Gen. Stat. § 1-567.3 to enjoin Adams from proceeding with arbitration because more than thirty days had passed since the dispute arose. Following a hearing on the matter, the district court judge granted defendants' motion and permanently enjoined Adams from participating in arbitration over this matter.

Adams then brought this action in Superior Court, Mecklenburg County seeking moneys allegedly owed under the agreement and promissory note. Thereafter, both Adams and the defendants filed summary judgment motions that were denied. Both parties appealed to this Court.

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[1] In addressing this appeal, we note the general rule that the denial of a motion for summary judgment is interlocutory and not appealable. *See Waters v. Qualified 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 division to have done with a case fully and finally before it is presented to the appellate division." *Id.* at 207, 240 S.E.2d at 343. Moreover, it gives the trial court and the parties an opportunity to develop more fully the facts in dispute and to put the merits of the claim in bolder relief than they are now. *Id.* at 209, 240 S.E.2d at 344.

Although a denial of summary judgment is generally not appealable, we will allow for such an appeal when the ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *See North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974). For example, when a motion for summary judgment is made on the basis of claim preclusion, the denial of that motion affects a substantial right and thus entitles the party to an immediate appeal. *See Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993).

In the case sub judice, both Adams and the defendants are seeking to appeal the denial of their summary judgment motions. Adams, however, has not claimed nor argued that the denial of his motion affected a substantial right. Accordingly, we find his appeal interlocutory and dismiss it.

[2] The defendants, on the other hand, contend that their appeal is appropriate because it is based upon claim preclusion. Specifically, the defendants contend that the district court's earlier decision to permanently enjoin Adams from sending this matter to arbitration precludes Adams' present suit. We disagree.

"The doctrine of claim preclusion precludes a second suit when: (1) the same claim is involved; (2) the suit is between the same parties or those in privity with them; and (3) there was a final judgment on the merits in the earlier action." *Howerton v. Grace Hosp., Inc.*, 130 N.C. App. 327, 330, 502 S.E.2d 659, 661 (1998). In the case sub judice, although the same parties are involved in this suit as were involved in the prior arbitration litigation, the claims here are different. Significantly, in the earlier case, the only consideration before the trial court was whether Adams' attempt to bring the defendants into arbitration was untimely. This case, on the other hand, involves a claim by Adams that the defendants defaulted on the promissory note itself. Moreover, the set-off provision contained in the promissory note requires arbitration only when there is a dispute "as to the amount of the set-off"—it does not require arbitration when the dispute revolves around whether set off itself is appropriate. Accordingly, this case does not involve an issue of claim preclusion. Therefore, we find that the defendants' appeal is interlocutory and also warrants dismissal.

Appeal and Cross-appeal dismissed.

Judges GREENE and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 JULY 1999

ALLSTATE INS. CO. v. OXENDINE No. 98-1543	Scotland (98CVS17)	Dismissed
AMERICAN MOTORIST INS. CO. v. NATIONWIDE MUT. AUTO. INS. CO. No. 98-1083	Mecklenburg (97CVS15236)	Reversed and Remanded
BAUGUESS v. AMERICAN DREW/LADD FURN. No. 98-861	Ind. Comm. (306043) (373712)	Affirmed
BURNS v. GRANNY SQUIRREL MTN. CLUB HOMEOWNER'S ASS'N No. 98-1231	Cherokee (95CVS155)	Affirmed
COLLIDGE v. MAJERCIK No. 98-1146	Cherokee (97CVD47) (97CVS98) (98CVD41)	Reversed and Remanded
COOK v. DOXEY No. 98-127	New Hanover (94CVS3621)	Affirmed
DUKES v. WINSTON-SALEM/ FORSYTH COUNTY BD. OF EDUC. No. 98-892	Forsyth (97CVS2311)	Affirmed
FALEY v. FALEY No. 98-734	Guilford (94CVD4028)	Affirmed
GRIFFIN v. CHARLOTTE-MECKLENBURG BD. OF EDUC. No. 98-1241	Mecklenburg (96CVS10226)	Affirmed
HAWKINS v. CAROLINA POWER & LIGHT CO. No. 98-544	Wake (95CVS12414)	Affirmed
IN RE ESTATE OF HILL No. 98-1151	Henderson (97E169)	Affirmed
IN RE OAKLEY No. 98-663	Johnston (96J36)	Affirmed
JONES v. ROCHELLE No. 98-603	Jones (92CVS94)	No Error
KATH v. H.D.A. ENTERTAINMENT, INC. No. 98-1200	Pender (94CVS239)	No Error

LUTZ v. BRIAN CTR. NURSING CARE/HICKORY, INC. No. 98-818	Catawba (95CVS1290)	No Error
MARSHALL v. MEDFORD No. 98-1221	Forsyth (98CVS1758)	No Error
PCI ENERGY SERVS., INC. v. WACHS TECH. SERVS., INC. No. 98-490	Mecklenburg (96CVS10528)	Reversed and Remanded
PINEHURST AREA REALTY, INC. v. LONGSTREET No. 98-459	Moore (94CVD00927)	Affirmed in part; Vacated in part
STATE v. BATTLE No. 99-66	Johnston (98CRS9521)	No Error
STATE v. BRADLEY No. 98-1573	Brunswick (97CRS4569) (97CRS4570)	Affirmed
STATE v. BURGESS No. 98-1423	Cabarrus (97CRS184)	No Error
STATE v. DALTON No. 98-1578	Forsyth (97CRS30623)	No Error
STATE v. DANIELS No. 98-1544	Wake (96CRS35541)	No Error
STATE v. HORTON No. 98-1002	New Hanover (97CRS29626) (97CRS29627)	Vacated and Remanded
STATE v. INGRAM No. 98-1534	Gaston (98CRS1005)	No Error
STATE v. JUDGE No. 98-1502	Mecklenburg (97CRS20546) (97CRS20547)	No Error
STATE v. RAINEY No. 98-554	Iredell (95CRS11543)	No Error
STATE v. SMITH No. 98-664	Cumberland (90CRS47583) (90CRS47584) (90CRS47585) (90CRS47588) (90CRS47612)	No Error
STATE v. WILES No. 98-1386	Rockingham (94CRS834) (94CRS835) (94CRS836)	No Error

	(94CRS837) (94CRS838)	
STATE v. WILLIAMS No. 98-941	Nash (96CRS3875)	No Error
WALKER v. N.C. BD. OF PHARMACY No. 98-1091	Rockingham (96CVS1806) (97CVS1813)	Affirmed
WILSON v. ABBOTT No. 98-1048	Caswell (95CVD149)	Reversed
YOUNT v. MULLE No. 98-795	Forsyth (96M32)	Affirmed

STATE OF NORTH CAROLINA v. AARON PRETTY

No. COA98-1094

(Filed 3 August 1999)

1. **Evidence— expert—underlying basis of opinion—voir dire not required—no prejudice from delay**

The trial court did not err in failing to allow defense counsel to voir dire the State's expert witnesses before they testified at trial to determine the underlying basis of their opinion since the disclosure of these facts occurred during direct and cross-examination testimony, and defendant failed to show any prejudice from this delay.

2. **Evidence— hearsay—unavailable child—catchall exception**

The trial court did not err in admitting the hearsay statements of the five-year-old child sex abuse victim in the trial of her father because the findings support the trial court's six-step inquiry assessing that the statements were admissible under the Rule 804(b)(5) catchall exception.

3. **Constitutional Law— hearsay—unavailable witness—right to confrontation not violated—incompetency of child—necessary evidence—trustworthiness satisfied**

The trial court did not violate defendant-father's constitutional right to confront the five-year-old child sex abuse victim when it admitted the child's hearsay statements because the unavailability of the child was due to her incompetency and the evidentiary importance of the child's statements demonstrate their necessity. Further, the child victim's personal knowledge of the underlying incident and the fact she never recanted her statements satisfied the circumstantial guarantees of trustworthiness.

4. **Constitutional Law— effective assistance of counsel—failure to object—opened the door**

Defense counsel's failure to object to the social worker's testimony that the child sex abuse victim's statements were believable did not constitute ineffective assistance of counsel where defense counsel opened the door to this testimony by attempting to show the child's sexual knowledge resulted from a prior incident of sexual abuse occurring at her mother's home as opposed to the incident for which defendant-father was being tried.

Judge GREENE concurring in the result.

STATE v. PRETTY

[134 N.C. App. 379 (1999)]

Appeal by defendant from judgment entered 21 September 1993 by Judge J.B. Allen, Superior Court, Durham County. Heard in the Court of Appeals 8 June 1999.

Mark E. Edwards for the defendant.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

WYNN, Judge.

The State of North Carolina tried Aaron Pretty in 1991 on charges of first-degree-statutory rape, first-degree-statutory sex offense, taking indecent liberties with a minor, and incest with his five-year-old daughter. Upon his conviction on all charges, the trial judge sentenced him to consecutive-life sentences for the rape and sex offenses, and concurrent sentences of ten years for indecent liberties and fifteen years for incest. Our review of his trial finds no error in either his conviction or sentence.

The evidence presented at trial showed that at the time of the alleged misconduct, the defendant's daughter lived in a foster home. The Durham County Department of Social Services had removed the child from her mother's custody due to allegations of sexual abuse by another man while the child stayed with her mother. However, a juvenile court ordered the Durham County Department of Social Services to allow the defendant to have unsupervised visits with the child.

Following one of those visits, the child's foster mother became concerned that the child had been sexually abused. She testified at trial that while bathing the child she noticed that the child's vaginal area was red. She further testified that the child, referring to the defendant as "June", told her that "it hurt down there where June was playing" and also stated that during her visit the defendant got on top of her, "played mama and daddy", and put his private part in her vagina.

According to the foster mother, the child's behavior substantially changed following this unsupervised visit. In particular, the child began having nightmares during which time she would say: "Stop, June." Additionally, the child, who had previously been shy and manageable, began misbehaving at home and school. In fact, a school counselor testified that as a result of a drastic change in her behav-

ior—including the child's actions of crying very easily and touching the private parts of little boys—the school began having major problems with the child in January 1991.

On 31 January 1991, the Duke Child Protection Team performed a medical evaluation of the child which revealed abnormal physical findings consistent with penile penetration of the vagina. Further physical findings included: a vaginal discharge; the hymenal tissue was narrowed and the rim thickened; the vaginal opening was 8-9mm, which was the upper limit or greater than upper limit of normal for a five-year-old child. Based on these physical findings, Dr. Thomas Frothingham, the Director of the Duke Child Protection Team, concluded that the findings were consistent with an evaluation that the child had been sexually abused.

Following this evaluation, the Durham County Department of Social Services reported the findings to the Durham Police Department. Thereafter, Detective McDonald Vick, of the Durham Police Department, along with a female officer, interviewed the child. During this interview, the child used anatomically correct dolls to show the officers what had occurred during her unsupervised visit with the defendant. At trial, Detective Vick demonstrated the child's use of the anatomical dolls which included the placing of the "daddy" doll on top of the "child" doll with no clothes and moving back and forth, to simulate vaginal intercourse and digital penetration.

Jeanne Neimeyer, a clinical social worker at the Duke Child Protection Team, also testified as to the child's statements made to her during two interview sessions which occurred in March of 1991. She testified that the child told her that she slept with her daddy in his bed during this visit and while in the bed her daddy put "his dink-a-link right there" pointing to the genital area of the girl doll. During her cross examination, Ms. Neimeyer stated: "I wouldn't expect a child to make a statement that [her] daddy put [his penis] in [her] mouth because a child wants to protect the people that she's close to and the people that take care of her. So I wouldn't have expected her to say it if it didn't happen."

Notwithstanding the defense counsel's objections to the child's out-of-court statements made to the school counselor, police detective, and social worker, the trial court allowed these statements after determining that the child was incompetent as a witness and unavailable to testify.

Moreover, the trial court denied defendant's pretrial motion to *voir dire* each of the State's expert witnesses—on the underlying basis of their opinion—before the witnesses gave their testimony. The court, however, informed counsel that he could *voir dire* the witnesses as to their qualifications.

The trial court also denied the defendant's motion to dismiss the charges against him.

On appeal, the defendant contends that: (1) his pretrial request for *voir dire* of the State's expert witnesses should have been granted; (2) his motion to dismiss should have been granted; (3) the child's hearsay statements made to the school counselor, police detective, and social worker should not have been admitted into evidence; and (4) his counsel's failure to object to the social worker's testimony that the child was believable constituted ineffective assistance of counsel. We address each respectively.

I.

[1] Defendant first argues that the trial court should have allowed his counsel to *voir dire* the State's expert witnesses before they testified at trial to determine the underlying basis of their opinion. We disagree.

Under North Carolina law, an expert may testify,

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

N.C. Gen. Stat. 8C-1, rule 705 (1992).

Thus, while rule 705 provides for the disclosure of the underlying facts or data forming the basis of expert testimony upon an adverse party's request, it permits the trial court to require such disclosure either on direct or cross-examination, or on *voir dire* before stating the opinion. In the case *sub judice*, the disclosure of the underlying facts or data forming the basis of the experts' opinions occurred during direct and cross-examination testimony. Moreover, the defendant has not shown any prejudice from the delay in obtaining this evidence

during direct and cross-examination testimony. Accordingly, we find no merit to defendant's first assignment of error.

II.

Next, the defendant contends that the trial court should have dismissed the charges against him because the delay in receiving access to the Durham Community Guidance Clinic's records violated his constitutional right to due process by hindering his preparation of a defense.

In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed.2d 215 (1963), the United States Supreme Court held that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. *See id.* However, a general request for all *Brady* information or all exculpatory information does not create a prosecutorial duty to respond with the production of all evidence. *See United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct 2392, 2399, 49 L.Ed.2d 342, 351-52 (1976).

Before the subject trial, the defendant moved for the production of the confidential records of the Durham Community Guidance Clinic. However, since the State did not have access to these records, the trial court ordered and reviewed *in camera* the files of the Durham County Department of Social Services which contained the Durham Community Guidance Clinic's records. Upon its review, the trial court determined that most of these records were not relevant to the matter before the court. Nonetheless, the trial court allowed both the prosecutor and the defense to inspect all of the records. The trial court also allowed the defense to review the State's subpoenaed records from the Durham Community Guidance Center received after the defendant's pre-trial discovery motion. In fact, these records were available to the defense during the weekend recess of trial.

In denying the defense's motion, the trial court determined that the defendant had ample time to review the records and offered him more time if needed, stating:

> And the court finds that counsel for the defendant has had an opportunity, an adequate opportunity to review any and all records concerning this matter. And the Court further finds as fact that if the defendant needs a delay in trial to go over these

> records more in order to recall any witnesses to question them about any of these records the Court will be willing to do so.

Thus, the defendant had ample access and adequate time to review the Durham Community Guidance Center's records in preparing a defense. Because he has failed to show that the State withheld exculpatory evidence in violation of *Brady*, we reject defendant's second assignment of error.

III.

[2] The defendant next asserts that the admission of the child's hearsay statements made to the school counselor, police detective, and social worker violated his constitutional right to confront witnesses. He argues first that the trial court erred in finding that the child was unavailable to testify. We disagree.

The determination of whether a child is competent to testify is a matter within the sound discretion of the trial court. *See State v. Ward*, 118 N.C. App. 389, 455 S.E.2d 666 (1995). Moreover, "[t]he trial court's decision will not be reversed on appeal unless it is shown that it could not have been the result of a reasoned decision." *Id.* at 394, 455 S.E.2d at 669.

Because the defendant has failed to show that the trial court's decision was not the result of a reasoned decision, we will not disturb the trial court's finding that the child in this case was unavailable to testify. *See State v. Chandler*, 324 N.C. 172, 376 S.E.2d 728 (1989) (holding that a four-year-old victim who was unable to respond to questions because of fear was "unavailable" within meaning of hearsay rule and thus, her testimony from defendant's first trial was admissible in a subsequent retrial).

Next, the defendant challenges the trial court's admission of these hearsay statements under the N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) catchall exception.

This catchall exception permits the admission of statements having equivalent guarantees of trustworthiness where a declarant is unavailable. To determine whether the subject statements were admissible under the catchall exception, the trial court conducted a six-step inquiry, under the guidance of *State v. Swindler*, 339 N.C. 469, 450 S.E.2d 907 (1994), and found that:

> (1) The State gave the defense sufficient notice of intent of its use of these statements;

(2) These statements were not specifically covered by any of the other exceptions to the hearsay rule under Rules 803 and 804;

(3) These statements were trustworthy;

(4) The proffered statements were offered as evidence of a material fact;

(5) The statements were more probative on the point for which they were offered than any other evidence which the proponent could accrue through reasonable efforts;

(6) The general purpose of these rules and the best interest of justice would be served by the admission of these statements into evidence.

See State v. Swindler, 339 N.C. 469, 473-74, 450 S.E.2d 907, 910 (1994); *see also State v. Wagoner*, 131 N.C. App. 285, 506 S.E.2d 738, 740 (1998); N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (1992).

Reviewing the record on appeal, we find evidence to support the trial court's assessment as to each of these particular findings which in turn supports the trial court's decision to allow the hearsay statements under the Rule 804(b)(5) catchall exception.

[3] Nonetheless, we further address the issue of whether the admission of these hearsay statements violated the defendant's constitutional right to confront the declarant child.

"The Confrontation Clauses in the Sixth Amendment to the United States Constitution and Article I Section 23 of the North Carolina Constitution prohibit the State from introducing hearsay evidence in a criminal trial unless the State: (1) demonstrates the necessity for using such testimony, and (2) establishes the inherent trustworthiness of the original declaration." *State v. Waddell*, 130 N.C. App. 488, 494, 504 S.E.2d 84, 88 (1998).

"In the circumstance where the State's case depends in the main upon the child sex abuse victim's statements and the child is incompetent to testify '[t]he unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements adequately demonstrate the necessity prong of this test." *Waddell*, 130 N.C. App. at 494, 504 S.E.2d at 88. (quoting *State v. Gregory*, 78 N.C. App. 565, 568, 338 S.E.2d 110, 112 (1985)). In the subject case, because the unavailability of the child was due to her incompetency, it was necessary to allow the testimonies of the school counselor,

police detective, and social worker. Thus, the necessity requirement was satisfied in the case *sub judice.*

In evaluating whether the hearsay testimony meets the circumstantial guarantees of trustworthiness, the trial court should consider the following factors:

> (1) assurances of the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaning of cross examination.

State v. Triplet, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986).

Our review of the record in this case, shows that the trial court's determination that the subject hearsay statements satisfied the circumstantial guarantees of trustworthiness was supported by evidence showing that the child—as the victim—had personal knowledge of the underlying incident at issue in this case. Further, there was no evidence in the record that the child had any motive for lying, nor that she had ever recanted these statements. Additionally, it was not practical for the child to testify in this case because of her incompetency.

Moreover, the trial court's finding of incompetence under these circumstances did not as a matter of law invalidate the child's prior statements made with personal knowledge. *See State v. Rogers*, 109 N.C. App. 491, 498, 428 S.E.2d 220, 224, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1102, 114 S. Ct. 1875, 128 L. Ed.2d 495 (1994) (holding that the trial court's finding of incompetence is not "inconsistent as a matter of law with a finding that the child may nevertheless be qualified as a declarant out of court to relate truthfully personal information and belief"). Accordingly, we conclude that the second requirement of trustworthiness has also been satisfied.

In sum, since the trial court's admission of these hearsay statements did not infringe upon the defendant's constitutional right to confront witnesses, we reject the defendant's third assignment of error.

IV.

[4] Finally, the defendant argues that his constitutional right to effective assistance of counsel at trial was violated because his trial attor-

ney failed to object to the social worker's testimony that the child's statements were believable. In particular, the social worker stated during cross examination: "I wouldn't expect a child to make a statement that [her] daddy put [his penis] in [her] mouth because a child wants to protect the people that she's close to and the people that take care of her. So I wouldn't have expected her to say it if it didn't happen."

To establish ineffective assistance of counsel, the defendant must satisfy a two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984). *See State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985); *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998). Under this test, the defendant must show that: (1) the counsel's performance fell below an objective standard of reasonableness as defined by professional norms and (2) the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. See *Lee*, 348 N.C. at 491, 501 S.E.2d at 345.

Under Rules 405 and 608 of the North Carolina Rules of Evidence, an expert witness may not testify that the prosecuting witness in a sexual abuse trial is believable, *see State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), nor that the child is lying about the alleged sexual assault, *see State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986). However, an expert may testify as to the "characteristics of sexually abused children" and may express an opinion as to whether the characteristics of the child at issue are "consistent with" the characteristics of sexually abused children. *See State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987); *State v. Hammond*, 112 N.C. App. 454, 461, 435 S.E.2d 798, 802 (1993) (an expert may express her opinion as to whether the victim exhibited characteristics "similar" to an abused child), disc. review denied, 335 N.C. 562, 441 S.E.2d 126 (1994)).

In the instant case, the first part of the social worker's statements that "I wouldn't expect a child to make a statement that [her] daddy put [his penis] in [her] mouth because a child wants to protect the people that she's close to and the people that take care of her" is merely the social worker's opinion that abused children generally do not falsely accuse their parents—which is permissible testimony of the characteristics of abused children. The last part of the social worker's statements that she "wouldn't have expected her to say it if it didn't happen" constitutes impermissible expert testimony as to the credibility of this particular child. *See State v. Oliver*, 85 N.C. App. 1,

11, 354 S.E.2d 527, 533 (holding that an expert may testify as to "the general credibility of children who report sexual abuse," but not as to "the credibility of the specific victim").

However, under certain circumstances, "otherwise inadmissible evidence may be admissible if the door has been opened by the opposing party's cross examination of the witness." *State v. Baymon*, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994). " 'Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially.' " *Id.* at 752-53, 446 S.E.2d at 3 (quoting *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (1994)).

In the case at hand, the testimony at issue was given by the social worker in response to the defense counsel's questions. Specifically, the following colloquy took place at trial:

> Q. You would not expect a five year old to say someone put their dink-a-link in her mouth unless it had happened.
>
> A. No. Because it is a very shameful thing for a child.
>
> Q. Unless they had experience before?
>
> A. I wouldn't expect a child to make a statement that their daddy put it in their mouth because a child wants to protect the people that she's close to and the people that take care of her. So. I wouldn't have expected her to say that if it didn't happen.
>
> Q. And unless they have experienced the dink-a-link in their mouth before or seen somebody put a dink-a-link in somebody's mouth before they wouldn't even know it ever went on any way, would they?

Through this line of questioning, the defense counsel attempted to show that the child's sexual knowledge resulted from a prior incident of sexual abuse occurring at her mother's home as oppose to the incident for which the defendant was being tried. Hence, the defense counsel opened the door to the social worker's testimony as to the child's statements being believable.

We, therefore, hold that the social worker's testimony was admissible. Consequently, the defendant's assertion that his counsel's failure to object to such testimony constituted ineffective assistance of

counsel is without merit. *See Lee*, 348 N.C. at 492, 501 S.E.2d at 345 (stating that "[t]he first part of the *Strickland* test is not satisfied where defendant cannot even establish that an error occurred").

Having summarily determined that the defendant's remaining assignments of error lack merit, we conclude that the defendant was given a fair trial, free of prejudicial error.

No error.

Judge GREENE concurs in the result in a separate opinion.

Judge MARTIN concurs.

Judge GREENE concurring in the result.

Although I concur in the result reached by the majority, I must write separately because I do not agree that our inquiry into whether Defendant received effective assistance of counsel ends with the determination that defense counsel "opened the door" to the admissibility of expert testimony as to the credibility of the child victim in this case. To the contrary, I believe opening the door to otherwise inadmissible testimony could be as indicative of ineffective assistance of counsel as the failure to object to its admission.

The majority holds, and I agree, that Defendant's trial counsel "opened the door" to admission of this statement by asking the State's expert witness whether she would "expect a five year old to say someone put their dink-a-link in her mouth unless . . . they had experience[d] [it] before." I do not believe, however, that our inquiry ends there. We must further determine whether defense counsel's elicitation of this statement constitutes ineffective assistance of counsel.

A defendant's constitutional right to counsel includes the right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). To show that counsel was ineffective, a defendant must satisfy a two-part test. *Id.* at 562, 324 S.E.2d at 248.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

> This requires showing that counsel's error[s] were so serious as to deprive the defendant of a fair trial . . . .

Id. (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "[E]very effort [should] be made to eliminate the distorting effects of hindsight" in reviewing defense counsel's effectiveness "and to evaluate the conduct from counsel's perspective at the time." *State v. Mason*, 337 N.C. 165, 177-78, 446 S.E.2d 58, 65 (1994) (quoting *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694). There is a "strong presumption" that, under the circumstances, the challenged action of defense counsel was sound trial strategy rather than ineffective assistance. *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694.

In this case, my review of the record reveals defense counsel herein was attempting to elicit favorable information from the expert when asking whether she would expect a five-year-old to make allegations of sexual abuse "[u]nless they had experience[d] [it] before." There was evidence before the jury that Defendant and the child's mother maintained separate residences, and that the child had previously been sexually abused while in her mother's care. Testimony of several witnesses, including experts, revealed that the child had told the same story of abuse by Defendant to each of them, and the physical evidence revealed that the child had been sexually abused. Defense counsel was therefore proceeding on the theory that the child was, at best, describing sexual acts committed by adults other than Defendant. Because the evidence supported this reasonable trial strategy, Defendant has not overcome the strong presumption that defense counsel acted reasonably in attempting to elicit this information. Accordingly, I agree with the majority that Defendant was not denied effective assistance of counsel.

I also write separately to address the majority's statement that the Confrontation Clause prohibits "the State from introducing hearsay evidence in a criminal trial unless the State: (1) demonstrates the necessity for using such testimony, and (2) establishes the inherent trustworthiness of the original declaration." 134 N.C. App. 379, 385, 517 S.E.2d 677, —— (1999). Our Supreme Court has explicitly held: "[T]he Confrontation Clause of the North Carolina Constitution *does not require a showing or finding of necessity* before hearsay testimony may properly be admitted under a firmly rooted exception to the hearsay rule." *State v. Jackson*, 348 N.C. 644, 647, 503 S.E.2d 101, 103 (1998) (emphasis added). Necessity is a prerequisite to

admission of hearsay testimony *only* when the testimony is offered under one of the "residual" hearsay exceptions (*i.e.*, Rule 803(24) and Rule 804(b)(5) of our Rules of Evidence). *See id.* at 652, 503 S.E.2d at 106. I agree with the majority that necessity was a prerequisite to admission of the hearsay testimony in this case because the hearsay testimony at issue was offered under the "residual" hearsay exceptions rather than a "firmly rooted" exception.

FREDERICKA HOLSHOUSER, PLAINTIFF v. SHANER HOTEL GROUP PROPERTIES ONE LIMITED PARTNERSHIP, SHANER OPERATING CORPORATION, BEN ROBINSON, AND LOSS PREVENTION SERVICES, INC., DEFENDANTS

No. COA98-814

(Filed 3 August 1999)

1. **Negligence— summary judgment inappropriate—ambiguity—contract—extrinsic evidence**

The trial court erred as a matter of law in granting summary judgment in favor of defendant-security guard and defendant-security company on plaintiff-employee's claim of negligence for failure to protect her, as a hotel employee, from criminal attacks. Since defendant-employer's contract for guard service was ambiguous with respect to the nature of the security company's duties under the contract, the ambiguity permits resort to extrinsic evidence creating an issue of fact for the jury.

2. **Contracts— no breach—not a third-party beneficiary—plain language of contract**

The trial court did not err in dismissing plaintiff-employee's claim against defendant-security guard and defendant-security company for breach of contract because plaintiff was not a third-party beneficiary of the contract for guard service between defendant-employer and defendant-security company. The plain language of the agreement shows defendant-security company and defendant-employer did not intend plaintiff to receive a legally enforceable right under the contract in the absence of negligent performance of the services.

3. Workers' Compensation— summary judgment inappropriate—assault—unknown assailant—not arising out of and in the course of employment

The trial court erred in granting summary judgment to defendant-employer because the attack on plaintiff-employee in the employee parking lot by an unknown assailant while the employee was coming to work was not an injury arising out of and in the course of her employment with the hotel so as to limit her remedy to the Workers' Compensation Act because the high criminal activity on the hotel premises and the surrounding neighborhood made it a hazard to which hotel employees would have been equally exposed apart from the employment.

Judge HUNTER concurring in part and dissenting in part.

Appeal by plaintiff from judgments entered 31 March 1998 and 14 April 1998 by Judge Julius A. Rousseau, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 24 February 1999.

McCall Doughton & Blancato, PLLC, by Thomas J. Doughton, for plaintiff-appellant.

Young Moore and Anderson, P.A., by John A. Michaels and Reed N. Fountain, for defendant-appellee Shaner Operating Corporation.

Davis & Hamrick, L.L.P., by Kent L. Hamrick, for defendants-appellees Loss Prevention Services, Inc., and Ben Robinson.

TIMMONS-GOODSON, Judge.

Fredericka Holshouser ("plaintiff") appeals from orders granting summary judgment to Shaner Operating Corporation ("Shaner Operating"), Ben Robinson ("Robinson"), and Loss Prevention Services, Inc. ("LPS") on plaintiff's claims for negligence and breach of contract. Having carefully examined plaintiff's arguments, we reverse in part, affirm in part, and remand this case for further appropriate proceedings.

The relevant factual and procedural background is as follows: On 23 October 1996, plaintiff was employed as a waitress at the Holiday Inn Select Hotel ("the hotel") in Winston-Salem, North Carolina. The hotel was owned by Shaner Hotel Group Properties One Limited Partnership ("Shaner Hotel Group") and was operated by Shaner Operating. Robinson was working as a security guard for the hotel

pursuant to a contract between Shaner Hotel Group and Robinson's employer, LPS.

At 4:40 a.m. on 23 October 1996, plaintiff arrived at the hotel for her work shift and parked in the rear parking lot, as required by her employer, Shaner Operating. The purpose of this requirement was to make front parking spaces available for hotel guests. As plaintiff approached the back door of the hotel, an unknown assailant grabbed her from behind, pulled her into an adjacent area overgrown with trees and shrubbery, and raped her.

Plaintiff filed a complaint on 23 June 1997 against Shaner Hotel Group alleging that it was negligent in failing to provide adequate security and proper lighting and in failing to cut back the shrubbery and trees. Thereafter, plaintiff filed an Amended and Second Amended Complaint adding Robinson, LPS, and Shaner Operating as defendants. Plaintiff alleged two theories of recovery against Robinson and LPS: (1) that they were negligent in failing to provide proper security and protection to plaintiff; and (2) that plaintiff was a direct beneficiary of the contract between the hotel and LPS.

After the parties had conducted extensive discovery, Robinson, LPS, Shaner Hotel Group, and Shaner Operating filed motions for summary judgment. On 30 March 1998, before the discovery period had expired, the trial court held a hearing on the motions. The court entered summary judgment for Robinson and LPS on 31 March 1998 and for Shaner Operating on 14 April 1998. Plaintiff's claim against Shaner Hotel Group, however, is still pending. Plaintiff filed timely notice of appeal.

Plaintiff raises several issues on appeal: (1) whether Robinson and LPS owed any duty to plaintiff to protect her from the criminal attack committed against her by an unknown assailant; (2) whether plaintiff was a third-party beneficiary of the contract for security services between LPS and Shaner Hotel Group; (3) whether the injuries sustained by plaintiff during the attack were compensable under the Workers' Compensation Act; and (4) whether the trial court erred in granting summary judgment to Robinson, LPS, and Shaner Operating while discovery was still pending. We will examine each of these issues in turn.

Plaintiff argues first that the trial court improvidently granted summary judgment for Robinson and LPS on plaintiff's claim that

they were negligent in failing to properly secure and protect her against criminal assaults. We agree.

On appeal from an order granting summary judgment, this Court's review is confined to two questions: "(1) whether there is a genuine issue of material fact, and (2) whether the moving party is entitled to judgment as a matter of law." *Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 314, 498 S.E.2d 841, 848, *disc. review denied*, 348 N.C. 695, 511 S.E.2d 649, *and disc. review dismissed*, 348 N.C. 695, 511 S.E.2d 650 (1998). The party moving for summary judgment bears the burden of proving that the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, establish the absence of any triable issue of fact. *Lamm v. Bissette Realty*, 94 N.C. App. 145, 379 S.E.2d 719 (1989). In ruling on a motion for summary judgment, the trial court must examine the evidence in the light most favorable to the non-moving party, and the non-moving party is entitled to have all factual inferences drawn in her favor. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 666, 449 S.E.2d 240, 242 (1994).

"Negligence is the failure to exercise proper care in the performance of a legal duty owed by a defendant to a plaintiff under the circumstances." *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996). To establish a prima facie case of negligence liability, the plaintiff must show: (1) that the defendant owed her a duty of care; (2) that the conduct of the defendant breached that duty; (3) that the breach actually and proximately caused the plaintiff's injury; and (4) that the plaintiff sustained damages as a result of the injury. *Lamm*, 94 N.C. App. at 146, 379 S.E.2d at 721. "When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care, summary judgment is inappropriate." *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E.2d 588, 594 (1984).

Plaintiff contends that under the terms of the Contract For Guard Service executed by the President of LPS and the Vice President of Operations for Shaner Hotel Group, LPS and Robinson owed plaintiff a duty to protect her from criminal affronts. LPS and Robinson argue, however, that an obligation to protect hotel employees from harm did not originate from any of the promises contained in the agreement; therefore, the court was correct in entering summary judgment in favor of the security company and its employee. For the following reasons, we hold that the contract was ambiguous with respect to the nature of LPS' duties under the contract, that this ambiguity

raised an issue of material fact to be resolved by the jury with the help of extrinsic evidence, and that summary judgment was, therefore, inappropriate.

In North Carolina, it is well settled that an injured third party need not be in privity of contract to recover against a contracting party for negligently performing services for another. *Id.* at 26, 321 S.E.2d at 594. To that end, our courts have adopted the following principle of tort law, as set forth in *Condominium Assoc. v. Scholtz Co.*, 47 N.C. App. 518, 268 S.E.2d 12 (1980):

> [U]nder certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking.

Id. at 522, 268 S.E.2d at 15. Determining whether a party who has contracted to provide services for another has assumed a duty to protect third parties from harm requires balancing the following factors:

> "(1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm."

Ingle, 71 N.C. App. at 27, 321 S.E.2d at 594 (quoting *Leasing Corp. v. Miller*, 45 N.C. App. 400, 406-07, 263 S.E.2d 313, 318 (1980)). "If the evidence, direct or circumstantial, is sufficient as to any of these factors, it will create a jury question as to whether such a duty exists and whether it was breached by the defendant." *Id.*

In *Cassell*, our Supreme Court held that the extent of the duty, if any, owed by a security company to a guest who was stabbed at an apartment complex the company was hired to patrol, is governed by the contract between the security company and the property owner. *Cassell*, 344 N.C. at 163-64, 472 S.E.2d at 772. The contract in question provided that the company's security guard was responsible for "closing and securing the complex pool, tagging cars that were parked improperly, making rounds on the property, and preventing tenants from 'hanging out' in common areas." *Id.* at 164, 472 S.E.2d at 772-73. The memorandum from the complex management to the security company further provided that the security guard "was 'to be visible

both as a deterrent to potential vandals as well as a sense of security for residents.' " *Id.* at 164, 472 S.E.2d at 773. Because neither the contract nor the memorandum imposed a duty on the security company to protect tenants or their guests, the Court concluded that the security company could not be held liable to the plaintiff for negligence in failing to protect him.

Recently, this Court, in *Hoisington v. ZT-Winston-Salem Assoc.*, 133 N.C. App. 485, 516 S.E.2d 176 (1999), considered the issue of liability for negligently performing security services. That case involved a brutal assault against an employee of Silas Creek Shopping Center. While working in one of the stores on the night of 9 December 1995, the plaintiff's ward, Jill Marker, was severely beaten, resulting in serious and permanent injuries. The owner of Silas Creek had contracted with Wackenhut Corporation to provide security guard services for the shopping center. Under the contract, the "Scope of Work" was 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.

Hoisington, 133 N.C. App. at 487, 516 S.E.2d at 178. On appeal from an order granting summary judgment to Wackenhut on the plaintiff's negligence claim, the plaintiff argued 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." *Hoisington*, 133 N.C. App. at 489, 516 S.E.2d at 180. This Court found, however, that the contract language was similar to that in *Cassell* and, thus, created no duty to "protect" employees of the shopping center from criminal assaults. *Id.*

[1] Therefore, the issue presently before us is whether the trial court erred in determining that as a matter of law, the Contract for Guard Service imposed no duty upon LPS and Robinson to protect hotel employees from criminal assaults. Our examination of the contract reveals ambiguities regarding the responsibilities assumed by LPS and its security officers. Such ambiguities permit resort to extrinsic evidence and create an issue of fact for the jury as to the extent of Robinson and LPS's duties under the agreement.

In interpreting a contract, the court's principle objective is to determine the intent of the parties to the agreement. *Glover v. First Union National Bank*, 109 N.C. App. 451, 428 S.E.2d 206 (1993). Generally, "[w]hen the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." *Whirlpool Corp. v. Dailey Construction, Inc.*, 110 N.C. App. 468, 471, 429 S.E.2d 748, 751 (1993). "However if the terms of the contract are ambiguous then resort to extrinsic evidence is necessary and the question is one for the jury." *Id.* Appellate review of a trial court's determination of whether a contract is ambiguous is *de novo*. *Barrett Kays & Assoc. v. Colonial Building Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998).

An ambiguity exists where the " 'language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Id.* (quoting *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996)); *see also Drye v. Nationwide Mut. Ins. Co.*, 126 N.C. App. 811, 813-14, 487 S.E.2d 148, 150, *disc. review denied*, 347 N.C. 265, 493 S.E.2d 45 (1997). Stated another way, an agreement is ambiguous if the " 'writing leaves it uncertain as to what the agreement was[.]' " *Id.* (quoting *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989)). " 'The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.' " *Glover*, 109 N.C. App. at 456, 428 S.E.2d at 209 (quoting *St. Paul Fire & Marine Ins. v. Freeman-White Assoc.*, 322 N.C. 77, 366 S.E.2d 480 (1988)).

Here, we find ambiguities with respect to the nature of services to be rendered by LPS under the Contract for Guard Service. Regarding the services to be provided by LPS for Shaner Hotel Group, the Contract For Guard Service pertinently states the following:

> 1. During the term of this contract Client desires LPS to provide uniformed unarmed guards during the hours designated at Client's property[.]
>
> . . .
>
> 6. The services to be rendered under this contract by LPS shall be in conformity with operating policies and procedures mutually agreed upon by Client and LPS. However, if at the

> request of Client, a guard is assigned duties outside the scope of normal guard duties, Client shall assume complete responsibility for any and all liability arising therefrom.

The contract manifests the parties' intent that the services should be performed according to certain standards of conduct; however, the contract is ambiguous as to those standards, stating only that "services . . . shall be in conformity with the operating policies and procedures mutually agreed upon by Client and LPS." The general reference to "operating policies" and "procedures mutually agreed upon" reveals the parties' intent that the contract be performed according to certain guidelines, but the language of the contract left the exact nature of those guidelines unclear. Furthermore, the reference in Paragraph 6 to "normal guard duties" indicates that LPS's guards are, by virtue of their employment, charged with certain responsibilities. However, nowhere within the four corners of the agreement are these responsibilities listed or explained, other than by general reference to "operating policies." These ambiguities in the language of the contract create an issue of material fact for the jury and allow consideration of extrinsic evidence. *See Barrett*, 129 N.C. App. 525, 500 S.E.2d 108; *Drye*, 126 N.C. App. 811, 487 S.E.2d 148.

Plaintiff presented a sufficient forecast of the evidence to raise issues of material fact on the questions of whether there exists a duty to protect plaintiff under the contract and whether this duty was performed in a negligent manner. Plaintiff offered LPS's Security Procedures Manual ("the manual") as a statement of the operating policies and procedures mutually agreed upon by the parties. Plaintiff also points to the deposition testimony of LPS President Larry W. McClellan, whose signature appears on the Contract For Guard Service, wherein he concedes that all LPS security officers working at the hotel were required, at a minimum, to follow those procedures set forth in the manual.

Section I of the manual, entitled "Rules and Regulations Governing Loss Prevention Services Security Officers," sets out a list of performance requirements. Paragraph 1 provides that "Security Officers shall at all times preserve the peace, *protect life and property, prevent crime, apprehend violators*, and enforce all Loss Prevention Services rules and regulations." (Emphasis added). Paragraph 1 of the subsection entitled "Uniforms and Appearance" further states that "[the officer's] uniform identifies [him] as the individual who is *specifically charged with protecting life and property* at [his] place of duty." (Emphasis added). Moreover, when asked if

one of the services expected of a security guard was to preserve the peace, protect life and property, and prevent crime, McClellan stated "Yes. That is the intent, uh-huh." This evidence, taken in the light most favorable to plaintiff, was sufficient to raise a question of fact as to whether defendant had a contractual duty to protect plaintiff from harm.

In addition, should the jury find such a duty to exist, plaintiff also presented evidence tending to establish the negligent performance of that duty. Plaintiff's evidence showed that Robinson knew that plaintiff arrived at work at approximately 4:00 a.m. and that she was required to park in the rear parking lot. Robinson also knew that the parking lot was poorly lit and that there had been a substantial amount of criminal activity on the premises and in the surrounding neighborhood. Plaintiff also presented evidence tending to show that it was standard practice for the security guard on duty between 4:00 and 5:00 a.m. to stand guard at the rear entrance to the hotel to observe employees coming into work from the rear parking lot. Plaintiff's evidence further tended to show that if Robinson had been patrolling at or near the back door on the morning of 23 October 1996, it is unlikely that the assault against plaintiff would have occurred. In addition, on the morning of the attack on plaintiff, an employee of the hotel advised Robinson that plaintiff had not yet reported for work. Although he knew that plaintiff's vehicle was in the rear parking lot and that there had been various criminal incidents on the premises, Robinson did nothing to ascertain plaintiff's whereabouts. Therefore, we hold that plaintiff presented a sufficient forecast of evidence to withstand a motion for summary judgment on the issue of whether Robinson and LPS acted negligently in failing to protect plaintiff. The trial court erred in entering summary judgment for Robinson and LPS, and we reverse the order accordingly.

[2] Next, plaintiff argues that the trial court erred in dismissing her claim against Robinson and LPS for breach of contract, as she was a third-party beneficiary of the Contract For Guard Service between Shaner Hotel Group and LPS. We must disagree.

To assert a claim for breach of contract, the plaintiff must show that she is either a party to the contract or a third-party beneficiary of the contract. *State ex. rel Long v. Interstate Casualty Ins. Co.*, 120 N.C. App. 743, 747, 464 S.E.2d 73, 75 (1995). A plaintiff is a third-party beneficiary if she can show (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and

(3) that the contract was executed for the direct, and not incidental, benefit of the plaintiff. *Id.* at 747, 464 S.E.2d at 75-76. A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991). It is not enough that the contract, in fact, benefits the plaintiff, if, when the contract was made, the contracting parties did not intend it to benefit the plaintiff directly. *Id.* In determining the intent of the contracting parties, the court "should consider [the] circumstances surrounding the transaction as well as the actual language of the contract." *Id.* at 652, 407 S.E.2d at 182. " 'When a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.' " *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 34, 351 S.E.2d 786, 791 (1987) (quoting *Lane v. Surety Co.*, 48 N.C. App. 634, 638, 269 S.E.2d 711, 714 (1980)).

The contract at issue specifically provides as follows:

> The services provided by this contract are solely for the benefit of the Client and neither this contract nor any services rendered hereunder shall give rise to, or shall be deemed to or construed so as to confer any rights on any other party as a third party beneficiary or otherwise and Client agrees to indemnify LPS against any claims by such third parties. LPS shall be liable only for bodily injury, personal injury or property damage resulting directly from the negligent performance of the services rendered under this contract.

From the plain language of the agreement, it is clear that LPS and Shaner Hotel Group did not intend that plaintiff receive a legally enforceable right under the contract, in the absence of the negligent performance of the services. Therefore, the trial court was correct in granting summary judgment to LPS and Robinson on plaintiff's claim for breach of contract under the theory that she is a third-party beneficiary. Plaintiff's argument, then, fails.

[3] Plaintiff further argues that the trial court erred in granting summary judgment to Shaner Operating. Plaintiff contends that the assault perpetrated against her was not an injury arising out of and in the course of her employment with the hotel, so as to limit her remedy to that available under the Workers' Compensation Act. Plaintiff's contention has merit.

Where an injury is compensable under the Workers' Compensation Act, the employee's remedies against the employer are exclusive and, thus, preclude a claim for ordinary negligence. *Wake County Hosp. Sys. v. Safety Nat. Casualty Corp.*, 127 N.C. App. 33, 487 S.E.2d 789, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997); N.C. Gen. Stat. § 97-10.0 (1991). To be compensable under the Workers' Compensation Act, the employee's injury must be "(1) by accident, (2) arising out of [her] employment with the defendant, and (3) within the course of [her] employment with the defendant." *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116, *disc. review denied*, 349 N.C. 363, — S.E.2d — (1998). An "accident" is an unanticipated and unpleasant event " 'which is not expected or designed by the person who suffers the injury.' " *Id.* (quoting *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (citations omitted)). "The term 'arising out of' refers to the origin or causal connection of the accidental injury . . . to the employment," *Ross v. Mark's Inc.*, 120 N.C. App. 607, 610, 463 S.E.2d 302, 304 (1995), and "the term 'in the course of' refers to the time, place and circumstances under which the injury occurred," *Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 81 N.C. App. 140, 142, 343 S.E.2d 551, 552 (1986).

The question presented by this appeal is whether the assault on plaintiff "arose out of" her employment with the hotel. An injury resulting from an assault on an employee is not compensable if the " 'circumstances surrounding the assault furnish no basis for a reasonable inference that the nature of the employment created the risk of such an attack[.]' " *Ross*, 120 N.C. App. at 611, 463 S.E.2d at 305 (quoting *Robbins v. Nicholson*, 281 N.C. 234, 240, 188 S.E.2d 350, 354 (1972)).

> [T]he controlling test of whether an injury "arises out of" the employment is whether the injury is a natural and probable consequence of the nature of the employment. A contributing proximate cause of the injury must be a risk to which the employee is exposed because of the nature of the employment. This risk must be such that it "might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. The test 'excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the [employees] would have been equally exposed apart from the employment.' "

Gallimore v. Marilyn's Shoes, 292 N.C. 399, 404, 233 S.E.2d 529, 532-33 (1977) (quoting *Bartlett v. Duke University*, 284 N.C. 230, 233, 200 S.E.2d 193, 195 (1973)).

In *Wake County*, this Court concluded that the death of a hospital employee was compensable under the workers' compensation laws because the facts were sufficient to show a causal connection between the employee's death and her employment. The evidence tended to show that "[the employee] was abducted from the employee parking lot, she was assaulted and killed on an adjacent street, she was carrying work materials, and the assailant was a co-employee." 127 N.C. App. at 39, 487 S.E.2d at 792. In the present case, however, the evidence tended to show that although plaintiff was in the employee parking lot walking toward the rear entrance to the hotel, she was abducted and raped by an unknown assailant in an adjacent area overgrown with trees and shrubbery. She had not reported to work, and she was not carrying any money or documents for the hotel. The evidence also tended to show that there had been numerous reported incidents of criminal activity on the hotel premises and in the surrounding neighborhood. In view of these facts, we are of the opinion that the assault on plaintiff was not a "natural and probable consequence of the nature of [plaintiff's] employment," but a " 'hazard to which [hotel employees] would have been equally exposed apart from the employment.' " *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 533 (quoting *Bartlett*, 284 N.C. at 233, 200 S.E.2d at 195). Therefore, the trial court erred in granting summary judgment to Shaner Operating. In light of our holding in this regard, we need not address plaintiff's argument that there was a question of fact as to whether Shaner Operating was her employer.

Plaintiff's final argument is that the trial court erred in allowing defendants' motions for summary judgment while discovery was still pending. Because plaintiff failed to assign error to this matter in the record on appeal, the issue is not properly presented for our review. N.C.R. App. P. 10(a),(c).

In sum, we reverse the entry of summary judgment on plaintiff's negligence claim against Robinson and LPS, we affirm summary judgment on plaintiff's third-party beneficiary breach of contract claim, and we reverse summary judgment on plaintiff's claim against Shaner Operating. This case is remanded to the Superior Court for further proceedings consistent with this opinion.

Reversed in part, affirmed in part, and remanded.

Judge MARTIN concurs.

Judge HUNTER concurs in part and dissents in part.

Judge HUNTER concurring in part and dissenting in part.

I respectfully dissent from the majority opinion in its reversal of summary judgment in favor of Shaner Operating on the issue of whether plaintiff's remedy is limited to those available under the North Carolina Workers' Compensation Act ("Act").

The general rule which applies to this case is when an employee is injured while going to or from his place of work, upon premises owned or controlled by his employer, and his 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). However, the employment must be traceable as a contributing proximate cause of the injury in order for it to have "arisen out of" the employment. *Id.* The court is justified in upholding the award as "arising out of employment" "[w]here any *reasonable relationship* to the employment exists, or employment is a contributory cause[.]" *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968) (*quoting Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960)).

In *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977), cited in the majority opinion, the North Carolina Supreme Court held that the injury did not arise out of employment where an employee was abducted in the shopping mall parking lot as she left work because the risk of being robbed or abducted was one common to the neighborhood. The employee in *Gallimore* was not carrying anything which indicated she was transporting money or bank deposits for her employer. In that case, the Court noted that a parking lot at the mall in question was well-lighted and concluded that the assault on the employee was not peculiar to the employment as it could happen to anyone who patronized the shopping mall, as employees did not park in a separate area. The Court noted that "[t]he tragic and untimely death of Miss Gallimore was caused by the vicious and unreasoned criminal act of Darrell Lee Young, not by an accident arising out of her employment." *Id.* at 405, 233 S.E.2d at 533.

In another case involving an assault in a parking lot, this Court concluded that a causal connection did exist between the employee's death and her employment when she was abducted from the employee parking lot as she was leaving work carrying work materials, she was assaulted and killed on an adjacent street, and the assailant was a co-employee. *Wake County Hosp. Sys. v. Safety Nat. Casualty Corp.*, 127 N.C. App. 33, 487 S.E.2d 789, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997).

Reviewing these cases together, I am of the opinion that they indicate if specific circumstances of work put the employee in a position making it more likely for them to be attacked rather than someone common to the neighborhood, then the resulting injury arises out of and in the course of employment. The evidence in the case *sub judice* indicates that patrons did not park identically to employees as those in *Gallimore*. In fact, plaintiff and other employees were required by their employer to park at the rear of the hotel in order for patrons to obtain the better parking spaces in front. Additionally, plaintiff was required to park in this dimly lit parking lot while reporting to work in the dark, early morning hours, and enter the rear of the building at the point where it had adjacent overgrown shrubs. These factors placed plaintiff in the proximity of her assailant, just as the factors enunciated from *Wake* put that employee in proximity of her co-employee assailant. Therefore, they contributed proximately to her subsequent attack. As recently stated by this Court, "[s]o 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 [Workers' Compensation Act]." *Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 384, 514 S.E.2d 545, 550 (1999). Plaintiff's parking instructions by her superior were contributing proximate causes of her being assaulted and raped, both of which also occurred on her employer's premises.

In view of the foregoing facts and liberally construing the Act in favor of coverage, *see Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), I am of the opinion that the assault on plaintiff was a natural and probable consequence of plaintiff's employment instead of a risk common to the neighborhood. Accordingly, plaintiff's injuries on her employer's premises while going to work are covered by the Act, *see Bass*, 258 N.C. 226, 128 S.E.2d 570, and therefore, her remedy is limited by it.

Plaintiff contends that the issue of her employer's identity is a question of fact which was not determined by the trial court.

Therefore, I would remand this issue for the trial court to make appropriate findings of fact and conclusions of law determining whether Shaner Operating is plaintiff's actual employer, and thereupon enter an order in accordance with this opinion.

MICHAEL JENKINS, EMPLOYEE, PLAINTIFF v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, EMPLOYER, SELF-INSURED CONSTITUTION STATE SERVICE COMPANY, SERVICING AGENT, DEFENDANTS

No. COA98-1072

(Filed 3 August 1999)

1. **Workers' Compensation— testimony of doctor—based on employee's subjective complaints**

The Industrial Commission did not err in concluding plaintiff-employee's second doctor did not give incompetent testimony based on "mere speculation." Although the Industrial Commission could have given the doctor's opinion less weight due to the fact that it was based on plaintiff's subjective complaints rather than on objective testing, it was not required to do so.

2. **Workers' Compensation— failure to properly complete Form 28U not reversible error—not the authorized treating physician**

Plaintiff-employee's failure to submit a "properly completed" Form 28U did not require reversal because the Industrial Commission ultimately found that plaintiff's return to work was a "failed return to work" based on his work-related compensable injury. The form was improperly completed because although the doctor who signed it was plaintiff's initial authorized treating physician, the doctor had not treated plaintiff for nearly two years at the time of plaintiff's trial return to work as a meter reader and another doctor was currently plaintiff's authorized treating physician.

3. **Workers' Compensation— private communication—treating physician and rehabilitation professional—exclusion of testimony not required—not an agent of defendant**

The Industrial Commission erred in excluding or assigning no weight to the authorized treating physician's testimony pursuant to *Salaam v. N.C. Dept. of Transp.*, 122 N.C. App. 83 (1996),

because there is no evidence that the rehabilitation professional is an agent of defendant barring the rehabilitation professional's communication with plaintiff's treating physician.

4. Workers' Compensation— private communication—treating physician and rehabilitation professional—exclusion of testimony not required—Industrial Commission's rules—broad discretion

The Industrial Commission erred in excluding or assigning no weight to the authorized treating physician's testimony based on the Commission's rules merely because he communicated with a rehabilitation professional outside plaintiff's presence without plaintiff's consent. Although the Industrial Commission's rules indicate a strong preference that plaintiff-employee be present during conferences between the treating physician and the rehabilitation professional, the rules expressly give the treating physician broad discretion to confer with the rehabilitation professional outside plaintiff's presence with or without plaintiff's consent.

Judge WYNN dissenting.

Appeal by defendants from Opinion and Award filed 1 June 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 May 1999.

Law Offices of Edward Jennings, by Griffis C. Shuler, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and Shelley Walters Coleman, for defendant-appellants.

GREENE, Judge.

Public Service Company of North Carolina, Inc. (PSC) and its servicing agent (collectively, Defendants) appeal from the Opinion and Award of the North Carolina Industrial Commission (Commission) in favor of Michael E. Jenkins (Plaintiff).

Plaintiff received a compensable back injury on 25 October 1993 while working for PSC. A Form 21 "Agreement for Compensation for Disability" was entered into by the parties, and pursuant to that agreement, Plaintiff received temporary total disability compensation. Plaintiff's authorized treating physician immediately following

his injury, R. Mark Rodger, M.D. (Dr. Rodger), performed surgery on Plaintiff in 1993. Early in 1994, Plaintiff was referred to J. Robinson Hicks, M.D. (Dr. Hicks), who then became Plaintiff's authorized treating physician.

On 7 February 1996, Plaintiff attempted a trial return to work with PSC as a meter reader. Plaintiff worked as a meter reader for approximately one week. Plaintiff then filled out a Form 28U, "Employee's Request that Compensation be Reinstated After Unsuccessful Trial Return to Work," because he felt he could "not physically perform the job duties of a meter reader. The job requires constant walking, driving, and getting in and out of a truck. I am in severe pain." On 22 February 1996, Plaintiff took the Form 28U and x-rays to his authorized treating physician, Dr. Hicks, for certification that his return to work had been unsuccessful due to his disability. Plaintiff testified:

> [Dr. Hicks] looked at [the Form 28U] and took it out and talked to my rehab nurse out in the hall, come back. First he was going to sign it, I thought, and he said, "Well, I need to talk to your rehab nurse about it." So he took it out in the hall and talked to her a few minutes, come back in and handed it back to me and said he couldn't sign it.

Dr. Hicks testified that prior to discussing a trial return to work with Plaintiff, his test results had not shown signs of symptom magnification; however, "about three weeks after [they] discussed for the first time returning to work," Plaintiff's test results suggested symptom magnification. Dr. Hicks felt the meter reader position was "appropriate" for Plaintiff and "had no medical reason for keeping [Plaintiff] out of work"; he therefore refused to sign the Form 28U. Dr. Hicks further testified that he had no recollection of any conversation with Nancy Lipscomb, R.N. (Nurse Lipscomb), Plaintiff's rehabilitation professional, prior to declining to sign Plaintiff's Form 28U. Dr. Hicks stated: "I sometimes talk to the rehabilitation nurse outside the presence of a patient, but I have no idea in this particular case whether I did, and if I did, what the subject was." Dr. Hicks noted that it would not have been unusual for him to confer with a patient's rehabilitation professional outside the patient's presence.

In her 24 March 1996 Progress Report, Nurse Lipscomb noted:

> On 2/22/96, I met [Plaintiff] at Dr. Hicks' office. From [Plaintiff] I learned that he is not working now, and he walks with a limp. . . .

> [Plaintiff] was examined by Dr. Hicks by himself. Dr. Hicks did discuss with me that the patient brought a paper to him today to have him reinstate his Worker's [sic] Compensation. Dr. Hicks did state he can't take him out of work, as he needs to know why, and [Plaintiff] was given a consent paper to sign, so that Dr. Hicks' office could obtain [Plaintiff's medical records from other physicians he had seen], and then perhaps [Dr. Hicks] could help him. Dr. Hicks did tell the patient that he would write to the Industrial Commission to the effect that [Plaintiff] is having so much pain that he says he is unable to work. Dr. Hicks did plan to get another [functional capacity evaluation]. Dr. Hicks did state that he would write to the other doctors to obtain records and the x-rays to see if he would concur with their diagnosis. However, the patient did not sign the consent [for the other doctors to release his medical records to Dr. Hicks]. . . .

Following Dr. Hicks' refusal to sign the Form 28U, Plaintiff took the Form 28U to Dr. Rodger. Dr. Rodger had not seen Plaintiff as a patient in nearly two years, since 11 March 1994. Dr. Rodger testified, in relevant part, as follows:

> I did some x-rays, and my best supposition was that it was this problem at L5-S1. A lot of what, you know, what he can and can't do, I have to rely on what the patient tells me. You know, I don't have hard documentation of what he is being observed physically to be able to do, like a functional capacity assessment or something. I didn't have access to that. So my interpretation is subjective and based on what the patient tells me. . . . He convinced me that he wasn't able to do it. . . . Just coming to tell me you can't do it doesn't always mean that I agree that you can't do it. . . . I have to be convinced, and he was able to convince me.

Plaintiff's attorney asked Dr. Rodger if he had an "opinion satisfactory to yourself and to a reasonable degree of medical certainty as to what specific restrictions or limitations [Plaintiff] has as a result of his physical condition?" Dr. Rodger testified that his "impression was that [Plaintiff] was functionally unable to do any significant lifting and probably required frequent position changes for relief of his back pain." Dr. Rodger x-rayed Plaintiff, and testified the x-rays revealed that Plaintiff "had a good fusion. It looked okay to me." Dr. Rodger stated that "the history [he] had about [Plaintiff's] fusion . . . was from [Plaintiff] and from supposition and guesswork based on his x-rays." Dr. Rodger further testified:

> I don't think I took a detailed history of the actual occupation [Plaintiff] was involved with [(*i.e.*, the meter reader position)]. We did talk in general terms about the fact that he had gone back to a light-duty job, but hadn't been able to tolerate it. The actual details of how much time he spent sitting, standing, lifting, I don't have it detailed in the chart. And I can't remember if I asked him specifically about that or not.

Dr. Rodger testified that "in [his] opinion, he couldn't do the job that they wanted him to do." Dr. Rodger did not require Plaintiff to perform objective tests to determine whether his complaints of pain were exaggerated or nonphysiogenic; rather, because he believed Plaintiff's subjective complaints, he signed Plaintiff's Form 28U certifying that Plaintiff's return to work had been unsuccessful due to his injury.

The Commission gave "no weight" to the testimony of Dr. Hicks, finding that Dr. Hicks "left at least the appearance of undue influence by the rehabilitation nurse by stepping outside the presence of the plaintiff and into the presence of the rehabilitation nurse before saying whether or not he would sign the Form 28U." In addition, the Commission found "Dr. Rodger to be the proper party, under the circumstances, to sign the Form 28U," and concluded Plaintiff had complied with its rule 404A requiring the Form 28U to be signed by the authorized treating physician. Finally, based on the evidence before it, the Commission found Plaintiff's trial return to work in the meter reader position "was a failed return to work." Accordingly, the Commission, with one commissioner dissenting, awarded Plaintiff temporary total disability from 25 October 1993 through 4 February 1996, partial disability from 5 February 1996 through 12 February 1996 (during his trial return to work at lower wages than his pre-injury employment), and temporary total disability from 19 February 1996 "until further order of the Commission."

The issues are whether: (I) Dr. Rodger's testimony was incompetent because it was based on "mere speculation"; (II) Dr. Rodger could not certify that Plaintiff's return to work was unsuccessful because he was not Plaintiff's authorized treating physician; and (III) private conversations between the authorized treating physician and the rehabilitation professional without the employee's consent are permissible.

I

[1] Defendants first contend the testimony of Dr. Rodger was incompetent because it was based on "mere speculation."

In this case, it is clear from the record that Dr. Rodger based his opinion that Plaintiff could not perform the meter reader position primarily on Plaintiff's subjective complaints. It does not follow, however, that Dr. Rodger's opinion was based on "mere speculation." *See, e.g., Ballenger v. Burris Industries*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887 (expert testimony as to causation is incompetent if based on "mere speculation and possibility"), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984). A physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law. Dr. Rodger was aware of Plaintiff's history to a certain extent because he had been Plaintiff's initial treating physician for his back injury, and Dr. Rodger testified he was "convinced" that Plaintiff was unable to tolerate the meter reader position due to his injury. Dr. Rodger further testified that, in his medical opinion, Plaintiff could not perform the job. In addition, Dr. Rodger's testimony that he derived his *update of Plaintiff's history* from Plaintiff and from "supposition and guesswork" following his review of Plaintiff's x-rays does not render his testimony incompetent, because the method by which Dr. Rodger derived his update of Plaintiff's history is a separate question from his determination of Plaintiff's *inability to perform the meter reader position*. On that question, Dr. Rodger was clear: in his medical opinion, Plaintiff could not perform the meter reader job. Although the Commission could have given Dr. Rodger's opinion less weight due to the fact that it was based on Plaintiff's subjective complaints rather than objective testing, it was not required to do so. *See Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (holding the Commission "is the sole judge of the credibility of the witnesses and the weight to be given their testimony").

II

[2] Defendants further contend Dr. Rodger could not certify that Plaintiff's return to work was unsuccessful due to his compensable injury because Dr. Rodger was not Plaintiff's authorized treating physician. Although we agree with Defendants that Dr. Rodger was not the appropriate party to sign Plaintiff's Form 28U, this does not constitute reversible error at this stage of the proceedings.

Section 97-32.1 provides that an employee may "attempt a trial return to work." N.C.G.S. § 97-32.1 (Supp. 1998). "If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 [for total incapacity] shall be unimpaired . . . ." *Id.* The determination of whether an employee's trial return to work was unsuccessful is made by the Commission. *See* N.C.G.S. § 97-84 (1991) (determination of disputed issues). To expedite reinstatement of an employee's compensation pending a determination by the Commission of whether an employee's return to work was unsuccessful, the Commission's rules provide that an employee may file a Form 28U "Request that Compensation be Reinstated." Workers' Comp. R. N.C. Indus. Comm'n 404A(2), 1999 Ann. R. N.C. 690. The Form 28U must contain a certification by the employee's "authorized treating physician" that, in the physician's medical opinion, the employee is unable to continue with the trial return to work because of his compensable injury. *Id.* Upon the filing of a "properly completed" Form 28U, the defendant-employer "shall forthwith resume payment of compensation for total disability." *Id.* If it is thereafter determined by the Commission that the employee's trial return to work was not unsuccessful due to his injury, then the defendant-employer is entitled to a credit for sums paid pursuant to the Form 28U. Workers' Comp. R. N.C. Indus. Comm'n 404A(4), 1999 Ann. R. N.C. 691.

An employee's "authorized treating physician" is generally selected by the employer. *See Schofield v. Tea Co.*, 299 N.C. 582, 586-87, 264 S.E.2d 56, 60 (1980). If the employee prefers, however, he may select, subject to the Commission's approval and authorization, a new physician. *Id.*; *see also Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387 (noting that approval of a new physician is within the Commission's discretion), *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). Although the Commission's approval and authorization need not be obtained prior to seeking the services of a new treating physician, it must be obtained within a reasonable time after the employee has selected the new physician. *Schofield*, 299 N.C. at 593, 264 S.E.2d at 63. Where an employee seeks retroactive authorization of a new treating physician, the Commission "must make findings relative to whether such approval was sought . . . within a reasonable time." *Id.* at 594, 264 S.E.2d at 64.

In this case, Plaintiff returned to work on 7 February 1996. Plaintiff worked approximately one week, and then submitted a Form

28U, signed by Dr. Rodger, requesting reinstatement of his total disability compensation due to an unsuccessful return to work. Although Dr. Rodger had initially been Plaintiff's authorized treating physician, Plaintiff had not been treated by Dr. Rodger for nearly two years at the time of Plaintiff's trial return to work as a meter reader. Plaintiff's authorized treating physician at that time was Dr. Hicks. Accordingly, Plaintiff's Form 28U was not "properly completed" when Plaintiff obtained the certification of Dr. Rodger. Dr. Rodger was not Plaintiff's authorized treating physician, and there is no indication in the record that Plaintiff, at any time either before or after having Dr. Rodger sign his Form 28U, sought the Commission's approval of Dr. Rodger as his authorized treating physician. The Commission ultimately found, however, based on competent evidence in the record, that Plaintiff's return to work was "a failed return to work" due to his work-related compensable injury. It follows that Plaintiff's failure to submit a "properly completed" Form 28U, which would merely have reinstated compensation pending the Commission's determination on this issue, does not require reversal.

III

[3] Finally, Defendants contend the Full Commission erred in excluding, or assigning no weight to, Dr. Hicks' testimony based solely on his conversation with the rehabilitation professional assigned to Plaintiff's case outside Plaintiff's presence and without his consent.

The defendant and defense counsel are precluded from engaging in *ex parte* communications with the plaintiff's nonparty treating physician without the plaintiff's consent. *Salaam v. N.C. Dept. of Transportation*, 122 N.C. App. 83, 87-88, 468 S.E.2d 536, 538-39 (1996) (quoting *Crist v. Moffatt*, 326 N.C. 326, 336, 389 S.E.2d 41, 47 (1990)), *disc. review improvidently allowed*, 345 N.C. 494, 480 S.E.2d 51 (1997). It follows that, if the rehabilitation professional is an agent of the defendant, her communication with the plaintiff's treating physician is also barred by *Salaam*.

Rehabilitation professionals, as defined by the Commission, are "case managers and coordinators of medical rehabilitation services and/or vocational rehabilitation services." N.C. Indus. Comm'n Rules for Rehabilitation Professionals I(A), 1999 Ann. R. N.C. 745.[1] A reha-

1. "The Commission may adopt utilization rules and guidelines . . . for vocational rehabilitation services and other types of rehabilitation services." N.C.G.S. § 97-25.5 (Supp. 1998).

bilitation professional's case management services include, but are not limited to:

> [C]ase assessment, including a personal interview with the injured worker; development, implementation and coordination of a care plan with health care providers and with the worker and family; evaluation of treatment results; planning for community re-entry; return to work with the employer of injury and/or referral for further vocational rehabilitation services.

Id., at I(D), 1999 Ann. R. N.C. 745. A rehabilitation professional's medical rehabilitation services include "the planning and coordination of health care services appropriate to achievement of the goal of medical rehabilitation." *Id.* Rehabilitation professionals are required to "exercise independent professional judgment in making and documenting recommendations for medical and vocational rehabilitation," *id.*, at VI(B), 1999 Ann. R. N.C. 748, and "have an obligation to provide unbiased, objective opinions," *id.*, at V(D), 1999 Ann. R. N.C. 747. In addition, rehabilitation professionals are bound by the ethical rules of their field of certification. *Id.*, at V(A), 1999 Ann. R. N.C. 747. Finally, the Commission's rules provide that rehabilitation professionals "shall not accept any compensation or reward from any source as a result of settlement." *Id.*, at VI(E)(3), 1999 Ann. R. N.C. 748. It follows from all of the above that the role of a rehabilitation professional is not that of an agent for either the defendant or the plaintiff, but of a neutral and unbiased proponent of the plaintiff's rehabilitation. Accordingly, *Salaam* does not, as a matter of law, prohibit communication between the rehabilitation professional and the plaintiff's non-party treating physician. Of course, where evidence is presented that the rehabilitation professional is the agent of the defendant rather than a neutral and unbiased professional, *Salaam* will apply. We will not assume, however, without supporting evidence, that a rehabilitation professional is acting as the agent of the defendant, because acting as the defendant's agent would be unethical and in violation of the Commission's rules.[2]

In this case, the evidence supports the Commission's finding that Dr. Hicks and Nurse Lipscomb communicated outside Plaintiff's pres-

2. We also note that a rehabilitation professional "may be removed from a case upon motion by either party for good cause shown or by the Industrial Commission in its own discretion." N.C. Indus. Comm'n Rules for Rehabilitation Professionals X(A), 1999 Ann. R. N.C. 750. It follows that a plaintiff who believes the rehabilitation professional is behaving unethically or in violation of the Commission's rules may seek her removal.

ence and without his consent. Plaintiff testified that Dr. Hicks left his presence to speak with Nurse Lipscomb; Dr. Hicks testified that, although he had no recollection of the conversation, such a conversation would not have been unusual; and Nurse Lipscomb noted the substance of her conversation with Dr. Hicks in her Progress Report, as required by the Commission's rules. No evidence was presented, however, which would show that Nurse Lipscomb was an agent of Defendants. Accordingly, *Salaam* does not require exclusion of any of Dr. Hicks' testimony based on his private conversation with Nurse Lipscomb.

[4] The remaining question is whether the rules of the Commission prohibit communication between a rehabilitation professional and the plaintiff's treating physician. The Commission's rules expressly provide "no right to confidential communication between the [rehabilitation professional], the parties, the physician, or the health-care providers." N.C. Indus. Comm'n Rules for Rehabilitation Professionals VII(E), 1999 Ann. R. N.C. 749; *see also* N.C.G.S. § 97-27 (1991) ("[N]o fact communicated to or otherwise learned by any physician . . . shall be privileged in any workers' compensation case . . . ."). The rules further provide:

> If the [rehabilitation professional] wishes to obtain medical information in a personal conference with the physician following an examination, the [rehabilitation professional] should reserve with the physician sufficient appointment time for a conference. The worker must be offered the opportunity to attend this conference with the physician. *If the worker or the physician does not consent to a joint conference, or if in the physician's opinion it is medically contraindicated for the worker to participate in the conference*, the [rehabilitation professional] will note this in his or her report and *may in such case communicate directly with the physician* and shall report the substance of the communication.

N.C. Indus. Comm'n Rules for Rehabilitation Professionals VIII(C), 1999 Ann. R. N.C. 749 (emphases added). Although the Commission's rules indicate a strong preference that the plaintiff be present during conferences between the treating physician and the rehabilitation professional, the rules expressly give the treating physician broad discretion to confer with the rehabilitation professional outside the plaintiff's presence whether or not the plaintiff has consented. Accordingly, the fact that a treating physician and a rehabilitation professional have communicated outside the plaintiff's presence

without the plaintiff's consent, without more, does not violate the Commission's rules. Dr. Hicks' private conversation with Nurse Lipscomb therefore does not require exclusion of his testimony, and likewise does not support disregarding his testimony or assigning it no weight.[3] The Commission's apparent misapprehension of the applicable law on this issue requires us to remand for reconsideration of Plaintiff's case. *See, e.g., Teer Co. v. Highway Commission*, 265 N.C. 1, 14, 143 S.E.2d 247, 257 (1965) ("[W]hen it appears that the Industrial Commission has found the facts under a misapprehension of the applicable law, the cause will be remanded for findings of fact by the Industrial Commission upon consideration of the evidence in its true legal light."); *Cauble v. The Macke Co.*, 78 N.C. App. 793, 795, 338 S.E.2d 320, 322 (1986).

Reversed and remanded.

Judge MARTIN concurs.

Judge WYNN dissents in part.

Judge WYNN dissenting in part.

I disagree with the majority's holding that the Full Commission erred in assigning no weight to Dr. Hicks' testimony. In essence, the majority failed to consider whether competent evidence existed to support the Commission's finding that Dr. Hicks' conversation with the rehabilitation nurse gave "at least" the appearance of undue influence.

In *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), our Supreme Court reiterated the limited role of this Court in reviewing decisions of the Industrial Commission. There, the Supreme Court instructed us that the Industrial Commission is the fact-finding body, and is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *See id.* Thus, the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary. *See Plummer v. Henderson Storage Company*, 118 N.C. App. 727, 456 S.E.2d 886 (1995).

3. Of course, the Commission may find that Dr. Hicks' testimony is entitled to no weight, or less weight, for permissible reasons, as the Commission is the judge of the weight to be assigned to the evidence before it.

Further, the Supreme Court stated that this Court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. [In fact,] [t]he court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Here, the pertinent findings that relate to Dr. Hicks' conversation with the rehabilitation nurse are:

> 18. The Commission gives great weight to the opinions of Drs. Rodger and Grobler in their treatment of plaintiff because their treatment accomplished the most toward solving plaintiff's medical problem. The Full Commission gives no weight to the evidence of Dr. Hicks who left at least the appearance of undue influence by the rehabilitation nurse by stepping outside the presence of the plaintiff and into the presence of the rehabilitation nurse before saying whether or not he would sign the Form 28U.
>
> 19. . . . The Deputy Commission also erred in not considering the possibility of undue influence upon Dr. Hicks by the medical rehabilitation nurse, who had apparently had a private conversation with Dr. Hicks just prior to his initial refusal to sign the Form 28U. . . .

These findings state that the Full Commission considered the opinions of Drs. Rodger, Grobler, and Hicks, but chose not to give any weight to Dr. Hicks' testimony. The evidence shows that neither Dr. Rodger nor Dr. Grobler consulted with the rehabilitation nurse prior to making their medical decisions. Their medical conclusions favoring the plaintiff indeed are some evidence supporting the Commission's findings that there was "left at least" a "possibility of undue influence upon Dr. Hicks by the medical rehabilitation nurse."

Moreover, Dr. Hicks testified that the plaintiff informed him that two physicians in Statesville had seen "something on [the plaintiff's] x-ray that would explain his pain." According to plaintiff's testimony, Dr. Hicks refused to review the accompanying x-rays at the time that the plaintiff presented the Form 28U for his approval. This again is some evidence to support the Commission's findings.

Further, the plaintiff testified that he thought that Dr. Hicks was going to sign the form prior to his conversation with the rehabilitation

nurse. He testified that following this conversation, Dr. Hicks handed the plaintiff the form and informed him that he could not sign it. This, too, is some evidence supporting the Commission's findings.

Despite Dr. Hicks' refusal to sign the Form 28U, he testified that in his opinion the plaintiff would be expected to live with some form of pain for the rest of his life which would limit certain jobs that he could perform. Additionally, Dr. Hicks admitted that he had no reason not to believe the plaintiff's complaints of pain that he experienced while walking, standing, and sitting—which are all activities the plaintiff was required to perform in his position as a meter reader.

Finally, the Commission is the fact-finding body for matters arising under the Workers Compensation Act. As such, it considers numerous claims involving rehabilitation nurses. The Commission, not this Court, best understands the function of those specialists and their roles.

As long as there was any competent evidence to support the possibility of undue influence upon Dr. Hicks, the Commission's findings on this basis are conclusive on appeal. *See Plummer*, 118 N.C. App. at 730, 456 S.E.2d at 888. And while contrary evidence existed, competent evidence supported the finding that Dr. Hicks' consultation with the rehabilitation nurse prior to agreeing to sign the Form 28U created "at least the appearance of undue influence." Accordingly, I dissent.

STATE OF NORTH CAROLINA v. VINCENT TAN HALL, DEFENDANT

No. COA98-525

(Filed 3 August 1999)

1. Evidence— identification—in-court—hypnosis—essentially identical description before and after

The trial court did not err in allowing the witness' in-court identification of defendant because even though the witness had been hypnotized by the police, her description of the assailant remained essentially identical before and after hypnosis. The witness' identification was based on her observations the night of the murder and attempted robbery, and was related immediately to police well before hypnosis. The only portion of the witness'

testimony which might be considered "hypnotically refreshed" was that containing the minimal descriptive details and not her in-court identification of defendant.

2. Evidence— identification—in-court—hypnotically refreshed descriptive details—failure to disclose hypnosis prior to testimony—harmless error

Although a witness' in-court testimony regarding "hypnotically refreshed" descriptive details of the assailant and the State's failure to disclose the hypnosis prior to the witness' testimony were improper, the tardy disclosure is mitigated because the disclosure was: (1) prior to the witness' identification testimony and the comprehensive voir dire hearing on admissibility thereof, and (2) immediately upon the prosecutor's discovery of the witness' hypnosis. Further, it was harmless error because there was no reasonable possibility that the jury verdict would have been different had the additional descriptive testimony been excluded in light of other evidence including defendant's confessions to his friend and to a fellow prisoner.

3. Evidence— identification—in-court—viewing defendant at trial

The trial court properly denied defendant's request to suppress a witness' identification of defendant at trial as a participant in another robbery because the identification was not tainted by the fact that the witness observed defendant in open court.

4. Evidence— prior crime or act—other robberies—corroboration—intent, motive, and plan

The trial court did not err in admitting evidence of other robberies involving defendant because it was relevant and admissible under Rule 404(b) either to corroborate the accounts of other witnesses or to show defendant's intent, motive, and plan to commit armed robbery at the time of the victim's murder.

5. Witnesses— cross-examination—discretion of trial court

The trial court did not err in allowing cross-examination of defendant including inquiries involving a stolen credit card and other robberies because the scope of cross-examination is a matter within the sound discretion of the trial court.

Appeal by defendant from judgment entered 5 August 1997 by Judge J.B. Allen Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 January 1999.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's judgment and commitment entered upon convictions by a jury of first-degree murder and armed robbery. We conclude the trial court committed no prejudicial error.

Defendant was indicted 16 December 1996 for the murder and attempted armed robbery of Keir Lohbeck (Lohbeck). The charges were consolidated and tried at the 28 July 1997 Criminal Session of Wake County Superior Court.

The State's evidence at trial tended to show the following: On 25 January 1994, Lohbeck and Catherine Harold (Harold), employees of a Raleigh Blockbuster Video store, closed the business at 1:00 a.m. As the pair walked to their automobiles in a well-lighted parking lot, Harold showed Lohbeck a photograph album containing photos from a recent trip. While looking at the album, Harold noticed a man walking in the distance. Once inside her automobile, Harold looked through the passenger window and saw Lohbeck talking to a man between his truck and another vehicle. As she began to drive off, Harold observed Lohbeck and the man struggling, heard a "bang" and then saw Lohbeck fall.

Lohbeck died shortly thereafter from a .32 caliber gunshot wound to the neck. Harold described the assailant as a black male, approximately thirty years old with some facial hair, 5'10" tall and weighing between one hundred sixty and one hundred eighty pounds, wearing a white hooded sweatshirt with red lettering. Harold indicated she had clearly seen the man's side profile at a distance of seven feet.

On 2 February 1994, Harold was interviewed and hypnotized by City of Raleigh police officer Michael Hunter (Hunter). During hypnosis, Harold related a description similar to that previously given, but added that the man had small eyes, detailed lips and a broad nose.

At trial, Harold described the assailant consistent with her pre-hypnosis statements, but also included the additional details which arose during hypnosis. Upon learning Harold had previously been hypnotized, the prosecutor immediately informed the judge and defense counsel of the hypnosis. Notwithstanding, the prosecutor also sought permission to tender an in-court identification of defendant by Harold, based solely upon her observations the night of the murder. Defendant thereupon moved to suppress Harold's identification evidence, asserting it would constitute inadmissible hypnotically refreshed testimony. The trial court conducted a *voir dire* hearing, rendered specific findings of fact, and denied defendant's motion. Harold thereupon identified defendant before the jury as the individual who shot Lohbeck.

Darrold Brown (Brown), one of defendant's roommates, testified for the State in exchange for a reduced sentence on a robbery charge. Brown indicated he heard defendant enter their apartment, located across the street from the Blockbuster store in question, around 1:00 a.m. on 25 January 1994. At 8:00 a.m. that morning, defendant told Brown he had killed a man at the Blockbuster store in an attempt to rob him and stated that "he had to get rid of the gun or they'd be able to connect him" with the crime. Brown further testified he and defendant robbed Burger King restaurants in Fuquay-Varina and Raleigh shortly after the Blockbuster killing.

Defendant testified he was in his apartment on 25 January 1994 around 1:00 a.m. talking to his girlfriend on the telephone. Defendant's girlfriend and another roommate corroborated this testimony, and Hin Hall, defendant's brother and also a roommate, testified defendant went to bed that morning between 1:30 and 2:00 a.m. Defendant stipulated that he had pleaded guilty to the 17 August 1994 robbery of a Fayetteville Burger King.

On 5 August 1997, the jury found defendant guilty of attempted armed robbery and first-degree murder on the theory of felony murder. The trial court arrested judgment on the armed robbery charge and sentenced defendant to life imprisonment in the murder case. Defendant timely appealed.

Initially, we note defendant's appellate brief includes no argument addressed to assignments of error one, two, three, four, six, seven, thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-three, twenty-four, twenty-five, or twenty-six. Accordingly these assignments of error are deemed abandoned, *see* N.C.R. App.

P. 28(b)(5) ("[a]ssignments of error not set out in the appellant's brief . . . will be taken as abandoned"), and we do not address them.

[1] In his first assignment of error, defendant contends Harold's in-court identification was hypnotically refreshed evidence and admission thereof violated our Supreme Court's decision in *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984). We conclude otherwise.

Peoples held that hypnotically refreshed testimony is "inadmissible in judicial proceedings" because it is subject to suggestive circumstances rendering it "inherently unreliable." *Id.* at 533, 319 S.E.2d at 188. However, "[a] person who has been hypnotized may testify as to facts which he related before the hypnotic session." *Id.*

In the case *sub judice*, the trial court conducted a comprehensive *voir dire* hearing during which Harold stated the hypnosis had no effect on her memory of the assailant's side profile, and that she recognized defendant based upon her observations the night of the murder. She related that the parking lot on the night of the murder was well lighted, that she had a clear view of the assailant's side profile from a distance of six to seven feet, and that she recognized defendant as the assailant when she saw his side view for the first time in the courtroom.

The trial court rendered extensive findings of fact, which are conclusive on appeal if supported by competent evidence. *State v. Miller*, 69 N.C. App. 392, 397, 317 S.E.2d 84, 88 (1984). The court noted Harold testified there were no suggestions during the hypnotic sessions "in any way for her to pick out or identify" any individual, and found as fact *inter alia* that: 1) the Blockbuster parking lot was sufficiently lighted to permit Lohbeck to view Harold's photograph album, 2) Harold observed the assailant's side profile at a distance of six to seven feet, 3) Lohbeck and the assailant faced each other giving Harold a clear unobstructed view of the assailant's side profile, 4) Harold viewed numerous photographs of suspects and had seen defendant on television months prior to trial, but refused to identify anyone as the assailant based on her need to view a side profile for a positive identification, 5) that Harold "had not seen a side view of the defendant until she saw him in court" on 28 July 1997, at which time she notified a witness coordinator that defendant was the person who shot Lohbeck, and 6) that Harold's description of the assailant remained essentially identical before and after hypnosis. Further, the court acknowledged that additional description details, *i.e.*, small

eyes, flat nose, and well defined lips, surfaced during hypnosis, but concluded the hypnosis did not affect Harold's overall description which remained "substantially the same," and that Harold's identification of defendant

> was of an independent origin and not tainted by any hypnotic sessions or anything else that any law enforcement officers . . . had done in this matter.

We believe the trial court properly analyzed the evidence before it. Significantly, the only portion of Harold's testimony which might accurately be characterized as "hypnotically refreshed" was that containing the minimal descriptive details and *not* her in-court identification of defendant. The trial court's determination that Harold's identification was based upon her observations the night of the murder and related immediately to police well before hypnosis, *see Harker v. State of Md.*, 800 F.2d 437, 443 (4th Cir. 1986) (description of assailant by witness under hypnosis "closely matched the description he had given to police shortly after the shooting"), and that it was "not tainted" by her subsequent hypnotic sessions, is uncontradicted by any evidence in the record. Hence Harold's identification of defendant as Lohbeck's killer at trial 1) was of "independent origin," *Miller*, 69 N.C. App. at 396, 317 S.E.2d at 88, 2) was unaffected by the intervening circumstance of hypnosis, and 3) did not constitute "hypnotically refreshed" testimony. Therefore, *Peoples* is inapposite to that portion of Harold's testimony.

[2] On the other hand, Harold's in-court testimony regarding "hypnotically refreshed" descriptive details of the assailant and the State's failure to disclose the hypnosis of Harold prior to her testimony were improper under *Peoples*. *See Peoples*, 311 N.C. at 533-34, 319 S.E.2d at 188 ("hypnotically refreshed testimony is inadmissible in judicial proceedings," and "party proffering the testimony of a previously hypnotized subject is under a duty to disclose the fact of th[e] hypnosis to the court and counsel . . . before the testimony of the witness").

However, the tardy disclosure of Harold's hypnosis is mitigated by the circumstances that disclosure came 1) prior to Harold's identification testimony and the comprehensive *voir dire* hearing on admissibility thereof, and 2) immediately upon discovery of Harold's hypnosis by the prosecutor, *see* N.C.G.S. § 15A-907 (1997) (if party "prior to or during trial" discovers additional evidence subject to disclosure, party "must promptly notify the attorney for the other party of the existence of the additional evidence").

Nonetheless, the belated discovery by the prosecutor of law enforcement's hypnosis of Harold and the, at best, negligent failure of the police to apprize the prosecutor of the hypnosis and to retain tapes of the sessions, necessitate reiteration here of the caution to "those who use hypnosis [that] it is a procedure to be executed with care," *Peoples*, 311 N.C. at 534, 319 S.E.2d at 188, and that the "procedural safeguards" noted in *Peoples* should "be followed in the use of hypnosis for criminal investigative purposes," *id.*

As to admission of hypnotically refreshed testimony by Harold of certain descriptive features of the assailant, we first note again the trial court's finding, supported by the record and conclusive on appeal, *Miller*, 69 N.C. App. at 397, 317 S.E.2d at 88, that her description remained "essentially the same" prior to and following hypnosis, *see Harker*, 800 F.2d at 443. Moreover, discrepancies in descriptions are ordinarily for the jury to hear and consider in weighing the credibility of the witness. *See State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981).

In any event, such error as may have occurred in consequence of the foregoing contraventions of *Peoples* was harmless error which created no "reasonable possibility" the jury verdict would have been different had Harold's additional description testimony been excluded. *See* N.C.G.S. § 15A-1443(a) (1997) (in order for error to be prejudicial, there must be a "reasonable possibility that, had the error in question not been committed, a different result would have been reached"); *see also State v. Annadale*, 329 N.C. 557, 571, 406 S.E.2d 837, 845 (1991) (harmless error analysis applied to in-court identification following hypnosis).

First, we reiterate our holding that Harold's in-court identification of defendant as Lohbeck's killer did not constitute "hypnotically refreshed" testimony. In addition to Harold's designation of defendant as the perpetrator, moreover, the State introduced evidence of defendant's confessions to his friend and roommate Brown and to a fellow prisoner, William Johnson, as well as testimony by the victim identifying defendant as participant in another robbery which Brown testified he and defendant had committed together. In light of the overwhelming weight of this evidence, any error resulting from belated disclosure of Harold's hypnosis or in admitting her testimony concerning additional descriptive details regarding the assailant which surfaced during hypnosis was harmless. *See id.*

[3] Defendant next asserts the trial court erred by denying his motion to suppress in-court identification testimony by Sandra Jacobs (Jacobs) of defendant as participant in the robbery of a Burger King in Fuquay-Varina. This assignment of error is unfounded.

Initially, we note defendant argued different grounds for his motion at trial than those presented to this Court. Defendant asserted below that his identification by Jacobs resulted from impermissibly suggestive circumstances, specifically that Jacobs

> has been sitting in [the courtroom] and . . . defendant is seated at counsel table and has been identified as the defendant in this case. . . .

Our Supreme Court has held

> the viewing of a defendant in the courtroom during . . . a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification . . . .

State v. Covington, 290 N.C. 313, 324, 226 S.E.2d 629, 638 (1976). After a *voir dire* hearing, the trial court concluded that "identification [of defendant by Jacobs] was not tainted by . . . the fact that she was here after lunch today and observed the defendant in open court." Based upon the principles set out in *Covington* and our determination that the facts found by the trial court were supported by the evidence and thus conclusive on appeal, *Miller*, 69 N.C. App. at 397, 317 S.E.2d at 88, we hold the court properly rejected defendant's motion to suppress the identification testimony of Jacobs.

Defendant now argues to this Court that Jacobs had no reasonable possibility of observing the robber in a manner sufficient to make a subsequent identification. Because this argument was not advanced at trial, it has not been preserved for appellate review. N.C.R. App. P. Rule 10(b) ("to preserve a question for appellate review, a party must have presented to the trial court a timely . . . motion, stating the specific grounds for the ruling the party desired . . . ."); *State v. Waddell*, 130 N.C. App. 488, 503, 504 S.E.2d 84, 93 (1998) (citations omitted) (where theory argued on appeal not raised in trial court, "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]").

Notwithstanding, we have considered the record in light of defendant's new argument. *See* N.C.R. App. P. Rule 2. Suffice it to

state the trial court's findings were supported by the evidence adduced at the hearing, *see Miller*, 69 N.C. App. at 397, 317 S.E.2d at 88, and that the court did not err in admitting the identification of defendant by Jacobs as perpetrator of the Burger King robbery. *See Manson v. Brathwaite*, 432 U.S. 98, 116, 53 L. Ed. 2d 140, 155 (1977) (excluding evidence from jury is drastic sanction limited to manifestly suspect identification testimony; anything short of that is "for the jury to weigh . . . [in that] evidence with some element of untrustworthiness is customary grist for the jury mill").

[4] Defendant next challenges the admission of Brown's testimony that he and defendant robbed Burger King restaurants in Fuquay-Varina and Raleigh. Defendant argues the State's N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1998) (Rule 404(b)), "other crimes" evidence of defendant's prior misconduct was inadmissible, and in any event cumulative and prejudicial such that it should have been excluded under N.C.G.S. § 8C-1, Rule 403 (1992) (Rule 403). We do not agree.

> While evidence of prior misconduct may not be introduced if
>
> its probative value is . . . limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged,

State v. Stager, 329 N.C. 278, 303-04, 406 S.E.2d 876, 890 (1991) (emphasis in original), it may be admitted if it 1) constitutes "substantial evidence tending to support a reasonable finding by the jury that the defendant committed a similar act or crime," *id.* at 303, 406 S.E.2d at 890, 2) is "of a type made admissible under [Rule 404(b)]," *id.*, such as to show the defendant's "motive, opportunity, intent, preparation, plan, knowledge, [or] identity," Rule 404(b), and 3) is "logical[ly] relevan[t]," 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 95 (5th ed. 1998)[hereinafter *Brandis & Broun*], "for some purpose other than showing the defendant's propensity for the type of conduct at issue, *Stager*, 329 N.C. at 303, 406 S.E.2d at 890. Moreover, the listing of "proper purpose[s]" under Rule 404(b) is not exclusive. 1 *Brandis & Broun* § 95.

In addition, our Supreme Court has emphasized that Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant," *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original); nonetheless, such evidence must involve facts sufficiently similar to those of the charged offense which tend to support a reasonable inference they were com-

mitted by the same person, *Stager*, 329 N.C. at 303, 406 S.E.2d at 890, and the probative value thereof must not be substantially outweighed by its prejudicial effect, G.S. § 8C-1, Rule 403; *State v. Boczkowski*, 130 N.C. App. 702, 706, 504 S.E.2d 796, 799 (1998).

On *voir dire*, Brown testified he and defendant robbed a Raleigh Burger King on 14 May 1994 and a Fuquay-Varina Burger King on 22 February 1994, and described the circumstances surrounding each robbery. Brown's testimony was later corroborated by the Burger King employees who were robbed, including Jacobs who identified defendant as one of the robbers and whose testimony itself was later corroborated by Brown's identification of her as a robbery victim.

In its findings, the trial court noted *inter alia* that Brown and defendant were roommates, that defendant told Brown the morning of the murder he had shot a Blockbuster employee in a robbery attempt and that defendant owned a handgun and sawed-off shotgun during the time period in which the Burger King robberies occurred. The court recited certain similarities between the Blockbuster murder and the Burger King robberies, indicating that 1) each had occurred in the dark early morning hours while the affected commercial establishment was empty and closed, 2) defendant waited in the darkness and then, armed with a firearm, forced or attempted to force an employee into the establishment in order to rob it, 3) all three crimes occurred in Wake County within a four month period, 4) the establishments closed late or opened early, and 5) all were robbed pursuant to a plan.

Following recitation of its detailed findings of fact, the trial court ruled evidence of the Burger King robberies was relevant and admissible under Rule 404(b) because similar to the crime charged at trial and indicative of defendant's intent, motive and plan to commit armed robbery at the time of Lohbeck's murder. The court also held under Rule 403 that the probative value of the evidence was not substantially outweighed by its prejudicial effect. Finally, the court instructed the jury both prior to Brown's testimony and at the close of all evidence to consider the evidence, "if [it] believe[d] th[e] evidence," solely for the limited purpose of showing defendant's motive, intent or plan.

Based upon the record and the trial court's conclusive findings of fact, *see Miller*, 69 N.C. App. at 397, 317 S.E.2d at 88, we hold the court did not err in allowing evidence of defendant's participation in

the Burger King robberies. Further, the exclusion of evidence under Rule 403 is a matter left to the sound discretion of the trial court. *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. We do not believe defendant has demonstrated an abuse of discretion and therefore decline to disturb the trial court's ruling on appeal. *See State v. Robinson*, 327 N.C. 346, 356-57, 395 S.E.2d 402, 408 (1990), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (abuse of discretion only where ruling is manifestly unsupported by reason).

Notwithstanding, defendant insists that "[o]verall, the [Rule 404(b)] evidence was cumulative and emotional" and presented to inflame the jury. Again we disagree.

The admission of relevant evidence is left to the sound discretion of the trial court, *Stager*, 329 N.C. at 308, 406 S.E.2d at 893, and that discretionary ruling will be reversed on appeal "only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision," *State v. Jones*, 347 N.C. 193, 213, 491 S.E.2d 641, 653 (1997).

The trial court *sub judice* properly allowed evidence under Rule 404(b) either to corroborate the accounts of other witnesses or for the purpose of showing defendant's motive, intent or plan to commit the instant crime. In addition, the court properly instructed the jury prior to and after presentation of the evidence specifically limiting the jury's consideration thereof. Under these circumstances, admission of this evidence cannot fairly be characterized as arbitrary and unreasonable, *see id.*, and thus was not error.

[5] Finally, defendant maintains the trial court committed prejudicial error by allowing "improper and highly prejudicial cross-examination of defendant," including inquires involving a stolen credit card, the Fuquay-Varina and Raleigh Burger King robberies, and the robbery of a Fayetteville Burger King to which defendant pleaded guilty. We have carefully considered defendant's arguments, note that the scope of cross-examination is a matter within the sound discretion of the trial court, *State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992), and conclude the court committed no prejudicial error in allowing the challenged cross-examination. *See* G.S. § 15A-1443(a).

No error.

Judges GREENE and HUNTER concur.

CLAIRE A. BARBER, EMPLOYEE/PLAINTIFF v. GOING WEST TRANSPORTATION, INC., EMPLOYER/DEFENDANT, AND NON-INSURED, CARRIER/DEFENDANT

No. COA98-494

(Filed 3 August 1999)

1. **Workers' Compensation— employment relationship—jurisdiction—independent determination by appellate courts**

   The Industrial Commission did not err in determining plaintiff truck driver was a regular employee of defendant rather than an independent contractor based on the factors of: (1) method of payment; (2) furnishing of equipment; and (3) direct evidence of exercise of control by defendant. Whether an employer-employee relationship exists is a jurisdictional issue requiring an independent determination by the appellate courts.

2. **Workers' Compensation— competent evidence—incapable of earning wages**

   There was competent evidence to support the Industrial Commission's determination that plaintiff-employee, a truck driver, was incapable of earning wages as a result of her injury based on the medical evidence, her complaints of chronic leg and back pain related during each visit to her physicians, and her continuing pain treatment and doctor visits as of the hearing date.

3. **Workers' Compensation— average weekly wage—fluctuating schedule—exceptional reasons method**

   The Industrial Commission erred in determining plaintiff-employee's average weekly wage because plaintiff's fluctuating work schedule qualified her job more as "seasonal" rather than continuous employment. The plaintiff's average weekly wage should be calculated under the "exceptional reasons" method. N.C.G.S. § 97-2(5).

Appeal by defendant Going West Transportation, Inc., from Opinion and Award of the North Carolina Industrial Commission filed 15 December 1997. Heard in the Court of Appeals 18 February 1999.

Janine W. Dunn, for defendant-appellant.

Brumbaugh, Mu and King, P.A., by Leah D. Lassiter, for plaintiff-appellee.

JOHN, Judge.

Defendant appeals an Opinion and Award of the North Carolina Industrial Commission (the Commission) granting plaintiff temporary total disability compensation. Defendant contends the Commission erred in 1) classifying plaintiff as an employee rather than an independent contractor, 2) finding plaintiff was incapable of earning wages from any employer as result of her lumbosacral strain, and 3) setting plaintiff's average weekly wage at $548.94. For reasons set forth herein, we remand to the Commission for re-calculation of plaintiff's average weekly wage in compliance with N.C.G.S. § 97-2(5) (Supp. 1998).

Pertinent facts and procedural information include the following: Defendant is a provider of long haul transportation services specializing in produce shipment with its home office in Burgaw, N.C. On 3 February 1996, plaintiff, a tractor trailer driver operating a truck owned by defendant, was involved in an out-of-state collision with an automobile. Plaintiff subsequently sought treatment at the Onslow Family Medical Center 8 February 1996 for pain in her lower back and hips and received medication.

On 20 February 1996, plaintiff presented to Onslow Memorial Hospital with numbness in her hands and legs and pain in her lower back and left buttock and was excused from work pending examination by orthopedist Dr. Jeffery L. Gross (Dr. Gross). On 6 March 1996, Dr. Gross diagnosed plaintiff with lumbosacral strain, referred her to physical therapy for a strengthening program, and excused her from work based upon her inability to sit for prolonged periods of time without pain. After months of unsuccessful treatment, Dr. Gross sought a second opinion from Dr. Ellis Muther (Dr. Muther). On 18 September 1996, Dr. Muther concluded plaintiff suffered from a bilateral L5 radiculopathy.

On 7 October 1996, Dr. Gross referred plaintiff to Dr. Scott Johnston (Dr. Johnston) for pain management. Dr. Johnston began treating plaintiff with caudal epidural steroid injections which temporarily reduced her pain symptoms. Following a 7 November 1996 examination, Dr. Johnston reported that plaintiff continued to experience "chronic low back pain and left lower extremity pain," and upon plaintiff's inquiry informed her she could return to work in a progressive fashion "at her leisure."

Defendant had no policy of workers' compensation insurance in effect on 3 February 1996, but agreed to compensate plaintiff at the

rate of $306.15 a week until she was able to resume work. Defendant paid plaintiff a total of $5,184.55 between 23 February 1996 and 21 June 1996, but discontinued payments upon receiving plaintiff's demand for additional compensation. Plaintiff thereupon filed a workers' compensation claim 24 June 1996, which claim was heard 21 November 1996 before a Deputy Commissioner.

During the hearing, plaintiff testified she was unable to work and that her doctors had not yet released her to return to work. As of the hearing date, plaintiff was continuing to see Dr. Gross and receive treatments from Dr. Johnston. Subsequently, on 14 January 1997, Dr. Gross determined plaintiff had reached maximum medical improvement, but indicated she was to return upon any increase in symptoms and that Dr. Johnston would continue treatments for her chronic back pain.

On 26 March 1997, the Deputy Commissioner filed an Opinion and Award ruling, *inter alia*, that plaintiff was "a regular employee of defendant" and entitled to temporary total disability compensation at the rate of $365.97 per week from 4 February 1996 until otherwise ordered by the Commission, as well as payment of all medical expenses. Defendant appealed to the Full Commission which filed an Opinion and Award 15 December 1997 adopting the Deputy Commissioner's findings, conclusions, and award, but remanding in regards to imposition of a penalty in consequence of defendant's failure to maintain a policy of workers' compensation insurance.

[1] On appeal to this Court, defendant first contends the Commission erred in determining plaintiff was a regular employee of defendant. The latter argues plaintiff was an independent contractor not subject to the North Carolina Workers' Compensation Act, N.C.G.S. § 97-1 (1991 & Supp. 1998) (the Act). We do not agree.

A workers' compensation claimant "must be, in fact and in law, an employee of the party from whom compensation is claimed." *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988). Whether an employer-employee relationship exists is a jurisdictional issue, *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976), and unlike most findings by the Commission, "findings of jurisdictional fact . . . are not conclusive, even when supported by competent evidence," *Youngblood*, 321 N.C. at 383, 364 S.E.2d at 437. This Court thus must "review the evidence of record" and make an independent determination of plaintiff's employment status, *id.*, guided "by the application of ordinary common law tests,"

Richards v. Nationwide Homes, 263 N.C. 295, 302, 139 S.E.2d 645, 650 (1965).

> An independent contractor is one who
>
> contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work.

Hayes v. Elon College, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944). On the other hand, an employment relationship exists where the employer retains the right to control and direct the manner in which details of the work are to be executed and what shall be done as the work progresses. *Id.*

While not conclusive individually, certain factors ordinarily indicative of whether control incident to an employment relationship has been retained include: 1) method of payment, 2) furnishing of equipment, and 3) direct evidence of exercise of control. *Youngblood*, 321 N.C. at 384-85, 364 S.E.2d at 437-38. Upon review of the instant record in light of the foregoing factors, we conclude an employment relationship existed between plaintiff and defendant.

Notably, the "Contract Driver Handbook" (the Handbook), furnished by defendant to each driver, reflects plaintiff and her husband, as team drivers, were paid each Friday in an amount equal to 26% of that week's haul. Generally, payment according to units of time, *i.e.*, per week, is considered an emolument of employment, *see* 3 Arthur Larson, *The Law of Workmen's Compensation* § 61.06(1) (1999), whereas an independent contractor is customarily paid a fixed contract price or lump sum, *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140. Although plaintiff had entered into a "Non-Exclusive Contract" with defendant's predecessor on 8 August 1994, which agreement had expired, no similar contracts were subsequently signed. However, plaintiff generally agreed to the weekly pay method provided in the Handbook by signing an acknowledgment and pledge of adherence to the Handbook rules on 8 April 1995.

The treatment and classification of drivers for taxation purposes is related to method of payment. In January 1995, defendant began deducting federal and state taxes and health insurance and social security costs from drivers' checks following an IRS demand that it classify alleged "contract" drivers as "employees" and withhold taxes. Archie McGirt (McGirt), CEO and president of defendant, informed drivers of their new taxable employee status. According

to McGirt, although plaintiff continued to drive, many others quit as a result.

Moreover, the Handbook provided regulations and rules governing the operation and maintenance of defendant's trucks by drivers. Handbook provisions included: 1) instructions both on the location and timing of the reporting by drivers for deliveries and pick-up and on the preparation and submission of log books and other paper work; 2) a directive to travel approved routes without deviation; 3) a mandate to submit required mileage reports each Monday; 4) orders to call defendant twice a day between 8:00 a.m. and 10:00 a.m. and between 4:00 p.m. and 6:00 p.m., and upon reaching pick-up or delivery destinations; and 5) guidelines for truck maintenance including oil, fuel and water changes, washing and waxing, and tire monitoring. Failure to call in as directed or to observe paperwork completion schedules could result in imposition of a $25.00 fine. In addition, drivers were subject to random drug testing, the cost of which was deducted from their pay, and positive drug test results constituted cause for immediate termination.

Regulations such as the foregoing, mandating that drivers perform in a certain manner and "conform to a particular schedule," *Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438, are indicative of employee status as opposed to that of an independent contractor who may choose the time and manner of performance, *id.*

Additionally, the trucks operated by the drivers were owned, insured and maintained by defendant, and drivers were issued Comcash and Comcheck cards in defendant's name for fuel purchases. When valuable equipment is furnished for use of a worker, an employee relationship almost "invariably" is established. *Id.*

In short, we conclude the record reflects an employer-employee relationship between defendant and plaintiff.

Notwithstanding, defendant argues drivers such as plaintiff furnished specialized skills and knowledge necessary to obtain and deliver loads, thereby indicating they functioned as independent contractors. However, although defendant's drivers may have possessed specialized skills and required little supervision, such circumstance alone is not determinative of independent contractor status, *Durham v. McLamb*, 59 N.C. App. 165, 168-69, 296 S.E.2d 3, 6 (1982) (citing *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 819, 266 S.E.2d 35, 37 (1980)), and is in any event outweighed in the case *sub judice* by the

evidence of other factors, *see Youngblood*, 321 N.C. at 384-85, 364 S.E.2d at 437-38.

[2] Defendant next argues that no competent evidence in the record supports the Commission's finding that plaintiff was incapable of earning wages as a result of her lumbosacral strain. This contention is unfounded.

The Commission rendered the following pertinent findings of fact:

> 10. On Saturday, 3 February 1996, plaintiff . . . w[as] involved in a collision with another vehicle. . . . Initially, plaintiff did not believe that she was injured in the collision. However, she began to experience pain the following day.
>
> 11. On 8 February 1996, plaintiff presented to Onslow Family Medical Center. On that date, plaintiff had pain in her low back and hips. Plaintiff was prescribed medications and referred to physical therapy beginning 13 February 1996.
>
> 12. On 20 February 1996, plaintiff presented to Onslow Memorial Hospital . . . [with] numbness in her hands and legs and pain in her lower back and left buttock. Plaintiff's medications were changed and she was excused from work until she attended an appointment that was scheduled with Dr. Gross on 6 March 1996. When plaintiff presented to Dr. Gross, she had a lumbosacral strain, with no neurological deficits. Dr. Gross referred plaintiff to physical therapy for a strengthening program and excused plaintiff from work due to her inability to sit for prolonged periods of time. Dr. Gross continued to excuse plaintiff from work through 23 July 1996.
>
> 13. On 18 September 1996, plaintiff presented to Dr. Muther who performed EMG and NCV testing. These studies revealed that plaintiff had a bilateral L5 radiculopathy, left greater than right. Thereafter, plaintiff continued under the care of Dr. Gross, who eventually referred her to Dr. Johnston for pain management. Dr. Johnston treated plaintiff with epidural steroid injections which diminished plaintiff's symptoms, at least temporarily. Dr. Johnston continued to treat plaintiff through the date of the hearing in this case.
>
> 14. Plaintiff reached maximum medical improvement on [1]4 [sic] January 1997. There is no evidence of record whether plain-

tiff retained any permanent impairment as a result of the incident on 3 February 1996.

. . . .

16. As a result of her lumbosacral strain, plaintiff was incapable of earning wages from defendant, or any other employer from 4 February 1996 through the date of the hearing in this case.

Pertinent conclusions of law include:

3. On 3 February 1996, plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant.

4. Plaintiff is entitled to payment of temporary total disability compensation at the rate of $365.97 per week from 4 February 1996 and continuing until order of the [Commission] allowing defendant to cease payment. . . .

In reviewing an Opinion and Award of the Commission, this Court must determine whether there is any competent evidence in the record to support its findings of fact and whether those findings support the conclusions of law. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 129, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). The Commission has the "exclusive authority to find facts necessary to determine workers' compensation awards," *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992), and its findings are conclusive on appeal if supported by any competent evidence, even though there may be evidence which would support contrary findings, *id.* Further, the Commission, as sole judge of the credibility of witnesses and the weight to be given their testimony, may reject the testimony of any witness. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951).

To qualify as "disabled" under N.C.G.S. § 97-2(9) (Supp. 1998), an employee must show the inability to earn the same wages earned prior to injury, either in the same employment or in any other employment. G.S. § 97-2(9). Disability, consisting of impairment of the injured employee's earning capacity rather than physical disablement, *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986), may be proven by production of medical evidence that the employee is, as a consequence of the work related injury, physically or mentally incapable of work in any employment, *id.* at 444, 342

S.E.2d at 809. If an employee presents substantial evidence he or she is incapable of earning wages, the employer must then

> come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.

Kennedy v. Duke Univ. Med. Center, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990).

Thorough review of the record reflects substantial competent evidence supporting the Commission's determination plaintiff was incapable of earning her previous wages in any employment. For example, Dr. Gross diagnosed plaintiff with lumbosacral strain on 6 March 1996 and excused her from work based upon her inability to sit for prolonged periods of time without pain. Dr. Gross saw plaintiff every few weeks following her injury and extended the work exemption through plaintiff's 23 July 1996 appointment because of her continued pain. On 3 September 1996, Dr. Gross reported plaintiff had "chronic pain in the back and it bother[ed] her to sit," and decided, "because of her continued difficulty[, to] get a second opinion" from Dr. Muther, who later diagnosed plaintiff with bilateral L5 radiculopathy and suggested epidural steroid injections.

On 7 October 1996, Dr. Gross noted Dr. Muther's diagnosis, but determined he had nothing further to offer plaintiff "orthopedically" and that she should be seen by Dr. Johnston for pain management. On 17 October 1996, Dr. Johnston diagnosed plaintiff with "chronic sacral and lower extremity pain, status post motor vehicle accident" and began caudal epidural steroid injections to reduce her sacral and coccygeal pain, but cautioned he did "not expect a great deal of benefit for her lower extremity pain." On 7 November 1996, upon plaintiff's inquiry, Dr. Johnston indicated she could "return to work at her leisure," but only in a "progressive fashion" and not full scale.

On 14 January 1997, examination of plaintiff by Dr. Gross revealed she continued to complain of chronic back pain and could remain seated only ten to fifteen minutes. He concluded plaintiff had reached maximum medical improvement, observing she should return to him upon any increase in symptoms and that she would continue pain treatments with Dr. Johnston. Plaintiff testified that she was prevented from returning to work following her injury due to pain, and that she was still "receiving steroid injection shots" from Dr. Johnston and continuing to see Dr. Gross as of the date of

hearing. She further testified that neither had released her to return to work.

The medical evidence, plaintiff's complaints of chronic leg and back pain related during each visit to her physicians, and plaintiff's continuing pain treatment and doctor visits as of the hearing date provide competent evidence supporting the Commission's determination that plaintiff was incapable of earning the same wages from defendant or another employer as a result of lumbosacral strain. Defendant failed to come forward with rebuttal evidence, and the Commission did not err. *See Cone Mills Corp.*, 316 N.C. at 443, 342 S.E.2d at 809; *see also Kennedy*, 101 N.C. App. at 33, 398 S.E.2d at 682.

[3] In its third assignment of error, defendant contends the Commission's finding that plaintiff's "average weekly wage was $548.94," is not supported by the evidence. We agree.

Pursuant to G.S. § 97-2(5), an injured employee's average weekly wage is:

> the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . , divided by 52. . . .
>
> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

G.S. § 97-2(5).

The parties stipulated in a Form 22 Wage Chart to the days and weeks plaintiff worked in 1995 and 1996 and to the earnings she received. Upon review of the Wage Chart, we note plaintiff did not work during 1995 in February, March, August, September or November, and reported working only eleven days in April, six days in July and seven days in December. In consequence of a fluctuating work schedule dependent in the main upon the produce season, plaintiff's job more properly qualified as "seasonal" rather than continuous employment. *See Joyner v. Oil Co.*, 266 N.C. 519, 522-23, 146 S.E.2d 447, 450 (1966).

In *Joyner*, our Supreme Court reviewed the circumstance of a relief truck driver who worked only on an as-needed basis during the

fifty-two weeks prior to injury. *Id.* The court described the driver's employment as "part-time and intermittent" and held it was "[un]fair[] to the employer . . . [not to] take into consideration both peak and slack periods" in calculating average weekly wage because "it gives plaintiff the advantage of wages earned in . . . peak . . . season without taking into account the slack periods" during which he did not work. *Id.* at 521, 146 S.E.2d at 450. Therefore, the court concluded, the driver's average weekly wage was to be calculated under the "exceptional reasons" method set forth in G.S. § 97-2(5). *Id.* at 522, 146 S.E.2d at 450.

In determining the driver's average wage, the *Joyner* Court took the total wages earned during the twelve month period prior to injury, noting that without the injury the driver "himself would not be earning more than this sum in a normal year," *id.*, and divided that amount by 52, representing the number of weeks in a year, *id.* Utilizing the same methodology herein, we observe plaintiff's total wages earned between February 1995 and February 1996 would equal a sum of $9,333.05, $7,178.12 earned in 1995 and $2,154.93 earned in 1996. Dividing that sum by 52 weeks results in an average weekly wage of $179.48, well below the figure of $548.94 per week or $28,544.88 annually calculated by the Commission.

The Commission's determination of plaintiff's average weekly wage is not supported by the evidence and its award contains no findings indicating how the amount of $548.94 was derived. The matter therefore must be remanded to the Commission for recalculation of plaintiff's average weekly wage and entry of related findings. The Commission shall rely on the existing record and receive additional evidence and argument from the parties in its sole discretion. *See Smith v. Smith*, 111 N.C. App. 460, 517, 433 S.E.2d 196, 230 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994) (on remand, trial court to "rely on the existing record, . . . but may hear additional arguments from the parties and take such additional evidence as the court finds necessary to correct the errors identified herein").

Remanded with instructions.

Judges WALKER and McGEE concur.

LIONEL LEWIS, EMPLOYEE, PLAINTIFF v. CRAVEN REGIONAL MEDICAL CENTER, EMPLOYER, VIRGINIA INSURANCE RECIPROCAL, CARRIER, DEFENDANTS

No. COA98-1080

(Filed 3 August 1999)

1. Workers' Compensation— approval of agreement—fairness inquiry necessary

Plaintiff-employee's motion to set aside the Form 26 agreement was properly before the Industrial Commission since the Commission failed to make an entry indicating it had conducted a fairness inquiry or that it otherwise determined the agreement was fair and just.

2. Workers' Compensation— collateral estoppel—determination of earning capacity

In plaintiff-employee's motion to set aside the Form 26 agreement based on changed condition requiring additional compensation, the Industrial Commission was collaterally estopped from determining that plaintiff was incapable of work because the Court of Appeals already affirmed an earlier decision of the Commission finding plaintiff had earning capacity on the date of the Form 26 approval. It was necessary for the Commission to establish plaintiff's earning capacity because it is the primary factor for determining employee's entitlement to additional compensation.

Judge WYNN dissenting.

Appeal by defendants from Opinion and Award filed 23 June 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 May 1999.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff-appellee.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by James R. Sugg, Scott C. Hart, and Jill Quattlebaum Byrum, for defendant-appellants.

GREENE, Judge.

Craven Regional Medical Center (Medical Center) and Virginia Insurance Reciprocal (Carrier) (collectively, Defendants) appeal

from an opinion of the North Carolina Industrial Commission (Commission) awarding Lionel Lewis (Plaintiff) temporary total disability compensation, attorney's fees, and medical expenses.

It is undisputed that while working for Medical Center as a general maintenance worker, Plaintiff suffered a compensable injury by accident on 23 February 1990, which required surgery. Following his surgery and on 1 November 1990, he was released to work with restrictions not to lift over forty pounds and not to crawl in tight places. Plaintiff did not return to work at that time because the Medical Center would not allow Plaintiff to work with his restrictions. On 21 January 1991, Dr. Gerald Pelletier, Jr. (Pelletier), who performed Plaintiff's surgery, determined Plaintiff had reached maximum medical improvement. In Form 21 and 26 agreements, which were both approved by the Commission pursuant to N.C. Gen. Stat. § 97-82, Defendants admitted liability and paid Plaintiff workers' compensation. The Form 21 agreement, which was approved on 31 October 1991, provided temporary total disability from 30 March 1990 through 28 January 1991. The Form 26 agreement, approved on 10 October 1991, provided workers' compensation for a 15 percent permanent partial disability to Plaintiff's back, beginning 28 January 1991 for forty-five weeks, pursuant to N.C. Gen. Stat. § 97-31.

On 14 May 1992, Plaintiff asserted that his level of pain had increased, and sought additional compensation from Defendants pursuant to N.C. Gen. Stat. § 97-47, because of his alleged changed condition. Defendants denied compensation and Plaintiff requested a hearing pursuant to N.C. Gen. Stat. § 97-83, seeking additional medical care and workers' compensation for temporary total disability.

The deputy commissioner made findings and conclusions, which the Commission adopted in its own opinion and award. The Commission found, *inter alia*, that Plaintiff: (1) "has remained essentially the same since he reached maximum medical improvement"; (2) has had wage earning capacity despite his very limited education, his work history of manual labor, and his work restrictions not to lift over forty pounds and not to crawl in tight places; and (3) has alleged "that he has been totally disabled," but this allegation "is not accepted as credible." The Commission concluded that "Plaintiff has not sustained a material change for the worse" in his back condition, and denied Plaintiff's request for additional compensation.

Plaintiff appealed the Commission's opinion to this Court, where we: (1) determined the findings of the Commission were supported

by competent evidence in the record; and (2) found "the Commission correctly concluded that there has been no change in [Plaintiff's] condition." *See Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996). We specifically stated: "Whether the Form 26 Agreement is 'fair and just' remains an issue, however, that can be addressed by the Commission upon the filing of a proper and timely motion." *Id.* at 148-49, 468 S.E.2d at 274.

On 6 June 1996, Plaintiff requested a hearing to challenge the appropriateness of the Form 26 agreement, alleging the agreement was "improvidently approved" since it was not fair and just. The Commission found, *inter alia*, that: (1) had Plaintiff's medical records "present in the [Commission] file at the time the Form 26 was approved on 10 October 1991 been fully investigated" by the Commission at the time the agreement was approved, "it would have been apparent that the Form 26 was not fair and just," and thus the "Form 26 agreement was improvidently approved by the [Commission]"; and (2) medical records before the Commission at the time the agreement was approved revealed Plaintiff was "incapable of earning wages with [Medical Center] or in any other employment from 23 February 1990 through the date of the hearing and continuing."

The medical records in the Commission file on 10 October 1991 included various medical reports from physicians treating Plaintiff. One of these reports was from Pelletier, who indicated that Plaintiff had a 15 percent permanent impairment of his spine on 30 October 1990, and he was free to return to work with limited duty. On 4 April 1991, Pelletier's notes include the following notation, "I placed him back on Prednisone, Flexeril, Lorcet, light activity, no work. He will return here in 11 days." On 16 April 1991, the following notation is included, "He is doing better on the Prednisone. I am shifting him now to Feldene and will have him return here in one month. No work." The last notation on the notes was entered on 1 August 1991, stating, "His straight leg raise is negative. I see no evidence of muscle spasm. He has various complaints probably related to degenerative disk disease. RECOMMENDATIONS: I placed him on Lodine and advised him to lose weight, continue exercising. He has reached maximum improvement."

From the findings of fact, the Commission concluded: (1) the Form 26 agreement was "improvidently approved" since it "was not fair and just"; (2) Plaintiff has been "incapable of work in his former

position with [Medical Center] or any other employment" since 23 February 1990; and (3) Plaintiff was entitled to temporary total disability compensation from 27 April 1992.

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[1] The dispositive issue is whether the Form 26 agreement between Plaintiff and Defendants gave Plaintiff the most favorable disability benefits to which he was entitled at the time the agreement was approved by the Commission.

Every compensation and compromise agreement between an employer and an injured employee must be determined by the Commission to be fair and just prior to its approval. *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 432-33, 444 S.E.2d 191, 195 (1994). The conclusion the agreement is fair and just must be indicated in the approval order of the Commission and must come after a full review of the medical records filed with the agreement submitted to the Commission. *Id.* at 434, 444 S.E.2d at 195-96; *see* N.C.G.S. § 97-82(a) (Supp. 1998) (agreement tendered to Commission must be "accompanied by a full and complete medical report"). The agreement is fair and just only if it allows the injured employee to receive the most favorable disability benefits to which he is entitled. *Vernon*, 336 N.C. at 432, 444 S.E.2d at 195; *see also* 8 Arthur Larson, *Larson's Workers' Compensation Law* § 82.41, at 15-1208 (1999) (employee and employer not entitled to agree to disposition of claim that gives employee less than the maximum amount to which she is entitled).

If the Commission approves an agreement without conducting the required inquiry and concluding the agreement is fair and just, the agreement is subject to being set aside. *Vernon*, 336 N.C. at 434-35, 444 S.E.2d at 96. At the hearing on a motion to set aside the agreement, the Commission must determine the fairness and justness of the agreement from the medical evidence filed with the agreement at the time it was originally submitted to the Commission for approval.[1]

In this case, the Commission, in approving the Form 26 agreement, made no entry indicating it had conducted a fairness inquiry or otherwise determined the agreement to be fair and just. Thus Plaintiff's motion to set aside the Form 26 agreement was properly before the Commission.

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1. Of course the agreement is always subject to being set aside on the grounds of misrepresentation, fraud, undue influence, or mutual mistake, *see* N.C.G.S. § 97-17 (1991), and pursuant to the inherent authority of the Commission, "analogous to that conferred on courts by [Rule] 60(b)(6)." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985).

[2] In reviewing the fairness of the Form 26 Agreement pursuant to Plaintiff's motion, the Commission appears to have appropriately limited its consideration to the medical records present in the Commission file at the time the Form 26 was approved on 10 October 1991. From those records, the Commission concluded the Form 26 agreement was not fair and just. This conclusion was based on the finding that at the time the Form 26 was approved, Plaintiff was incapable of earning wages with Medical Center or in any other employment. Although this finding supports the conclusion that the Form 26 agreement is not fair and just,[2] Defendants argue there is not competent evidence in the record to support this finding. We agree. Plaintiff relies on the two references in Pelletier's notes of "no work" to support the finding that Plaintiff was incapable of earning any wages on 10 October 1991. These references, taken in context, simply do not support the finding. *See Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 204, 472 S.E.2d 382, 385 (Commission's findings are binding on appeal only when supported by competent evidence), *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). Indeed, the last entry by Pelletier makes no mention of any work prohibition, instead it emphasized Plaintiff's need to take Lodine, lose weight, and continue exercising.

In any event, the Commission was collaterally estopped from finding Plaintiff to be incapable of work on 10 October 1991. *See Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986) (collateral estoppel prevents re-litigation of issues actually litigated and necessary to the outcome of the prior action, where new action is between the same parties or their privies). This Court previously affirmed an earlier decision of the Commission finding Plaintiff had earning capacity on the date of the Form 26 approval, a determination necessary for resolution of the matter before the Commission. *Lewis*, 122 N.C. App. at 146, 149, 468 S.E.2d at 272, 274 (issue was raised and determined in change of condition hearing). It was necessary for the Commission to establish Plaintiff's earning capacity on 10 October 1991 in order to determine whether there had been a subsequent change in that earning capacity. *See Lucas v. Bunn Manuf. Co.*, 90 N.C. App. 401, 404, 368 S.E.2d 386, 388 (1988) (change in earning capacity is primary factor for determining employee's entitlement to additional compensation under section 97-47). Accordingly, because Plaintiff's earning capacity was

2. If Plaintiff indeed was incapable of earning any wages at the time of the Form 26 approval, he would have been entitled to benefits under section 97-29, a more favorable benefit than the section 97-31 benefit he agreed to accept.

actually litigated and necessary to the outcome of his section 97-47 hearing, the Commission is bound by that finding when determining if the Form 26 agreement was fair and just.

It follows that the opinion of the Commission that the Form 26 agreement was "improvidently approved" on the grounds Plaintiff had no earning capacity on 10 October 1991, thus qualifying him for benefits under section 97-29, must be reversed. Whether Plaintiff, on 10 October 1991, would have been entitled to some other benefit more generous than that provided in the Form 26 agreement is a matter not addressed by the Commission and requires remand.[3] If it is determined on remand that Plaintiff would have been entitled to receive a greater benefit under section 97-30 than he received under the Form 26 agreement, the agreement must be set aside. *See Franklin*, 123 N.C. App. at 205, 472 S.E.2d at 385-86 (employee has option of choosing the most favorable remedy of those offered in sections 97-29, 97-30, or 97-31).

We have considered the cross-assignments of error tendered by Plaintiff and overrule them without discussion.

Reversed and remanded.

Judge MARTIN concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I disagree with the majority's characterization of the issue in this case as,

> whether the Form 26 agreement between Plaintiff and Defendants gave Plaintiff the most favorable disability benefits to which he was entitled at the time the agreement was approved by the Commission.

The determination of that issue is the function of the Industrial Commission, not this Court. Rather, the proper inquiry for this Court to determine on appeal is whether there is any competent evidence in the record to support the Commission's finding that the claimant was incapable of earning wages with Craven Regional Medical Center or

3. It is undisputed the Form 26 agreement offered Plaintiff benefits under section 97-31.

in any other employment at the time the Form 26 agreement was approved. I further disagree with the majority's finding that, even if there was competent evidence to support the Commission's finding, the Commission was barred by the principles of collateral estoppel and res judicata from determining that the claimant was unable to work.

It is well settled that the Industrial Commission's findings of fact are conclusive on appeal if supported by any competent evidence, even though there may be evidence that would support findings to the contrary. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Competent evidence is evidence "that a reasonable mind might accept as adequate to support the finding[s]." *Andrews v. Fulcher Tire Sales and Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995).

Here, the Commission found that:

> [a]s a result of plaintiff's injury by accident, he has been incapable of earning wages with defendant-employer or in any other employment from 23 February 1990 through the date of the hearing and continuing.

The majority asserts that Dr. Pelletier's notations—"I placed him back on Prednisone, Flexeril, Lorcet, light activity, no work" on 4 April 1991 and "[n]o work" on 16 April 1991—are not competent evidence to support this finding. I, however, believe the physician's orders are adequate to support the aforementioned finding that the claimant was unable to work, even if there was evidence to support a different finding. Therefore, the Commission's finding on the claimant's inability to work is conclusive on appeal. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Moreover, contrary to the majority's position, the doctrines of collateral estoppel and res judicata do not apply to the case *sub judice*. Although our Court in *Lewis I* affirmed the Commission's finding that the claimant "had wage earning capacity" for a claim of a change in condition pursuant to N.C. Gen. Stat. § 97-47, we did not litigate the claimant's earning capacity as it relates to the issue of whether the Form 26 agreement was improvidently approved by the Commission. *See Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996); *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 382 S.E.2d 874 (1989) (holding that the doctrine of collateral estoppel bars re-adjudication of issues when (1) the prior suit

resulted in judgment on the merits; (2) identical issues are involved; (3) the issue was actually litigated; (4) the issue was actually determined; and (5) the determination was necessary to the resulting judgment); *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973) (stating that where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon determination of which finding or verdict was rendered).

In fact, this Court in *Lewis I* refused to determine the issue at bar and stated that:

> We do not, however, address [the claimant's argument that the Form 26 Agreement was improvidently improved by the Commission and must therefore be set aside as not being 'fair and just'] because there has been no motion to set aside the Form 26 agreement before the Commission.

Id. at 148, 468 S.E.2d at 274. Instead, this Court left that particular issue to the Commission "upon the filing of a proper and timely motion." *Id.* at 149, 468 S.E.2d at 274. Thus, *Lewis I* and the instant case involve the adjudication of different issues.

Respectfully, I dissent.

STATE OF NORTH CAROLINA v. EARL KENNETH DOMINIE, JR., DEFENDANT

No. COA98-1223

(Filed 3 August 1999)

1. Kidnapping— indictment

The trial court erred in instructing the jury on first-degree kidnapping where the indictment alleged only second-degree kidnapping.

2. Kidnapping— indictment—disjunctive instruction improper

In a kidnapping case where the indictment alleged only that the victims were unlawfully removed, the trial court erred by instructing the jury in the disjunctive that it could find defendant guilty if it found he unlawfully confined, restrained, or removed a person from one place to another. Even if the evidence amply

supports the trial court's instruction, it is improper to convict a defendant upon a theory not supported by the bill of indictment.

3. Confessions and Incriminating Statements— Miranda warning—not in custody

The trial court did not err in failing to suppress two of defendant's statements because Miranda warnings are not required simply because the person questioned is one whom the police suspect. Although the officer went to defendant's home to arrest him, defendant was not in custody because he voluntarily went to the officer's patrol car and discussed the incident, he was explicitly told he was not under arrest, he sat in the front seat of the patrol car, and he made the alleged statements spontaneously and not in response to questioning.

Judge WALKER concurring.

Appeal by defendant Earl Kenneth Dominie, Jr. from judgment entered 8 April 1997 by Judge George L. Wainwright, Jr., in Moore County Superior Court. Heard in the Court of Appeals 29 April 1999.

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

Paul Pooley, for defendant-appellant.

WYNN, Judge.

The record on appeal in this case shows that around 8:30 p.m. on 12 December 1996, two women—mother and daughter—entered their car parked in a Wal-Mart lot after just completing a shopping trip. However, before they were able to drive away, defendant Earl Kenneth Dominie, Jr. jumped into the back seat and instructed the daughter to drive until they reached a "real dark, deserted area where there is nothing."

The daughter complied and upon reaching the described area, the defendant robbed the women and ordered them out of the car. The daughter, however, pleaded with the defendant by stating "my mama is old and she can't walk up there to where there's some lighting. Can't we just drive up to the . . . shopping center and we'll let you have the car, we'll get out." The defendant agreed and allowed her to drive to a fairly well lit residential area that was approximately one-quarter mile from the shopping center. There, the women got out of the car and the defendant drove the car away.

Lieutenant Arthur Frye of the Aberdeen Police Department investigated the incident. On 8 January 1997, after concluding that the defendant was a suspect, Lt. Frye, along with other police officers, went to a mobile-home park where the defendant was believed to be living. Lt. Frye testified that he went to the park to arrest the defendant for the 12 December crime.

At the defendant's mobile home, the defendant agreed to speak with Lt. Frye who escorted him to the patrol car. However, before discussing the incident with the defendant, Lt. Frye informed him that he was not under arrest. Indeed, Lt. Frye's conversation with the defendant took place in the front seat of the patrol car—an area off-limits to arrested individuals. In the patrol car, Lt. Frye informed the defendant of the incident at Wal-Mart and notified him that the two women had identified him out of a lineup as the culprit. The defendant responded: "I guess I f--ked up this time". He asked whether he could apologize to the two women. Lt. Frye informed him that things don't work that way and arrested him.

The defendant was tried and convicted by a jury for two counts of first-degree kidnapping, one count of armed robbery, and one count of common-law robbery. At sentencing, the trial judge consolidated the armed robbery conviction with one of the first-degree kidnapping convictions and consolidated the common-law robbery conviction with the other first-degree kidnapping conviction.

[1] On appeal, the defendant contends that the trial court erred in instructing the jury on first-degree kidnapping where the indictment alleged only second-degree kidnapping. The State agrees with the defendant's argument and therefore concedes this issue on appeal. However, contrary to the defendant, the State contends that this matter should be remanded for re-sentencing under a conviction for second-degree kidnapping. *See State v. Dawkins*, 305 N.C. 289, 287 S.E.2d 885 (1982); *State v. Corley*, 310 N.C. 40, 311 S.E.2d 540 (1984). We would ordinarily agree with the State that this should be remanded only for re-sentencing on the lesser offenses of second-degree kidnapping but the defendant makes a further argument that the State also recognizes as having merit.

[2] The defendant also argues that the trial court erred in instructing the jury on the kidnapping charges in the disjunctive where the indictment alleged only that the victims were unlawfully removed.

The defendant's indictment read:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above defendant named did unlawfully, willfully and feloniously did kidnap [Wanda Marion Ring/Vera Wood Marion], a person who attained the age of 16 years, by unlawfully removing her from one place to another, without her consent, and for the purpose of facilitating the commission of a felony, robbery with a dangerous weapon.

Although the indictment stated that the defendant unlawfully "removed" the victims, the trial court instructed the jury that they could find him guilty of kidnapping if they found that he "unlawfully *confined* a person—that is, imprisoned her within a given area—*restrained* a person—that is, restricted her freedom—or *removed* a person from one place to another." Therefore, even though the indictment charged the defendant with kidnapping for "removing" the victims, the trial court informed the jury that the defendant committed kidnapping if he "confined, restrained, or removed" the victims.

The defendant contends this instruction constitutes reversible error. As the State recognizes, he is correct under our Supreme Court's holding in *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986).

In *Tucker*, the defendant was indicted for, *inter alia*, kidnapping. The indictment stated that he "unlawfully . . . kidnapp[ed] [the victim] . . . by unlawfully removing her from one place to another, without her consent. . . ." *Id.* at 537, 346 S.E.2d at 420. (emphasis in original). Like the trial judge in this case, the trial judge in *Tucker* instructed the jury that the defendant could be found guilty of first-degree kidnapping if they found that "the defendant unlawfully restrained [the victim], that is, restricted [her] freedom of movement by threat or force." (emphasis added). *Id.* Our Supreme Court, after noting that the evidence amply supported the judge's instruction, nonetheless reversed defendant's conviction because the instructions constituted prejudicial error. *Id.* at 537-38, 346 S.E.2d at 420. Specifically, the Court stated that it was improper to convict a defendant upon an abstract theory not supported by the bill of indictment. *Id.* That is, a defendant could not be convicted upon the theory that he "restrained or removed" the victim when the bill of indictment stated that he was charged only with "removing" her.

We note that the State cites our recent decision in *State v. Raynor*, 128 N.C. App. 244, 495 S.E.2d 176 (1998), contending that it supports a position contrary to *Tucker*. However, both the State and the concurring opinion recognize that a decision of this Court cannot overrule an explicit holding of our Supreme Court. So, to the extent that *Raynor* is cited as law contrary to *Tucker*, we are bound to follow only *Tucker*.

As in *Tucker*, the facts before us indicate that the trial judge committed prejudicial error by instructing the jury that the defendant could be found guilty if he confined, restrained or removed the victims. Further, as demonstrated by *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984), this error is so prejudicial as to warrant a new trial. Accordingly, following the directives of our Supreme Court, we vacate the defendant's first-degree kidnapping convictions and remand this matter for a new trial.

[3] In the interests of judicial economy, we also address the defendant's last argument challenging the trial court's failure to suppress two statements he allegedly made involuntarily and without being provided proper *Miranda* warnings.

"This Court has consistently held that the rule of *Miranda* applies only where a defendant is subject to custodial interrogation." *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404, *cert. denied*, 118 S.Ct. 248, 139 L. Ed.2d 177 (1997). When determining whether a defendant is subject to custodial interrogation, "the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with formal arrest." *Id.* at 662, 483 S.E.2d at 405; *see also Stansbury v. California*, 511 U.S. 318, 128 L. Ed.2d 293 (1994). Significant to the case *sub judice*, *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977).

In the instant case, the defendant voluntarily went with Lt. Frye to his patrol car and discussed the Wal-Mart incident with him. The defendant was explicitly told that he was not under arrest and was placed in the front seat of the patrol car, an area where arrested suspects rarely, if ever, sit. Further, the statements the defendant seeks to suppress—"I guess I f--ked up" and his offer to apologize to the victims—were not made in response to questions, but rather were spontaneously made.

These facts support the trial judge's conclusion that the defendant was not in custody at the time the statements were made and therefore the defendant was not required to receive Miranda warnings. In so ruling, we note the fact that Lt. Frye went to the defendant's home to arrest him is irrelevant. *See Oregon*, 429 U.S. at 495, 50 L. Ed. 2d at 719. Accordingly, we find no merit to this assignment of error.

In conclusion, we are compelled by our Supreme Court's prior decisions to hold that the trial court committed prejudicial error by instructing the jury on first-degree kidnapping and by instructing the jury on the kidnapping charges in the disjunctive. Moreover, because defendant's convictions for armed robbery and common-law robbery were consolidated with his first-degree kidnapping convictions for sentencing purposes, we must remand this matter for re-sentencing upon those convictions.

First Degree Kidnapping, 97CRS464—New Trial.

First Degree Kidnapping, 97CRS467—New Trial.

Robbery with a Dangerous Weapon, 97CRS466—No Error On Conviction, Remand For Re-Sentencing.

Common Law Robbery, 97CRS465—No Error On Conviction, Remand For Re-Sentencing.

Judge HUNTER concurs.

Judge WALKER concurs with a separate opinion.

Judge WALKER concurring.

I write separately to express my belief that our Supreme Court should reexamine its holding in *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986).

A bill of indictment is sufficient if it charges the offense in a plain, intelligible manner, with averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972). The purpose of the indictment is to put the defendant on notice of the offense with which he is charged and to allow him to prepare a

defense to that charge. *State v. Sumner*, 232 N.C. 386, 61 S.E.2d 84 (1950). In this case, defendant was indicted on two counts of kidnapping in violation of N.C. Gen. Stat. § 14-39.

Specifically, each indictment alleges that defendant "unlawfully, willfully and feloniously did kidnap . . . by unlawfully removing . . . from one place to another, without . . . consent, and for the purpose of facilitating the commission of a felony, robbery with a dangerous weapon." However, the trial court instructed not only on "removal" of the victim, but also "confinement" or "restraint" of the victim as provided in N.C. Gen. Stat. § 14-39 (Cum. Supp. 1998).

Implicit in the words "kidnap" and "remove" contained in the indictment are the words "restrain" and "confine." By alleging that the defendant has kidnapped a victim, the indictment has necessarily placed the defendant on notice that he is accused of "restraining, confining, or removing" a person. The terms "restrain," "confine" or "remove" are related in that they all encompass an act which asserts control over the victim. These terms are not mutually exclusive. The same act could comprise both restraint and confinement as surely as restraint is a necessary part of removal. *See State v. Fulcher*, 34 N.C. App. 233, 237 S.E.2d 909 (1977), *affirmed*, 294 N.C. 503, 243 S.E.2d 338 (1978). Allowing the jury to consider all three terms which statutorily constitute kidnapping does not necessarily allow conviction upon an "abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980).

Under N.C. Gen. Stat. § 14-39, if the State proves that the confinement, restraint or removal is for one of four purposes, the actions amount to kidnapping. Allowing a jury to convict on the basis of a purpose not listed in the indictment would constitute such an "abstract theory." *See State v. Moore*, 315 N.C. 738, 340 S.E.2d 401 (1986). Allegations that the actions occurred for the purpose of committing a felony as opposed to holding a victim for ransom are theories which would require different factual defenses. As "restrain," "confine" and "remove" all connote a similar action by the defendant, the danger of conflicting defenses or lack of notice is not present.

Our Supreme Court, in *Tucker*, quoted from its prior decision in *State v. Dammons*, 293 N.C. 263, 237 S.E.2d 834 (1977) noting, "[h]ad the state desired to prosecute on the theory that defendant confined and restrained the victim . . ., it should have so alleged by way of an additional count in the indictment." *Id.* at 273, 237 S.E.2d at 841. The

reasoning in *Dammons* would seem to allow for a separate count of kidnapping for each individual act of restraint, confinement or removal such that three counts of kidnapping could arise from what would formerly be considered a single act. I do not believe this was the intent of the legislature in revising our kidnapping statute in 1975 to replace the common-law definition.

ROLANDO FLORES, EMPLOYEE-PLAINTIFF v. STACY PENNY MASONRY COMPANY, DEFENDANT-EMPLOYER; AETNA CASUALTY AND SURETY CO., CARRIER-DEFENDANT

No. COA98-1047

(Filed 3 August 1999)

1. **Workers' Compensation— physical and vocational abilities—suitable jobs presently available**

The Industrial Commission did not err in awarding plaintiff-employee temporary total disability benefits on an admittedly compensable injury to his left knee. Defendant-employer's showing that more than one year ago plaintiff held a job that would seemingly suit his current physical and vocational abilities was not sufficient to prove that suitable jobs were presently available and he was capable of getting one.

2. **Workers' Compensation— termination for misconduct unrelated to compensable injury**

The Industrial Commission did not err in concluding that plaintiff-employee was terminated from his employment with defendant-employer because of his injury and not because of misconduct unrelated to his compensable injury. Plaintiff's medical record revealed he missed a considerable amount of work because of his work-related injury and his employer admitted plaintiff would not have been fired for taking a day off to tend to personal matters if his attendance was satisfactory. In order to bar the employee from receiving disability benefits, the employer must show the employee was terminated for misconduct or fault unrelated to the compensable injury for which a nondisabled employee would ordinarily have been terminated.

3. **Workers' Compensation—expenses incurred on appeal**

Plaintiff-employee is entitled to receive from defendant-employer the expenses incurred as a result of this appeal because

defendant was ordered to continue paying temporary total disability benefits to the employee. N.C.G.S. § 97-88.

Appeal by defendants from opinion and award entered 4 June 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 April 1999.

Robert J. Willis for plaintiff-appellee.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Stacy Penny Masonry Company ("defendant-employer") and Aetna Casualty Insurance Company ("defendant-carrier") (collectively, "defendants") appeal from an opinion and award of the North Carolina Industrial Commission ("the Commission") awarding temporary total disability benefits to Rolando Flores ("plaintiff") on an admittedly compensable injury to his left knee. Having examined the issues raised by this appeal, we affirm the opinion and award of the Commission.

The relevant facts are as follows: On 9 April 1992, plaintiff, who was then employed with defendant-employer as an assistant brick mason and general laborer, sustained an injury by accident to his left knee when a wheelbarrow loaded with bricks overturned on his left leg. The parties subsequently entered into a Form 21 Compensation Agreement, and the Commission approved the agreement on 12 May 1992. According to Dr. S. Robert Bylciw, plaintiff's treating physician, plaintiff's injuries consisted of a torn medial meniscus and a torn anterior cruciate ligament. Dr. Bylciw performed arthroscopic surgery on plaintiff's knee to repair the torn meniscus. Plaintiff's torn anterior cruciate ligament was treated conservatively with a post-operative rehabilitation program, including physical therapy and exercise.

Plaintiff returned to work on 9 June 1992 but regularly followed up with Dr. Bylciw. Although plaintiff continued to improve during the summer and fall of 1992, he experienced periodic swelling, buckling, and giving way of the knee while he worked. Dr. Bylciw, therefore, recommended intermittent time off from work and continued physical therapy. Consequently, plaintiff periodically missed work between 9 June 1992 and 16 April 1993, when his employment with defendant-employer was terminated.

Following his termination, plaintiff worked in a variety of short-term jobs: (1) as a laborer in a tobacco warehouse for less than one day; (2) as a pipe layer from the end of April 1993 to 21 June 1993; and (3) as a painter from 1 June 1993 to 21 June 1993. Plaintiff left his painting and pipe laying jobs because of continuing pain in his knee. He left the tobacco warehouse position for reasons unrelated to his compensable injury. On 1 September 1993, plaintiff began working as a laborer for F.T. Williams, a construction company. His duties consisted of assisting mechanics, washing cars, and moving barrels and materials. Plaintiff worked for F.T. Williams until 23 November 1993, when he left due to problems with his knee.

In December of 1993, Dr. Bylciw determined that the conservative treatment of plaintiff's torn anterior cruciate ligament was unsuccessful and, on 17 December 1993, performed a repeat arthroscopy of plaintiff's left knee. After the surgery, plaintiff began a program of extensive physical therapy to increase the strength and range of motion in his knee. On 11 July 1994, while engaged in physical therapy, plaintiff re-injured his knee by tearing his medial meniscus again. Dr. Bycliw performed an arthroscopic operation on 8 December 1994 to repair this injury.

On 22 February 1995, Dr. Bylciw determined that plaintiff had reached maximum medical improvement and, in restricting his work capacity, required plaintiff to avoid repetitive motion of the left knee. In addition, Dr. Bylciw insisted that plaintiff work only on flat surfaces, avoid frequent climbing, and abstain from roofing or other elevated work. Plaintiff returned to work at F.T. Williams on 17 March 1995 but, due to continued pain in his knee, left that job on 17 June 1995. Plaintiff then began working as a dishwasher at Oliver's Family Restaurant ("Oliver's") on 28 August 1995. However, on 24 September 1995, plaintiff left that position, again due to difficulties with his knee. Dr. Bylciw assigned an 18% permanent partial disability to plaintiff's left knee on 21 November 1995.

On 6 March 1996, plaintiff sought treatment from Dr. Andrew P. Bush for continuing pain in his knee. Dr. Bush recommended physical therapy. Following a program of strengthening exercises, plaintiff's physical therapist noted on 19 November 1996 that plaintiff was capable of complete stabilization of his left knee and that he was able to achieve multiple squat positions of near full-depth, ascend and descend stairs without difficulty, and repeat groups in multidirectional step-up activities. On 4 March 1997, Dr. Bush re-examined plaintiff and concluded that he had reached maximum medical

improvement, thereupon assigning him a permanent partial disability rating of 25% to his left knee. Dr. Bush further stated that plaintiff retained some clinical instability of the knee, which would hamper his ability to return to construction work.

Plaintiff filed a request for hearing, and the matter was heard before Deputy Commissioner W. Bain Jones, Jr. on 21 October 1996. On 30 June 1997, the deputy commissioner entered an opinion and award granting plaintiff temporary total disability compensation from 16 April 1993 to 1 September 1993, from 12 November 1993 to 17 December 1993, from 17 June 1995 to 28 August 1995, and from 25 September 1995 to present. Defendants appealed this ruling to the Full Commission, which affirmed with minor modifications to the findings of fact. Again, defendants appeal.

On appeal, defendants first argue that the Commission erred in awarding temporary total disability to plaintiff from 25 September 1995 to the present. Defendants contend that because the dishwashing position at Oliver's was suitable to plaintiff's physical condition, they have successfully rebutted the presumption that plaintiff continues to be disabled. Defendants maintain that, as a result, plaintiff was only entitled to partial compensation under section 97-30 of the North Carolina General Statutes for the period after he left Oliver's. We cannot agree.

The law governing this Court's review of an opinion and award entered by the Full Commission is well settled. Our analysis is confined to two questions: (1) whether there is any competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's findings of fact, in turn, support its conclusions of law. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). If the record contains any evidence to support the Commission's findings of fact, they are binding on appeal. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 484 S.E.2d 853, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). This is true, even if there is evidence to support contrary findings. *Id.* The Commission's conclusions of law, however, are fully reviewable. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

An injured employee seeking to be compensated for a disability under the Workers' Compensation Act must initially establish both the existence and the extent of the disability. *Franklin v. Broyhill*

Furniture Industries, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). "Disability" refers to 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. 1997). Where, as in the instant case, a Form 21 Agreement has been executed by the parties and approved by the Commission, the employee is entitled to a presumption that he is, indeed, disabled. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). Therefore, he is relieved of the burden to prove his disability. *Franklin*, 123 N.C. App. at 205, 472 S.E.2d at 386.

Once disability is established, by presumption or otherwise, the employer has the burden of producing evidence "that suitable jobs are available to the employee and 'that the [employee] is capable of getting one,' taking into account the employee's 'age, education, physical limitations, vocational skills, and experience.' " *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 447 (1997) (quoting *Franklin*, 123 N.C. App. at 206, 472 S.E.2d at 386). The employee is deemed to be " 'capable of getting' " a job if " 'a reasonable likelihood [exists] that he would be hired if he diligently sought the job.' " *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73-74, 441 S.E.2d 145, 149 (1994) (quoting *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984)).

[1] In the case *sub judice*, the Commission made the following relevant findings of fact concerning plaintiff's present earning capacity:

> 29. The medical evidence tends to show that upon plaintiff's reaching maximum medical improvement, it may have been difficult for him to perform certain types of construction jobs. The evidence also tends to show that jobs of the type held by plaintiff at Oliver's Restaurant are within plaintiff's physical and vocational capabilities.
>
> 30. Although plaintiff obtained a job at Oliver's which would appear to be within his current physical and vocational capabilities, he left that job more than a year before he received additional physical therapy and reached maximum medical improvement. Plaintiff's success in obtaining the Oliver's job is not sufficient to rebut the presumption of continuing disability. Defendants have not offered any evidence as to the current availability of suitable employment within plaintiff's physical and

vocational limitations, or of plaintiff's capability of obtaining such employment.

After carefully examining the record, we hold that the Commission's findings were supported by competent evidence. Defendants had presented no evidence that plaintiff was presently employable. To show that more than one year before this matter was initially heard, plaintiff held a job that would seemingly suit his current physical and vocational abilities was not sufficient to prove "that suitable jobs *[are] available* to the employee and 'that the [employee] is capable of getting one.' " *Smith*, 127 N.C. App. at 361, 489 S.E.2d at 447 (quoting *Franklin*, 123 N.C. App. at 206, 472 S.E.2d at 386). Insofar as the Commission was correct in finding that defendants had failed to rebut the presumption of continuing disability as to plaintiff, the Commission was likewise correct in concluding that plaintiff was entitled to temporary total disability after 25 September 1995. Defendant's argument, then, fails.

[2] Next, defendants argue that the Commission erred in ruling that plaintiff was entitled to temporary total disability benefits for the period between 16 April 1993, the date plaintiff was terminated, and 17 December 1997, the date disability payments were resumed following plaintiff's second arthroscopic surgery. Relying on our decision in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), defendants contend that the evidence before the Commission compelled a finding that plaintiff was terminated from his employment with defendant-employer because of misconduct unrelated to his compensable injury. Again, we disagree.

In *Seagraves*, this Court held as follows regarding the effect of an employee's termination on his entitlement to disability benefits:

> [W]here an employee, who has sustained a compensable injury and has been provided light duty work or rehabilitative employment, is terminated from such employment for misconduct or other fault on the part of the employee, such termination does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving benefits for temporary partial or total disability. Rather, the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability.

> Therefore, in such cases the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits for lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability.

Id. at 233-34, 472 S.E.2d at 401. In considering these questions, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Floyd v. First Citizens Bank*, 132 N.C. App. 527, 512 S.E.2d 454 (1999).

Regarding plaintiff's termination, the Commission found as follows:

> 9. Plaintiff's physical disability resulting from his knee injury and subsequent treatment caused him to miss work intermittently between 9 June 1992 and 16 April 1993.
>
> 10. On 16 April 1993, Stacy Penny came to take plaintiff to work. Plaintiff indicated that he would not be able to work that day because he had to pick up a relative at the airport. Mr. Penny stated that plaintiff had missed a great deal of work and he had to have someone who would work. When plaintiff indicated that he would not be able to go to work that day, Mr. Penny terminated his employment.
>
> 11. Plaintiff's employment was terminated as a direct result of time missed from work over a period of several months due to his continuing disability caused by his compensable injury, and not for misconduct or other just cause.

Plaintiff's testimony, the testimony of his treating physician, Dr. Bylciw, and plaintiff's medical records proved that he missed a considerable amount of work from 9 June 1992 to 16 April 1993 because of his work-related injury. Furthermore, on cross-examination, Stacy Penny admitted that he would not have fired an employee for taking a day off to tend to personal matters, if that employee's attendance was satisfactory. In light of these facts, we hold that the

Commission's findings were supported by competent evidence. Moreover, pursuant to our decision in *Seagraves*, 123 N.C. App. 228, 472 S.E.2d 397, the Commission's findings supported its conclusion that plaintiff was not barred from receiving disability benefits after 16 April 1993. This argument also fails.

[3] In addition to addressing defendants' arguments, plaintiff requests that we order defendants to pay plaintiff's expenses incurred in connection with the present appeal. Under section 97-88, the Commission or a reviewing court may award costs, including attorney's fees, to an injured employee " 'if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee.' " *Brown v. Public Works Comm.*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996) (quoting *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994)). In the instant case, defendants appealed the deputy commissioner's decision to the Full Commission, which affirmed the award of disability compensation, and now appeals the Full Commission's decision to this Court, and we too affirm the directive that defendants continue paying temporary total disability benefits to plaintiff. The requirements of section 97-88 are satisfied, and in our discretion, *see Brown*, 122 N.C. App. at 477, 470 S.E.2d at 354, we grant plaintiff's request. Accordingly, this matter is remanded to the Commission for determination of the amount due plaintiff for the expenses he incurred as a result of the appeal to this Court, including reasonable attorney's fees.

For the foregoing reasons, the opinion and award of the Commission is affirmed and this matter remanded for a determination of the appropriate amount of costs to be taxed to defendants.

Affirmed and remanded.

Judges LEWIS and HORTON concur.

DONNA ELLEN SAIN, PLAINTIFF v. JAMES PHILLIP SAIN, DEFENDANT

No. COA98-1024

(Filed 3 August 1999)

1. **Child Support, Custody, and Visitation— no changed circumstances—modification improper**

Having concluded that no changed circumstances justified modification of the prior custody order, the trial court erred in modifying the terms of the custody order by requiring plaintiff-mother to give defendant-father decision-making authority as to their child's schooling, extracurricular activities, and travel.

2. **Child Support, Custody, and Visitation— deviation from Guidelines—sufficient findings of fact necessary**

Although the trial court appears to have determined that deviation from the Child Support Guidelines is appropriate due to defendant-father's disability, the trial court erred by modifying child support without making sufficient findings of fact to determine: the appropriate amount under the Guidelines, the child's reasonable needs, and that application of the presumptive Guidelines amount would be "unjust or inappropriate."

3. **Child Support, Custody, and Visitation— disability check—not income**

The trial court properly refused to consider defendant-father's disability check he received on behalf of his child as his income in figuring his support obligation.

4. **Child Support, Custody, and Visitation— disability check—parent with primary custody—may support deviation from Guidelines**

The trial court erred in failing to direct payment of defendant-father's disability check he received on behalf of his child to plaintiff-mother because she is the custodial parent. However, the receipt of these funds by the custodial parent may support a deviation from the Guidelines' presumptive support amount to be paid by the non-custodial parent on the ground that the child is receiving funds as a result of the obligor's disability.

Appeal by plaintiff from order filed 1 April 1998 by Judge Gregory R. Hayes in Catawba County District Court. Heard in the Court of Appeals 8 June 1999.

Daniel R. Greene, Jr., for plaintiff-appellant.

H. Kent Crowe, P.A., by H. Kent Crowe, for defendant-appellee.

GREENE, Judge.

Donna Ellen Sain (Plaintiff) appeals from the trial court's child custody and support order.

On 18 June 1992, the trial court entered an order awarding Plaintiff and her ex-husband James Phillip Sain (Defendant) joint custody of their minor child (Melissa). The order set Defendant's child support obligation, provided that Plaintiff would have primary custody of Melissa, and provided that Defendant would have physical custody of Melissa every other weekend during the school year and at additional times during vacations and holidays. At that time, Defendant's gross monthly income was $1,720.00, and Plaintiff's gross monthly income was $726.00.

On 12 June 1997, Plaintiff filed a motion in the cause seeking modification of the custody and support order. In her motion, Plaintiff sought sole custody of Melissa, limitation of Defendant's visitation privileges, and "adequate" child support. Defendant filed a motion in the cause on 20 August 1997 seeking a reduction in his child support obligation because he was no longer able to work due to a disability, his income had decreased to disability payments of $800.00 per month and "$412.00 per month on behalf of the minor child as income,"[1] and Plaintiff's income had increased.

In February 1998, the trial court heard testimony from both parties, ten-year-old Melissa, several counselors, Carol Blevins (Blevins) and Sandra Robbins (Robbins) of the Department of Social Services (DSS), and various other individuals. Melissa's school counselor, who never noticed any unusual bruises on Melissa, testified that Melissa would "say that her mother told her she needed to come and see me" concerning allegations of abuse and neglect by Defendant. Blevins testified that she had investigated the allegations on behalf of DSS and that Melissa "could not give me any clear details" to support the

1. Defendant's disability check received on behalf of Melissa had increased to $421.00 per month by the date of the February 1998 hearing on the parties' motions.

allegations. Melissa was "very inconsistent" in her statements and would not maintain "good eye contact" during the interviews. Blevins further testified that "[n]o injuries ha[d] ever been observed by DSS." Robbins had substantiated one report of neglect for DSS. Robbins testified she "couldn't get a clear understanding from either [Defendant or Melissa]" as to the circumstances supporting the allegation, and that she found Melissa to be very bright and manipulative. Robbins stated that Melissa had apparently "hit [Defendant] with a belt" during an argument, and Defendant acknowledged to Robbins that, in response to this behavior, he had "grabbed [Melissa] and held her." Robbins testified that although she did not consider this to be appropriate discipline, "some psychologists . . . will actually give that as an option to a parent."

Based on the evidence presented, the trial court found that Melissa is "strong-willed," has become "the tail wagging the dog," and that some of her testimony was "hard to believe." The trial court made several findings to the effect that Plaintiff had repeatedly attempted to manipulate Melissa in order to remove Defendant from their lives. In addition, the trial court found that Plaintiff had instigated, through her daughter, seven separate DSS investigations of Defendant for abuse and neglect. The trial court found that Melissa had given DSS "inconsistent statements and answers . . . as to what had happened and how it happened . . . [and] fluctuated in her answers, and . . . had no good eye contact [with the DSS investigator]." DSS closed all but one of these investigations without substantiating either abuse or neglect. As to the one investigation substantiating neglect based on Robbins' report, the trial court found the neglect to be a "technical" violation, that it may have been an "accidental" occurrence, and that the DSS recommendation was only for counseling to "try[] to prevent future reports [and to] get[] everyone to get along." The parties and Melissa underwent counseling pursuant to the DSS recommendation.

Based on these findings, the trial court concluded "[t]here has *not* been a material and substantial change of circumstance justifying a modification of the joint custody arrangement in this matter, other than as stated hereinbelow." (emphasis added). Nothing stated "hereinbelow" in the trial court's conclusions of law relates to custody modification. The trial court then ordered the following modification:

> Defendant will consult with [Plaintiff], but the final decisions in these particular areas involving the minor child rests with [Defendant]:

(A) Where the child is to go to school;

(B) Extracurricular activities that the child will participate in; and

(C) Any out of state travel in which the minor child will participate.

Consultation shall take into account [Plaintiff's] interest, [Melissa's] interest and the best interests of [Melissa].

As to each party's motions for a modification in Defendant's child support obligations, the trial court found:

(12) [Plaintiff] had $13,000.00 income for 10 months, then worked at a conference center making $4,000.00 during the summer of 1997. The child care is about $50.00 per week during the summertime. . . .

. . . .

(14) [Defendant] is now totally disabled, with disability income of $799.00 per month. As a result of his total disability, he received checks for $412.00 per month on behalf of [Melissa]. He was declared permanently disabled in February, 1997. He ceased full-time employment in 1994, when the company was sold. He has not worked part-time, and had no income from August, 1994, until February of 1997.

. . . In or about November of 1995, [Plaintiff] began getting the Social Security Administration to re-route the checks for Melissa on the part of [Defendant's] social security disability of $412.00 per month directly to her. Worksheet B should be the appropriate calculation of child support in this matter. However, calculations being made on Worksheet B results [sic] in what was supposed to be joint custody. The income of [Defendant] each month at this time does put him in the poverty level. The parties have income of $17,000.00 annually for [Plaintiff], and $9,600.00 annually for [Defendant]. The Court determines that the social security checks which [Plaintiff] had re-routed from the Social Security Administration to her, being paid on behalf of the minor child of now [$421.00] per month, should be re-routed back to [Defendant] to help him make the child support payments.

There is no Worksheet B attached to the trial court's order or included in the record on appeal.

Based on these findings, the trial court concluded "[t]here has been a material and substantial change of circumstance justifying a modification of the child support ordered in this matter." Accordingly, the trial court directed that Defendant should receive the $421.00 disability check (paid "on behalf of" Melissa), and reduced Defendant's child support obligation to $95.00 per month.

The issues are whether: (I) there was a substantial change in circumstances since entry of the prior custody order justifying its modification; (II) the trial court's findings justify deviation from the North Carolina Child Support Guidelines (Guidelines); and (III) disability checks received for the benefit of a child may warrant deviation from the Guidelines.

I

Plaintiff contends the evidence of neglect and abuse required the trial court to conclude changed circumstances existed affecting Melissa's welfare. We disagree.

The trial court "is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998). The trial court "has the opportunity to see the parties in person and to hear the witnesses," *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981), and its findings "turn in large part on the credibility of the witnesses," *Brandon v. Brandon*, 132 N.C. App. 646, 652, 513 S.E.2d 589, —— (1999). Accordingly, where the trial court's findings of fact are supported by competent evidence, they are binding on appeal. *Harris v. Harris*, 51 N.C. App. 103, 105, 275 S.E.2d 273, 275, *disc. review denied*, 303 N.C. 180, 280 S.E.2d 452 (1981). The trial court's findings must, in turn, support its conclusions of law. *Blanton v. Blanton*, 40 N.C. App. 221, 225, 252 S.E.2d 530, 533 (1979).

In this case, the trial court heard both parties and Melissa testify as to the allegations of abuse and neglect. In addition, the trial court heard testimony that Plaintiff urged Melissa to tell her school counselor that she was abused and neglected by Defendant, and that DSS got "inconsistent statements" and poor eye contact from Melissa when interviewing her concerning these allegations. As to the one substantiated allegation of neglect, Robbins testified that she did not get a "clear understanding" of what had occurred, and that, although she did not personally believe grabbing and holding a child was an appropriate disciplinary measure, some psychologists did. This com-

petent evidence supports the trial court's findings that Plaintiff was manipulating Melissa; that six of the seven allegations of abuse and neglect were unsubstantiated following DSS investigations; and that the one instance of neglect which had been substantiated was "technical" in nature and resulted only in a recommendation for counseling (which the parties and Melissa underwent). These findings, in turn, support the trial court's conclusion that no change in circumstances affecting Melissa's welfare had been shown. We therefore affirm the trial court's conclusion that no changed circumstances affecting the welfare of the child exist.

[1] Plaintiff alternatively contends the trial court erroneously modified the prior custody order without concluding changed circumstances existed. We agree. The law is clear that the trial court may not modify an existing custody order unless changed circumstances affecting the welfare of the child are shown. *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899. Having concluded no changed circumstances justifying modification of the prior custody order had been shown, the trial court was without authority to modify the terms of the prior custody order. Requiring Plaintiff to give Defendant final decision-making authority as to Melissa's schooling, extracurricular activities, and travel constituted modification of the prior custody order; accordingly, we reverse the portion of the trial court's order giving Defendant final decision-making authority in these areas. The terms of the prior custody order therefore remain in full force and effect.

II

[2] Plaintiff next contends the trial court erred in deviating from the Guidelines in modifying child support without making sufficient findings of fact. We agree.

The child support amounts provided in the Guidelines are presumptive. N.C.G.S. § 50-13.4(c1) (Supp. 1998). Deviation from the Guidelines upon a party's request is permissible, however, under proper circumstances, and will not be disturbed on appeal absent a clear abuse of discretion. *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998). Deviation is essentially a four-step process. *See* N.C.G.S. § 50-13.4(c); Child Support Guidelines, 1999 Ann. R. N.C. 31-43. First, the trial court must determine the presumptive child support amount under the Guidelines. N.C.G.S. § 50-13.4(c). Second, the trial court must hear evidence as to "the reasonable needs of the child for support and the relative ability

of each parent to provide support." *Id.* Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount "would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate." *Id.*; 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)."); *Brooker v. Brooker*, 133 N.C. App. 285, 290-91, 515 S.E.2d 234, —— (1999). Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be "otherwise unjust or inappropriate." N.C.G.S. § 50-13.4(c); Child Support Guidelines, 1999 Ann. R. N.C. 32.

In this case, nowhere in its order does the trial court determine what the child support amount would be under the Guidelines. The trial court also failed to make findings as to Melissa's reasonable needs. Although the trial court appears to have determined deviation from the Guidelines is appropriate due to Defendant's disability, the trial court failed to make any finding that the greater weight of the evidence establishes that application of the presumptive Guidelines amount would be "unjust or inappropriate" on this ground. Accordingly, we must remand for entry of a new child support order. If the trial court determines that deviation from the Guidelines is warranted, it must make appropriate findings of fact therein.

III

[3],[4] Finally, Plaintiff contends the trial court misapplied the $421.00 disability check Defendant receives on behalf of Melissa. Again, we agree.

> The Guidelines provide:
>
> Payments received for the benefit of the child(ren) as a result of the disability of the obligor are not considered in determining the amount of the basic child support obligation.

Child Support Guidelines, 1999 Ann. R. N.C. 33. The Guidelines therefore prohibit the trial court from considering disability payments

received on behalf of a child as income in determining the presumptive support amount. The Guidelines further provide:

> [T]he Court should compare the obligor's support obligation under the [G]uidelines with the benefits received by the child(ren) due to the obligor's disability, and determine whether an award of child support in addition to the child(ren)['s] disability-related benefits is warranted.

Id. The Guidelines contemplate that disability payments received for the benefit of the child are "received by" the child. Accordingly, the parent with primary custody is entitled to the disability payments received on behalf of the child. The receipt of these funds by the custodial parent may, however, support a deviation from the Guidelines' presumptive support amount to be paid by the non-custodial parent. Accordingly, the trial court, after making proper findings to support deviation, may reduce the obligor's child support obligation on the ground that the child is receiving funds as a result of the obligor's disability. *Cf. Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996) (holding third-party contributions may be used to support deviation from the Guidelines).

In this case, the trial court properly refused to consider the $421.00 disability check Defendant receives on Melissa's behalf as Defendant's income in figuring his support obligation. The trial court erred, however, in allowing Defendant to receive the $421.00 disability check for his own use. This money is earmarked for Melissa's benefit, and, on remand, the trial court should direct payment of the $421.00 disability check to Plaintiff, the custodial parent. In light of Plaintiff's receipt of this check, the trial court may determine deviation from the Guidelines is warranted and, with proper findings, may reduce Defendant's child support obligation.

We have thoroughly reviewed Plaintiff's remaining contentions, and find them unpersuasive.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and MARTIN concur.

WILSON REALTY & CONSTRUCTION, INC., BILLIE C. WILSON, AND VERNON WILSON, PLAINTIFFS v. ASHEBORO-RANDOLPH BOARD OF REALTORS, INC., THOMAS A. TROLLINGER, JAY KING, AWEILDA WILLIAMS, BETTY PELL, VICKIE LORIMER, PEGGY HAMMER, WALTER COTTEN AND PAT COOPER, DEFENDANTS

No. COA98-1061

(Filed 3 August 1999)

1. Evidence— compromise negotiations—statements offered for other purposes

The trial court erred in granting summary judgment for defendants, Board of Realtors, on the claim of breach of "good faith and fair dealing" because it improperly ruled the affidavit of plaintiff's attorney concerning statements made by defendants' attorney was inadmissible. Even if the statements of defendants' attorney were made to plaintiff's attorney in the context of a settlement negotiation, plaintiff did not offer these statements to prove its innocence of the charges against it, but instead to support a separate and distinct claim for damages on the ground that defendants denied it a fair hearing.

2. Evidence— hearsay—negotiations—scope of agency

Statements made by defendants' attorney during negotiations with plaintiff's attorney that recant out-of-court statements concerning what certain of his unidentified clients told him were not hearsay because the statements concern a matter within the scope of the attorney's agency and were made during the existence of the agency relationship.

Appeal by plaintiffs Wilson Realty & Construction, Inc., Billie C. Wilson, and Vernon Wilson from order filed 30 September 1997 by Judge Ben F. Tennille in Randolph County Superior Court. Heard in the Court of Appeals 8 June 1999.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr. and Matthew W. Sawchak; and Moore & Brown, by B. Ervin Brown, II, for plaintiff-appellants.

Rightsell, Eggleston & Forrester, L.L.P., by Donald P. Eggleston, for defendant-appellees.

GREENE, Judge.

Wilson Realty & Construction, Inc. (Plaintiff) appeals from the trial court's grant of summary judgment for Asheboro-Randolph Board of Realtors, Inc. and its individual members, Thomas A. Trollinger, Jay King, Aweilda Willaims, Betty Pell, Vickie Lorimer, Peggy Hammer, Walter Cotten, and Pat Cooper (collectively, the Board). Plaintiff, a corporation doing business in Asheboro, Randolph County, North Carolina, is a licensed real estate brokerage firm. The Board is a nonprofit corporation, the members of which engage in the listing, sale, or appraisal of real estate in and around Asheboro, Randolph County, North Carolina. Membership in the Board is voluntary. Plaintiff became a member of the Board in order to obtain access to its Multiple Listing Service (MLS). MLS is a service by which members of the Board publish and advertise exclusive listing agreements for the sale of real estate. The rules of the Board include the by-laws and Code of Ethics of the National Association of Realtors (NAR).

Plaintiff filed this lawsuit as a result of a series of grievance hearings the Board conducted against Plaintiff and its owners and officers, Vernon Wilson (Mr. Wilson) and Billie C. Wilson (Mrs. Wilson).[1] On 12 July 1994, as a result of a complaint against Plaintiff and Mrs. Wilson filed with the Board by a fellow realtor and member of the Board, the Board held a grievance hearing. Prior to 12 July 1994, the attorney for Plaintiff and Mrs. Wilson, L. Charles Grimes (Grimes), met with the Board's attorney, Donald P. Eggleston (Eggleston), to discuss the upcoming hearing.

After the grievance hearing, the Board held Mrs. Wilson to be in violation of the NAR Code of Ethics. The Board also held that Plaintiff and Mrs. Wilson had violated certain provisions of an order entered by the Board in 1993 as a result of a prior grievance hearing. Mrs. Wilson was expelled from Board membership for a period of two years and fined $2,500.00. Plaintiff was suspended from Board membership for a period of one year, and was also fined $2,500.00.

On 23 March 1995, Plaintiff filed a complaint in Superior Court. The complaint alleged the Board "breached its obligation of good faith and fair dealing" with respect to Plaintiff. Plaintiff, additionally,

1. Procedurally there is only one plaintiff on appeal. Originally, Wilson Realty and Construction, Inc. and Mr. and Mrs. Wilson, in their individual capacities, each asserted claims against the Board. The claims of Mr. and Mrs. Wilson were dismissed previously, however, and they did not appeal from that dismissal.

alleged the Board had committed unfair and deceptive trade practices and had conspired to restrain trade. The Board counterclaimed for wrongful civil proceedings and moved for summary judgment on all claims. Summary judgment was granted for the Board on Mr. and Mrs. Wilson's claims.

On 7 June 1995, Plaintiff filed the affidavit of Grimes relating his sworn version of the conversation between himself and Eggleston prior to the 1994 grievance hearing. The Grimes affidavit stated, in pertinent part, that Eggleston had advised Grimes "that many members of [the Board] were very upset with [Grimes'] clients for many reasons . . . [and] it would be wise to resolve the matter short of having a grievance hearing because the Board would subject Mrs. Wilson to the maximum monetary fine and expulsion." On 16 November 1995, Plaintiff moved to have Eggleston either disqualified as the Board's attorney for this case or barred from testifying in this case. On 30 May 1996, the Honorable W. Steven Allen, Sr. (Judge Allen) denied the motion. In his order, Judge Allen made no findings as to the admissibility of the Grimes affidavit.

On 30 September 1996, the Honorable Ben F. Tennille (Judge Tennille) ruled the Grimes affidavit inadmissible for two reasons: (1) Judge Tennille believed Judge Allen's denial of Plaintiff's motion to disqualify Eggleston or bar his testimony rendered the Grimes affidavit inadmissible, and (2) Judge Tennille concluded the Grimes affidavit was inadmissible pursuant to Rule 408 of our Rules of Evidence. Based in part on this ruling, Judge Tennille granted the Board's motion for summary judgment on Plaintiff's claims.

The dispositive issue is whether there is a genuine issue of material fact as to the impartiality of the Board.

It is well established that courts will not interfere with the internal affairs of voluntary associations. 6 Am. Jur. 2d *Associations and Clubs* § 37 (1963). A court, therefore, will not "determine, as a matter of its own judgment, whether [a] member should have been suspended or expelled." *Id.* A decision of a voluntary association to suspend or expel a member, however, is subject to judicial review to determine whether: (1) the proceeding was conducted pursuant to the rules and laws of the association; (2) the rules and laws of the association are against public policy; and (3) the member had fair notice and a hearing conducted in good faith before an impartial tribunal at which she had an opportunity to be heard. *Id.*; Sydney R.

Wrightington, *The Law of Unincorporated Associations* § 56 (1916). In other words, a member of a voluntary association has no recourse to the courts when she is suspended or expelled by the association, if that association is vested with authority to take such action, such action is not against public policy, and such action is pursuant to fair notice and a hearing conducted in good faith before an impartial tribunal. *See Lowery v. Int'l Bhd. of Boilermakers*, 130 So. 2d 831, 839 (Miss. 1961).

[1] In this case, Plaintiff's primary contention[2] is that it did not receive a hearing before an impartial tribunal. In support of this argument, Plaintiff points to the Grimes affidavit. In this affidavit, Grimes asserts that Eggleston told him "many members" of the Board "were very upset" with his clients[3] and if the matter was not resolved "the Board would subject [them][4] to the maximum monetary fine and expulsion." We believe this evidence, if admissible, raises a genuine issue of material fact as to whether the Board was impartial. Members of a hearing tribunal must be in an "impartial frame of mind at beginning of trial," must be "influenced [only] by legal and competent evidence produced during the trial," and must base their "verdict [only] upon evidence connecting" a party with the commission of the offense charged. *Black's Law Dictionary* 752 (6th ed. 1990) (defining "impartial jury"). Statements made prior to the hearing that some members of the Board were upset with Plaintiff or were inclined to subject it to the maximum penalties are an indication that those Board members were not in an impartial frame of mind at beginning of trial, and were influenced by something other than evidence produced during the hearing.

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2. Plaintiff also argues in its brief to this Court that the hearing before the Board was not in keeping with the mandates of the rules of the Board, in that it did not receive a sufficiently specific notice of the charges, it was denied an opportunity to cross-examine witnesses at the hearing, and the hearing committee did not sign the Certificate of Qualification. We do not address these contentions because the rules of the Board are not a part of the record before this Court and thus cannot be relied on by Plaintiff to support its claims.

3. At the time of this alleged conversation there is no dispute that Grimes represented both Plaintiff and Mrs. Wilson.

4. Although the Grimes affidavit only states the Board would "subject Mrs. Billie Wilson" to the maximum penalties, because the Board consolidated complaints against Plaintiff, Mr. Wilson, and Mrs. Wilson into one hearing, a reasonable juror could conclude that any comments with respect to Mrs. Wilson applied to the other parties as well. In any event, a determination that the Board was not impartial with respect to one party could support the conclusion that it was not impartial to other parties in the same proceeding.

The Board contends the Grimes affidavit is not admissible for several reasons. The Board first argues that evidence of a conversation between Grimes and Eggleston, as reflected in the Grimes affidavit, is inadmissible under Rule 408 of the Rules of Evidence. We disagree. Rule 408 does prohibit the presentation into evidence of "conduct or . . . statements made in compromise negotiations," to prove liability for a claim, invalidity of a claim, or amount of a claim. N.C.G.S. § 8C-1, Rule 408 (1992). This Rule, however, does not prohibit the presentation of evidence of statements made in compromise negotiations, if offered for some other purpose. *Id.*; *Renner v. Hawk*, 125 N.C. App. 483, 492-93, 481 S.E.2d 370, 375-76 (statement made by attorney during compromise discussion admissible to support Rule 11 violation), *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997). In this case, assuming Eggleston's statements were made in the context of settlement negotiations, Plaintiff does not offer them to prove its innocence of the charges against it before the Board, but instead to support a distinct and separate claim for damages on the ground that it was denied a fair hearing by the Board.

[2] The Board next argues the evidence contained in the Grimes affidavit constitutes hearsay and is thus inadmissible because it is a recantation of what unidentified members of the Board told Eggleston. We disagree. Under Rule 801(d), a statement made by an agent of a party relating an out-of-court statement made by that party is admissible against that party if the statement concerns a matter within the scope of the agency and was made during the existence of the agency relationship. N.C.G.S. § 8C-1, Rule 801(d) (1992). In this case, there is no dispute that Eggleston represented the Board in its negotiations with Plaintiff and that his statements to Grimes were made within the context and scope of that representation. It follows that the Grimes affidavit is admissible under Rule 801(d).

Finally, the Board argues the Grimes affidavit is inadmissible because Judge Allen had earlier ruled it inadmissible and Plaintiff never appealed from that ruling. Although the record in this case contains an order entered by Judge Allen denying Plaintiff's motion to disqualify Eggleston, nowhere in that order (or in the record) is there any evidence that Judge Allen ruled the Grimes affidavit inadmissible. Accordingly, we reject this argument.

Plaintiff also asserted claims for conspiracy in restraint of trade and unfair and deceptive trade practices, and argues in support of these claims in its brief to this Court. After careful review of the evi-

dence submitted in support of these claims, we hold that genuine issues of material fact simply are not presented. The trial court thus correctly entered summary judgment on these claims for the Board.[5] *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 351 (1985) (summary judgment proper where no genuine issue of material fact is presented by the evidence).

We also reject the Board's cross-assignments of error, as the issues it attempts to raise by cross-assignment may only be raised by cross-appeal. *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 588, 397 S.E.2d 358, 361 (1990). A cross-assignment of error relates to rulings of the trial court that "deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal was taken." N.C.R. App. P. 10(d). The issues the Board seeks to raise here, the dismissal of its "wrongful civil proceeding" claim and the denial of its request for attorney's fees, do not serve as an alternative basis for supporting the trial court's order granting summary judgment on Plaintiff's claims.

Accordingly, summary judgment for the Board on Plaintiff's claim for breach of "good faith and fair dealing" is reversed and remanded. Summary judgment for the Board on Plaintiff's remaining claims is affirmed.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and MARTIN concur.

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5. Plaintiff also alleged claims based on "breach of fiduciary duty" and violation of the due process provisions of the North Carolina Constitution, article I, section 19. Neither of these claims are argued in the brief and therefore are deemed abandoned. *See* N.C.R. App. P. 28. We do note, however, that because the grievance procedure before this voluntary association did not involve state action, the constitution is not implicated. *See State v. Avent*, 253 N.C. 580, 118 S.E.2d 47 (1961), *vacated on other grounds*, 373 U.S. 375, 10 L. Ed. 2d 420 (1963).

IN THE MATTER OF: THE APPEAL OF PHOENIX LIMITED PARTNERSHIP OF RALEIGH FROM THE DECISION OF THE WAKE COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF CERTAIN REAL PROPERTY FOR THE TAX YEAR 1993

No. COA98-752

(Filed 3 August 1999)

1. Taxation— bankruptcy—stigma not on property

The Tax Commission did not err in its 1993 valuation of the taxpayer's property at $28,150,000 even though the taxpayer bought the property for $18,520,000 after the previous owner filed for Chapter 11 bankruptcy. The mismanagement of property by a business owner is not a proper reason to lower the property's value and any stigma resulting from the previous property owner's business failure and subsequent bankruptcy taints the prior owner, not the property.

2. Taxation— bankruptcy—actual sale price not true value

The Tax Commission did not err in failing to adopt the actual sale price of the property as its true value in money because the circumstances of this transaction, a bankruptcy sale, reveal the sale was not an arm's length transaction between a willing buyer and a willing seller.

Appeal by taxpayer from final decision entered 24 November 1997 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 23 February 1999.

C.B. McLean, Jr., for taxpayer-appellant.

Wake County Attorney's Office, by Assistant Wake County Attorney Shelley T. Eason, for appellee.

LEWIS, Judge.

Appellant Phoenix Limited Partnership ("taxpayer") disputes the 1993 tax valuation of its property, a 29-story office tower known as Two Hannover Square and an adjacent three-story galleria, situated on 0.6221 acres of land in downtown Raleigh (collectively, "the property"). The property's initial 1993 valuation was $40,755,536, but this figure was reduced to $31,768,902 upon taxpayer's appeal to the Wake County Board of Equalization and Review ("the Board"). Taxpayer appealed this decision to the North Carolina Property Tax Commission ("the Commission"), which lowered the figure further to

$28,150,000. Seeking an even lower valuation, taxpayer now appeals to this Court.

There is no dispute that 1 January 1993 is the critical date for valuation purposes in this case. *See* N.C. Gen. Stat. § 105-285(d) (1997). In September of 1992, the owner of the property had filed for bankruptcy protection under Chapter 11. By the beginning of 1993, the property was no more than two years old and had but nineteen percent (19%) occupancy. The U.S. Bankruptcy Court approved the sale of the property to taxpayer in February of 1993 for $18,520,000. Taxpayer's central argument is that this figure more accurately reflects the value of the property than the $28,150,000 figure adopted by the Commission.

The Commission heard testimony from a number of witnesses using different valuation methods to arrive at possible values of the property. Ultimately, the Commission adopted the $28,150,000 value computed under a direct capitalization approach by J. Thomas Hester ("Hester"), an expert witness for Wake County. Taxpayer's first argument on appeal is a three-part contention that the Commission erred in adopting this value without correcting alleged factual and legal errors affecting Hester's computation.

We must first address this Court's standard of review for decisions of the Commission. Our statutes make the following provisions:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (1997). We make these determinations in light of the whole record, with due account taken of the rule of prejudicial error. N.C. Gen. Stat. § 105-345.2(c) (1997).

Taxpayer first notes that Hester presented two variations of the income approach in his appraisal: the direct capitalization approach, yielding a value of $28,150,000, and the discounted cash flow method, yielding a value of $29,790,000. The Commission adopted the former approach, despite Hester's testimony that it was less preferable than the latter. There is evidence to support each of these figures, and taxpayer's bare assertion that adopting the appraiser's disfavored method constitutes error is without merit. In light of our standard of review, we do not find this to be reversible error.

In the second part of its first argument, taxpayer claims the Commission failed to correct errors in Hester's testimony identified in a report by Martin & Associates, experts hired by taxpayer. Taxpayer cites no case law, statutes, or appraisal guidelines in support of its argument; instead, we are asked to reverse the Commission to resolve a disagreement between appraisers hired by adversarial parties. This we decline to do. The Commission was in a far better position to weigh the credibility of the witnesses and their methods, and we defer to its judgment. The testimony of both Hester and members of Martin & Associates had support in the record, and "[i]n the absence of case law to the contrary, we cannot say that the Commission erred in adopting the position of certain experts over that of others." *In re Appeal of Westinghouse Electric Corp.*, 93 N.C. App. 710, 716, 379 S.E.2d 37, 40 (1989).

The third part of taxpayer's first argument is that Hester ignored the "stigma" of bad business decisions and bankruptcy on the property in determining its appraisal value. The issue of this purported stigma is raised again in taxpayer's third main argument on appeal, that "the Commission erred by failing to consider the stigma affecting the property as required by N.C. Gen. Stat. § 105-317." Addressing these arguments together, we find them without merit.

Persons appraising a building have a statutorily imposed duty "to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other

uses; past income; probable future income; and any other factors that may affect its value." N.C. Gen. Stat. § 105-317(a)(2) (1997). Taxpayer claims the stigma of bankruptcy haunts this property and is a factor that affects its value, thus falling under the purview of G.S. § 105-317(a)(2). Taxpayer contends in its brief that Hester "offer[ed] his opinion that the stigma should not be considered in appraising the fee simple value of the property," citing the following exchange in the transcript:

> Q. Okay. But is it your opinion that this stigma is not a factor that should be considered in arriving at your estimate of value as of 1/1 of '93?
>
> A Well, I think technically speaking, if we're going to look at fee simple we would look at this building without the stigma, outside the stigma. *I can't say that that's what I've done. I think it's in there.*

(emphasis added). It appears to us from this testimony, then, that although Hester may have preferred to avoid considering the stigma of bankruptcy, he nevertheless considered it in his analysis. Hester cannot be faulted for failing to express in his testimony exactly how such a stigma can be quantified in light of the highly speculative nature of such an ethereal concept. Taxpayer's contention that Hester ignored the impact of any stigma on the property is without merit.

[1] Taxpayer directs us to no case in this state, and we have found none, which indicates that mismanagement of property by a business owner is a proper reason to lower the property's tax value. We agree with Wake County that "any stigma resulting from the property owner's business failure and subsequent bankruptcy taints the owner, not the property." The focus of G.S. § 105-317(a)(2) is on the property itself and not the business acumen of the parties involved in the development of the property. Taxpayer's attempts to analogize this situation to the stigma of environmental contamination in *In re Appeal of Camel City Laundry Co.*, 115 N.C. App. 469, 444 S.E.2d 689 (1994) and *In re Appeal of Camel City Laundry Co.*, 123 N.C. App. 210, 472 S.E.2d 402 (1996), *disc. review denied*, 345 N.C. 342, 483 S.E.2d 162 (1997), fail. Those cases involved real property affected by subsurface soil and groundwater contamination, rendering the property difficult to sell. Here, the issue of bankruptcy is clearly distinguishable, as it reflects mismanagement and has no bearing on the safety of or the cost to clean up the premises. By declining to further reduce the tax value of this property even lower than it did to reflect

the stigma of bankruptcy, the Commission wisely refused to set a standard of "penaliz[ing] the competent and diligent" by "reward[ing] the incompetent or indolent." *See In re Appeal of Greensboro Office Partnership*, 72 N.C. App. 635, 640, 325 S.E.2d 24, 26 (quoting *In re Pine Raleigh Corp.*, 258 N.C. 398, 403, 128 S.E.2d 855, 859 (1963)), *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). Furthermore, taxpayer's testimony at oral argument that the property is currently better occupied than it was before it became the subject of bankruptcy proceedings, when there could have been no stigma of bankruptcy, indicates to us that any stigma attached to the property is fading with time and good management.

[2] Taxpayer's second main argument on appeal is that the Commission erred by failing to adopt the actual sale price of the property as its true value in money on 1 January 1993. Taxpayer contends the sale of this property met the statutory requirements set out below:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands *between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell* and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283 (1997) (emphasis added). The Commission indicated in its findings of fact that the circumstances of this case precluded the sale of the property to taxpayer from establishing the fair market value of the property. Based on our review of the whole record, we agree with the Commission.

Taxpayer contends in its brief that this was "an arm's length sale between a willing and financially able buyer and a willing seller, neither under any compulsion to buy or to sell," just two pages after arguing that there was a stigma on the property because it "ha[d] been so poorly received by the marketplace that the owner [was] forced into bankruptcy filing . . . ." These assertions are inherently contradictory. Furthermore, evidence before the Commission supported Hester's testimony that this bankruptcy sale was not an arm's length transaction. Interest on fully secured claims was accruing at a rate of

$1,000 a day and the Carolina Power and Light Company was threatening to disconnect power on the property. Time was of the essence in the sale, and the buyer was required to provide full consideration entirely in cash. A bid higher than taxpayer's was made but rejected because the debtor would have had to seek additional financing if the process was delayed even two weeks while the new bid was confirmed. While we need not reach the question of whether a sale in a Chapter 11 bankruptcy proceeding is ever an arm's length transaction, it seems clear to us under the facts and circumstances of this transaction that this sale was not between a willing buyer and a willing seller as contemplated by the statute and therefore was not indicative of the property's true value in money under G.S. § 105-283. As such, the Commission did not err by reviewing the opinions of appraisers when determining the value of the property.

Taxpayer's final argument is a general contention that the Commission's decision to value the property at $28,150,000 "is in violation of constitutional provisions or affected by errors of law or unsupported by competent, material, and substantial evidence in view of the entire record as submitted or arbitrary or capricious." In light of our review of the whole record under the provisions of our statutes and the analysis set out above, we find this argument without merit.

Affirmed.

Judges GREENE and HORTON concur.

STATE OF NORTH CAROLINA v. CAREY DEVON WASHINGTON

No. COA98-792

(Filed 3 August 1999)

1. Appeal and Error— appealability—denial of a motion to suppress

Defendant had a right to appeal pursuant to N.C.G.S. § 15A-979 from a final order denying his motion to suppress evidence taken from a conviction entered upon his guilty plea.

2. Search and Seizure— warrantless search—curtilage—expectation of privacy

The Fourth Amendment does not prohibit the warrantless search and seizure of garbage after it has been collected by the garbage collector and given to the police, even if defendant left it in the curtilage of his home.

3. Search and Seizure— expectation of privacy—garbage

The factors to be considered in determining whether there is an objectively reasonable expectation of privacy in one's garbage barring a search and seizure by the police are: (1) the location of the garbage; (2) the extent to which the garbage is exposed to the public or out of the public's view; and (3) whether the garbage was placed for pickup by a collection service and actually picked up by the collection service before being turned over to the police.

4. Search and Seizure— motion to suppress—expectation of privacy—garbage

The trial court did not err in denying defendant's motion to suppress evidence of traces of marijuana and cocaine in his trash bags because the warrantless search and seizure of his trash bags did not violate his expectation of privacy and was not an unreasonable search and seizure. Defendant's act of leaving his garbage in a communal dumpster 125 to 150 feet from his residence in his apartment complex manifested his intent to convey the garbage to the waste management service listed on the dumpster, who effectively collected his garbage. Further, the communal dumpster was not within defendant's curtilage and he therefore retained no legitimate expectation of privacy in his garbage once he placed it in the dumpster.

Appeal by defendant from an order entered 23 January 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 1 April 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General William P. Hart and Agency Legal Specialist M. Kevin Smith, for the State.

John T. Hall for defendant-appellant.

HUNTER, Judge.

Defendant appeals the denial of his motion to suppress evidence. Due to the nature of this case, a thorough review of the facts is necessary.

The record reveals that Detective G. M. Smith of the Raleigh Police Department received information from an unknown informant through a "hot line" telephone tip on 10 March 1996 that a man known only as "D" was selling drugs. The informant gave a detailed physical description of "D" and reported that he lived in an apartment at 3903-A Marcom Street in Raleigh. Thereafter, Detective Smith began surveillance of the apartment and, on 29 March 1996, he observed a person matching the informant's description of "D" take two white plastic bags, tied closed with yellow strips, across the parking lot to the communal apartment complex dumpster. The dumpster was approximately 125 to 150 feet from "D's" apartment, and had the name of a waste management service on its side. "D" left the trash bags in the dumpster and returned to his apartment. Detective Smith immediately retrieved the bags from the dumpster and took them to the Raleigh Police Station, where he searched them without a warrant, finding small amounts of marijuana and cocaine. He then applied for and obtained a search warrant for "D's" apartment only. The search warrant was executed on a form approved by the Administrative Office of the Courts and contained the officer's affidavit of the property to be seized, the place to be searched and the basis for probable cause.

The next morning, Detective Smith returned to 3903-A Marcom Street. Prior to serving the warrant, he observed defendant, who was determined to be "D," exiting the apartment to walk a short distance on foot. Raleigh Police Detective Broadhurst approached the defendant and escorted him back to speak with Detective Smith concerning service of the warrant. The warrant was served on defendant, and the detectives entered the apartment.

The search of the apartment yielded plastic bags containing 7.4 grams and 168 grams of powder cocaine which was found in the defendant's closet under "lift out" tennis shoe soles. Detectives also seized digital scales, a small amount of marijuana, and $2,045.00 cash.

Defendant was thereupon placed under arrest. The search incident to arrest yielded 219 additional grams of cocaine concealed in the shoes defendant was wearing at the time.

[1] The Wake County Grand Jury indicted defendant with trafficking in cocaine by possession and maintaining a dwelling for keeping and selling controlled substances on 21 October 1996. On 10 February 1997, defendant was indicted for trafficking in cocaine by possession and trafficking in cocaine by transportation. All four indictments arose from events which occurred 30 March 1996. On 27 November 1996, defendant filed a motion to suppress drug evidence seized pursuant to a search warrant executed at his premises. The trial court conducted a *voir dire* after which it entered extensive findings and conclusions in upholding the search and admitting the evidence obtained. Following the trial court's denial of his motion to suppress, the defendant, on 1 April 1997, entered a plea of guilty to the charges against him with the condition that "defendant may appeal the denial of his motion to suppress." Pursuant to a plea agreement between defendant and the State, the trial court consolidated the cases for judgment and sentenced defendant to imprisonment for a minimum of seventy months and a maximum of eighty-four months and to pay a fine of $100,000.00. Defendant appeals pursuant to the plea agreement. Defendant's appeal is properly before this Court pursuant to N.C. Gen. Stat. § 15A-979 (1997), which states that an appeal from a final order denying a motion to suppress evidence may be taken from a judgment of conviction, including a judgment entered upon a plea of guilty.

Defendant first contends that the trial court committed reversible error in denying his motion to suppress because the seizure and search of the white plastic trash bags placed by defendant in a communal dumpster violated his expectation of privacy and was an unreasonable search and seizure; therefore, all evidence obtained pursuant to that search and subsequent warrant should be suppressed.

[2] In *State v. Hauser*, 342 N.C. 382, 464 S.E.2d 443 (1995), the North Carolina Supreme Court held that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage after it has been collected by the garbage collector and given to the police, although defendant left it for collection in the curtilage of his home. Curtilage is defined as "the area around the home to which the activity of home life extends." *Oliver v. United States*, 466 U.S. 170, 182, 80 L. Ed. 2d 214, 226, n. 12 (1984). "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of the home itself for Fourth Amendment pur-

poses." *Id.* at 180, 80 L. Ed. 2d at 225 (citation omitted). The United States Supreme Court has further defined the curtilage of a private house as "a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 90 L. Ed. 2d 226, 235 (1986).

[3] In *Hauser*, a detective was conducting a drug investigation and made arrangements with a sanitation worker to collect defendant's garbage from defendant's property in the usual fashion and then turn it over to the police. The sanitation worker agreed to keep it separate from other garbage, ensuring that it was positively identified when given to the police. The search of the garbage yielded cocaine residue, and this information was used as the basis for obtaining a search warrant that ultimately led to the defendant's arrest. In *Hauser*, this Court stated the factors which must be considered in determining whether there is an objectively reasonable expectation of privacy are: (1) the location of the garbage, (2) the extent to which the garbage is exposed to the public or out of the public's view, and (3) "whether the garbage was placed for pickup by a collection service and actually picked up by the collection service before being turned over to the police." *Hauser* at 386, 464 S.E.2d at 446. Focusing on these factors, the Court stated:

> While the defendant may have retained some expectation of privacy in garbage placed in his backyard out of the public's view, so as to bar search and seizure by the police themselves entering his property, a different result is dictated when the garbage is collected in its routine manner. The clear intention to convey the garbage to a third party, so as to allow the trash collector to make such use and disposal of it as he desires, is a factor which merits substantial weight in considering any expectation of privacy. Under these conditions, we are persuaded that the defendant retained no legitimate expectation of privacy in his garbage once it left his yard in the usual manner.

Hauser, 342 N.C. at 388, 464 S.E.2d at 447. In making this determination, the Court relied on the holding of *California v. Greenwood*, 486 U.S. 35, 100 L. Ed. 2d 30 (1988). The Court stated that the warrantless search of garbage by police only violates the Fourth Amendment if the defendant manifested a subjective expectation of privacy in the garbage, an expectation which society would be willing to accept as objectively reasonable.

[4] In the present case, defendant left his garbage in a communal dumpster in the apartment complex where he resided. While the dumpster was for the use of certain residents, it was not defendant's private property, was located approximately 125 to 150 feet from his residence and was accessible to other apartment dwellers and passers-by. The dumpster may not have been in public view but defendant has presented no evidence that public access to the dumpster was restricted. It is clear that like the defendant in *Hauser*, defendant in the case *sub judice* had the intention to convey the garbage to a third party when he abandoned the trash bags in the communal dumpster. At that point, the waste management service whose name was on the dumpster had effectively "collected" the garbage. Based on the factors outlined in *Hauser*, we hold that the communal dumpster was not within the curtilage of defendant and he therefore retained no legitimate expectation of privacy in his garbage once he placed it in said dumpster. Therefore, the warrantless search of the dumpster did not violate the Fourth Amendment of the United States Constitution or Article I, Section 20 of the North Carolina Constitution and the motion to suppress was properly denied by the trial court.

Defendant next assigns error to the trial court's denial of his motion to suppress evidence on the basis that the application for the search warrant was deficient under N.C. Gen. Stat. § 15A-244(3) (1997) in failing to particularly set forth the facts and circumstances establishing probable cause, that the warrant was therefore not issued upon a proper finding of probable cause as required by N.C. Gen. Stat. § 15A-245(b) (1997), and that the warrant in question was a "general warrant" prohibited under Article I, Section 20 of the North Carolina Constitution.

The scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal. *Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991). In order to preserve a question for appellate review, defendant must have: (1) presented to the trial court by his motion the specific grounds for the ruling desired; (2) obtained a ruling on the specific grounds, N.C.R. App. P. 10(b); and, (3) stated plainly and concisely in his assignment of error the legal basis for which the error is assigned, N.C.R. App. P. 10(c). The record reflects that at the time defendant entered his plea, he only wished to preserve his right to appeal the denial of the motion to suppress on the grounds of unreasonable search and seizure, which we have previously analyzed. The transcripts reveal that defendant's

claims in his second assignment of error were not presented to the trial court, and it consequently did not rule on these issues. The appellate courts will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal. *State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991). Further, defendant has not specifically and distinctly contended that any of the foregoing amounts to "plain error" and therefore they may not be made the basis of an assignment of error under Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure. Defendant has waived plain error review by failing to allege in his assignment of error that the trial court committed plain error. *State v. Truesdale*, 340 N.C. 229, 456 S.E.2d 299 (1995). Based upon the foregoing, defendant's second assignment of error is not properly before this Court and is therefore dismissed.

Affirmed.

Judges WYNN and WALKER concur.

JAMES M. LITTLE, PLAINTIFF v. WILLIAM B. HAMEL, INDIVIDUALLY AND HELMS, CANNON, HAMEL, AND HENDERSON, A PROFESSIONAL ASSOCIATION, JOINTLY AND SEVERALLY, DEFENDANTS

No. COA98-1110

(Filed 3 August 1999)

1. Appeal and Error— appealability—summary judgment—res judicata—substantial right

The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and entitles a party to an immediate appeal.

2. Collateral estoppel and res judicata— claims precluded—issues precluded

Res judicata precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction. A judgment operates as an estoppel not only as to all matters actually determined or litigated in the proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exer-

cise of reasonable diligence, could and should have brought forward for determination.

3. Collateral estoppel and res judicata— new or different grounds for relief—malpractice—fraud

The trial court erred by failing to grant summary judgment for defendants based on the doctrine of res judicata. Plaintiff's first action alleged legal malpractice and his second action alleged fraud because defendants failed to inform him that he had no claim in his discrimination lawsuit. Except in special circumstances, res judicata may not be avoided by shifting legal theories or by asserting a new or different ground for relief because a party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery. While fraud may not be in the nature of legal malpractice under the relevant statute of limitations, the substance of the two claims in the instant case are so intertwined that they are essentially the same claim under different legal theories.

Appeal by defendants from judgment entered 9 July 1998 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 April 1999.

Jerry D. Jordan for plaintiff-appellee.

Poyner & Spruill, L.L.P., by E. Fitzgerald Parnell, III and Parmele P. Calame, for defendant-appellants.

HUNTER, Judge.

James M. Little ("plaintiff") is a former employee of the United States Postal Service ("Postal Service"). In February 1993, some time after retiring from his position, plaintiff retained defendant Helms, Cannon, Hamel and Henderson ("Helms Cannon") to represent him in the prosecution of a discrimination and a retaliation claim against the Postal Service. On behalf of plaintiff, Helms Cannon filed a lawsuit ("discrimination lawsuit") on 12 March 1993 in the United States District Court for the Western District of North Carolina alleging that the Postal Service "conspir[ed] to harass, discriminate, and retaliate against [him] in order to deprive [him] of his civil rights, to frustrate [him] in his job and render [him] totally ineffective, to undermine [his] authority, and to prevent [his] advancement in the Postal Service, and destroy [his] career with the Postal Service." The discrimination lawsuit was dismissed pursuant to defendants' motion on

27 June 1994 in a memorandum of decision and order by United States District Court Judge Robert D. Potter, on the grounds that it was barred by the relevant statute of limitations and the doctrine of sovereign immunity.

Plaintiff filed a lawsuit ("Case I") against Helms Cannon on 25 July 1996 in which he alleged that it was negligent in its representation of him in the discrimination lawsuit. Helms Cannon was granted summary judgment on 18 September 1997, and the plaintiff did not appeal.

Plaintiff filed the present case ("Case II") on 22 September 1997 jointly and severally against William B. Hamel, an attorney with Helms Cannon, and Helms Cannon (collectively "defendants"), alleging they committed fraud by failing to inform plaintiff that he had no claim in the discrimination lawsuit under the relevant statute of limitations and the doctrine of sovereign immunity. Defendants' motion for summary judgment was denied by Judge Downs on 9 July 1998. Defendants appeal.

Defendants contend that the trial court committed error by failing to grant summary judgment based on the doctrine of *res judicata*.

[1] The denial of a motion for summary judgment is not immediately appealable unless it affects a substantial right. N.C. Gen. Stat. § 7A-27 (1995). The denial of a motion for summary judgment on the basis of *res judicata* affects a substantial right and thus, entitles a party to an immediate appeal. *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993). Therefore, defendants' appeal is properly before this Court.

[2] The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are companion doctrines which have been developed by the Courts "for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161. *Res judicata* precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction. *Northwestern Financial Group v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692-93 (1993). A judgment operates as an estoppel not only as to all matters actually determined or litigated in the proceeding, "but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise

of reasonable diligence, could and should have brought forward for determination." *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985).

[3] In the present case, this Court must determine if the judgment in Case I precludes the present case. It is clear that Case I was brought before a court of competent jurisdiction and that a final judgment on the merits was obtained by the entry of summary judgment. It is also clear that identical parties are involved. Case I was brought by the plaintiff against Helms Cannon. There is a difference in the present case in that William B. Hamel is a defendant; however, Hamel is quite obviously in "privity with" Helms Cannon since he is an attorney with the firm (and was at the time Case I was filed) and the suit concerns his representation of the plaintiff. Therefore, the only issue before this Court is whether or not the plaintiff has brought the same claim herein as he brought in Case I and, if not, whether the claim being brought here could and should have been brought in Case I.

Plaintiff filed Case I alleging malpractice by defendant law firm in the discrimination lawsuit. Therefore, using reasonable diligence, the law firm should have brought forth any claim relating to defendants' representation of plaintiff in the discrimination lawsuit. Nevertheless, plaintiff has filed the present case based on defendants' alleged fraud related to the discrimination lawsuit, asserting that because fraud and malpractice are separate and distinct causes of action for purposes of statute of limitations, *Sharpe v. Teague*, 113 N.C. App. 589, 439 S.E.2d 792 (1994), they are therefore separate and distinct for purposes of *res judicata*.

In *Sharpe*, plaintiff sued defendant law firm for negligence, breach of contract, fraud and breach of fiduciary duty. Defendant contended that all actions were in the nature of legal malpractice and therefore one statute of limitations applied. This Court disagreed, stating: "[f]raud by an attorney . . . is not within the scope of 'professional services' as that term is used in N.C. Gen. Stat. § 1-15(c), and thus cannot be 'malpractice' within the meaning of the statute." *Sharpe* at 592, 439 S.E.2d at 794.

While fraud may not be in the nature of legal malpractice under the relevant statute of limitations, the causes of action in *Sharpe* were all based on the same relevant facts, i.e., the defendants' representation of the plaintiff. The plaintiff in *Sharpe* brought all claims related to defendants' representation of her within the same suit. This Court has held:

> A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen the subject of the arbitration or litigation with respect to matters which might have been brought forward in the previous proceeding.

Rodgers, 76 N.C. App. at 23, 331 S.E.2d at 730. "The defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief." *Id.* at 30, 331 S.E.2d at 735.

In his complaint in the present case, plaintiff addresses defendants' alleged fraud as inducing him to pay the defendants a retainer and incur costs and expenses as a result of the representation of him. He also claims that defendants "ignored the existence of barriers to successful litigation" in their prior representation of him. It is obvious that the substance of the present claims are so intertwined with a cause of action for legal malpractice that they are, essentially, the same claim under different legal theories. The present claims would also have been material and relevant to the claims in Case I.

Even if defendants concealed from plaintiff that certain rules barred his discrimination lawsuit, plaintiff was informed of their applicability to that suit and therefore the potential fraud of defendants by the order of the United States District Court dismissing the case on 27 June 1994. Plaintiff cannot deny notice of the order since he referenced and included it as an exhibit to his complaint in Case I. Therefore, his assertion that he did not have knowledge of the potential fraud at the time Case I was adjudicated is unconvincing.

Plaintiff, with knowledge at the time Case I was adjudicated of all potential claims stemming from defendants' representation of him, has failed to show any special circumstances warranting an exception to the *Rodgers* rule of *res judicata*. We therefore hold that plaintiff's cause of action is barred. Accordingly, we reverse and remand to the trial court to enter an order granting summary judgment to defendants.

Reversed and remanded.

Judges WYNN and WALKER concur.

CARL L. PERKINS, EMPLOYEE, PLAINTIFF v. ARKANSAS TRUCKING SERVICES, INC., EMPLOYER; SELF-INSURED (GUARDIAN NATIONAL INSURANCE COMPANY), DEFENDANTS

No. COA98-1114

(Filed 3 August 1999)

1. Workers' Compensation— jurisdiction—out-of-state accident

The North Carolina Industrial Commission is vested with jurisdiction for accidents taking place outside of the state only if: (1) the contract of employment was made in this State; (2) the employer's principal place of business is in this State; or (3) the employee's principal place of employment is within this State.

2. Workers' Compensation— competent evidence—principal place of employment

There was competent evidence in the record supporting the Commission's finding that plaintiff's principal place of employment was in North Carolina because: (1) plaintiff's residence was in North Carolina; (2) he conducted all aspects of his business in North Carolina, including receipt of assignments, storage and maintenance of his employer's truck when plaintiff was not on the road, and receipt of payments; and (3) each of his assignments started and ended in North Carolina.

3. Workers' Compensation— improper attempt to limit rights

Although employer had plaintiff sign a form purporting to limit plaintiff's right to compensation in any state other than Arkansas, N.C.G.S. § 97-6 specifically invalidates an attempt by an employer to relieve itself of responsibility under the North Carolina Workers' Compensation Act.

Appeal by defendants from an opinion and award of the North Carolina Industrial Commission filed 9 June 1998. Heard in the Court of Appeals 12 May 1999.

Jonathan S. Williams, P.C., by Jonathan S. Williams, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, L.L.P., by Dayle A. Flammia and Michael P. Williams, for defendant-appellants.

HUNTER, Judge.

This workers' compensation case arises from proceedings before the North Carolina Industrial Commission where plaintiff alleged he was injured on 8 March 1994 in a motor vehicle accident in the course and scope of his employment with Arkansas Trucking Services, Inc. ("Arkansas Trucking"). The accident occurred on I-95 in Florence, South Carolina. Plaintiff filed a worker's compensation claim with his employer which was denied. The initial hearing on 23 April 1996 before Deputy Commissioner Shuping was limited to whether the North Carolina Industrial Commission had jurisdiction under N.C. Gen. Stat. § 97-36. In an interlocutory opinion and award filed 8 May 1996, the deputy commissioner concluded that plaintiff's principal place of employment was in North Carolina and the Industrial Commission had jurisdiction over the claim. On 30 October 1996, the matter was reheard by Deputy Commissioner Shuping for a determination of the compensable consequences.

At the hearing, plaintiff's uncontroverted evidence indicated he had been severely injured in the accident occurring on 8 March 1994 and had been treated extensively. In an opinion and award filed 30 April 1997, the deputy commissioner concluded that plaintiff is and has remained totally disabled and unable to earn any wages in any capacity and is entitled to compensation of $417.75 per week from 8 March 1994 "to the scheduled hearing date and thereafter continuing at the same rate so long as he remains totally disabled, subject to a change of condition, medical or employment." Defendants appealed and the Full Commission affirmed the award and adopted both the interlocutory and final opinions of the deputy commissioner. Defendants appealed to this Court.

[1],[2] Defendants' primary argument is that the Full Commission erred in concluding it had proper jurisdiction in this claim. Jurisdiction vests with the North Carolina Industrial Commission for accidents taking place outside of the state only "(i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State[.]" N.C. Gen. Stat. § 97-36 (1991). Since the Commission's findings of fact are binding on appeal if there is any competent evidence to support them, "our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law." *Beaver v.*

City of Salisbury, 130 N.C. App. 417, 419, 502 S.E.2d 885, 887 (1998), *disc. review improv. allowed*, 350 N.C. 376, 514 S.E.2d 89 (1999). *See also Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, — S.E.2d — (1999). Therefore, the question before us on appeal is whether there is any competent evidence supporting the Commission's finding that plaintiff's principal place of employment is within North Carolina.

The Commission found:

> 5. Plaintiff was assigned to operate out of defendant-employer's southeastern hub in Doraville, Georgia, that controlled the twelve southern states, including North Carolina. The majority of the time during his subsequent employment, plaintiff hauled freight in all those states, but on occasion drove outside them. Defendant-employer did not maintain a terminal in North Carolina, but, rather, dispatched its North Carolina drivers out of the Doraville, Georgia terminal. During business hours, plaintiff would contact his dispatcher at the Doraville terminal by telephone; and, after hours he would contact his dispatcher at his home for any dispatching information. Plaintiff would ordinarily be on the road for two weeks at a time before returning home; and, after two days home, would return to the road. When off the road, plaintiff kept defendant-employer's vehicle at his residence in Dudley [North Carolina] and would be dispatched from there to begin his next route, after calling into his dispatcher at the Doraville, Georgia terminal or at the same dispatcher's home after hours. Because plaintiff did not regularly go to the Doraville, Georgia terminal, his checks were mailed to his residence at home. In order to prevent plaintiff from deadheading (driving one way with an empty truck), defendant-employer always attempted to have him pick up his first load in North Carolina as close to his residence in Dudley as possible, including pick-ups in Kinston, Durham, Roseboro and Charlotte, N.C. Similarly, the defendant-employer attempted to have plaintiff's last drop located in North Carolina as close to plaintiff's home as possible; and, presumptively, defendant-employer had similar arrangements with its other North Carolina drivers. Although plaintiff drove in all the other eleven southern states as well as outside of them occasionally, approximately eighteen-to-twenty percent of his stops were in North Carolina.

Based on these findings, the Commission determined that "plaintiff's principal place of employment was in North Carolina."

Clearly, plaintiff's residence is within North Carolina. Furthermore, he conducted all aspects of his business in North Carolina—receipt of assignments, storage and maintenance of employer's truck when not on the road, receipt of paychecks, etc. Finally, each of his assignments started and ended in North Carolina. While there may have been differing opinions between the parties as to plaintiff's principal place of employment, it was for the Commission to weigh the evidence and to decide the issues. Based on the recent holdings in *Beaver* and *Adams*, we conclude there was sufficient competent evidence in the record to support the Commission's finding that plaintiff's principal place of employment was within North Carolina and its conclusion that the North Carolina Industrial Commission had jurisdiction over this claim.

[3] Additionally we note that, upon being hired by Arkansas Trucking, plaintiff signed a form entitled "Policies, Procedures and Agreement" which purported to limit plaintiff's right to compensation in any state other than Arkansas. N.C. Gen. Stat. § 97-6 specifically invalidates any such attempt by an employer to relieve itself of responsibility under the North Carolina Workers' Compensation Act.

Affirmed.

Judges JOHN and TIMMONS-GOODSON concur.

CORA G. HOWZE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF NATHANIEL HOWZE, DECEASED, PLAINTIFF v. LINDA K. HUGHES, M.D., FAYETTEVILLE FAMILY MEDICAL CARE, P.A., STEPHEN GINN, M.D., CAPE FEAR CARDIOLOGY ASSOCIATES, P.A., AND CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. D/B/A CAPE FEAR VALLEY MEDICAL CENTER/THE HEART CENTER, DEFENDANTS

No. COA98-1607

(Filed 3 August 1999)

1. Appeal and Error— appealability—interlocutory order—certification erroneous

The trial court's attempt to grant Rule 54(b) certification based on the order denying defendants' motions to dismiss fails because the order leaves the issues as to all parties and all claims open for future adjudication by the court.

2. Appeal and Error— appealability—interlocutory order—motion to dismiss denied—no substantial right

Defendants' appeal from the trial court's denial of their motions to dismiss plaintiff's complaint because of lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, and failure to state a claim upon which relief can be granted is based merely on procedural grounds and does not affect their substantial right to due process.

Appeal by defendants Stephen Ginn, M.D., Cape Fear Cardiology Associates, P.A., and Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Medical Center/The Heart Center from order entered 20 October 1998 by Judge William C. Gore, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 12 July 1999.

John Michael Winesette; and Reid, Lewis, Deese, Nance & Person, by James R. Nance, Jr., for plaintiff-appellee.

Walker, Barwick, Clark & Allen, L.L.P., by Gay Parker Stanley, for defendants-appellants Stephen Ginn, M.D. and Cape Fear Cardiology Associates, P.A.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Mark E. Anderson and Christopher J. Derrenbacher, for defendant-appellant Cumberland County Hospital System, Inc., d/b/a/ Cape Fear Valley Medical Center/The Heart Center.

SMITH, Judge.

This action arises out of defendants' medical treatment of plaintiff's decedent, Nathaniel Howze, who died on 25 March 1996. Prior to the expiration of the original two-year statute of limitation, plaintiff moved for an extension of the applicable statute of limitation pursuant to N.C.R. Civ. P. 9(j). By order entered 24 March 1998, plaintiff was allowed an extension up to and including 22 July 1998 within which to commence the instant action. Defendants Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Medical Center/The Heart Center (hereinafter "Medical Center"), Stephen Ginn, M.D., and Cape Fear Cardiology Associates, P.A. (hereinafter "Cardiology Associates") were not named in the motion for extension or the order granting that extension. Further, these defendants were not served with notice of the extension. On 17 July 1998, plaintiff filed this action, individually and in her capacity as Administratrix of the Estate of Nathaniel Howze, against defendants Linda K. Hughes, M.D.,

Fayetteville Family Medical Care, P.A., Ginn, Cardiology Associates, and Medical Center, alleging causes of action for medical malpractice, wrongful death and emotional distress. Defendants subsequently moved to dismiss plaintiff's complaint pursuant to N.C.R. Civ. P. 12(b)(2), (4), (5), (6), and 9(j). These motions were denied, and defendants Medical Center, Cardiology Associates, and Ginn (collectively referred to as "defendants-appellants) appealed to this Court. Thereafter, defendants-appellants obtained Rule 54(b) certification for immediate appellate review.

[1] N.C.R. Civ. P. 54(b) provides,

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. *In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by the rules or other statutes.*

(Emphasis added.) *See also Kirkman v. Wilson*, 86 N.C. App. 561, 564, 358 S.E.2d 550, 552 (1987) (stating that "while Rule 54(b) makes it possible to appeal before an entire case has been adjudicated, it does not authorize the appeal of claims that have not been finally adjudicated[]"). In the instant case, there has been no adjudication as to any claim(s) or part(ies) within the meaning of Rule 54(b). The order denying defendants-appellants' motions to dismiss leaves the issues as to *all* parties and *all* claims open for future adjudication by the court. *See Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 495, 315 S.E.2d 97, 99 (1984) (stating that a denial of a motion to dismiss "simply allows an action to proceed"). Hence, the trial court's attempt at Rule 54(b) certification fails.

[2] We note that in their motion for certification for immediate appeal, defendants Ginn and Cardiology Associates assert that the court's order denying their motion to dismiss affects a substantial right—their right to due process. Further, in light of the "contradictory rulings entered by various Superior Court Judges," defendants

Ginn and Cardiology Associates also assert that "appellate review of the issues presented would be of aid and benefit to the Bar and the Court." We disagree. These assertions have no bearing upon a trial court's certification under N.C.R. Civ. P. 54(b). The right to immediate appellate review under the substantial right doctrine is addressed in G.S. § 1-277(b) (1996).

While this Court has interpreted G.S. § 1-277(b) to allow immediate appellate review when there is a jurisdictional challenge as to the person or property of the defendant(s), *Hart v. F.N. Thompson Const. Co.*, 132 N.C. App. 229, 231, 511 S.E.2d 27, 28 (1999), this right to immediate review is only applicable when the jurisdictional challenge is substantive rather than merely procedural. The difference was explained in *Berger v. Berger*:

> If defendant's motion raises a due process question of whether his contacts within the forum state were sufficient to justify the court's jurisdictional power over him, then the order denying such motion is immediately appealable under G.S. 1-277(b). If, on the other hand, defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b).

67 N.C. App. 591, 595, 313 S.E.2d 825, 828-29 (citations omitted), *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984).

In the present case, defendants-appellants allege that the trial court did not have jurisdiction in the matter because they were not named in the motion requesting nor the order granting plaintiff's motion for extension of time under N.C.R. Civ. P. 9(j), and were not served with a notice of that extension. Therefore, defendants-appellants argue that the extension of the statute of limitations under N.C.R. Civ. P. 9(j) was not effective as to them, and the trial court erred in denying their motions to dismiss for lack of personal jurisdiction pursuant to N.C.R. Civ. P. 12(b)(2), insufficiency of process pursuant to N.C.R. Civ. P. 12(b)(4), insufficiency of service of process pursuant to N.C.R. Civ. P. 12(b)(5), and failure to state a claim upon which relief can be granted pursuant to N.C.R. Civ. P. 12(b)(6).

Although, defendants-appellants argue to the contrary, this case does not present any allegations of due process proportions. Here, defendants base their allegations purely upon procedural

grounds. The order denying defendants-appellants' motions to dismiss, therefore, does not affect a substantial right within the meaning of G.S. § 1-277(b).

As the judgment in the instant case does not finally adjudicate any claim(s) as to any part(ies), the trial court's attempt to certify this matter under Rule 54(b) fails. Further, the order does not affect a substantial right, and is therefore, not immediately appealable under G.S. § 1-277(b). Accordingly, this appeal is dismissed as interlocutory.

Dismissed.

Judges JOHN and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 AUGUST 1999

BARTLETT v. BARTLETT No. 99-73	Alamance (98CVS277)	Appeal dismissed; petition for writ of certiorari denied.
BISHOP v. PERDUE FARMS, INC. No. 98-1230	Ind. Comm. (426409) (579391)	Reversed
DURHAM v. DESSENBERGER No. 98-1020	Durham (96CVS1230)	Affirmed
EASTHAVEN DEV. v. SMITH No. 98-1390	Mecklenburg (97CVD009055)	No Error
EDWARDS v. BUNCOMBE COUNTY DSS No. 99-44	Buncombe (97J257) (97J258)	Affirmed
IN RE DAY No. 98-910	Buncombe (96J308)	Affirmed in part and remanded with instructions
IN RE ESTATE OF HILL No. 98-849	Henderson (97E169)	Affirmed
IN RE GRADY No. 98-1198	Lenoir (97J128) (97J129) (97J130) (97J131)	Affirmed
IN RE ROMINGER No. 99-263	Forsyth (96J91)	Affirmed
MEEKER v. WAGONER No. 99-67	Haywood (97CVD1221)	Dismissed
SESSLER v. MARSH No. 98-1473	Guilford (97CVS7346)	Appeals Dismissed
STATE v. ALLEN No. 99-81	Granville (97CRS3480) (97CRS3500) (97CRS3501) (97CRS3514) (97CRS4436)	No Error
STATE v. CATANZARO No. 99-132	Alleghany (97CRS560)	Vacated and remanded with instructions; costs taxed personally to counsel for defendant

STATE v. CHASTEN No. 99-1	Onslow (97CRS25004) (98CRS9994)	No Error
STATE v. CRAVER No. 98-1614	Davidson (97CRS14916) (97CRS14917) (97CRS14918) (97CRS14919) (97CRS14920) (97CRS14921)	No Error
STATE v. DALTON No. 98-1524	Edgecombe (96CRS4679)	No Error
STATE v. EVERETT No. 99-202	Martin (94CRS2282) (94CRS2283) (94CRS3791) (94CRS513)	No Error
STATE v. FRYAR No. 98-1636	New Hanover (97CRS15848) (97CRS15842) (98CRS1470) (98CRS1471) (98CRS1472)	No Error
STATE v. GARNETTE No. 98-688	Person (97CRS2891) (97CRS2892)	No Error
STATE v. HALEY No. 99-222	Wake (98CRS56468)	No Error
STATE v. HENRY No. 98-1470	Guilford (97CRS71066) (97CRS71067) (97CRS71068)	Affirmed
STATE v. HOLT No. 98-1611	Cumberland (96CRS2778)	Affirmed in part, vacated and remanded in part
STATE v. HUFFMAN No. 99-29	Rowan (98CRS4900) (98CRS4600) (98CRS4601)	No Error
STATE v. LINSLEY No. 98-933	Guilford (97CRS58193)	Dismissed

STATE v. MARTIN No. 99-193	Duplin (97CRS6461) (97CRS6462) (97CRS6464) (97CRS6465) (97CRS6466)	No Error
STATE v. McGEE No. 99-138	Gaston (96CRS36667)	No Error
STATE v. MURPHY No. 98-1612	Onslow (97CRS11837)	Reversed and Remanded
STATE v. NGUYEN No. 98-1518	Guilford (97CRS78575) (97CRS78576) (97CRS81298)	No Error
STATE v. NGUYEN No. 99-89	Guilford (97CRS78266)	No Error
STATE v. O'NEAL No. 98-920	Currituck (97CRS1411) (97CRS1412) (97CRS1969)	No Error
STATE v. ROBINSON No. 99-9	Cumberland (98CVD3560)	Reversed and Remanded
STATE v. RUDD No. 98-753	Craven (96CRS10754)	Vacated and remanded for resentencing
STATE v. SECHRIST No. 98-1507	Davidson (95CRS20934)	No Error
STATE v. SMITH No. 98-1536	Harnett (97CRS1940)	No Error
STATE v. TORAIN No. 98-1140	Alamance (96CRS22465)	No Error
STATE v. WALKER No. 99-83	Guilford (98CRS7514)	No Error
STATE v. WALLS No. 99-21	Wake (96CRS37585) (96CRS37597)	No Error
STATE v. WARD No. 99-228	Wake (97CRS24278)	No Error
STATE v. YOCKEL No. 99-68	Yadkin (97CRS4084)	No Error

TURNER v. CHICK-FIL-A, INC. No. 98-953	Rowan (96CVS297)	Affirmed
WAVERLY BELMAN S.C. SHOPPING CTR. v. ANDREACHI No. 98-488	Wake (96CVS9949)	Affirmed
WHALEY v. GEORGIA-PACIFIC No. 98-876	Ind. Comm. (403184)	Affirmed

VIRGINIA C. LEFTWICH, PLAINTIFF v. LUTHER EUGENE GAINES, MARY ANN WRAY, AND TOWN OF MOUNT AIRY, NORTH CAROLINA, DEFENDANTS

No. COA98-1304

(Filed 17 August 1999)

1. Fraud— sufficiency of evidence—purported opinion—town employee's self-dealing

In an action arising from the purchase of a commercial corner lot by the girlfriend of a town's Chief Building Official, there was sufficient evidence to support a jury's finding that defendant-Gaines' representations to plaintiff concerning a zoning change were knowingly false, contrary to Gaines' actual opinion, made with intent to deceive, and motivated by a plan to obtain strategically important corner property in order to secure benefits for himself and defendant Wray. A statement purporting to be opinion may be the basis for fraud if the maker of the statement holds an opinion contrary to the opinion he or she expresses and the maker intends to deceive the listener.

2. Fraud— sufficiency of evidence—victim deceived

In action arising from the purchase of a commercial corner lot by the girlfriend of a town's Chief Building Official, the evidence that plaintiff was deceived by defendant-Gaines' misrepresentations was sufficient to withstand defendants' motions for directed verdict and j.n.o.v. where plaintiff testified that she became doubtful about purchasing the property because of Gaines' statements.

3. Fraud— damages—town employee's self-dealing—loss of property

There was sufficient evidence of damages to withstand motions for directed verdict and j.n.o.v. in a fraud action against a town and its Building Official where the Official's (Gaines') false representation as to his opinion on zoning was a maneuver calculated to make plaintiff hesitate long enough for his girlfriend (Wray) to purchase the property and the loss of the property thwarted plaintiff's plan to expand her framing business.

4. Damages and Remedies— calculation of amount—fraud—loss of prospective real property purchase—expansion of business

There was sufficient evidence in a fraud action to calculate damages to the required reasonable certainty where plaintiff

alleged that defendants' fraud led to the loss of her opportunity to purchase adjoining property needed for the expansion of her business. A plaintiff may recover loss of bargain damages in a tort action if she establishes that the damages are the natural and probable result of the tortfeasor's misconduct and that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty.

5. Unfair Trade Practices— town employee—acting outside scope of duties

A town's Chief Building Official was not exempt from suit under Chapter 75 where the evidence was sufficient to establish that he was acting outside the scope of his duties when giving plaintiff a false opinion on zoning which allegedly caused her to hesitate and gave defendant's girlfriend the opportunity to buy the property. *Sperry Corp v. Patterson*, 73 N.C. App. 123, and *Golden Rule Insurance Co. v. Long*, 113 N.C. App. 187 protect government officials from actions under N.C.G.S. § 75-1.1 as long as they act as representatives of the State or a political subdivision of the State, but this protection is independent of, and different from, sovereign immunity.

6. Cities and Towns— public duty doctrine—negligent supervision—intentional tort

The public duty doctrine did not apply to an action brought against a town and its Chief Building Official for negligent supervision of the Building Official, who allegedly provided a deliberately misleading opinion on zoning in order to facilitate purchase of certain property by his girlfriend. The public duty doctrine is not incompatible with negligent supervision and is inapplicable where the employee's tort is intentional, as opposed to grossly negligent.

7. Torts, Other— negligent supervision—sufficiency of evidence

There was sufficient evidence of negligent supervision of a Chief Building Official (Gaines) by a town where plaintiff presented evidence that Gaines had previously been involved in buying property that he had discovered in the course of his employment, that the Mayor had reported complaints about earlier activities to the Town Manager and other authorities, that the Town Manager had asked Gaines to stop purchasing property in

the town limits, and that this request was inadequate to cause Gaines to change his ways.

8. Evidence— relevance—action against town employee—mayor's remarks

The trial court did not abuse its discretion in an action for negligent supervision of a town employee by admitting remarks by the mayor about the employee. The remarks were relevant and the court thrice gave a limiting instruction.

9. Evidence— value of property—owner's opinion

The trial court did not err in an action for fraud by admitting plaintiff's opinion as to the value of her property. Plaintiff had experience in real estate and defendants had the opportunity to cross-examine her, present their own evidence as to the value of the property, and to argue the value before the jury.

10. Evidence— action for fraud and negligent supervision—motion in limine to forbid mention of criminal statute—denied

The trial court did not abuse its discretion in an action for fraud and negligent supervision of a town employee by denying defendant's motion in limine to exclude mention of the criminal statute which forbids the use of non-public information by town employees to their benefit. The statute was relevant as evidence of the corrupt and possibly criminal nature of the employee's alleged acts and therefore relevant to support plaintiff's contention of a breach of fiduciary duty.

11. Appeal and Error— preservation of issues—arguments of counsel

Arguments of counsel which were not part of the record were not addressed. N.C. R. App. P. 10(a).

12. Trials— motion for new trial denied—no abuse of discretion

The trial court did not abuse its discretion by denying a motion for a new trial which was based upon whether the jury disregarded the instructions of the trial court, whether damages were excessive and the result of passion or prejudice, whether there was sufficient evidence to justify the verdict, and whether there were errors in law at trial.

13. Unfair Trade Practices— refusal to resolve—attorney fees—findings

The issue of attorney fees was remanded in an unfair trade practices action where the findings were inadequate to support the trial court's conclusion that defendant made an unwarranted refusal to resolve the matter fully.

14. Conspiracy— fraud—circumstantial evidence—sufficient

There was sufficient circumstantial evidence to support a jury's finding that the girlfriend of a town employee conspired with the employee fraudulently to discourage and outbid plaintiff for real property which plaintiff intended to purchase.

Appeal by defendants from judgment entered 9 April 1998 by Judge Clarence W. Carter in Surry County Superior Court. Heard in the Court of Appeals 20 May 1999.

Harrell Powell, Jr., for plaintiff-appellee.

Brinkley Walser, P.L.L.C., by G. Thompson Miller, for defendant-appellants Luther Eugene Gaines and Town of Mount Airy, N.C., and Francisco & Merritt, by H. Lee Merritt, for defendant-appellant Town of Mount Airy, N.C.

Warren Sparrow for defendant-appellant Mary Ann Wray.

EDMUNDS, Judge.

Defendants, Luther Eugene Gaines (Gaines), Mary Ann Wray (Wray), and Town of Mount Airy (Mount Airy), appeal a jury verdict finding liability for fraud, unfair and deceptive trade practices, and negligent supervision. For the reasons given below, we hold that there was no error in the trial. We remand the case for further hearings as to the award of attorney fees against Gaines and for clarification on the issue of joint and several liability. We affirm all other aspects of the trial court's judgment.

Plaintiff owned and operated a frame shop in her family homeplace, which was located in Mount Airy on a tract of land situated near the intersection of Linville Road and Riverside Drive. Although her lot bordered both streets, plaintiff only had access to Linville Road because utility poles obstructed her path to Riverside Drive. Plaintiff's lot also bordered a pie-shaped piece of land owned by Ms. Elizabeth Bowman (the Bowman property). The Bowman property,

which fronted Riverside Drive, was placed on the market in 1994. At that time, Mrs. Bruner, Ms. Bowman's daughter who had her power of attorney, contacted plaintiff and asked if she would be interested in purchasing the property. Plaintiff hoped to purchase the property, combine it with her own tract so that her shop would be accessible from both streets, and have the combined lot rezoned to allow her to operate her business there. Investigating her plan, plaintiff contacted Mount Airy's Director of Planning, David Hennis, to discuss potential use of the Bowman property. At the conclusion of her meeting with Hennis, plaintiff was satisfied that rezoning was possible and offered Mrs. Bruner $10,000 for the Bowman property. Mrs. Bruner neither accepted nor rejected the offer, nor did she make a counteroffer. Plaintiff perceived no sense of urgency on the part of Mrs. Bruner to sell the property.

Having already made her offer, plaintiff, on 18 March 1994, called Gaines, the Chief Building Official for the Town of Mount Airy, to inquire about a blocked ditch on her property. During their conversation, Gaines mentioned that he had condemned two structures on the Bowman property and asked if plaintiff knew the owner. Plaintiff told Gaines that Mrs. Bruner was selling the property and gave him Mrs. Bruner's phone number. Gaines advised plaintiff that the owner of the Bowman property would have to connect to city sewage and water service by July 1994.

During a subsequent telephone discussion with Gaines on 19 May 1994, plaintiff told him of her earlier conversation with Director Hennis. Gaines responded that the rezoning decision could go either way and that in his opinion, "to do any kind of zoning along there would be illegal," because it would constitute spot zoning. Gaines also informed plaintiff that water and sewage hookup would cost around $2,200, that plaintiff would bear the cost of removing the condemned buildings, and that if plaintiff could not get the property rezoned, she would have no recourse for her expenses. After plaintiff told Gaines she had made an offer of $10,000 for the property, Gaines suggested that plaintiff heed the advice she had received and bid only $6,000-8,000.

Two days later, Mrs. Bruner informed plaintiff that she had sold the property for $11,000 and that she could not tell plaintiff the name of the buyer. Plaintiff subsequently learned that Wray had purchased the Bowman property and that Wray was the girlfriend of Gaines. Upon learning of the relationship between these defendants, plaintiff

called Emily Taylor, Mayor of Mount Airy. As the Mayor listened to the gist of plaintiff's complaint but before plaintiff revealed Gaines' identity, Mayor Taylor volunteered that she knew plaintiff was speaking about Gaines. Mayor Taylor added that plaintiff's experience was not the first time Gaines had acted similarly. Plaintiff later discovered that Mount Airy's Town Manager had asked Gaines to refrain from purchasing property within town limits. When her complaint to the Town failed to result in any melioration, plaintiff initiated suit.

Plaintiff's complaint included allegations of fraud by Gaines and Wray, a conspiracy to buy the Bowman Property, breach of fiduciary duty by Gaines, and negligent supervision and retention of Gaines by Mount Airy. Plaintiff further alleged unfair and deceptive trade practices and sought treble damages and attorney fees in addition to punitive damages against all three defendants. The trial court dismissed claims for punitive damages against Mount Airy and also granted Mount Airy's motion for summary judgment on plaintiff's claim of unfair and deceptive trade practices. The jury returned a verdict for plaintiff, finding compensatory damages totaling $60,000. Plaintiff elected to receive treble damages in lieu of punitive damages. The court ordered Gaines and Wray to pay treble damages, resulting in an award of $180,000. The trial court further found that Mount Airy was jointly and severally responsible for the (untrebled) $60,000 compensatory award, ordered that Gaines and Wray pay attorney fees of $50,000, and denied defendants' motions for new trial and judgment notwithstanding the verdict. Gaines and Mount Airy jointly appeal; Wray appeals separately.

I. Appeal by Gaines and Mount Airy

A.

Gaines and Mount Airy first contend that the trial court erred by failing to grant their motions for directed verdict and judgment notwithstanding the verdict. They assign error, challenging the sufficiency of the evidence. The standard of review for both motions is the same; we consider the evidence in the light most favorable to the non-movant to determine whether it is insufficient to support a verdict in favor of the non-moving party. *See Smith v. Childs*, 112 N.C. App. 672, 682, 437 S.E.2d 500, 507 (1993).

i. Fraud

[1] "In fraud cases, it is inappropriate to grant motions for directed verdict and judgment notwithstanding the verdict if there is evidence

that supports the plaintiff's *prima facie* case in all its constituent elements." *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 16, 418 S.E.2d 648, 658 (1992) (citations omitted). Gaines and Mount Airy argue that plaintiff's evidence failed to establish fraud. To prove fraud, the evidence must show (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which did in fact deceive, and (5) resulted in damage to the injured party. *See id.* at 17, 418 S.E.2d at 658 (citations omitted). Gaines and Mount Airy contend plaintiff's evidence is insufficient to establish that Gaines made a false representation of a material fact or that he intended to deceive plaintiff; they further contend that plaintiff was not deceived by Gaines and that plaintiff suffered no damage as a result of statements by Gaines. Their position is that Gaines' statements expressed opinions or a prediction about future actions, neither of which constitute representations of material fact.

It is true that, "[a] mere recommendation or statement of opinion ordinarily cannot be the basis of a cause of action for fraud." *Johnson v. Insurance Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 616 (1980)[1] (citing *Myrtle Apartments v. Casualty Co.*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (1962)); *see also* 37 C.J.S. *Fraud* § 13, at 189 (1997); 37 Am. Jur. 2d *Fraud and Deceit* § 45 (1968). "However, the general rule that no one is liable for an expression of opinion is not a hard and fast rule; . . . it does not apply to the dishonest expression of an opinion not actually entertained." 37 C.J.S. *Fraud* § 13, at 190 (1997).

Our Supreme Court has adopted the stance enunciated in C.J.S. with regard to a "promissory representation." "As a general rule, a mere promissory representation will not be sufficient to support an action for fraud. A promissory misrepresentation may constitute actionable fraud when it is made with intent to deceive the promisee, and the promisor, at the time of making it, has no intent to comply." *Johnson*, 300 N.C. at 255, 266 S.E.2d at 616 (citations omitted). Elsewhere in its opinion, the *Johnson* Court equated "promissory representations" and "opinions," leading us to conclude that, for the purpose of a fraud action, these types of statements are treated similarly. Accordingly, a statement purporting to be opinion may be the basis for fraud if, at the time it is made, the maker of the statement

1. In *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559-69, 374 S.E.2d 385, 392 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989), our Supreme Court disavowed the holding in *Johnson only* to the extent that its statement of the elements of fraud omitted the essential element of the intent to deceive.

holds an opinion contrary to the opinion he or she expresses, and the maker also intends to deceive the listener. This rule recognizes, "[t]he state of any person's mind at a given moment is as much a fact as the existence of any other thing." *Cofield v. Griffin*, 238 N.C. 377, 381, 78 S.E.2d 131, 134 (1953) (citation omitted); *see also In re Baby Boy Shamp*, 82 N.C. App. 606, 614, 347 S.E.2d 848, 853 (1986) (citation omitted), *disc. review denied*, 318 N.C. 695, 351 S.E.2d 750 (1987). The fraudulent nature of such statements may be proved by circumstantial evidence. *See Lewis v. Blackman*, 116 N.C. App. 414, 419, 448 S.E.2d 133, 136 (1994) (citing *Bank v. Belk*, 41 N.C. App. 328, 339, 255 S.E.2d 430, 437, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 299 (1979)). Whether statements were intended and received as expressions of opinion or as statements of fact is a factual issue proper for the jury. *See Machine Co. v. Feezer*, 152 N.C. 516, 67 S.E. 1004, (1910), *cited in Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 501 (1974).

Here, plaintiff testified that when she discussed the zoning change with Gaines, he responded that her plan for the property would be spot zoning. In his deposition, which was read to the jury, Gaines admitted telling plaintiff that "to do any kind of zoning out there would be illegal, it would be spot zoning." Although these statements purport to be Gaines' opinion as to validity of the proposed rezoning, plaintiff presented circumstantial evidence from which the jury could find that Gaines actually did not hold that opinion and that he intended to deceive plaintiff. Plaintiff's evidence indicated that Gaines was romantically associated with Wray (the purchaser of the property), that Gaines lived rent-free in a home owned by Wray, that together Gaines and Wray attended and bid at the auction of a large parcel of land that adjoined the Bowman property, and that after selling her mother's property to Wray, Mrs. Bruner asked plaintiff if her property were for sale and, if so, what was plaintiff's asking price. Plaintiff presented further evidence that Gaines suggested to her that $6,000-$8,000 was an appropriate offer for the property; that only two days after plaintiff revealed to Gaines the amount she had offered, Wray purchased the Bowman property for $1,000 more than plaintiff's bid; and that the purchasers told Mrs. Bruner she could not disclose their identities to plaintiff. Moreover, by introducing evidence that buildings on the Bowman property were dilapidated and near collapse and that Wray never checked the existing zoning of the Bowman property, even though Wray had previously run afoul of zoning ordinances, plaintiff impeached Wray's testimony that she purchased the property on her own initiative in order to open a beauty

shop. Viewed in the light most favorable to plaintiff, this evidence is sufficient to support the jury's finding that Gaines' representations to plaintiff concerning a zoning change were knowingly false, contrary to Gaines' actual opinion, made with the intent to deceive, and motivated by a plan to obtain strategically important corner property in order to secure benefits for himself and Wray.

[2] Gaines and Mount Airy argue that plaintiff was not deceived by Gaines. Plaintiff testified that after talking with Gaines, she consulted an attorney, who impressed upon her the notion that if Gaines opposed a requested zoning change, the change would not occur. Plaintiff further testified that she became doubtful about purchasing the property on account of Gaines' statements concerning her financial exposure if she purchased the land but could not obtain the desired zoning change. Viewed in the light most favorable to plaintiff, this evidence that plaintiff was deceived by Gaines' misrepresentations is sufficient to withstand defendants' motions for directed verdict and judgment notwithstanding the verdict.

[3] Gaines and Mount Airy next argue that plaintiff suffered no damage as a result of statements by Gaines. However, a mere two days after plaintiff revealed to Gaines the amount she had offered, Wray bought the property for $1,000 more and instructed Mrs. Bruner not to disclose the buyers' identities. This evidence sufficiently supports the jury verdict that Gaines' false representation as to his opinion on zoning was a maneuver calculated to make plaintiff hesitate just long enough for Wray to snatch the property and to prevent plaintiff from finding out how she had been so precisely outbid. The loss of the property thwarted plaintiff's plan to expand her framing business.

[4] Defendants assert that plaintiff's evidence of the amount of damages was speculative and did not support the jury's award of damages. Because no other type of damages was identified by plaintiff, damages awarded in this case would represent "loss of bargain," in other words, the difference between the property she would have owned if not defrauded and the property that actually wound up in her possession. Although our Supreme Court has noted that it is an unresolved issue of first impression whether such damages may be recovered in a fraud action, *see Britt v. Britt*, 320 N.C. 573, 580-81, 359 S.E.2d 467, 472 (1987),[2] the Court has also held that "[i]n a tort

2. In *Myers*, 323 N.C. 559, 374 S.E.2d 385, our Supreme Court disavowed the holding in *Britt only* to the extent that its statement of the elements of fraud omitted the essential element of the intent to deceive.

action the general rule in North Carolina is that a plaintiff is 'entitled to recover an amount sufficient to compensate . . . for *all pecuniary losses* sustained . . . which are the natural and probable result of the wrongful act and which . . . are shown with reasonable certainty by the evidence.' " *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 462, 406 S.E.2d 856, 865 (1991) (emphasis added) (quoting *Huff v. Thornton*, 287 N.C. 1, 8, 213 S.E.2d 198, 204 (1975)). In a case where the plaintiff sought damages for loss of profits of a new business, and where the action lay in tort (as here) rather than in contract, our Supreme Court allowed recovery, stating, "damages must be the natural and probable result of the tort-feasor's misconduct." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 545, 356 S.E.2d 578, 585 (citation omitted), *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). Further, "the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Id.* at 547-48, 356 S.E.2d at 586 (citation omitted). Using these factors as a basis for its analysis, the *Olivetti* Court held that projected profits for a new business, when proven with reasonable certainty, could constitute damages in an action for fraud. In the case at bar, the loss of bargain damages sought are inherently less speculative than damages arising from loss of projected future profits of a new business. We therefore hold, consistent with *Olivetti*, that a plaintiff may recover loss of bargain damages in a tort action if she establishes (1) that the damages are the natural and probable result of the tortfeasor's misconduct and (2) that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty.

In the instant case, plaintiff testified that her frame shop had been in existence for thirteen years and that "I had a good, pretty good business." Plaintiff also testified that previously she had taken a two-year course in real estate at Forsyth Tech, had obtained a license to sell real estate, had worked for almost three years with a real estate sales firm that operated over a wide area of northwest North Carolina, and had familiarized herself with property values in that region. She testified that, valued separately, her property was worth $50,000 and that the Bowman property was worth $10,000, but that, in her opinion, combining the property to give access to both streets would double the value of the two properties to $120,000. We note that plaintiff arguably could have also attempted to pursue lost profits, as is permitted under *Olivetti*; instead, she limited her damage claim to the loss of the property value.

Because we are reviewing defendants' motions for directed verdict and judgment notwithstanding the verdict, we consider the evidence in the light most favorable to plaintiff. Plaintiff demonstrated significant training, knowledge, and experience in the field of real estate. Other evidence in the case indicated that, while the tract in question was physically small, its location was significant. If plaintiff owned it, she had access to Riverside Drive; if another owned it, plaintiff's access was denied. Owning both lots would create a significant synergy to plaintiff's benefit. This evidence coupled with plaintiff's testimony as to property value was sufficient to calculate damages with the required "reasonable certainty" sufficient to withstand defendants' motions. This assignment of error is overruled.

ii. Constructive Fraud

Gaines and Mount Airy next argue that the court erred by failing to grant their post-verdict motions as to the issue of constructive fraud. Because we have already held that the evidence sufficiently established actual fraud, it is not necessary to address this issue. *See Kim v. Professional Business Brokers*, 74 N.C. App. 48, 52, 328 S.E.2d 296, 299 (1985).

iii. Unfair Trade Practices

Gaines and Mount Airy initially argue that because plaintiff's claims for fraud and constructive fraud are not viable, neither is her claim for unfair and deceptive trade practices. Because we have already determined that the actual fraud claim was properly submitted to the jury, we overrule this argument.

[5] Next, Gaines and Mount Airy assert that because towns may not be sued under Chapter 75, town employees, such as Gaines, are also exempt from suit under that chapter. They cite *Sperry Corp. v. Patterson*, 73 N.C. App. 123, 325 S.E.2d 642 (1985) and *Golden Rule Insurance Co. v. Long*, 113 N.C. App. 187, 439 S.E.2d 599, *appeal dismissed and disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993) in support of their argument. *Sperry* and *Golden Rule* protect government officials from a lawsuit under N.C. Gen. Stat. § 75-1.1 (1994) as long as they act as representatives of the State or a political subdivision of the State, e.g., a municipal corporation. *See Rea Construction Co. v. City of Charlotte*, 121 N.C. App. 369, 465 S.E.2d 342, *disc. review denied*, 343 N.C. 309, 471 S.E.2d 75 (1996). The protection afforded is independent of, and different from, sovereign immunity. *See Sperry*, 73 N.C. App. at 125, 325 S.E.2d at 644. The

plaintiff in *Sperry* failed to state a claim because there was no allegation of fraudulent, corrupt, or otherwise tortious conduct on the part of the State's representative. *See id.* at 125, 325 S.E.2d at 645. The holding was similar in *Golden Rule*, 113 N.C. App. at 196, 439 S.E.2d at 604. Here, in contrast, plaintiff alleged fraud and introduced evidence that Gaines took fraudulent actions inconsistent with his official duties.

Gaines testified that he was Chief Building Official for the Town of Mount Airy and that the job involved "taking applications for building permits, answering building code questions and things that come in, going out and making field inspections, doing police actions on code violations . . . holding hearings, enforcing any of the city ordinances that I'm directed to." To enforce the zoning code of Mount Airy, Gaines conducted investigations and inspections to confirm that buildings were in compliance. He also made appearances on behalf of Mount Airy before the Zoning Board of Adjustment.

Plaintiff made specific allegations of fraudulent behavior by Gaines. To support those allegations, she presented evidence that Gaines permissibly received information in his public capacity but then impermissibly used that information to help his girlfriend acquire property while making fraudulent representations to stall plaintiff. The evidence of Gaines' actions in this case is sufficient to establish that he was acting outside the scope of his duties in representing the town. Plaintiff's allegations of fraud distinguish this case from the holdings of *Sperry* and *Golden Rule*. This assignment of error is overruled.

iv. Negligence Claim against Mount Airy

[6] Gaines and Mount Airy argue that, when viewed in a light most favorable to plaintiff, the evidence against Mount Airy is insufficient to present the case to the jury. We disagree. Plaintiff's complaint alleged two causes of action: first, that Gaines' acts were attributable to Mount Airy and second, that Mount Airy corruptly and maliciously failed to discipline similar conduct by Gaines. The court, without objection, instructed the jury on negligent supervision.

> North Carolina recognizes a cause of action for negligent supervision and retention as an independent tort based on the employer's liability to third parties. To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that "the incompetent employee committed a

> tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency."

Smith v. Privette, 128 N.C. App. 490, 494-95, 495 S.E.2d 395, 398 (citations omitted), *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998).

Gaines and Mount Airy assert that the public duty doctrine defeats plaintiff's claim for negligent supervision because plaintiff cannot establish that Mount Airy owed any duty to plaintiff. We disagree. Under the public duty doctrine, "a municipality and its agents are deemed to act for the benefit of the general public and not for a specific individual when exercising its statutory police powers, and thus, ordinarily, no duty is owed, and there can be no liability to specific individuals." *Tise v. Yates Construction Co.*, 122 N.C. App. 582, 586, 471 S.E.2d 102, 106 (1996) (citation omitted), *aff'd as modified*, 345 N.C. 456, 480 S.E.2d 677 (1997). For the following two reasons, we hold that the public duty doctrine does not apply here to shield Gaines and Mount Airy.

First, the public duty doctrine is not incompatible with negligent supervision. The public duty doctrine was adopted in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992), in which a sheriff's deputy murdered his wife. The administrator of the wife's estate sued the sheriff, alleging both negligent failure to protect and negligent supervision and retention. Our Supreme Court held that the trial court properly directed a verdict in favor of the defendant on the issue of negligent failure to protect because the public duty doctrine prevented a lawsuit against the sheriff. The Court also found that the trial court properly directed a verdict for the defendant as to negligent supervision and retention; however, the *Braswell* Court did not apply the public duty doctrine to the claim of negligent retention and supervision, even though the doctrine had been asserted as a defense and even though the Court had relied on the doctrine elsewhere in its opinion. Instead, the *Braswell* Court addressed negligent supervision by focusing on the issue of notice. The *Braswell* Court found two lines of cases in its survey of North Carolina precedent. In one line, an employer was held liable for negligent supervision where the employee's wrongdoings were forecast to the employer and took place while working. In the other line, defendants were not liable for negligent supervision where the defendants were not on notice and where the wrongdoing took

place away from work. Because the facts in *Braswell* showed that (1) except for his relationship with his wife, the deputy was known to be stable and even-tempered and (2) the deputy's erratic behavior toward his wife prior to the murder occurred while he was off-duty, the Court categorized the case under the second line of cases. Here, by contrast, after receiving notice of prior wrongdoing of the nature complained of by plaintiff, Mount Airy allowed Gaines to continue his duties as a zoning inspector without undertaking supervision adequate to ensure there would be no recurrence; he was merely asked not to do it again. Gaines' fraudulent actions also took place while he was on duty. We therefore hold that defendants' invocation of the public duty doctrine does not trump plaintiff's claim of negligent supervision.

Second, the evidence in the instant case shows that Gaines deliberately misled plaintiff. We have held previously that where the employee's tort is intentional, as opposed to grossly negligent, the public duty doctrine is inapplicable. *See Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 406, 442 S.E.2d 75, 79, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994). In the case at bar, the evidence was abundant that Gaines' acts were intentionally fraudulent. Therefore, consistent with both *Braswell* and *Clark*, we hold that the public duty doctrine does not apply to the facts of the instant case.

[7] Plaintiff nevertheless had the burden of proving her case for negligent supervision against Mount Airy. Here, plaintiff presented (1) evidence that the Mayor of Mount Airy stated that Gaines had previously been involved in buying property that he had discovered in the course of his employment; (2) evidence that when earlier victims of Gaines' purchasing techniques had complained, the Mayor had reported these complaints to the Town Manager and other authorities; and (3) a deposition by Gaines in which he admitted that the Town Manager had asked him to stop purchasing property in the town limits. Plaintiff's evidence demonstrated that the Town Manager's request was inadequate to cause Gaines to change his ways materially. Viewing this evidence in the light most favorable to the non-movant, we hold that plaintiff presented sufficient evidence to allow her claim of negligent supervision to be submitted to the jury. This assignment of error is overruled.

B.

[8] Gaines and Mount Airy next argue that the trial court erroneously admitted statements by the Mayor regarding Gaines, contending

that the statements should have been excluded as irrelevant under N.C. Gen. Stat. § 8C-1, Rule 403 (1992).

> Application of the Rule 403 balancing test remains entirely within the inherent authority of the trial court. Thus, the balance struck by the trial court will not be disturbed on appeal absent a clear showing the court abused its discretion by admitting, or excluding, the contested evidence. A trial court abuses its discretion when its decision "lack[s] any basis in reason."

Warren v. Jackson, 125 N.C. App. 96, 98-99, 479 S.E.2d 278, 280 (alteration in original) (citations omitted), *disc. review denied*, 345 N.C. 760, 485 S.E.2d 311 (1997). This evidence was relevant to the claim for negligent supervision, and the trial court thrice gave a limiting instruction as to the applicability of the Mayor's statements. The trial court therefore did not abuse its discretion in admitting the statements.

C.

[9] Gaines and Mount Airy next argue that the trial court erred by admitting plaintiff's testimony as to the value of her property because it was too speculative. Plaintiff responds by citing *Huff v. Thornton*, 287 N.C. 1, 213 S.E.2d 198 (1975), which held that a witness could testify about value as a *de facto* expert based upon experience in the field. *See id.*; *see also Zagaroli v. Pollock*, 94 N.C. App. 46, 379 S.E.2d 653 (holding that plaintiff, a real estate developer who owned and developed other similar property, demonstrated sufficient personal knowledge to give opinion testimony regarding the value of the particular property in question), *disc. review denied*, 325 N.C. 437, 384 S.E.2d 548 (1989). Here, evidence of plaintiff's experience in real estate has been set out in detail in part (I)(A)(i) of this opinion. Gaines and Mount Airy had ample opportunity to cross-examine plaintiff about her opinion as to the value of her property, present their own evidence as to value of the property, and to argue the value before the jury. This assignment of error is overruled.

D.

[10] Gaines and Mount Airy next argue that the trial court erred by denying their motion *in limine* to exclude mention of N.C. Gen. Stat. § 14-234.1 (1993) (misusing confidential information). Grant or denial of a motion *in limine* lies within the discretion of the trial court. *See Peed v. Peed*, 72 N.C. App. 549, 559, 325 S.E.2d 275, 282 (citation omitted), *cert. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985). Gaines and

Mount Airy assert the statute had "no application to this case." They also contend that plaintiff improperly argued this statute to he jury. Section 14-234.1 is a criminal statute that, for the purposes of this case, forbids use by any town employee of any non-public information received in his or her official capacity, either to aid another in acquiring a financial interest in any property, or to gain any pecuniary benefit that may be affected by that information. N.C. Gen. Stat. § 14-234.1 (1993). Although we have held above that it is not necessary for us to address the issue of constructive fraud because plaintiff sufficiently established actual fraud, constructive fraud was one of plaintiff's theories at trial. To sustain her burden as to that claim, plaintiff had to establish that Gaines had a fiduciary relationship with her and that Gaines breached this duty. The statute was relevant as evidence of the corrupt and possible criminal nature of the acts allegedly perpetrated by Gaines. It is therefore relevant to support plaintiff's contention that Gaines' actions constituted a breach of the fiduciary duty he allegedly owed to plaintiff. Accordingly, we hold that the trial court did not abuse its discretion in denying defendants' motion *in limine*. This assignment of error is overruled.

[11] Gaines and Mount Airy also contend that plaintiff's closing argument pertaining to this statute improperly implied Gaines was a criminal. However, the arguments of counsel are not part of the record on appeal and therefore will not be addressed by this Court. *See* N.C. R. App. P. 10(a).

E.

[12] Gaines and Mount Airy next argue that the trial court erred in denying their motion for a new trial. The motion was based on four issues: (1) that the jury manifestly disregarded the instructions of the court; (2) that damages were excessive and appeared to have been given under the influence of passion or prejudice; (3) that the evidence was insufficient to justify the verdict, which was contrary to law; and (4) that errors in law occurred at trial to which defendants objected. In discussing this Court's standard of review of a trial court's order granting or denying a motion for a new trial, our Supreme Court has stated,

> Appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). The trial court's discretion is " 'practically unlimited.' " *Id.*, 290 S.E.2d at 603 (quoting from

> *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915)). A "*discretionary* order pursuant to [N.C.]G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Id.* at 484, 290 S.E.2d at 603. "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E.2d at 604. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605.

Campbell v. Pitt County Memorial Hosp., 321 N.C. 260, 264-65, 362 S.E.2d 273, 275-76 (1987) (alterations in original). Gaines and Mount Airy have candidly acknowledged the heavy burden they must meet to prevail on this issue. Neither their arguments nor our review of the record reveals that the trial court abused its discretion in denying defendants' motion for a new trial on any of the four issues. This assignment of error is overruled.

F.

[13] Gaines and Mount Airy finally contend that the trial court erred in awarding $50,000 in attorney fees on the unfair and deceptive trade practices claim. Our Supreme Court has held that where

> "[t]he 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," the "presiding judge may, in his discretion, allow a reasonable attorney fee" to the prevailing party.

United Laboratories, Inc. v. Kuykendall, 335 N.C. 183, 190, 437 S.E.2d 374, 378-79 (1993) (alteration in original) (quoting N.C. Gen. Stat. § 75-16.1 (1994)). Gaines and Mount Airy argue that the treble damages award of $180,000 is $70,000 over and above plaintiff's compensatory damages ($60,000) and attorney fees ($50,000) and that allowing this award is an abuse of discretion. We find this argument unpersuasive because treble damages under N.C. Gen. Stat. § 75-16 (1994) are given for both punitive and remedial purposes, *see Marshall v. Miller*, 302 N.C. 539, 546, 276 S.E.2d 397, 401-02 (1981); however, for the following reasons, we remand this matter on the issue of attorney fees as to Gaines only. Section 75-16.1, which per-

mits attorney fees, was intended to encourage private enforcement in the marketplace and to make the bringing of such a suit more economically feasible. *See Winston Realty, Co. v. G.H.G., Inc.*, 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985). Plaintiff presented affidavits, exhibits, and proffers to the trial court to support her request for attorney fees. The hours committed and work done by plaintiff's counsel were made part of the record. Plaintiff established that while Mount Airy offered to settle for $12,000, Wray had moved prior to trial to dispense with a mediated settlement conference and refused to discuss settlement. However, the record is silent as to any settlement offers or negotiations by Gaines. The trial court made written findings that (1) plaintiff prevailed, (2) Gaines and Wray wilfully engaged in the acts and practices as found by the jury, and (3) there were unwarranted refusals by Gaines and Wray to fully resolve the matter constituting the basis of this lawsuit. *See Evans v. Full Circle Productions*, 114 N.C. App. 777, 781, 443 S.E.2d 108, 110 (1994). We hold that the trial court's findings as to Wray are adequately supported in the record and establish that the trial court did not abuse its discretion in awarding attorney fees against her. However, the findings are inadequate to support the court's conclusion that Gaines made an unwarranted refusal to resolve the matter fully. We therefore remand for further findings of fact as to the propriety of attorney fees to be paid by Gaines. *See United Laboratories*, 335 N.C. 183, 437 S.E.2d 374. As a housekeeping matter, we note that while the court ordered total costs in the amount of $1,877 be taxed against all defendants, the judgment does not state whether the liability is joint and several. On remand, the court should specify its intent in this regard.

II. Appeal by Wray

[14] In challenging the denial of her motions for directed verdict and judgment notwithstanding the verdict, Wray argues that there was no competent evidence to support any of the jury's findings of fact and that the court erred in submitting the case to the jury. We disagree for the reasons stated above with regard to fraud and unfair and deceptive trade practices. Further, there was sufficient circumstantial evidence to support the jury's finding that Wray conspired with Gaines fraudulently to discourage and outbid plaintiff for the Bowman property. Wray's assignments of error are overruled.

No error as to defendants Mount Airy and Wray.

Remanded with instructions as to defendant Gaines on the issue of attorney fees.

Remanded for clarification on the issue of joint and several liability.

Judges WALKER and McGEE concur.

MARGARET K. JONES, PLAINTIFF v. ASHEVILLE RADIOLOGICAL GROUP, P.A., NATHAN WILLIAMS, M.D., TIMOTHY GALLAGHER, M.D., MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA, AND LUCI A. LAYTON, DEFENDANTS

No. COA97-803

(Filed 17 August 1999)

1. **Statute of Limitations— medical malpractice—unauthorized disclosure of records**

Summary judgment was properly granted for some of the defendants based upon the statute of limitations in an action arising from the unauthorized release of mammography films where the last act giving rise to the cause of action occurred more than three years before the claim was filed. In the context of a health care provider's unauthorized disclosure of a patient's confidences, claims of medical malpractice, invasion of privacy, breach of implied contract, and breach of fiduciary duty or confidentiality should all be treated as claims for medical malpractice.

2. **Statute of Limitations— emotional distress—summary judgment**

Summary judgment was properly granted for some of the defendants on an emotional distress claim arising from the unauthorized release of mammography films where the action was not brought within three years of the last act giving rise to the action. Emotional distress is not specifically denominated under any limitation statute and falls under the general three-year provision of N.C.G.S. § 1-52(5).

3. Unfair Trade Practices— statute of limitations—four years

Summary judgment was properly granted on an unfair trade practices claim arising from the unauthorized release of mammography records where the claim was not filed within the four-year statute of limitations prescribed for Chapter 75 claims.

4. Evidence— privileged communications—physician-patient—waiver—filing of malpractice suit—discovery procedures required

Summary judgment was improperly granted for some defendants in an action arising from the second of two unauthorized disclosures of mammography records. The filing of a medical malpractice suit by a patient against the physician constitutes a limited implied waiver of the physician-patient privilege to the extent the defendant-physician may reveal the confidential information contained in the defendant-physicians's own records to third parties where it is reasonably necessary to defend against the suit. However, in this case the films were not in the possession of a defendant in the underlying malpractice action and could only be disclosed pursuant to statutorily authorized discovery procedures or plaintiff's authorization.

Judge WALKER concurring in part and dissenting in part.

On remand from the Supreme Court of North Carolina in accordance with their opinion, 350 N.C. 654, 517 S.E.2d 380 (1999). Previously heard by this Court on 17 February 1998, 129 N.C. App. 449, 500 S.E.2d 740 (1998), from an appeal by plaintiff from judgments filed 25 February 1997 and 4 March 1997 by Judge Forrest A. Ferrell in Buncombe County Superior Court. The issues addressed on remand are the same as those previously heard by this Court.

Hyler Lopez & Walton, P.A., by George B. Hyler, Jr. and Robert J. Lopez, for plaintiff-appellant.

Dameron & Burgin, by Sharon L. Parker, for defendant-appellees Asheville Radiological Group, P.A. and Timothy Gallagher, M.D.

Kennedy Covington Lobdell & Hickman, L.L.P., by James P. Cooney, III and Lara E. Simmons, for defendant-appellees Nathan Williams, M.D., Medical Mutual Insurance Company of North Carolina, and Luci A. Layton.

GREENE, Judge.

Margaret K. Jones (plaintiff) was diagnosed with breast cancer in 1989. Her claims in this case arose in connection with a medical malpractice action (the underlying action) she filed against her obstetrician and gynecologist (OB-GYN), Dr. Sherman Morris (Dr. Morris) for his failure to properly diagnose her breast cancer.

At the time the underlying action was filed, Dr. Morris was insured by defendant Medical Mutual Insurance Company of North Carolina (MMIC). Defendant Luci Layton (Layton) is an employee of MMIC and was assigned as a claims adjuster to investigate plaintiff's underlying claims against Dr. Morris.

During an office visit with Dr. Morris in 1987, plaintiff complained of a small, sore, firm lump in her left breast. At that time, Dr. Morris referred plaintiff to defendant Asheville Radiological Group, P.A. (Asheville Radiological) for the purpose of performing a baseline mammogram (the mammogram procedure). The mammogram procedure was performed on 9 March 1988, and Dr. Henri Kieffer prepared a report (the mammography report), which he forwarded to Dr. Morris, that interpreted the mammogram films (the films) and indicated there was "[n]o mammographic evidence of malignancy." During subsequent office visits with Dr. Morris, plaintiff was assured that the lump was only a cyst.

When the lump continued to grow and a second lump formed in her left breast, plaintiff was urged by family members to consult another physician about her condition. Thereafter, on 10 January 1989, plaintiff saw Dr. Peter Gentling (Dr. Gentling) to obtain a second opinion. Dr. Gentling performed a biopsy of plaintiff's left breast and diagnosed the lumps as breast cancer. After determining that the lumps were malignant, Dr. Gentling performed a mastectomy of plaintiff's left breast and found four distinct carcinomas. As a result of her cancer, plaintiff underwent chemotherapy and radiation treatments.

In April of 1989, plaintiff retained an attorney, William Eubanks (Eubanks), to investigate a possible civil action against Dr. Morris for his alleged misdiagnosis of her breast cancer. Subsequently, Eubanks sent a letter to Dr. Morris advising him of the possibility of a suit, which Dr. Morris forwarded to his medical malpractice insurance carrier, MMIC. Thereafter, MMIC's claims adjuster, Layton, set up a claims file and requested plaintiff's medical records from Dr. Morris.

After reviewing the medical records, which included the mammography report, Layton decided to have the films reviewed by an independent radiologist in order to insure that they had been interpreted correctly. Layton obtained the films from Asheville Radiological on 18 May 1989.

As a result of her displeasure with Dr. Morris's treatment, plaintiff switched to a new OB-GYN physician, Dr. Evelyn Lyles (Dr. Lyles). At Dr. Lyles' request, plaintiff went to Asheville Radiological in June of 1989 to obtain the films. When she arrived, however, plaintiff was informed that they had been checked out by Layton. Plaintiff immediately contacted Eubanks, who explained that Layton was associated with MMIC, but should not have checked out the films without plaintiff's consent. Eubanks assured plaintiff that he would "take care of it."

On 10 July 1990, Eubanks sent a settlement brochure to Layton, with a copy to plaintiff, in which he alleged that Dr. Morris's negligence caused damage to plaintiff in the form of "medical expenses, lost earnings, reconstructive surgery, loss of enjoyment of life for [plaintiff], pain and suffering, and loss of consortium for [plaintiff's husband]."

Plaintiff filed the underlying action against Dr. Morris on 14 November 1990, alleging that as a result of Dr. Morris's negligence, the proper diagnosis and treatment of her cancer was substantially delayed, which reduced her chance of survival and resulted in permanent physical, emotional, and economic injury. The complaint made specific references to the mammogram procedure ordered by Dr. Morris and performed by Asheville Radiological on 9 March 1988.

In December of 1990, MMIC retained James W. Williams (Attorney Williams) to represent Dr. Morris in the underlying action. On 27 December 1990, Attorney Williams served plaintiff with a discovery request for certain documents including, among other things, the medical records for all care and treatment received by plaintiff during the five-year period immediately preceding the institution of the underlying action. In response, plaintiff forwarded a copy of her medical records, which included a copy of the mammography report. Further, prior to her husband's deposition on 16 July 1992, plaintiff agreed to release a copy of her films to Dr. Morris.

On 10 January 1991, Attorney Williams questioned plaintiff at her deposition regarding Dr. Morris having ordered the mammogram pro-

cedure; the condition of her breast at the time of the mammogram procedure; the questionnaire she completed at Asheville Radiological prior to the mammogram procedure; and the mammography report itself.

On 14 June 1991, with plaintiff present, Dr. Morris was deposed by plaintiff's counsel regarding the mammogram procedure and the mammography report that interpreted the films.

Thereafter, Dr. Nathan Williams (Dr. Williams), an expert in breast disease, was retained by defendant to offer an opinion as to the standard of care practiced by Dr. Morris. Dr. Williams was provided with a complete copy of plaintiff's medical history. On 1 July 1992, with plaintiff present, Dr. Williams was deposed by plaintiff's attorney regarding his opinion as to Dr. Morris's treatment of plaintiff based on his review of her medical records, including the mammography report.

After his deposition in the underlying action, but before trial, Dr. Williams determined that in addition to reviewing the mammography report, he needed to review the films in order to be prepared to testify at trial. On 16 July 1992, Dr. Williams obtained the films from Memorial Mission Hospital (the Hospital) and briefly reviewed them before returning them to the Hospital's radiology department. It is unclear from the record how the films were initially transferred from Asheville Radiological to the Hospital.

Thereafter, pursuant to a previous agreement with Dr. Morris to provide him with a copy of her films, plaintiff called Asheville Radiological to arrange picking up the films so that she could take them to her husband's deposition later that day. At that time, plaintiff was advised that Dr. Timothy Gallagher (Dr. Gallagher), a physician employed by Asheville Radiological, had released the films to Dr. Williams. Plaintiff advised Asheville Radiological that Dr. Williams was not her treating physician and the films should not have been released to him. Asheville Radiological then retrieved the films from Dr. Williams.

On 25 August 1992, plaintiff discharged Eubanks and retained her present attorney. At trial, plaintiff, Dr. Morris, and Dr. Williams all testified in detail about the circumstances surrounding Dr. Morris's alleged failure to diagnose plaintiff's breast cancer properly, including the mammogram procedure performed by Asheville Radiological in March of 1988. Plaintiff did not object to any testimony regarding the mammogram procedure, and introduced the mammography

report as part of her exhibits. The jury returned a verdict in favor of Dr. Morris in the underlying action, and plaintiff appealed to this Court, which found no error.

On 17 July 1995, plaintiff filed this action, in which she alleged claims stemming from both the May 1989 and July 1992 unauthorized releases of her mammography films. Plaintiff alleged claims of medical malpractice and breach of fiduciary duty/confidentiality against Asheville Radiological and Dr. Gallagher; breach of implied contract against Asheville Radiological; unfair and deceptive trade practices against MMIC; and invasion of privacy and intentional infliction of emotional distress (emotional distress) against all defendants. Following a hearing, the trial court granted defendants' motions for summary judgment as to all claims.

The dispositive issues are whether: (I) plaintiff's claims against Asheville Radiological, MMIC, and Layton based on the unauthorized release of her films in May 1989 are barred by the applicable statutes of limitation; and (II) genuine issues of material fact exist as to whether plaintiff waived the physician-patient privilege with regards to Asheville Radiological and Dr. Gallagher's unauthorized release of her films to Dr. Williams in July 1992.

At the outset, we first note that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990); *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 300, 337 S.E.2d 644, 647 (1985). In reviewing a trial court's granting of summary judgment, we must view the evidence in the light most favorable to the party opposing summary judgment. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 507, 317 S.E.2d 41, 42 (1984), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985). Further, "[a] defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of [her] claim or cannot surmount an affirmative defense which would bar the claim." *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986); *see also Ballinger v. Secretary of Revenue*, 59 N.C. App. 508, 512, 296 S.E.2d 836, 839 (1982) ("[W]hen defendants establish a complete defense to plaintiff's claim, they are entitled to the quick and final disposition of that claim which summary judgment provides."), *cert. denied*, 307 N.C. 576, 299 S.E.2d 645 (1983).

I

Claims Arising from May 1989 Release

[1] Plaintiff contends the trial court erred by granting summary judgment as to her claims against Asheville Radiological, MMIC, and Layton based on the unauthorized release of her mammography films in May 1989. We disagree.

When a defendant properly pleads the statute of limitations as a defense, the burden shifts to the plaintiff to show that he instituted the action within the prescribed time period. *Pembee*, 69 N.C. App. at 507, 317 S.E.2d at 42. Further, when the facts are not in conflict, a question of law exists for which summary judgment may be appropriate. *Id.* at 508, 317 S.E.2d at 43. Here, since plaintiff has asserted multiple claims which are governed by different statutes of limitation, we will address each claim separately.

This Court has held that in the context of a health care provider's unauthorized disclosure of a patient's confidences, claims of medical malpractice, invasion of privacy, breach of implied contract, and breach of fiduciary duty/confidentiality should all be treated as claims for medical malpractice. *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 9, 330 S.E.2d 242, 248-249, *disc. review denied*, 314 N.C. 548, 335 S.E.2d 27 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). As such, N.C. Gen. Stat. § 1-15(c) provides for a three-year statute of limitations period and further states in pertinent part that "a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C.G.S. § 1-15(c) (1996).

In this case, it is uncontroverted that the last act giving rise to plaintiff's cause of action against Asheville Radiological, MMIC, and Layton occurred in June of 1989 when plaintiff was notified that Layton had obtained plaintiff's films from Asheville Radiological. Since plaintiff filed her claim for medical malpractice more than three years after June of 1989, the trial court thus did not err by granting summary judgment for MMIC and Layton, as well as for Asheville Radiological for its release of the films in June of 1989.

[2] Similarly, "[b]ecause it is not specifically denominated under any limitation statute, a cause of action for emotional distress falls under the general three-year provision of G.S. 1-52(5)." *King v. Cape Fear*

Mem. Hosp., 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 114 (1990); *see also* N.C.G.S. § 1-52(5) (1996). As such, the trial court did not err in granting summary judgment for Asheville Radiological, MMIC, and Layton on plaintiff's claim for emotional distress since it was not brought within the three-year limitations period, which began running in June of 1989.

[3] Finally, a claim for unfair and deceptive trade practices pursuant to Chapter 75 of the North Carolina General Statutes is subject to a four-year statute of limitations. *Hinson v. United Financial Services*, 123 N.C. App. 469, 474, 473 S.E.2d 382, 386, *disc. review denied*, 344 N.C. 630, 477 S.E.2d 39 (1996); *see also* N.C.G.S. § 75-16.2 (1994). Further, "a cause of action pursuant to § 75-16 accrues when the violation occurs." *Hinson*, 123 N.C. App. at 475, 473 S.E.2d at 387. Here, plaintiff's complaint alleges that MMIC "engaged in unfair or deceptive practices affecting commerce . . . by knowingly requesting, obtaining the release of, and reviewing the Plaintiff's confidential [films] without her authorization or consent." As previously stated, this cause of action accrued in June of 1989, when plaintiff became aware that Layton requested and received a copy of plaintiff's films. The trial court, therefore, did not err by granting MMIC's motion for summary judgment since plaintiff's claim for unfair and deceptive trade practices was not filed within the four-year statutorily prescribed period.

II

Claims Arising from July 1992 Release

[4] Plaintiff also contends the trial court erred by granting summary judgment as to her claims against Asheville Radiological, Dr. Gallagher, and Dr. Williams for the unauthorized release of her films in July 1992. Plaintiff avers this unauthorized release violated the physician-patient privilege conferred by N.C. Gen. Stat. § 8-53.

This Court has recognized a claim of medical malpractice based on the unauthorized disclosure of confidential information, the basis of plaintiff's claims in this action. *Watts*, 75 N.C. App. at 9, 330 S.E.2d at 249; *see* N.C.G.S. § 8-53 (1986) ("Confidential information obtained in medical records shall be furnished only on the authorization of the patient."). The filing of a medical malpractice suit by a patient against her physician, however, constitutes a limited implied waiver of the physician-patient privilege to the extent the defendant-physician may

reveal the patient's confidential information *contained in the defendant-physician's own records* to third parties where it is reasonably necessary to defend against the suit. *See, e.g., Acosta v. Richter*, 671 So. 2d 149, 156 (Fla. 1996) ("[A] defendant-physician is free . . . to discuss his knowledge of the patient in order to properly defend himself."); *Heller v. Norcal Mut. Ins. Co.*, 876 P.2d 999, 1003 (Cal.) (construing statutory physician-patient privilege to allow a doctor who is "a potential litigant in a malpractice action . . . to discuss with [his insurance provider] plaintiff's medical condition"), *cert. denied*, 513 U.S. 1059, 130 L. Ed. 2d 602 (1994); *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex. 1988) (waiving privilege completely as to records of defendant-doctors); *Otto v. Miami Valley Hosp. Soc'y*, 266 N.E.2d 270, 272 (Ohio 1971) ("[I]n an action against a physician for malpractice the doctor may disclose communications."); *cf.* N.C.R. Professional Conduct 1.6(d)(6) (permitting lawyers to disclose a client's confidential information "to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client").

In this case, plaintiff's medical malpractice suit against Dr. Morris constituted an implied waiver of her physician-patient privilege. Dr. Morris, as a defendant-physician in that suit, therefore was free to disclose to third parties *his own records* containing plaintiff's confidential information, to the extent he reasonably believed necessary in defending against plaintiff's action. In addition, plaintiff's filing of the underlying action against Dr. Morris *combined with* her subsequent conduct during the course of the medical malpractice action impliedly waived her physician-patient privilege as to records relating to plaintiff's breast cancer which were *not* in Dr. Morris's possession. It is the effect of plaintiff's waiver as to these records (*i.e.*, plaintiff's mammography films prepared by and in the possession of Asheville Radiological), which is at issue in this case.

The confidential nature of the physician-patient relationship extends beyond the time of the waiver by the patient, *Crist v. Moffatt*, 326 N.C. 326, 334, 389 S.E.2d 41, 46 (1990), and a defendant "must utilize the statutorily recognized methods of discovery enumerated in N.C.G.S. § 1A-1, Rule 26" to obtain a plaintiff's medical information, *id.* at 336, 389 S.E.2d at 47; *see also* N.C.G.S. ch. 1A, art. 5 (1990). Requiring defendants to abide by formal discovery rules in obtaining medical records from a non-party physician, even where

the patient has waived the physician-patient privilege, protects the patient from disclosure of aspects of her mental and physical health which may be irrelevant or otherwise inadmissible in court. *Wenninger v. Muesing*, 240 N.W.2d 333, 336-37 (Minn. 1976). It also protects the medical profession against unnecessary harassment and charges of professional misconduct. *See Crist*, 326 N.C. at 335, 389 S.E.2d at 47.

In this case, Asheville Radiological and Dr. Gallagher, neither of whom were defendants in the medical malpractice action against Dr. Morris, disclosed plaintiff's mammography films to Dr. Williams. Although the films were related to plaintiff's malpractice action, the films were not in the possession of a defendant to that action. It follows that, even after plaintiff's waiver, the films only could be disclosed pursuant to statutorily authorized discovery procedures or pursuant to plaintiff's authorization.

Plaintiff asserts she did not authorize Asheville Radiological or Dr. Gallagher to release her films to Dr. Williams, nor did Dr. Williams obtain the films pursuant to formal discovery procedures. We may assume, for the sake of argument, that once Dr. Morris had legal possession of plaintiff's mammography films (either pursuant to court-ordered discovery, plaintiff's delivery of the films to Dr. Morris, or plaintiff's authorization to Asheville Radiological to release the films to him), Dr. Morris could then have provided Dr. Williams with the films as a reasonably necessary step in defending himself against plaintiff's lawsuit; however, this intermediate step was not taken. Plaintiff, therefore, has asserted valid claims against Asheville Radiological, Dr. Gallagher, and Dr. Williams for the disclosure of her mammography films in July of 1992. Accordingly, the entry of summary judgment on the claims arising from the 1992 release was improper and must be reversed.

In summary, although summary judgment was proper as to all of plaintiff's claims stemming from the May 1989 release of her mammography films, genuine issues of material fact exist as to plaintiff's claims arising from the July 1992 unauthorized release against Asheville Radiological, Dr. Gallagher, and Dr. Williams, and this case therefore must be remanded on those July 1992 claims.

Affirmed in part, reversed in part, and remanded.

Judge TIMMONS-GOODSON concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I concur in the majority opinion in that plaintiff's claims against Asheville Radiological, MMIC, and Layton, based on the unauthorized release of her films in 1989, are barred by the applicable statutes of limitation.

I respectfully dissent from the majority opinion which holds there are genuine issues of material fact as to plaintiff's claims arising from the July 1992 release of her films.

No physician-patient privilege existed at common law; therefore, the statutory privilege is to be strictly construed. *Sims v. Insurance Co.*, 257 N.C. 32, 36-37, 125 S.E.2d 326, 329-330 (1962). The patient has the burden of establishing the existence of the privilege and objecting to the discovery of such privileged information in the first instance. *Adams v. Lovette*, 105 N.C. App. 23, 28, 411 S.E.2d 620, 624, *affirmed*, 332 N.C. 659, 422 S.E.2d 575 (1992). Further, this privilege is not absolute and may be waived by the patient's conduct. *Id.* at 28-29, 411 S.E.2d at 624; *see also Cates v. Wilson*, 321 N.C. at 14, 361 S.E.2d at 742. In addressing the issue of waiver, our Supreme Court has held:

> When . . . the patient breaks the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician, the patient has, in effect, determined it is no longer important that the confidences which the privilege protects continue to be protected. Having taken this position, the plaintiff may not silence the physician as to the matters otherwise protected by the privilege.

Cates v. Wilson, 321 N.C. at 15, 361 S.E.2d at 742-743.

Having determined that a patient may waive the physician-patient privilege by "break[ing] the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician," it must now be determined when a patient effectively waives the privilege, and the extent to which the privilege is waived. *Id.*; *see also Collins v. Bair*, 268 N.E.2d at 99.

In *Cates v. Wilson*, *supra*, our Supreme Court announced that the facts and circumstances of a particular case determine whether a

patient's conduct constitutes a waiver of the privilege. *Id.* at 14, 361 S.E.2d at 742; *see also Crist v. Moffatt*, 326 N.C. 326, 331, 389 S.E.2d 41, 44 (1990). The Court then elaborated on the general rule by stating that a waiver of the privilege may occur either when: (1) a plaintiff calls the treating physician as a witness and examines him as to her physical condition; (2) a plaintiff fails to object when the opposing party calls the treating physician to testify; or (3) a plaintiff testifies to the communication between her and the physician. *Id.* at 14, 361 S.E.2d at 742. Further, the Court observed that the privilege could also be waived when the patient "voluntarily goes into detail regarding the nature of [her] injuries and either testifies to what the physician did or said while in attendance." *Id.* (Citation omitted).

In his concurring opinion in *Cates*, Justice (now Chief Justice) Mitchell stated it was time for the Court to recognize an exception to the physician-patient privilege which has already been adopted by the majority of jurisdictions, the patient-litigant exception. *Id.* at 17, 361 S.E.2d at 744 (Mitchell, J., concurring). That exception recognizes that when a patient files a medical malpractice action against her treating physician in which an essential part of the claim is the existence of a physical ailment, there should be a waiver of the privilege for all communications causally or historically related to that ailment. *Id.* However, the Court concluded that a waiver had occurred under the facts and circumstances of the case and therefore declined to adopt this exception.

Here, when plaintiff filed the underlying action, she directly put her medical condition at the time of the mammogram procedure at issue. Thereafter, plaintiff's conduct during the course of the underlying action clearly establishes a waiver of her physician-patient privilege. During discovery, plaintiff agreed to provide Dr. Morris with copies of her medical records pertaining to her treatment for breast cancer, including the mammography report and the films, which are an integral part of the mammography report; plaintiff testified in detail during her deposition about the circumstances surrounding the mammogram procedure; plaintiff deposed Dr. Morris in detail about the mammogram procedure and the mammography report; and plaintiff was present when Dr. Williams was examined during his deposition about Dr. Morris' treatment of plaintiff based on Dr. Williams' review of the medical records, including the mammography report. Thereafter, during the trial of the underlying action, plaintiff testified as she did in her deposition regarding her medical records and the mammogram procedure, and plaintiff did not object to the testi-

monies of Dr. Morris and Dr. Williams regarding plaintiff's medical records and the mammogram procedure. All of these facts and circumstances lead to the conclusion that plaintiff never manifested a desire to preserve her physician-patient privilege and thus has waived such privilege as to Dr. Morris.

However, even when a plaintiff waives the physician-patient privilege, "the question remains by what procedures and subject to what controls the exchange of information shall proceed." *Crist v. Moffatt*, 326 N.C. at 334, 389 S.E.2d at 46. Here, plaintiff contends that while she "should not be able to hide behind the privilege and use it as a sword," there should be some control over the discovery process.

As our Supreme Court has recognized, even when a plaintiff waives the privilege, defendants must still utilize the formal discovery methods provided by the North Carolina Rules of Civil Procedure unless the parties consent to an informal discovery method. *Id.* at 334, 389 S.E.2d at 46.

Here, Dr. Morris ordered the mammogram procedure in connection with his evaluation and treatment of plaintiff. When plaintiff brought the underlying action against Dr. Morris for his alleged failure to properly diagnose her breast cancer, she directly put at issue her condition, thus allowing Dr. Morris to obtain any of her medical records that are relevant to her claim during the discovery process. Thereafter, when plaintiff provided Dr. Morris with copies of her medical records during discovery, and likewise agreed to provide him with her films in connection with her husband's deposition on 16 July 1992, no further discovery was necessary in order for Dr. Morris to permit Dr. Williams, his expert witness, to review these medical records and films. Therefore, I find that the waiver of the privilege as to Dr. Morris precludes any claims against Asheville Radiology, Dr. Gallagher and Dr. Williams.

STATE OF NORTH CAROLINA v. LAMONT CLAXTON UNDERWOOD

No. COA98-648

(Filed 17 August 1999)

1. Evidence— other crimes—common scheme—homicide

In a prosecution for the kidnapping and first-degree murder of a rival for a girlfriend, there was no abuse of discretion in the admission of evidence of the murder of the girlfriend's mother where the State used the evidence to show that defendant had a common scheme to hurt the girlfriend, there was substantial evidence from which a jury could conclude that defendant killed the mother, and the evidence clearly shows several significant similarities.

2. Evidence— other crimes—no chilling effect on testimony

The admission of evidence of a second murder in a first-degree murder prosecution did not impermissibly discourage defendant from testifying where defendant's decision not to testify was purely tactical and not constitutional.

3. Criminal Law— instructions—requested—incorrect statement of law

There was no error in a first-degree murder and kidnapping prosecution in the denial of defendant's requested instruction on the limited use of evidence concerning another murder where the tendered instruction would have incorrectly stated the law.

4. Witnesses— expert—mtDNA analyst

The trial court in a murder and kidnapping prosecution did not err by accepting as an expert in the field of mtDNA analysis the chief of an FBI DNA analysis unit. Although defendant argued that the testimony was of no assistance to the jury, the mtDNA evidence was relevant to show that it was more probable that a hair found in defendant's automobile trunk was the victim's.

5. Evidence— scientific testing—standard for admissibility

The following factors should be considered in determining whether scientific evidence is reliable: whether the theory or technique can be or has been tested, whether the theory has been subjected to peer review and publication, whether the theory has been submitted to the scrutiny of the scientific community, the known or potential rate of error, and the general acceptance in a

relevant scientific community. North Carolina emphasizes the reliability of the scientific method and not its popularity within a scientific community.

6. Evidence— mtDNA testing—admissible

Testing of mtDNA is sufficiently reliable to warrant admission into evidence.

7. Homicide; Kidnapping— sufficiency of evidence

There was substantial evidence to support the reasonable inference that the victim was kidnapped and murdered by defendant.

Appeal by defendant from judgment entered 25 July 1997 by Judge Forrest A. Ferrell in Watauga County Superior Court. Heard in the Court of Appeals 24 February 1999.

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

David Y. Bingham and Thomas M. King for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant appeals from the judgment entered upon his convictions of first-degree murder and first-degree kidnapping in violation of North Carolina General Statutes sections 14-17 and 14-39. He seeks a new trial based on his contention that the trial court committed prejudicial error by: (1) admitting evidence of the murder of Catherine Miller, (2) denying defendant's requested instruction to the jury, (3) admitting expert testimony regarding mitochondrial DNA ("mtDNA") testing and (4) refusing to dismiss the charges at the close of the State's evidence.

The State's evidence at trial tended to show that on 7 January 1994, the body of Viktor Gunnarsson ("Gunnarsson") was found near Deep Gap, North Carolina by a North Carolina Department of Transportation employee. The body was located about 300 feet from a ramp to the Blue Ridge Parkway in Watauga County. Gunnarsson had been dead for weeks and the cause of death, as determined by the Chief Medical Examiner, was a gunshot wound to the head. Two .22 caliber bullets were removed from Gunnarsson's head and the contents of his stomach revealed partially digested potatoes, sug-

gesting that he died within a few hours of eating. Gunnarsson had not been seen since 3 December 1993, when he had dinner with Kay Weden ("Weden"), a former girlfriend of defendant. As a part of Gunnarsson's dinner he had eaten potatoes.

Weden had ended a relationship with defendant in December of 1993. During her relationship with defendant, she received several anonymous threatening letters. One such letter stated that a .22 caliber bullet had been fired into her house. A deputy sheriff later found a .22 caliber bullet lodged in the exterior of her home near her son's bedroom.

Defendant was employed in December of 1993 at Salisbury High School as a Salisbury police officer. An examination of the typewriters at the school revealed that the same typewriter ribbon had been used to type Weden's address and a letter that had been sent to her.

Defendant possessed a .22 caliber pistol and rifle, and was issued a Colt .38 revolver while serving as deputy sheriff in Lincoln County. The inventory records at the Lincoln Police Department showed that the gun had been turned in but the actual weapon was never located. Several witnesses testified that they had seen defendant in possession of a .38 caliber weapon just prior to the December murders.

On the night of 3 December 1993, Gunnarsson's car was parked at the Weden residence. Defendant drove by Weden's house and saw Gunnarsson's car. Shirley Scott, a woman in the car with defendant, testified that they drove by Weden's house twice that night. Jason Weden, Weden's son, testified that he saw defendant drive by the house around 11:00 p.m. Defendant called his friend, Rick Hillard, at 11:30 p.m. and gave him a license plate number and asked him to perform a check on the license plate number. Defendant received a call shortly thereafter during which Scott heard Hillard say, "Viktor Gunnarsson." The license plate number was for a vehicle registered to Gunnarsson. His address was listed in the Salisbury phone directory.

In December 1993 or January 1994, defendant took his 1979 Monte Carlo to a car wash and had it thoroughly cleaned, including having the trunk carpet shampooed. When police searched the car on 1 February 1994, scratches were observed inside the trunk compartment and a mark that resembled a footprint was seen on the under-

side of the trunk lid. The trunk mat was removed from the car. Mitochondrial DNA and microscopic sequences were taken from hairs found on the trunk mat of defendant's car.

On 6 December 1993, defendant visited a restaurant where he knew that Weden would be dining with her mother, Catherine Miller ("Miller"), and friends. Defendant stated to Weden that Miller had ruined their relationship and that he wished something would happen to Miller so Weden would know how he felt.

On 9 December 1993, the body of Miller was found in her home. She had been shot twice in the head with .38 caliber bullets. The .38 caliber bullets that were taken from Miller's body were consistent with having been fired by a Colt .38 Detective Special.

Troy Hamlin ("Agent Hamlin") and Dr. Joseph A. DiZinno ("Dr. DiZinno") were two of the witnesses qualified by the court as experts. Agent Hamlin, special agent with the North Carolina State Bureau of Investigation, testified as an expert in the field of hair examination and comparison. After conducting a microscopic examination and comparison of the known hair samples of Gunnarsson and the hairs found on defendant's trunk mat, Agent Hamlin testified that the hairs were microscopically consistent and could have originated from Gunnarsson.

Dr. DiZinno, an employee of the Federal Bureau of Investigation, was qualified as an expert in the field of hair examination and mtDNA analysis. Dr. DiZinno has training in microscopic hair examination and has performed mtDNA research and analysis. He is the chief of DNA analysis unit number 2 where mtDNA tests are conducted. He performed a DNA sequencing from one of the hairs located on defendant's trunk mat and compared it to the mtDNA sequence obtained from a known blood sample of Gunnarsson. Dr. DiZinno opined that the DNA sequence from the hair and the DNA sequence from the blood sample were identical. He concluded that Gunnarsson could not be excluded as a source of the hairs from defendant's trunk mat.

I.

[1] The first question on appeal is whether the trial court erred by admitting evidence of Miller's homicide as evidence in the homicide of Gunnarsson in violation of Rule 404(b) of the North Carolina Rules of Evidence.

Rule 404(b) of the North Carolina Rules of Evidence 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). The landmark case in interpreting and applying Rule 404(b) is *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), where the Supreme Court upheld the admissibility of evidence of the death of the defendant's first husband in her trial for the murder of her second husband ten years later under similar circumstances. The Court ruled that evidence of other crimes is admissible if there is "substantial evidence tending to support a reasonable finding by the jury that the defendant committed a similar act or crime and its probative value is not limited solely to tending to establish the defendant's propensity to commit a crime such as the crime charged." *Id.* at 303-04, 406 S.E.2d at 890. The Court further held that Rule 404(b) is a general rule of inclusion of relevant evidence of other crimes with the exception that the evidence must be excluded if its probative value is to show that defendant had the propensity or disposition to commit an offense of the nature of the crime charged. *Id.* at 302-03, 406 S.E.2d at 890 (citations omitted). Other crimes may be offered to determine the issue of defendant's identity as the perpetrator when the circumstances of the two crimes "tend to show the crime charged and another offense were committed by the same person." *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983) (quoting *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 367 (1954)). The " 'acid test' for whether evidence of other distinct crimes properly falls within the identity provision in Rule 404(b) and its common law precursor 'is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced.' " *State v. Jeter*, 326 N.C. 457, 461, 389 S.E.2d 805, 808 (1990) (quoting *McClain*, 240 N.C. at 177, 81 S.E.2d at 368).

In the case at bar, the State used the evidence of Miller's death to show that defendant had a common scheme to hurt Weden for her refusal to continue their relationship. To carry out this scheme, he killed Gunnarsson, a man Weden dated, and Miller, Weden's mother.

Under Rule 404(b), there must be substantial evidence from which the jury could reasonably infer that defendant committed the

murder of the victim. *Stager*, 329 N.C. at 303, 406 S.E.2d at 890. Taking the facts in the light most favorable to the State, the evidence tends to show the following: The body of Miller was found on 9 December 1993 in her residence. She had been shot with a .38 Colt revolver similar to the one issued to defendant by the Lincoln County Sheriff's Department. Several witnesses testified that defendant had such a weapon in his possession as late as November of 1993. In fact, defendant gave the weapon to Rex Keller, Jr. ("Keller"), for the purpose of assaulting or scaring Weden. Keller returned the gun to defendant. Defendant had publicly blamed Miller for many of the problems he had with Weden. Prior to Weden breaking up with defendant on 8 December 1993, defendant wrote her a lengthy letter in which he twice warned her not to "force me into anything." We conclude that there was substantial evidence in which a jury could have concluded that defendant killed Miller.

Defendant argues that any evidence of the Miller homicide was inadmissible because the facts and circumstances of the Miller and Gunnarsson killings were not similar in nature. We disagree.

In *State v. Scott*, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986), our Supreme Court held that the incidents must be sufficiently similar and not so remote in time as to be more probative than prejudicial. The similarities between the instances need not rise to the level of the unique and bizarre but simply "must tend to support a reasonable inference that the same person committed both the earlier and later acts." *Stager*, 329 N.C. at 304, 406 S.E.2d at 891. While there are some differences, the evidence clearly shows several significant similarities. Both victims were shot twice in the head, both shootings took place between the 3rd and 9th of December, and both victims were closely connected to Weden who had recently broken up with defendant. With this circumstantial evidence, a jury could reasonably infer that defendant killed Miller.

Defendant argues that the prejudicial effect of the Miller homicide substantially outweighed its probative value to the jury. Whether or not to exclude evidence under Rule 403 is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Where the trial court has discretion and fails to exercise it, defendant is entitled to a new trial. *State v. Cotton*, 318 N.C. 663, 668, 351 S.E.2d 277, 280 (1987). In the instant case, the trial court conducted a lengthy pretrial hearing, made 53 findings of fact and made conclu-

sions of law supporting its decision to admit the evidence. Defendant offered no evidence. The similarities between the killings of Miller and Gunnarsson were highly probative on the issue of identity. We are aware of the propensity of unfair prejudice to defendant in the introduction of evidence of crimes separate from that for which he is being tried; however, we find no abuse of discretion by the trial court in failing to exclude this evidence.

[2] Defendant argues that the admittance of evidence regarding Miller's homicide had a chilling effect on his right to testify in his own defense. The evidence of the killing of Miller had been ruled admissible pursuant to Rule 404(b) prior to the trial. Defendant relies on *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988), where the Court held that the trial court erred in denying defendant's motion in limine to exclude evidence implicating defendant on other killings on the basis that the introduction of the evidence impermissibly "chilled" her right to testify in her own defense. However, in this case, the evidence had been ruled admissible prior to trial, thus defendant's decision not to testify was purely tactical, not constitutional. Furthermore, in *State v. White*, 340 N.C. 264, 288, 457 S.E.2d 841, 855 (1995), the Court held that because there was no threat that inadmissible evidence would be used to cross-examine defendant, he was not impermissibly discouraged from testifying at trial. Therefore, we hold that the admission of evidence of Miller's murder did not "chill" defendant from testifying. This argument is overruled.

II.

[3] Defendant next argues that the trial court erred in denying defendant's requested instruction on the limited use of the evidence of the murder of Miller. Once again, we disagree.

A trial court must, upon request, instruct the jury that the evidence is to be considered only for the purpose for which it was admitted. *State v. Haskins*, 104 N.C. App. 675, 411 S.E.2d 376 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). Defendant requested a jury instruction stating that the jury could consider the Miller killing as evidence of motive for the Gunnarsson killing only if "the State proves this evidence beyond a reasonable doubt." In *Haskins*, the court ruled that Rule 404(b) evidence is properly considered when the jury can conclude "by a preponderance of the evidence" that the extrinsic act was committed by the defendant. *Id.* at 679, 411 S.E.2d at 380. The jury instruction tendered by defendant would have incorrectly stated the law, consequently, the court

refused to instruct the jury as defendant requested. The law does not require that the trial court's charge be given exactly in the words of the tendered request for instruction. *State v. Avery*, 315 N.C. 1, 33, 337 S.E.2d 786, 804 (1985). The trial court is only required to give requested instructions when they are a correct statement of the law. *Id.* The trial court instructed as follows:

> Evidence has been received tending to show the alleged commission of wrongs, crimes, or other acts concerning Jason Weden, Kay Weden, and Catherine Miller by the defendant which occurred before and after the death of Viktor Gunnarsson. You are not to consider evidence of such alleged wrongs, crimes, or acts as evidence of the defendant's character or evidence that in the crimes charged he acted in conformity with such character. Rather, this evidence was received solely for the purpose of showing the following, if it does so: the identity of the person who committed the crimes charged in the case; that the defendant had a motive for the commission of the crimes charged; that the defendant had the intent, which is a necessary element of the crimes charged; that there existed in the mind of the defendant a plan, scheme, system or design involving the crimes charged; or that the defendant had the opportunity to commit the crimes charged. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received.

The trial court's instruction to the jury was proper and in accordance with the law. We find no error.

III.

Defendant next argues that the court erred in admitting expert testimony concerning mtDNA evidence. Specifically, defendant argues that mtDNA testing is not scientifically reliable and its reasoning and methodology were not properly applied to the facts of this case. We disagree.

The admissibility of mtDNA evidence is an issue of first impression in North Carolina's appellate courts. In addressing defendant's argument, it is helpful to briefly review the process of mtDNA analysis. In simplistic terms, mitochondria are microscopic particles found in the cell, but outside the nucleus. NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 72 (1996). Mitochondrial DNA analysis is a method of DNA testing which was implemented for

forensic purposes by the Federal Bureau of Investigation laboratory in June of 1996. It is based on the Polymerase Chain Reaction ("PCR") method of DNA analysis. The mtDNA is inherited solely from the mother and is the same for all maternal relatives. *Id.* Mitochondrial DNA testing is performed by extracting the DNA from the mitochondria. The DNA is then amplified and examined to determine its sequences of A's, G's, T's, and C's. The sequence is then compared to another sequence donated by a known person. If the sequences are identical, the examiner compares the sequence to the available database of mtDNA sequences to determine if he has ever seen that same sequence. The statistic will be based upon the frequency of similar DNA patterns occurring within the database and within each group in the database. The final result simply either excludes the tested individual as the sample donor or confirms that such individual is within a certain percentage of the population which could have donated the sample.

[4] Rule 702 of the North Carolina Rules of Evidence establishes the following standard for the admissibility of expert testimony:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (1992). "The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies." *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973). Ordinarily, whether a witness qualifies as an expert is exclusively within the discretion of the trial judge and is not to be reversed absent a complete lack of evidence to support his ruling. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). In the case at bar, Dr. DiZinno testified as an expert in mtDNA analysis in order to establish whether the hairs found in the trunk of defendant's car could have been those of Gunnarsson. Dr. DiZinno testified that as the chief of the FBI's DNA analysis unit number 2, he earned a Bachelor of Science degree from the University of Notre Dame and a Doctor of Dental Surgery from Ohio State. He further testified that he was an expert hair examiner with two years experience in conducting mtDNA analysis. He had previously testified in court

and given his opinion as an expert witness in mtDNA. The evidence shows that Dr. DiZinno was properly accepted by the trial court as an expert in the field of mtDNA analysis and, therefore, better qualified than the jury to form an opinion on the hairs taken from defendant's trunk.

Defendant argues that the expert testimony is of no assistance to the jury. This argument is rejected. The source of hair found in defendant's trunk was a crucial fact in this case. Mitochondrial DNA evidence was offered to show that the hair could have been Gunnarsson's. According to Rule 401, evidence is relevant if it has a tendency to make a fact of consequence "more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). Therefore, even though the expert testimony was unable to definitively eliminate the possibility that the hair came from someone else, the mtDNA was relevant to show that it was more probable that the hair belonged to Gunnarsson.

[5] Defendant argues that mtDNA evidence is scientifically unreliable. In North Carolina, a new scientific method is admissible at trial if it is scientifically reliable. *Bullard*, 312 N.C. at 148, 322 S.E.2d at 381 (citations omitted). In determining admissibility for new scientific evidence and scientific reliability, North Carolina does not adhere exclusively to the *Frye* standard which emphasizes a general acceptance in the particular field in which it belongs. *Id.* at 147, 322 S.E.2d at 380; *see Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Instead, we adopted factors similar to those of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), for determining scientific validity. In *Daubert*, the United States Supreme Court held that the following factors should be considered in determining whether scientific evidence is reliable: (1) whether the theory or technique can be or has been tested, (2) whether the theory has been subjected to peer review and publication, (3) whether the theory has been submitted to the scrutiny of the scientific community, (4) the known or potential rate of error, and (5) the general acceptance in a relevant scientific community. *Id.* North Carolina emphasizes the "reliability of the scientific method and not its popularity within a scientific community." 1 Brandis & Broun on North Carolina Evidence § 113 (5th ed. 1998). "[W]hen no specific precedent exists, scientifically accepted reliability justifies admission of the testimony . . . and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or a combination of the two." *Bullard*, 312 N.C. at 148,

322 S.E.2d at 381 (quoting 1 Brandis on North Carolina Evidence § 86 (2nd ed. 1982). Once a determination of scientific reliability and validity has been established, the next question is whether it is also relevant. Relevant evidence is admissible if it "has any logical tendency however slight to prove the fact at issue in the case." *State v. Pratt*, 306 N.C. 673, 678, 295 S.E.2d 462, 466 (1982). Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or a confusion of the issues. N.C. Gen. Stat. § 8C-1, Rule 403 (1992).

[6] In the case *sub judice*, Dr. DiZinno testified that he compared DNA sequence from Gunnarsson's blood and a DNA sequence from the hair found in the trunk mat of defendant's vehicle. He found the sequences to be the same so that Gunnarsson could not be excluded as a possible source of the hair. In the database relied upon by Dr. DiZinno, he testified that he had seen the same DNA sequence about one out of ten times. Dr. DiZinno opined that although possible, it is "highly unlikely" that two people would match in both a microscopic examination of hair and a mtDNA sequence.

Defendant further argues that the problem with mtDNA testing is that the population database with which DNA samples are compared consisting of over 1,000 people worldwide, is too small to draw any meaningful conclusions about the significance of a match. By contrast, the population database for nuclear or conventional DNA testing contains millions of samples that can be compared.

There has been over four years of solid research, testing and publications in peer-reviewed scientific journals on mtDNA analysis. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The mtDNA analysis provides results when genomic DNA analysis of hair shafts or any other biological specimen known to contain little or no DNA does not. Moreover, it has been widely accepted in evolutionary genetic studies and has been used in at least six other states.

In addressing the jury, Dr. DiZinno told the jury that mtDNA testing does not give proof of identification as conventional DNA testing does. In *State v. Catoe*, 78 N.C. App. 167, 169, 336 S.E.2d 691, 692 (1985), *cert. denied*, 316 N.C. 380, 344 S.E.2d 1 (1986), this Court stated that while the scientific technique on which an expert bases a proffered opinion must be recognized as reliable, "absolute certainty of result is not required." We hold that mtDNA testing is sufficiently reliable to warrant its admissibility into evidence.

We find support in another jurisdiction for our holding regarding the admissibility of mtDNA. *Council*, 335 S.C. 1, 515 S.E.2d 508. In *Council*, the South Carolina Supreme Court upheld the admission of mtDNA evidence, because the evidence was of assistance to the jury. The Court observed that mtDNA evidence provided an objective confirmation of the subjective microscopical comparison performed on the hairs. *Id.* The Court concluded that the trial judge was within his discretion in admitting the mtDNA analysis because the evidence was of assistance to the jury, the expert witness was qualified, and the underlying science was reliable.

In conclusion, the trial court did not err in admitting expert testimony concerning mtDNA linking defendant to the murder of Gunnarsson.

IV.

[7] Finally, defendant argues that the trial court erred in failing to dismiss all charges against defendant at the close of the State's evidence on the ground that the evidence was insufficient as a matter of law to sustain a conviction. We disagree.

In ruling upon a motion to dismiss, the standard is whether there is substantial evidence (1) of each essential element of the offense alleged and (2) of defendant being the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). If, upon defendant's motion to dismiss, evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the perpetrator, the motion should be allowed. *Id.* In ruling on the defendant's motion to dismiss, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *Id.* at 99, 261 S.E.2d at 117. The test for sufficiency of evidence is the same whether the evidence is circumstantial, direct, or both. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967).

Applying the foregoing principles of law to the convictions for first-degree murder and first-degree kidnapping, one is guilty of first-degree murder if he kills another human being with malice and with premeditation and deliberation. N.C. Gen. Stat. § 14-17 (1993). One is guilty of first-degree kidnapping if he unlawfully confines, restrains or removes a person against their will for a felonious purpose and seriously injures or sexually assaults the person. N.C. Gen. Stat. § 14-39 (1993).

The evidence when viewed in a light most favorable to the State established the following concerning the death of Gunnarsson: Gunnarsson was last seen alive when he left the house of Weden on 3 December 1993, at approximately 11:30 p.m. Earlier that night Gunnarsson and Weden visited a seafood restaurant where Gunnarsson had eaten a meal of seafood and potatoes. When his body was found, Gunnarsson had been dead for weeks and was killed by a .22 caliber bullet wound to the head. Defendant had possession of a .22 caliber weapon. The medical examiner found small traces of potato skins in Gunnarsson's stomach and opined that Gunnarsson received a fatal gunshot wound within a few hours after eating his meal.

Defendant was extraordinarily jealous when it came to Weden and very angry at her refusal to resume a relationship with him. On the 3rd of December, defendant learned that a car parked outside Weden's house that night was registered to Gunnarsson, whose address was listed in the Salisbury directory. Within a matter of days, defendant denied having ever heard Gunnarsson's name.

After Gunnarsson disappeared, defendant had his car cleaned and trunk mat shampooed at a car wash. He later painted the trunk's interior to hide small scratch marks and a faint footprint. Despite the cleaning, several hairs were found embedded in the trunk mat. The hairs matched those of Gunnarsson when examined by mtDNA analysis. Any person in Gunnarsson's maternal blood line would have the same mtDNA sequence; however, Gunnarsson's family lives in Sweden. These facts provide substantial evidence to support the reasonable inference that Gunnarsson was kidnapped and murdered by defendant.

For the aforementioned reasons, we conclude that there was substantial evidence to support findings that the offenses charged were committed by defendant. Therefore, the motion was properly denied.

CONCLUSION

Accordingly, we conclude that defendant has received a fair trial, free from prejudicial error.

No error.

Judges MARTIN and HUNTER concur.

STATE OF NORTH CAROLINA v. HERBERT WAYNE CHAVIS

No. COA98-1202

(Filed 17 August 1999)

1. Jury— juror related to district attorney staff member— mistrial denied

The trial court did not abuse its discretion in a prosecution for first-degree murder, assault and cocaine possession by denying defendant's motion for a mistrial where it was learned during the sentencing phase that the jury foreperson and the district attorney's witness coordinator were related. The juror stated that she could be fair even though she knew people in law enforcement and the court found that the witness coordinator had had no contact with the juror for at least ten years, that she was not sure that the juror recognized her, and that they had no contact at all regarding this case.

2. Jury— juror related to district attorney staff member—not revealed by prosecutor—sufficiency of court's inquiry

Defendant was not denied his due process rights where it was revealed during the sentencing proceeding for first-degree murder that the jury foreperson was related to the district attorney's witness coordinator and the trial court denied defendant's motion for a mistrial without conducting a voir dire of the juror. The trial court determined after questioning the witness coordinator that further inquiry was unnecessary as there was no showing that the juror concealed material information or demonstrated bias. It was not clear why the prosecutor did not reveal the information until the sentencing phase, but no impropriety was ascribed to the delay.

3. Homicide— first-degree murder—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss a first-degree murder charge based upon premeditation and deliberation or to set aside the conviction where it could be inferred by defendant's actions that he deliberately engaged in a confrontation using deadly force.

4. Homicide— felony murder—assault—store clerk protected by bullet resistant glass

The trial court did not err by denying defendant's motions to dismiss a first-degree murder charge based upon felony murder

arising from an assault where defendant fired at a store clerk who was protected by bullet resistant glass and then shot and killed a customer. Despite the bullet resistant glass, the store clerk was placed in apprehension and fear for his safety and other people in the store were clearly terrified; whether on transferred intent or shooting directly at the victim, the evidence of assault was sufficient.

5. Criminal Law— consolidation of offenses—murder, assault, narcotics

The trial court did not err by refusing to dismiss charges of possession of cocaine and possession of drug paraphernalia in a prosecution which included changes of assault and murder where, although defendant argued that the possession was a misdemeanor, possession of any amount of cocaine is felony and N.C.G.S. § 7A-271 gives a superior court jurisdiction to try a misdemeanor which may be properly consolidated for trial with a felony. The trial court here properly consolidated these charges.

6. Grand Jury— jurisdiction—offenses outside county

A grand jury had jurisdiction to indict defendant for cocaine and drug paraphernalia offenses in Randolph County where defendant was apprehended in Chatham County after he attempted to evade police in a high speed chase from Randolph County, defendant's car (in which the contraband was found) was continuously in sight of an officer from the time he spotted it until it crashed, and the car was placed in the custody of the police when it was returned to Randolph County.

7. Narcotics— constructive possession—articles in car

There was sufficient evidence of possession of cocaine and drug paraphernalia where the contraband was found in the back of defendant's car under a seat where a passenger was sitting. Even if defendant was not in exclusive possession of the car, there were ample other incriminating circumstances from which constructive possession can be inferred.

8. Arrest— *high speed chase—seizure in* Chatham County— appearance before Randolph County magistrate

There was no error in a prosecution for first-degree murder, assault, and possession of narcotics where defendant was seized in Chatham County by a Chatham County officer following a high speed chase from Randolph County, immediately turned over to a

Randolph County officer, and brought before a Randolph County magistrate. N.C.G.S. § 15A-501.

9. Search and Seizure— high speed chase—car returned to originating county for search

The was no error in a prosecution for possession of cocaine and paraphernalia found in defendant's car following a high speed chase from Randolph to Chatham County where the court concluded that officers had probable cause to search the car at the site of the crash in Chatham County. The fact that they chose to return the car to Randolph County and then obtain a search warrant did not negate their authority to make a warrantless search at the scene.

10. Evidence— cross-examination of witness—prior offense excluded

There was no error in a prosecution for murder, assault, and possession of narcotics arising from an incident at a food mart where the court prevented cross-examination of the store clerk about an alleged prior sexual offense. The State had asserted in pre-trial proceedings that there were no plea arrangements with the clerk and the court excluded the evidence for lack of relevance and undue prejudicial effect.

11. Confessions and Incriminating Statements— out-of court statement—not introduced—no prejudice

There was no prejudicial error where defendant contended that his out-of-court statement to officers was taken in violation of his Miranda rights, but the State never introduced the statement into evidence.

Appeal by defendant from judgment entered 12 June 1997 by Judge W. Douglas Albright in Randolph County Superior Court. Heard in the Court of Appeals 10 June 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Norma S. Harrell, for the State.

Irving Joyner for defendant-appellant.

WALKER, Judge.

On 19 May 1997, defendant was convicted of first degree murder under the theories of premeditation and deliberation and felony mur-

der and possession of cocaine, possession of drug paraphernalia, and assault with a deadly weapon with intent to kill. He was sentenced to life imprisonment for the first degree murder conviction and he received a concurrent two-year sentence in a consolidated judgment for the offenses of possession of cocaine and possession of drug paraphernalia. Judgment was arrested on the conviction for assault with a deadly weapon with intent to kill.

The State's evidence tended to show the following: Charles Hicks was working at the Servco gas station and food mart (the store) on Highway 64 in Asheboro, North Carolina, on 7 August 1994. Debbie Burke, Tina Davis, and Charles Hicks' wife, Kathy Dianne Hicks (Dianne Hicks), came into the store together. Davis went to use the telephone and Burke and Dianne sat in a booth in the eating area. Rhonda Brewer was also in the store, along with her son and nephew.

At approximately 1:30 a.m., a black Cadillac pulled up to the gas pumps and a woman, later identified as Racine Lawson, got out of the car and came into the store to pay for the gas and buy a drink. She left the store and then came back and asked Charles Hicks if he had "dry gas" or "white gas." Charles Hicks told her that he did not know what she was talking about, and the woman went back to the car.

Then, defendant came into the store carrying a gun, cursing, and asking about "white gas." Charles Hicks told him that he did not know what he was talking about. Defendant said there was water in the gas. Defendant yelled profanities at Charles Hicks and then raised the gun and shot at Charles Hicks who was in a cash register booth, which had visible bullet-resistant glass all the way across the front. The glass was struck at least twice by bullets. Defendant then turned around and fired the gun in the direction of the people sitting in the booths. One of the bullets struck Dianne Hicks who died from the gunshot wound. Charles Hicks called 911 from a phone located behind him. Defendant then drove away in the car. A total of four shots were fired.

Sergeant Billy Maness of the Asheboro Police Department was three to four blocks east of the store at 1:30 a.m. when he saw a black Cadillac speeding at an estimated 70 miles per hour through a 45-mile-per-hour zone. He pulled behind the car and noticed that it did not have a license plate. Sergeant Maness turned on his lights and sirens; however, the car did not pull over. He chased the car on Highway 64 and continued through Ramseur and Siler City, with offi-

cers from other jurisdictions getting involved. A chase took place at speeds up to 100 miles per hour. Near Pittsboro, two Pittsboro police cars parked parallel to each other in order to force defendant to stop. Defendant hit both of the cars and crashed into a ditch.

Defendant and his female passenger, Ms. Lawson, were arrested and placed in a Chatham County police officer's car until two Asheboro officers arrived at the scene and transported them back to Asheboro. Sergeant Maness stayed with the car at the scene until it was towed to Asheboro where it was secured.

A search of defendant's car produced a .380 pistol, a 12-gauge shotgun along with ammunition, a wallet with nearly $4,000 in cash, a bag containing $70,000 in U.S. currency, as well as vehicle sales and insurance documents for the car in defendant's name. A box of Kleenex was found under the passenger seat, and at the bottom of the box was a substance later identified as cocaine. A large black travel bag, found in the back floorboard area on the passenger side, contained numerous items including two folding knives, a set of Digital brand scales, a glass smoking pipe of a type used for crack cocaine and later shown to contain a residue of cocaine, an additional .380 pistol, and rolling paper.

An autopsy established that Dianne Hicks died of a gunshot wound to the head. The bullets recovered from the scene and the bullet from Dianne Hicks were consistent with bullets fired from a .380 semi-automatic pistol.

The defendant presented no evidence at trial. On appeal he contends: (1) the trial court erred when it failed to declare a mistrial after finding out that the jury foreperson was related to a member of the district attorney's office; (2) the trial court erred when it failed to set aside defendant's conviction for first degree murder; (3) the trial court erred by refusing to dismiss the possession of drugs and possession of drug paraphernalia charges and convictions; (4) the seizure and transfer of defendant and his car from Chatham County to Randolph County without benefit of process resulted in violations of his statutory and constitutional rights; (5) the trial court erred when it prevented defendant from cross-examining Charles Hicks concerning a criminal charge; (6) defendant did not make a voluntary, knowing, and intelligent *Miranda* waiver and his out-of-court statement should have been suppressed; and (7) the trial court failed to insure the jury selection procedures were lawfully administered.

[1] Defendant first contends the trial court should have declared a mistrial based upon information that a juror was related to a member of the district attorney's staff. While the jury was deliberating during the sentencing phase, it was revealed that the jury foreperson, Dawn Cox, and the district attorney's witness coordinator, Sandra Baucom, were related. The trial court conducted a *voir dire* during which Ms. Baucom testified that her mother's brother was the father of Juror Cox's father. After conducting the *voir dire*, the trial court made the following findings and conclusions:

> 2. . . . Witness Coordinator Baucom's mother's brother is the father of Foreperson Cox's father.
>
> . . .
>
> 4. Witness Coordinator Baucom has had no contact for at least ten years with Jury Foreperson Cox.
>
> 5. Indeed, Witness Coordinator Baucom did not know she was a Cox and did not even know her last name but did recognize her when she appeared for jury service. Witness Coordinator Baucom is not sure Foreperson Cox even recognized her.
>
> 6. There has been no contact of any sort or description with regard to this case between the two, and no conversation of any sort of description has taken place between the two regarding the case.
>
> . . .
>
> 8. The Court cannot perceive or does not find anything procedurally prejudice at this junction. This information was disclosed as quickly as the Court received it to the end that it would be spread upon the record and made available to the defendant and the defendant's counsel.

The trial court then denied defendant's motion for a mistrial.

The State contends that based on Ms. Baucom's testimony, the probability is that Juror Cox did not know, or did not recall, that her cousin was employed by the district attorney's office. The State also points out that during jury selection, Juror Cox had stated that she knew two Asheboro Police Department employees. In addition, she stated that she knew a couple connected with the Randolph County Sheriff's Department but that any acquaintance she had with these

law enforcement agencies would not affect her ability to make a fair decision.

The trial court must grant a mistrial when conduct takes place inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant. *State v. Brown*, 315 N.C. 40, 56, 337 S.E.2d 808, 821 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986). However, whether to grant a motion for a mistrial is at the sound discretion of the trial court and its ruling will not be reversed absent a showing of an abuse of discretion. *State v. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998).

Misconduct by a juror must be determined by the facts and circumstances of each case, and "[t]he circumstances must be such as not merely to put a suspicion on the verdict. . .but that there was in fact misconduct." *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984), *disc. review denied*, 313 N.C. 335, 327 S.E.2d 897 (1985) (*quoting State v. Johnson*, 295 N.C. 227, 234, 244 S.E.2d 391, 396 (1978)). "The determination of the existence and effect of jur[or] misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991).

A party moving for a new trial based upon misrepresentation by a juror during *voir dire* must show the following:

> (1) the juror concealed material information during *voir dire*; (2) the moving party exercised due diligence during *voir dire* to uncover the information; and (3) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party.

State v. Buckom, 126 N.C. App. 368, 380, 485 S.E.2d 319, 327, *cert. denied*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997). The record shows that Juror Cox, when questioned during *voir dire*, stated that even though she knew people in law enforcement, she could still be fair. The trial court found from Ms. Baucom's testimony that she had no contact with Juror Cox for at least ten years and that she was unsure whether Juror Cox recognized her. Also, the two had no contact at all regarding this case.

[2] Defendant further argues that he was denied his due process rights because the trial court did not make an adequate inquiry since it failed to conduct a *voir dire* of Juror Cox. Defendant also asserts that the prosecutor engaged in improper conduct by failing to reveal

information about the relationship of Ms. Baucom and Juror Cox. The record is unclear as to why the prosecutor did not reveal this relationship until the sentencing phase of the trial. Because we note that the prosecutor promptly notified the court during trial that another juror's spouse had called him to advise that the prosecutor and the juror were distantly related, we do not ascribe any impropriety to the delay raised here. Nevertheless, immediate disclosure of the relationship between Ms. Baucom and Juror cox would have allowed the trial court to address the issue promptly. As to the adequacy of the court's inquiry, "due process requires that a defendant have 'a panel of impartial, indifferent jurors.' " *State v. Williams*, 330 N.C. 579, 583, 411 S.E.2d 814, 817 (1992) (*quoting Rutherford*, 70 N.C. App. at 677, 320 S.E.2d at 919). It is the responsibility of the trial court to make investigations "as may be appropriate" to determine whether misconduct has occurred and whether it has prejudiced the defendant. *Id.* After Ms. Baucom was questioned concerning her relationship with Juror Cox, the trial court determined it was unnecessary to hear from Juror Cox or to conduct further inquiry as there was no showing that she concealed material information or demonstrated bias. We conclude the trial court did not err in failing to examine Juror Cox and did not abuse its discretion in denying defendant's motion for a mistrial.

[3] Defendant contends the trial court erred in denying his motion to dismiss the first-degree murder charge and in failing to set aside the first-degree murder conviction under the theories of premeditation and deliberation and felony murder. It is well-settled that when considering a motion to dismiss for the insufficiency of the evidence, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The motion to dismiss must be denied if the evidence, when viewed in the light most favorable to the State, permits "a rational jury to find the existence of each element of the charged crime beyond a reasonable doubt." *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998).

Here, the jury first found the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation. "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Connor*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994), *cert. denied*,

522 U.S. 876, 139 L. Ed. 2d 134 (1997). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836. Deliberation does not require a mind free of passion, but merely one that has not been overcome by passion stimulated by sufficient provocation. *State v. Watson*, 338 N.C. 168, 178, 449 S.E.2d 694, 700 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995). Both are usually proved by circumstantial evidence, and relevant factors include lack of provocation along with the defendant's actions and statements before and after the killing. *State v. Bruton*, 344 N.C. 381, 388, 474 S.E.2d 336, 341-42 (1996).

The evidence viewed in the light most favorable to the State shows that Charles Hicks advised Ms. Lawson that the store did not have "white gas" or "dry gas." After Ms. Lawson left, the defendant entered the store upset and asking about "white gas." He was mumbling, cursing, and carrying a gun. He engaged in a heated exchange with Charles Hicks and then raised his gun and fired. The first two shots were fired directly at Charles Hicks' head, but did not penetrate the bullet-resistant glass. Defendant then swung around and fired the gun toward the booth where Dianne Hicks was sitting. As a result, Dianne Hicks was killed. From this evidence it can be inferred by defendant's actions that he deliberately engaged in this confrontation by using deadly force. We find there was sufficient evidence to allow the jury to determine whether defendant was guilty of first-degree murder based on the theory of premeditation and deliberation.

[4] Defendant was also convicted of first-degree murder under the felony murder rule as a result of the underlying felony of assault with a deadly weapon with intent to kill. Specifically, defendant argues that he did not commit an assault on Charles Hicks since Charles Hicks was not placed in fear of bodily harm because he was protected by bullet-resistant glass.

A criminal assault can be shown by "an overt act or attempt, . . . with force and violence, to do some immediate physical injury to the person of another, which . . . must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. McDaniel*, 111 N.C. App. 888, 890-91, 433 S.E.2d 795, 797-98 (1993). In addition, it can also be shown by a "show of violence" where the State "must demonstrate some show of violence by the defendant, accompanied by reasonable apprehension of immediate bodily harm or

injury on the part of the person assailed, which causes him to engage in a course of conduct which he would not otherwise have followed." *Id.*

The evidence was sufficient to establish that despite the fact that Charles Hicks was sitting behind bullet-resistant glass, he was placed in apprehension and fear for his safety as a result of a person, not known to him, engaging in a shooting spree in the store. In addition, all of the other people in the store were clearly terrified as they ran for cover when the shooting began. Charles Hicks testified he immediately called the police when defendant began shooting and he was "still nervous" hours after the incident. Whether on a transferred intent theory, where it is immaterial whether the defendant intended injury to the person actually harmed as long as he acted with the required intent to someone, or a theory that defendant shot directly at the victim, the State's evidence was sufficient to allow the jury to determine whether defendant committed the felony of assault with a deadly weapon with intent to kill and was therefore guilty of first-degree murder under the felony murder rule. *See State v. Locklear*, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992).

[5] Defendant next argues the trial court erred in refusing to dismiss the charges of possession of cocaine and of possession of drug paraphernalia. We note at the outset that defendant states that possession of less than a gram of cocaine is a misdemeanor; however, N.C. Gen. Stat. § 90-95(d)(2) (Cum. Supp. 1998) clearly states that the possession of any amount of cocaine is a felony.

In support of his argument, the defendant asserts that with certain exceptions only the district court has jurisdiction to hear misdemeanors and that the grand jury should not have been permitted to indict him for misdemeanors. *See* N.C. Gen. Stat. § 7A-272(a) (Cum. Supp. 1998); N.C. Gen. Stat. § 7A-271(a) (1995). However, N.C. Gen. Stat. § 7A-271(3) (1995) gives a superior court jurisdiction to try a misdemeanor: "Which may be properly consolidated for trial with a felony under G.S. 15A-926." Here, the trial court determined the charges should be consolidated for trial and it ordered the following:

> 2. The offenses, however, are so connected in time and place that the evidence at the trial of one of the indictments would be competent and admissible at the trial of the others. The acts constituting the offenses in question were connected as continuing transaction. Indeed, the so-called "drug offenses" arise during the flight and concealment phase of the homicide case at issue.

3. The evidence in the drug cases fits into the proof of the capital offense in that these offenses arise during the flight or concealment phase of that offense, and arise substantially contemporaneously with the homicide charge. The offenses in question are not so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant.

We find the trial court properly consolidated the charges and this assignment of error is overruled.

[6] Defendant also argues the grand jury was without authority to indict defendant for offenses which occurred outside of its jurisdictional borders pursuant to N.C. Gen. Stat. § 15A-628(b) and N.C. Gen. Stat. § 15A-631. Further, the State failed to present sufficient evidence to support the convictions for possession of cocaine and drug paraphernalia in Randolph County. At the conclusion of the State's evidence, defendant moved to dismiss the murder and assault charges. After the defendant announced he would not present any evidence, he renewed his prior motion to dismiss based on the insufficiency of the evidence. We conclude the defendant has properly preserved this argument for appeal.

In ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975). The evidence offered by the State showed that the defendant was apprehended in Chatham County only after he attempted to evade police in a high speed chase from Randolph County. Also, the State's evidence showed that from the time defendant's car was spotted by Sergeant Maness, it was continuously within his sight until it crashed. The car was then placed in the custody of the police when it was brought back to Randolph County. The defendant was properly in Randolph County and the evidence was sufficient to go to the jury on the question of whether the cocaine and drug paraphernalia were possessed in Randolph County.

[7] Defendant argues that he did not have exclusive possession of the car and that he cannot be deemed to have been in constructive possession of the cocaine and drug paraphernalia.

Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both "the power and intent to control its disposition or use,"

> *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972), even though he does not have actual possession. *Id.* "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Id.* However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred. *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984).

State v. Davis, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Defendant asserts that he did not have exclusive possession of the car where the cocaine and drug paraphernalia were located since they were found in the back of the car and under the passenger's seat where Ms. Lawson was seated. Even if defendant was not in exclusive possession of the car, there were ample other "incriminating circumstances" from which constructive possession can be inferred. Defendant was both the owner and driver of the car. The cocaine found in the Kleenex box on the passenger side of the car was surrounded by other items belonging to the defendant, including his wallet and sales and insurance documents in his name. The black travel bag located in the back of the car which contained the drug paraphernalia also included a number of personal items including men's underwear and shaving items. Therefore, we find this assignment of error to be without merit.

[8] Next, defendant argues the "seizure and transfer" of him and his car from Chatham County "without benefit of process" violated his statutory and constitutional rights. Specifically, defendant contends that he should have been brought before a Chatham County magistrate pursuant to N.C. Gen. Stat. § 15A-501 since he was arrested by a Chatham County police officer. N.C. Gen. Stat. § 15A-501 (1997) states as follows:

> Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:
>
> . . .
>
> (2) Must, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person

arrested upon a warrant or order for arrest, take the person arrested before a judicial officer without unnecessary delay.

Defendant makes no argument that there was an "unnecessary delay." Instead, he contends that since he was arrested by a Chatham County police officer, he was required to be brought before a Chatham County magistrate. Defendant presents no authority to support this contention. Defendant was read his *Miranda* rights by a Chatham County police officer and was immediately turned over to Randolph County law enforcement at the scene. He was subsequently brought before a Randolph County magistrate who issued arrest warrants. Since the defendant was arrested in Chatham County solely because he was trying to evade police in a chase that began in Randolph County, he was properly brought before a Randolph County magistrate without "unnecessary delay."

[9] Defendant also argues that the search warrant for his car was not supported by probable cause. The trial court found and concluded that the officers had probable cause to search the car at the site of the crash. Defendant does not contend these findings and conclusions were erroneous or unsupported by the evidence. The fact that the officers chose to take the car back to Randolph County and then obtain a search warrant did not negate their authority to make a warrantless search and seizure of the car at the scene. *See State v. Mitchell*, 300 N.C. 305, 311-12, 266 S.E.2d 605, 609-10 (1980), *cert. denied*, 449 U.S. 1085, 66 L. Ed. 2d 810 (1981). Therefore, we find this assignment of error to be without merit.

[10] Defendant next contends the trial court erred when he was prevented from cross-examining Charles Hicks concerning an alleged sexual offense. He argues that if he had been able to elicit this information, Charles Hicks "would have been more vulnerable to intense cross-examination regarding these crimes, his bias, and credibility."

A defendant may ask questions of a State's witness concerning pending charges and possible "deals" or arrangements with the prosecution, for purposes of showing bias. *State v. Graham*, 118 N.C. App. 231, 237-38, 454 S.E.2d 878, 882, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 834 (1995). However, the trial court has broad discretion in controlling the scope of cross-examination and such a ruling will not be disturbed absent abuse of discretion and a showing the ruling was so arbitrary it could not have been the product of a reasoned decision. *Jones v. Rochelle*, 125 N.C. App. 82, 85-86, 479

S.E.2d 231, 233, *disc. review denied*, 346 N.C. 178, 486 S.E.2d 205 (1997).

Here, in pre-trial proceedings, the State asserted that there were no plea arrangements with Charles Hicks concerning the pending charges of taking indecent liberties with a minor. At trial, defendant asked Charles Hicks about any "deals" or "arrangements" he had with the State. However, the trial court did not permit defendant to inquire into the details of the charges. The trial court specifically excluded this evidence on the grounds of lack of relevance pursuant to N.C.R. Evid. 401. In addition, the trial court also excluded the evidence under N.C.R. Evid. 403 because it found that any probative value the evidence might have was outweighed by its prejudicial effect. A trial court's ruling on relevancy is given great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). Defendant has failed to demonstrate the relevancy of this information to his case.

[11] Defendant further argues that the trial court erred in denying his motion to suppress his out-of-court statement to law enforcement. Specifically, defendant contends that his statement was taken in violation of his *Miranda* rights. However, the State never introduced defendant's statement into evidence. Detective Mark Tolbert, formerly a detective and currently a patrolman with the Asheboro Police Department, testified that he interviewed defendant. The only statement which Officer Tolbert testified that was made by the defendant related to his height. Defendant has failed to show any prejudicial error. Therefore, we find this assignment of error to be without merit.

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

During the trial of this case, the defendant made numerous motions to which the trial court responded with appropriate findings and conclusions. It is apparent from the record that the able trial judge conducted the trial in a manner which assured the defendant that he would receive a fair trial. We conclude the defendant received a fair trial free from prejudicial error.

No error.

Judges McGEE and EDMUNDS concur.

STATE OF NORTH CAROLINA v. JESSE LEE THOMAS, DEFENDANT

No. COA98-715

(Filed 17 August 1999)

1. **Constitutional Law— right to conduct own defense—standby counsel—pro se defendant—first-degree murder—defendant expressly requested**

The trial court did not err in a first-degree murder case by permitting pro se defendant's standby counsel to approach the bench while the jury was present in the courtroom and argue legal issues outside of the jury's hearing because: (1) nothing in the record indicates that defendant was in any way prevented from conducting his own defense as he saw fit; (2) standby counsel's participation in the trial occurred either when the jury was absent from the courtroom or at bench conferences outside of the jury's hearing; and (3) in all instances, defendant expressly requested the assistance of the standby counsel.

2. **Homicide— first-degree murder—sufficiency of evidence—intervening factor determined by jury**

The trial court did not err in denying defendant's motion to dismiss the first-degree murder charge based on insufficiency of the evidence since none of the eyewitnesses saw him inflict the fatal wound to the victim's heart, even though they saw him inflict other wounds to the victim, because the possibility of an intervening factor is a matter for the determination of the jury and is irrelevant to the issue before the court on a motion to dismiss.

3. **Criminal Law— leg shackles—pro se defendant—waiver—failed to object**

The trial court did not commit prejudicial error in a first-degree murder case by requiring pro se defendant to appear before the jury in leg shackles because defendant waived this argument when he made no objection to his having to proceed in shackles.

4. **Constitutional Law— right to be present at all stages—ex parte conference—harmless error—conference recreated—opportunity to be heard**

Although the trial judge erred in a first-degree murder case by holding an ex parte conference in his chambers with the prose-

cutor and defendant's standby counsel, without defendant's presence, the error was harmless in light of the facts that: (1) the substance of the conference was recreated by the judge and there is not reason to question the accuracy or completeness of his recitation; and (2) the trial judge gave defendant ample opportunity to object and otherwise be heard on the issue discussed in the conference.

5. Constitutional Law— right to counsel—right to be present—first-degree murder—pro se defendant—disruptive behavior—removal from courtroom—no jurors present

The trial court did not violate defendant's right to be present and his right to counsel in a first-degree murder case when it momentarily removed pro se defendant from the courtroom for disruptive behavior during a break in jury selection when no prospective jurors were present in the courtroom and the trial court was attempting to enter findings into the record regarding various discovery issues raised by defendant because: (1) the trial court warned defendant that he would be removed if he kept interrupting the court; (2) defendant's standby counsel remained in the courtroom; and (3) defendant was present when the proceedings resumed and was given an opportunity to make his objections. N.C.G.S. § 15A-1032.

Appeal by defendant from judgment entered 10 December 1997 by Judge Cy A. Grant in Nash County Superior Court. Heard in the Court of Appeals 17 March 1999.

Attorney General Michael F. Easley, by Assistant Attorney General John F. Maddrey, for the State.

Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Jesse Lee Thomas appeals from a judgment entered upon his conviction of first-degree murder. For the reasons hereinafter articulated, we find that no prejudicial error occurred in the proceedings below and uphold defendant's conviction.

Pertinent factual and procedural background is as follows: Defendant was originally indicted for murder in the first degree of Debra Ann Proctor on 20 February 1989. In May of 1990, defendant

was tried capitally, convicted, and sentenced to death. Defendant appealed, and the North Carolina Supreme Court overturned the conviction and ordered a new trial. *See State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473 (1992). On remand, in July of 1995, defendant was tried non-capitally, convicted of first-degree murder, and sentenced to a mandatory term of life imprisonment. Defendant appealed, and the Supreme Court again reversed defendant's conviction and awarded him a new trial. *See State v. Thomas*, 346 N.C. 135, 484 S.E.2d 368 (1997).

On 29 May 1997, defendant appeared before Judge Frank R. Brown and requested that he be permitted to proceed *pro se* and that standby counsel be appointed, pursuant to section 15A-1243 of the North Carolina General Statutes, to assist him in his defense. The judge conducted a hearing in accordance with section 15A-1242 of the General Statutes and entered an order concluding that defendant freely, voluntarily, and with full understanding of the charge against him and the potential punishment, waived his right to be represented by counsel. Judge Brown thereupon authorized defendant to appear and proceed *pro se* and appointed David C. Braswell to act as standby counsel.

On 31 July 1997, Judge G.K. Butterfield conducted a hearing to entertain certain pretrial motions. The first of such motions was a motion by defendant to "define the role of standby counsel." At the hearing, defendant and the State both took the position that the standby counsel could conduct any portion of the trial upon defendant's request, without such actions disqualifying defendant from further representing himself. Judge Butterfield did not issue a ruling on the motion at the pre-trial hearing, and, thus, the issue was again raised when the case came on for trial at the 1 December 1997 criminal session of Nash County Superior Court before Judge Cy A. Grant. Following lengthy arguments by the parties regarding their interpretations of the proper role of standby counsel, the court ruled as follows:

> [I]n this particular case I'm going to take the position, Mr. Thomas and Mr. Braswell, that standby counsel will not be allowed to make any—not be allowed to make any statements—in front of the jury such as opening. . . . That as far as standby counsel is concerned, that the standby counsel will not make any statement in front of the jury. That is, standby counsel will not make a closing statement; standby counsel will not argue

> any objections or motions in front of the jury; standby counsel will not conduct jury voir dire. As I stated, standby counsel will not make any statement in front of the jury.
>
> All right, now, as it pertains to non-jury matters, for example, outside the presence of the jury at the request of Mr. Thomas if he sees fit, standby counsel may be allowed at Mr. Thomas' request to stand and argue questions of law with regard to, for example, positions on motions. . . .
>
> So anything outside the presence of the jury, for example, Mr. Thomas, if a legal issue arises and you feel more confident having Mr.—wait a minute—having Mr. Braswell stand on your behalf if you see fit, you may ask him to do it in your behalf if you so desire. I'm not going to ask him to do it for you. That's going to be my position.

Defendant objected to the ruling, arguing that, at his request, the standby counsel should be permitted to address the jury or the court in the presence of the jury. The court noted the objection, and the case proceeded to jury selection.

During a recess in jury selection, the trial judge held an *ex parte* conference with the prosecutor and the standby counsel, outside of defendant's presence. The judge indicated for the record that the conference was held for the purpose of discussing the possibility of removing the shackles from defendant's legs. The judge further noted that in his opinion, defendant did not present any flight risk. Upon learning of the conference, however, defendant vigorously objected, asserting that it was improper for the court to hold such a conference in his absence. The court responded, stating, "in light of the fact that you object to those types of conversations, we'll keep the shackles on your feet." Defendant's legs remained in shackles until the evening recess of 4 December 1997, when the court ordered the restraints removed.

After opening statements by the parties, the State presented the following evidence: On the morning of 13 July 1978, defendant and a group of people were seated on the porch of a house located on South Church Street in Rocky Mount, North Carolina. Defendant's car was parked on the street in front of the house. Alphonso Taylor, one of the individuals gathered at the house, testified that he saw the victim, Debra Ann Proctor, walk by the house in the direction of Proctor's Grocery Store, which was situated on the corner of South Church and

Home Streets. As the victim passed the house, Taylor observed defendant rise from the porch, go to the trunk of his car, withdraw a long-bladed knife, slide the knife under his shirt, and walk toward the grocery store. Intending to purchase cigarettes, Taylor and several other men proceeded to the store with defendant. Taylor stated that after the victim entered the store, defendant waited on the side of the building. When the victim exited the store, defendant grabbed her from behind, stabbed her in the arm, yanked her head back by her hair, and "pulled the knife around her throat." Taylor explained that he did not see whether defendant inflicted any additional wounds to the victim, because when he realized defendant was going to kill her, he turned his head.

Blondie Hinton, who was nine months pregnant, also witnessed the stabbing while heading toward the store entrance. Hinton testified that she saw defendant walk down Church Street and duck behind a dumpster next to the grocery store. When the victim exited the store, defendant, making no attempt to conceal his identity, grabbed the victim by her hair, pulled her head back, and slit her throat with a knife that was approximately twelve inches long. Defendant then walked passed Hinton, threatened to "get" her if she told anyone what she saw, and walked up Church Street. Hinton said that she did not see defendant inflict any other stab wounds to the victim and that, immediately after the stabbing occurred, she went into labor.

The State also presented the testimony of the medical examiner, Dr. Dawson E. Scarborough, who performed the autopsy on the victim's body. Dr. Scarborough testified that the victim died from a stab wound to the heart. Dr. Scarborough further stated that the victim suffered a total of eleven stab wounds and that the laceration to her neck was not fatal.

Defendant offered no evidence in his defense. At the close of all the evidence, defendant, through his standby counsel, moved to dismiss the charge based on insufficiency of the evidence. The trial court denied the motion, and the jury returned a verdict finding defendant guilty of murder in the first degree. The trial court sentenced defendant to a term of life imprisonment. Defendant appeals.

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[1] By his first assignment of error, defendant argues that representation *in propia persona* with the assistance of standby counsel,

such as he received in the instant case, constitutes "hybrid" representation, which is prohibited in North Carolina. Defendant contends that by permitting the standby counsel to approach the bench while the jury was present in the courtroom and argue legal issues outside of the jury's hearing, the trial court committed reversible error. We must disagree.

Regarding his representation, "a defendant has only two choices—'to appear in *propria persona* or, in the alternative, by counsel.' " *Thomas*, 331 N.C. at 677, 417 S.E.2d at 477 (quoting *State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981), *disavowed on other grounds by State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985)). A defendant is not entitled to "hybrid" representation, i.e., to appear both *pro se* and by counsel. *Id.* This notwithstanding, section 15A-1243 of our General Statutes authorizes the trial court to provide standby counsel for a defendant appearing *pro se*:

> When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may appoint standby counsel to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion.

N.C. Gen. Stat. § 15A-1243 (1997).

Although our research has uncovered no North Carolina cases that speak directly to the situation presented by these facts, the United States Supreme Court, in *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984), addressed the question of what role standby counsel is permitted to play in a proceeding where the defendant is appearing *pro se*. In that case, the Court stated that a defendant's right to conduct his own defense requires that he "be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *Id.* at 174, 79 L. Ed. 2d at 131. Regarding standby counsel's participation in the proceedings, the Court held as follows:

> Participation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable. A defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense. Such participation also diminishes any general claim that counsel unreasonably

> interfered with the defendant's right to appear in the status of one defending himself.

Id. at 182, 79 L. Ed. 2d at 136.

The record reveals that defendant, in the instant case, was permitted to examine jurors and exercise challenges, make an opening statement, cross-examine witnesses, make objections and arguments on legal issues, and make a closing argument. Nothing in the record indicates that defendant was in any way prevented from conducting his own defense as he saw fit. As to the standby counsel's participation in the trial, the record shows that such involvement occurred either when the jury was absent from the courtroom or at bench conferences outside of the jury's hearing. Of primary importance, however, is that in all instances, defendant expressly requested the assistance of the standby counsel.

> THE COURT: One thing for the record. I've been noticing every time we've had bench conferences that standby counsel, Mr. Braswell, also approaches the bench. Is he approaching the bench at your request, Mr. Thomas? I just want to get that in the record. Yes or no?
>
> MR. THOMAS: Yes, Your Honor.
>
> THE COURT: Very well.
>
> MR. THOMAS: I requested it.

Insofar as the standby counsel participated only "when called upon" by defendant and in a manner that was not at odds with defendant's right to conduct his own defense, *see* N.C.G.S. § 15A-1243, we hold that the trial court did not err in permitting such participation. Thus, defendant's assignment of error proves unsuccessful.

[2] Next, we examine defendant's assignment of error wherein he argues that the trial court erroneously denied his motion to dismiss the charge of first-degree murder for insufficiency of the evidence. Defendant asserts that the State's evidence was insufficient to show that he inflicted the fatal stab wound to the victim's heart. We are not persuaded.

"Before the issue of a defendant's guilt may be submitted to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator." *State v.*

Hamlet, 312 N.C. 162, 169, 321 S.E.2d 837, 842 (1984). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Pryor*, 59 N.C. App. 1, 5, 295 S.E.2d 610, 614 (1982). Thus, evidence necessary to support a conviction is that which "is sufficient for a rational trier of fact to find proof beyond a reasonable doubt of every essential element of the crime charged." *Id.* at 5, 295 S.E.2d at 613. However, while substantial evidence must be real and existing, it "need not exclude every reasonable hypothesis of innocence." *Hamlet*, 312 N.C. at 169, 321 S.E.2d at 842. Any contradictions or discrepancies in the evidence are for the jury to resolve, and these inconsistencies, by themselves, do not serve as grounds for dismissal. *Id.*

"First-degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995). Premeditation means that at some point and for some length of time before committing the murderous act, the defendant formulated the specific intent to kill the victim. *Id.* "Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Williams*, 319 N.C. 73, 80, 352 S.E.2d 428, 433 (1987). "A person is criminally responsible for a homicide only if his act caused or directly contributed to the death." *State v. Luther*, 285 N.C. 570, 573, 206 S.E.2d 238, 240 (1974).

The evidence, when taken in the light most favorable to the State, tends to show that after the victim walked passed the house where defendant and other individuals were congregated, defendant retrieved a long-bladed knife from the trunk of his car and followed the victim to the grocery store. Defendant then hid behind a dumpster in the store parking lot and laid in wait until the victim exited the store. When she did, defendant grabbed her from behind, stabbed her in or near her arm, pulled her head back by her hair, and cut her throat.

This evidence notwithstanding, defendant contends that because neither of the eyewitnesses saw him inflict the fatal wound to the heart, there was insufficient evidence to prove that he caused or contributed to the victim's death. This argument is seemingly premised on the unlikely possibility that another person intervened and mortally wounded the victim between the time when defendant stabbed her and the time of death. "However, the possibility of such

an intervening factor is a matter for the determination of the jury and is irrelevant to the issue before the court on a motion to dismiss as in nonsuit." *State v. Cheek*, 31 N.C. App. 379, 382-83, 229 S.E.2d 227, 229 (1976). Accordingly, it is our judgment that the State offered ample evidence of defendant's guilt to submit the crime of first-degree murder to the jury. The trial court was, therefore, correct in denying defendant's motion to dismiss, and this assignment of error fails.

[3] We now turn to defendant's contention in his next assignment of error that the trial court impermissibly allowed and required him to appear before the jury in leg shackles. Defendant argues that in so doing, the court undermined the presumption of innocence to which all criminal defendants are entitled in the minds of the jurors. We are of the opinion, however, that defendant has waived this argument.

State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976), is the seminal case on the subject of whether and under what circumstances a criminal defendant may be required to appear before the jury in shackles. In *Tolley*, Justice Huskins, writing for the Supreme Court, stated that as a general rule, "a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances." *Id.* at 365, 226 S.E.2d at 366. However, not every case wherein the defendant is made to wear shackles will be deemed to be fundamentally unfair. *Id.* at 367, 226 S.E.2d at 367. Under section 15A-1031 of the General Statutes, a trial judge may require a defendant to be physically restrained, "when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. N.C. Gen. Stat. § 15A-1031 (1997). "The propriety of physical restraints depends upon the particular facts of each case, and the test on appeal is whether, under all of the circumstances, the trial court abused its discretion." *Toley*, 290 N. C. at 369, 226 S.E.2d at 369. Nevertheless, "failure to object to the shackling, . . . waive[s] any error which may have been committed." *Id.*, 290 N.C. at 369, 226 S.E.2d at 370.

The record in the present case reveals no mention of defendant's shackled condition until the proceedings had progressed well into the jury voir dire. During a recess in the selection process, the trial judge summoned the district attorney and defendant's standby counsel into his chambers to discuss removing defendant's restraints before the actual trial began. This conference was held in defendant's absence, and in the course of the discussion, the court determined

that defendant did not present a flight risk. However, when the conference was brought to defendant's attention, the following exchange occurred:

MR. THOMAS: Object. Object. Objection, Your Honor.

THE COURT: All right.

MR. THOMAS: . . . I object to His Honor calling my standby counsel from the table into chambers, calling the district attorney from his table into chambers and discussing myself and my proceedings.

THE COURT: Certainly. And I'll tell you what we discussed.

MR. THOMAS: I object.

THE COURT: That's fine. I understand. Overruled.

MR. THOMAS: Your Honor, I was supposed to have been there. You are supposed to have called me in those proceedings.

THE COURT: Certainly. Certainly. Right.

MR. THOMAS: My name is not supposed to be mentioned, you're not to hold no proceedings out of my presence. I object to being excluded from those proceedings.

THE COURT: Your objection is on the record.

MR. THOMAS: I object to being excluded from those proceedings.

THE COURT: I understand.

MR. THOMAS: I was supposed to been with those proceedings.

THE COURT: How many times do you need to say it?

MR. THOMAS: Thank you, sir.

. . .

THE COURT: [Recreates the discussion for the record.] [A]nd the agreement that we came to was we thought it would be okay, that you wouldn't present a problem as a run risk. But in light of the fact that you object to those types of conversations, we'll keep the shackles on your feet. . . .

MR. THOMAS: I object to those proceedings, Your Honor.

THE COURT: Fine.

MR. THOMAS: And I wanted to discuss it with you. It was unconstitutional for you to discuss those issues with my standby counsel. Those are what I wanted to discuss with you, those procedures, those issues, about me being in shackles.

Thank you very much for another new trial. Thank you very much for another new trial.

From this transcript of the dialog between defendant and the trial judge, it is clear that defendant objected to the conference being held in his absence. It is likewise clear that defendant made no objection to his having to proceed in shackles. Therefore, any error as to the shackling has been waived.

Even had this issue been properly preserved, we are convinced that no prejudice to defendant has occurred. As shown above, the State offered overwhelming evidence of malice, premeditation, and deliberation to support the first-degree murder conviction. Based on the record, we conclude that the jury would not likely have reached a different verdict if defendant had not been made to appear before the jury in shackles. Since new trials are warranted only where an error was prejudicial, *State v. Wright*, 82 N.C. App. 450, 346 S.E.2d 510 (1986), and since it is apparent from the record that any error the court may have committed regarding the shackles "was harmless beyond a reasonable doubt," N.C. Gen. Stat. § 15A-1443(b) (1997), this assignment of error is overruled.

[4] Defendant next assigns error to the *ex parte* conference between the trial judge, the prosecutor, and defendant's standby counsel. Specifically, defendant argues that this conference violated his right to be present at all stages of the trial and his right to counsel. Though the trial court's action was error, we hold that the error was harmless beyond a reasonable doubt.

"Article I, section 23 of the North Carolina Constitution guarantees a criminal defendant the right to be present at every stage of his trial." *State v. Brogden*, 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991). The same right is afforded to a defendant by the Sixth Amendment to the United States Constitution. *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987). "This right to be present extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him." *State v. Chapman*, 342 N.C. 330, 337-38, 464 S.E.2d 661, 665 (1995). However, under section 15A-1443(b) of our General Statutes, constitutional error is subject to

a harmless error analysis. *State v. Colbert*, 311 N.C. 283, 286, 316 S.E.2d 79, 81 (1984). A defendant's conviction will not be reversed on appeal where the State shows that the error was harmless beyond a reasonable doubt. *Brogden*, 329 N.C. 534, 407 S.E.2d 158.

Assuming *arguendo* that the conversation at issue constituted a "stage" in the proceeding as that term has been construed in our jurisprudence regarding a defendant's right to be present, we hold that the error in excluding defendant was harmless beyond a reasonable doubt. Here, the transcript of the record reveals that the substance of the conference was recreated by the judge, and we have no reason to question the accuracy or completeness of the judge's recitation. Furthermore, the trial judge gave defendant ample opportunity to object and otherwise be heard on the issue discussed in the conference. Given these circumstances, we cannot conclude that a different verdict would likely have been reached had defendant been present at the conference; therefore, this argument fails.

As to defendant's contention that his absence from the conference infringed upon his Sixth Amendment right to counsel, we acknowledge that the right to counsel "is one of the most closely guarded of all trial rights" and that it extends to all stages of the proceeding. *Colbert*, 311 N.C. at 285, 316 S.E.2d at 80. However, for the reasons discussed in the preceding paragraph, we hold that any error pertaining to defendant's right to counsel was harmless beyond a reasonable doubt. Defendant's assignment of error is denied.

[5] With his next assignment of error, defendant challenges his momentary removal from the courtroom for disruptive behavior as violative of his right to be present and his right to counsel. From our review of the record, we find no error in the court's decision.

Section 15A-1032 of the General Statutes, which governs the removal of a disruptive defendant, provides as follows:

> (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.
>
> (b) If the judge orders a defendant removed from the courtroom, he must:

(1) Enter in the record the reasons for his action; and

(2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior.

N.C. Gen. Stat. § 15A-1032 (1997).

During a break in jury selection, when no prospective jurors were present in the courtroom, the judge attempted to enter findings into the record regarding various discovery issues raised by defendant. In the course of the court's dictation, however, defendant relentlessly interrupted, and the court noted its frustration.

THE COURT: Let the record reflect that the court is attempting to make some findings or make an observation for the record and the defendant continually interrupts the court, and I think this is to your prejudice and I would make sure this is a part of the file so that the Supreme Court can review this, that as the court is attempting to make a comment into the court (sic) with regard to discovery, the defendant continually stands up and interrupts the court.

When defendant continued to interrupt, the court warned him that if he persisted, he would be removed.

THE COURT: If the defendant makes another comment while I am trying to rule or make an observation, I'm going to ask that the defendant be removed from the courtroom, and I will have to make my observation or make my statement into the record outside of the presence of the defendant simply because I'm trying to make this and he continues to interrupt me.

Defendant again interrupted the court and was removed.

THE COURT: All right. Let the record reflect that the defendant was removed from the courtroom because as I warned him, he continually interrupted me as I was trying to speak into the record.

Also let the record reflect that standby counsel is present in the courtroom as well as the prosecutor.

The court then entered his findings into the record and declared a recess until the afternoon. Defendant was present when the proceedings resumed and was given an opportunity to make his objections. In light of these facts, we are satisfied that the court complied with the requirements of section 15A-1032, and we hold that the court's decision to remove defendant from the courtroom was without error.

In sum, after careful consideration of the entire record, we conclude that defendant has been afforded a fair trial, free from prejudicial error.

No error.

Judges MARTIN and HUNTER concur.

TAMMIE DOBSON, PLAINTIFF v. HOLLY HARRIS AND J.C. PENNEY COMPANY, INC., DEFENDANTS

No. COA98-1243

(Filed 17 August 1999)

1. Civil Procedure— summary judgment—discovery pending—time lapsed—no extension requested

The trial court did not abuse its discretion when it heard defendants' motion for summary judgment while discovery was still pending in a case alleging slander per se and intentional infliction of emotional distress based on an unsubstantiated report of child abuse because once the local judicial district rule of 120 days for discovery had lapsed, plaintiff did not move "promptly" for a discovery conference, an order establishing a plan for discovery, and an order extending time for placing of the case on the ready calendar. N.C.G.S. § 1A-1, Rule 26(d).

2. Emotional Distress— intentional infliction—summary judgment—unsubstantiated allegation of child abuse—false report not extreme and outrageous—no medical evidence

The trial court did not err in granting summary judgment for both defendants on plaintiff's claim for intentional infliction of emotional distress in a case involving an unsubstantiated report

of child abuse because: (1) assuming arguendo that defendant Harris exaggerated or fabricated the events she reported to DSS, falsely reporting child abuse does not constitute "extreme and outrageous conduct"; and (2) plaintiff failed to forecast medical evidence that she suffered "severe emotional distress."

3. Libel and Slander— summary judgment—report of child abuse—crime of moral turpitude—knowledge report was false

When the evidence is viewed in the light most favorable to plaintiff, the trial court erred in granting summary judgment in favor of defendant Harris on plaintiff's claim for slander per se because there was a sufficient forecast of evidence to show that defendant Harris reported that plaintiff had committed an act of child abuse under N.C.G.S. § 14-318.4, a crime of moral turpitude, and that she was not protected by the qualified privilege of N.C.G.S. § 7A-550 because she had knowledge that the report was false.

4. Libel and Slander— summary judgment—report of child abuse—respondeat superior—no express authority or ratification—actual malice outside scope of employment

The trial court did not err in granting summary judgment in favor of defendant J.C. Penney on plaintiff's claim of slander per se based on the theory of respondeat superior because: (1) plaintiff has not forecast evidence of express authority or ratification by J.C. Penney concerning defendant Harris' alleged false report of plaintiff committing child abuse; and (2) defendant Harris is only liable to plaintiff if Harris reported child abuse with actual malice, which would be outside the scope of her employment.

Appeal by plaintiff from order entered 2 July 1998 by Judge W. Erwin Spainhour in Guilford County Superior Court. Heard in the Court of Appeals 13 May 1999.

James A. Dickens for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Jon Berkelhammer and Shannon R. Joseph, for defendant-appellees.

EDMUNDS, Judge.

On 3 May 1997, plaintiff visited a J.C. Penney store in Oak Hollow Mall in High Point, North Carolina, to retrieve an item she had pur-

chased previously under the store's layaway plan. She brought her fifteen-month-old daughter with her. Defendant Holly Harris (Harris), an employee of defendant J.C. Penney Company, Inc. (Penney's), attempted to assist plaintiff. When plaintiff indicated that she did not have her store receipt for the item on layaway, Harris asked plaintiff her name. Harris apparently misheard plaintiff's response, for she brought plaintiff an item that was being held for a different customer. However, neither plaintiff nor Harris realized the misunderstanding until plaintiff had already written a check. Plaintiff then noticed the error and began to berate Harris, who apologized and obtained the correct item. Because the correct item was more expensive than the one Harris earlier produced, plaintiff was obligated to write another check for the difference in price. Plaintiff demanded an apology from Harris for causing plaintiff to have to write two checks. Although Harris apologized, plaintiff stormed out, indicating that she would call Harris's supervisor to complain.

While Harris was sorting out the mistake with the merchandise, plaintiff's daughter became restive. Plaintiff, apparently exasperated, yelled at the child, picked her off the counter where she had been sitting, and set her back down hard. Accounts of the incident differ as to the violence of plaintiff's act and whether the child's head was near a sharp edge. Allegedly concerned by plaintiff's display and actions toward her child, Harris reported her account of events to a representative of the Guilford County Department of Social Services (DSS). Upon request, Harris provided the representative with plaintiff's name, address, and other identifying information, which she obtained from plaintiff's check. An investigator for DSS advised plaintiff that a complaint had been filed against her. The investigation ultimately was terminated when DSS was unable to substantiate Harris's complaint.

Plaintiff brought suit claiming slander *per se* and intentional infliction of emotional distress. In her complaint, plaintiff alleged (1) that Harris falsely reported that plaintiff abused and neglected her child while in Penney's and (2) that Penney's was liable to plaintiff for the actions of its employee pursuant to the doctrine of *respondeat superior*. Defendants filed a joint answer in which they contended that Harris's observation of plaintiff's treatment of her child justified Harris's report to DSS. Defendants' answer also raised several defenses, including the qualified privilege established by N.C. Gen. Stat. § 7A-550 (1995, repealed 1 July 1999). Plaintiff then filed an affidavit denying assertions of fact made in defendants' answer. When

defendants failed to answer plaintiff's interrogatories completely, plaintiff moved to compel their response. Defendants moved for summary judgment, and on 2 July 1998, the Honorable W. Erwin Spainhour granted defendants' motion for summary judgment without hearing plaintiff's motion to compel. Plaintiff appeals.

I.

[1] Plaintiff first contends the trial court erred by ruling on defendants' summary judgment motion prior to completion of discovery. She cites *Kirkhart v. Saieed*, 107 N.C. App. 293, 419 S.E.2d 580 (1992) to support her contention that it is ordinarily error for a trial court to grant summary judgment while discovery is "still pending and the party seeking discovery has not been dilatory in doing so." *Id.* at 297, 419 S.E.2d at 582. However, this rule is not absolute, and

> [a] trial court is not barred in every case from granting summary judgment before discovery is completed. Further, the decision to grant or deny a continuance [to complete discovery] is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion.

N.C. Council of Churches v. State of North Carolina, 120 N.C. App. 84, 92, 461 S.E.2d 354, 360 (1995) (citations omitted), *aff'd per curiam*, 343 N.C. 117 468 S.E.2d 58 (1996); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(f) (1990); *Howard v. Jackson*, 120 N.C. App. 243, 250, 461 S.E.2d 793, 798 (1995); *Evans v. Appert*, 91 N.C. App. 362, 368, 372 S.E.2d 94, 97, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988).

Defendants respond that the trial court did not abuse its discretion in hearing the summary judgment motion prior to the motion to compel, citing Rule 26 of the North Carolina Rules of Civil Procedure. This rule states,

> Any order or *rule of court* setting the time within which discovery must be completed shall be construed to fix the date after which the pendency of discovery will not be allowed to delay trial or any other proceeding before the court, but shall not 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.

N.C. Gen. Stat. § 1A-1, Rule 26(d) (1990) (emphasis added). The civil calendaring rules of Judicial District 18AE provide:

> Discovery shall begin promptly as contemplated by Rule 8 of the General Rules of Practice in the Superior and District Courts and should be scheduled so as to be completed within 120 days of the [l]ast required pleading. If additional time for discovery is needed, counsel should promptly move the Court for: (1) A discovery conference pursuant to Rule 26(f) of the Rules of Civil Procedure, (2) An Order by the Court establishing a plan and schedule for discovery as contemplated by Rule 2[6](f) of the Rules of Civil Procedure, and (3) An Order extending time for the placing of the case on the READY CALENDAR.

Jud. Dist. 18AE Civ. Calendar R. 2.4 (1990).

Here, plaintiff filed her complaint on 6 November 1997. After the trial court granted defendants' motion for extension of time, they filed a joint answer on 9 January 1998. Plaintiff served interrogatories on defendants on 13 March 1998. Defendants requested and received a thirty-day extension to respond and answered on 8 May 1998. However, each defendant refused to answer an interrogatory pertaining to disciplinary action by Penney's against Harris. On 29 May 1998, plaintiff filed a motion to compel defendants to respond to the unanswered interrogatories. Defendants filed their motion for summary judgment on 2 July 1998. This chronology reveals that considerably more than 120 days elapsed between the filing of the answer (the last required pleading) on 9 January 1998 and the filing of the motion to compel on 29 May 1998. Plaintiff contends that defendants caused the delay by obtaining a thirty-day extension to answer plaintiff's discovery requests from the clerk of superior court. While plaintiff is correct in her recitation of events, regardless of the cause of the delay, the local rules required plaintiff to move "promptly" for a discovery conference, an order establishing a plan for discovery, and an order extending time for placing of the case on the ready calendar. Plaintiff did not do so. Under Rule 26, her failure to seek an extension under the local rules fixed the date (120 days after 9 January 1998) after which pendency of discovery "would not be allowed to delay trial or any other proceeding before the court . . . ." N.C. Gen. Stat. § 1A-1, Rule 26(d) (1990). We therefore hold that the trial court did not abuse its discretion when it heard defendants' motion for summary judgment, even though discovery was still pending.

II.

Plaintiff next contends that summary judgment was not appropriate because there were disputed issues of fact. A moving party is

entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. *See Boone v. Vinson*, 127 N.C. App. 604, 606-07, 492 S.E.2d 356, 357 (1997) (citation omitted), *disc. review denied*, 347 N.C. 573, 498 S.E.2d 377 (1998). Accordingly, plaintiff must forecast evidence of the elements of slander *per se* and intentional infliction of emotional distress to survive summary judgment in her case against Harris. In her case against Penney's, plaintiff must first show liability on the part of Harris, then establish that Penney's is responsible for the acts of Harris. We review plaintiff's claims seriatim.

A. Intentional Infliction of Emotional Distress

[2] A prima facie showing of intentional infliction of emotional distress requires a plaintiff to demonstrate that "the defendant (1) engaged in extreme and outrageous conduct, (2) which was intended to cause and did cause (3) severe emotional distress." *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 6-7, 437 S.E.2d 519, 522 (1993) (citation omitted), *appeal dismissed, disc. review denied*, 336 N.C. 71, 445 S.E.2d 29 (1994). Whether conduct is extreme and outrageous is a question of law. *See Lorbacher v. Housing Authority of the City of Raleigh*, 127 N.C. App. 663, 676, 493 S.E.2d 74, 82 (1997) (citing *Shillington v. K-Mart Corp.*, 102 N.C. App. 187, 198, 402 S.E.2d 155, 161 (1991)). To be extreme and outrageous, conduct must "go beyond all possible bounds of decency, and . . . be regarded as atrocious, and utterly intolerable in a civilized community." *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311 (citation omitted), *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985). In interpreting the language of *Briggs*, this Court has set a high threshold for a finding that conduct meets the standard. *Compare Eubanks v. State Farm Fire and Casualty Co.*, 126 N.C. App. 483, 485 S.E.2d 870, (soliciting the commission of murder is an extreme and outrageous act), *disc. review denied*, 347 N.C. 265, 493 S.E.2d 452 (1997), *and Miller v. Brooks*, 123 N.C. App. 20, 472 S.E.2d 350 (1996) (breaking into the plaintiff's house to install a hidden video camera is extreme and outrageous conduct), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997), *with Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116 (requiring pregnant plaintiff/employee to carry heavy loads and refusing to allow her leave to go to the hospital is not extreme and outrageous conduct), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). Assuming *arguendo* that defendant Harris exaggerated or fabricated the events she reported to DSS, the

report served only to initiate an investigatory process. Although falsely reporting child abuse wastes the limited resources available to DSS and subjects the reported parent to questioning and investigation, in light of this Court's precedent, we cannot say that such actions constitute "extreme and outrageous conduct" which is "utterly intolerable in a civilized community." *Briggs*, 73 N.C. App. at 677, 327 S.E.2d at 311.

Plaintiff also has failed to forecast evidence that she suffered "severe emotional distress," an essential element of a claim for infliction of emotional distress. "[T]he term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *McAllister v. Ha*, 347 N.C. 638, 645, 496 S.E.2d 577, 583 (1998) (quoting *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)).

Where the plaintiff failed to forecast evidence of medical documentation to substantiate alleged " 'severe emotional distress' " or " 'severe and disabling' psychological problems," our Supreme Court affirmed the trial court's grant of summary judgment for the defendant. *Waddle v. Sparks*, 331 N.C. 73, 85, 414 S.E.2d 22, 28 (1992) (quoting *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97). Here, plaintiff filed an affidavit in which she stated that she suffered from severe anxiety, sleeplessness, and emotional distress as the result of defendants' accusations; however, she has forecast no medical evidence to substantiate her claims.

Because plaintiff's evidence was insufficient to sustain her action against Harris, defendant Penney's cannot be held liable under a theory of *respondeat superior*. Accordingly, we hold that the trial court properly granted summary judgment for both defendants on plaintiff's claim for intentional infliction of emotional distress.

B. Slander *per se*

[3] Slander *per se* is a form of defamation in which the defendant makes a false oral communication to a third person that (1) harms the plaintiff's trade, business, or profession; (2) conveys that the plaintiff has a loathsome disease; or (3) states that the plaintiff has committed a crime involving moral turpitude. *See Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 450

S.E.2d 753 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). Here, Harris's allegation of child abuse qualifies as slander *per se*, if at all, under the last category. " 'Moral turpitude involves an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to society, or to his country, her institutions and her government.' " *Averitt v. Rozier*, 119 N.C. App. 216, 218, 458 S.E.2d 26, 29 (1995) (quoting *State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986)). Whether child abuse is a crime of moral turpitude is an issue of first impression in North Carolina. Review of cases outside North Carolina reveals that few states have considered the issue, and decisions in those states are split. *Compare People v. Williams*, 215 Cal. Rptr. 612 (1985) (holding convictions of moral turpitude include those involving child abuse),[1] *In Re Wortzel*, 698 A.2d 429 (D.C. 1997) (holding felony child abuse is a crime of moral turpitude), *and State v. Austin*, 172 N.W.2d 284 (S.D. 1969) (holding misdemeanor child abuse is a crime of moral turpitude), *with Bazzanello v. Tuscon City Court*, 1999 WL 398929 (Ariz. Ct. App. 1999) (holding misdemeanor child abuse is not a crime of moral turpitude).

Further complicating our decision is the fact that plaintiff's complaint contains ambiguities in its allegations that (1) Harris reported both that the child was abused and neglected and (2) that "there was a severe injury to [the child's] head." Accusations of abuse and neglect allegedly made by Harris may be covered by N.C. Gen. Stat. § 7A-517(1), and (21) (Cum. Supp. 1998, repealed 1 July 1999) (defining "Abused juveniles" and "Neglected juvenile" under the former North Carolina Juvenile Code), or N.C. Gen. Stat. § 14-318.4 (1993) (making child abuse a felony). Further, the allegation that "there was a severe injury to [the child's] head" may mean either that a preexisting injury was observed or that an injury was inflicted in the presence of Harris. However, because this matter is before us to review the grant of a motion for summary judgment, all conflicts are resolved against the moving party. *See Aune v. University of North Carolina*, 120 N.C. App. 430, 462 S.E.2d 678 (1995), *disc. review denied*, 342 N.C. 893, 467 S.E.2d 901 (1996). We therefore view allegations in the light most favorable to plaintiff and hold that statements allegedly made by Harris communicated that plaintiff had committed an act or acts that constituted a violation of N.C. Gen. Stat. § 14-318.4 (1993). We further hold that violation of section

1. To complicate matters further, the case relied on in *Williams*, *People v. Castro*, 696 P.2d 111, 119 (Cal. 1985), does not appear to hold precisely as the *Williams* court contends.

14-318.4 is a crime of moral turpitude and conclude that plaintiff alleged slander *per se* and forecast evidence sufficient to withstand Harris's motion for summary judgment.

Harris nevertheless contends that she is protected by the qualified privilege codified in N.C. Gen. Stat. § 7A-550 (1995, repealed 1 July 1999). That statute provides both civil and criminal immunity to defendants who in good faith report suspected child abuse; it also establishes a rebuttable presumption that reports are made in good faith. *Id.* A plaintiff may overcome this presumption by showing that a defendant acted with actual malice. *See Davis v. Durham City Schools*, 91 N.C. App. 520, 523, 372 S.E.2d 318, 320 (1988) (citation omitted).

> Actual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant[.] [It may also be proved] by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity.
>
> *Kwan-Sa You v. Roe*, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990) (citations omitted). If plaintiff cannot meet his burden of showing actual malice, the qualified privilege operates as an absolute privilege and bars any recovery for the communication, even if the communication is false.

Clark v. Brown, 99 N.C. App. 255, 263, 393 S.E.2d 134, 138 (second citation omitted), *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685, 105 L. Ed. 2d 562, 587 (1989) (citation omitted).

Because this is an appeal from summary judgment, the record reflects no resolution of facts in controversy. Accordingly, in reviewing the decision of the trial court, this Court must determine from the record on appeal whether "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any," N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990), when viewed in the light most favorable to plaintiff, indicate reckless disregard for the truth, knowledge of falsity, or a high degree of awareness of its probable falsity. *See Clark*, 99 N.C. App. at 263, 393 S.E.2d at 138. Plaintiff is permitted to prove actual malice by circumstantial evidence, *see*

Harte-Hanks, 491 U.S. at 657, 105 L. Ed. 2d at 562, and her affidavit adamantly denies Harris's allegations of abusive behavior. When viewed in a light most favorable to plaintiff, this affidavit forecasts some evidence indicating that Harris reported plaintiff with knowledge that the report was false. Plaintiff's and defendants' conflicting accounts establish that there is a genuine issue of material fact to be determined by a jury. We therefore reverse the trial court with regard to its grant of summary judgment on plaintiff's slander *per se* cause of action against Harris.

[4] As to Penney's, plaintiff alleges it is liable for the acts of its employee pursuant to *respondeat superior*. An employer is liable under this theory where: "(1) the employer expressly authorizes the employee's act; (2) the tort is committed by the employee in the scope of employment and in furtherance of the employer's business; or (3) the employer ratifies the employee's tortious conduct." *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 414, 473 S.E.2d 38, 41-42 (1996) (citation omitted). Here, plaintiff has not forecast evidence of express authority or ratification by Penney's. Moreover, because of the privilege found in N.C. Gen. Stat. § 7A-550 (1995, repealed 1 July 1999), Harris is only liable to plaintiff if Harris reported child abuse with actual malice. However, Harris's statements, if made with actual malice, were outside the scope of her employment, eliminating liability on the part of Penney's. *See Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 271-72, 365 S.E.2d 665, 668-69, *disc. review denied*, 322 N.C. 838, 371 S.E.2d 284 (1988). Consequently, summary judgment was properly granted in favor of defendant Penney's on the issue of slander *per se*.

We affirm the trial court's grant of summary judgment in favor of defendant Penney's. We affirm the trial court's grant of summary judgment in favor of defendant Harris as to intentional infliction of emotional distress. We reverse the trial court's grant of summary judgment and remand this case on plaintiff's claim against defendant Harris for slander *per se*.

Affirmed in part, reversed in part, and remanded.

Judges WALKER and McGEE concur.

RODERICK TODD McIVER AND TERRIE GENTRY, PLAINTIFFS V. JAMES SUGGS SMITH AND FORSYTH COUNTY, DEFENDANTS

No. COA98-1039

(Filed 17 August 1999)

1. **Immunity— summary judgment—county-operated ambulance service—governmental nature of services—not a proprietary function**

The trial court did not err in granting summary judgment in favor of defendants, an ambulance driver and the county operating the ambulance service, based on governmental immunity because: (1) the governmental nature of ambulance service is not altered by the charging of a fee; (2) the fact private companies may run ambulance services similar to this one does not transform it into a proprietary function; (3) an agency limited to the transportation of sick or injured persons to hospitals does not mean it is a public transportation system with a proprietary nature; and (4) governmental-operated ambulance services should be afforded the same consideration given to fire, police, and 911 services activities.

2. **Immunity— summary judgment—county-operated ambulance service—not a complete waiver if purchase insurance**

The trial court did not err in granting summary judgment in favor of defendants, an ambulance driver and the county operating the ambulance service, based on governmental immunity because defendant Forsyth County was insured for only those negligence claims of $250,000 or more, it did not waive its immunity for claims totaling less than $250,000, and plaintiffs indicated the total monetary relief they would be seeking was $73,000.

Appeal by plaintiffs from order entered 31 December 1997 by Judge Lester P. Martin in Forsyth County Superior Court. Heard in the Court of Appeals 28 April 1999.

Roderick T. McIver for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by Allan R. Gitter and Alison R. Bost, for defendant-appellees.

LEWIS, Judge.

Plaintiffs appeal the trial court's granting of defendants' motion for summary judgment based on defendants' qualification for governmental immunity. We affirm.

Defendant James Smith ("Smith"), an employee of Forsyth County, was driving a Forsyth County Emergency Medical Services ("EMS") vehicle on 20 August 1995 in Winston-Salem. While responding to a 911 call he approached the intersection of Cherry Street and Seventh Street, slowed the ambulance, looked both ways, saw no approaching traffic, and proceeded to enter the intersection. The ambulance's emergency lights and siren were on. Plaintiffs entered the intersection with Roderick McIver driving his car. The vehicles collided. Plaintiffs claimed personal injury and property damage as a result of the collision. Defendants requested each plaintiff state the precise amount of monetary damages they were seeking pursuant to Rule 8 of the North Carolina Rules of Civil Procedure. Plaintiffs responded with a total of $73,000.

Defendants filed a motion for summary judgment, asserting governmental immunity, and the trial court granted their motion 26 March 1996. On appeal from that order, this Court reversed in an unpublished opinion because there was insufficient supporting information in the record. At a new trial, defendants again filed a motion for summary judgment 22 October 1997 in Superior Court. The trial court granted this second motion 15 December 1997 and plaintiffs appealed 22 December 1997.

The standard of review for a motion for summary judgment by defendants is whether the evidence, in the light most favorable to plaintiffs, demonstrates that there is no genuine issue of material fact and that defendants are entitled to a judgment as a matter of law. *See, e.g., Coleman v. Rudisill*, 131 N.C. App. 530, 531, 508 S.E.2d 297, 299 (1998). The trial court may also grant a motion for summary judgment if it is shown that the non-moving party cannot survive an affirmative defense. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). To affirm the trial court's granting of defendants' motion for summary judgment, defendants must demonstrate that they are entitled to the insurmountable affirmative defense of governmental immunity. *See id. at* 63, 414 S.E.2d at 342.

[1] This is a case of first impression. There is no statutory, case, nor common law in North Carolina that states whether county-operated

ambulance services are entitled to governmental immunity. As such, we will examine the law as it now stands on the issue of governmental immunity as well as the law in other jurisdictions.

In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit. *See Overcash v. Statesville Bd. of Educ.*, 83 N.C. App. 21, 23, 348 S.E.2d 524, 526 (1986). *See also Steelman v. City of New Bern*, 279 N.C. 589, 592-93, 184 S.E.2d 239, 241-42 (1971); *Moffitt v. Asheville*, 103 N.C. 237, 254-55, 9 S.E. 695, 697 (1889). Like cities, counties have governmental immunity when engaging in activity that is clearly governmental in nature and not proprietary. *Robinson v. Nash County*, 43 N.C. App. 33, 35, 257 S.E.2d 679, 680 (1979). One cannot recover for personal injury against a government entity for negligent acts of agents or servants while they are engaged in government functions. *See Koontz v. City of Winston-Salem*, 280 N.C. 513, 521-22, 186 S.E.2d 897, 903 (1972). *See also Glenn v. Raleigh*, 246 N.C. 469, 473, 98 S.E.2d 913, 916 (1957). However, the county may waive its governmental immunity by purchasing liability insurance for specific claim amounts or certain actions. N.C. Gen. Stat. § 153A-435(a) (1991). This acts as a waiver of immunity "for any act or omission occurring in the exercise of a government function." *Id.* The county may limit its waiver of immunity to injuries specifically covered by the insurance policy and to the amount of the coverage. *See Overcash*, 83 N.C. App. at 22-23, 348 S.E.2d at 526.

Governmental immunity normally precludes recovery for personal injuries caused by negligent acts of the county's agents or servants. *See Koontz*, 280 N.C. at 521, 186 S.E.2d at 903. However, if the county is acting within its authority in the exercise of powers assumed voluntarily for its own advantage, it is liable for the negligence of its officers or agents, even though they may be engaged in work that will enhance the general welfare of the county. *See Moffitt*, 103 N.C. at 254, 9 S.E. at 697.

> On the other hand, where a [county] in exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute . . . subjects the corporation to pecuniary responsibility for such negligence.

Id. at 254-55, 9 S.E. at 697. In other words, if the governmental entity was acting in a government function, there can be no recovery unless the county waives its governmental immunity; but if the operations were proprietary rather than governmental, the county is not protected. *See Glenn*, 246 N.C. at 473, 98 S.E.2d at 916. Governmental immunity depends on the nature of the power the entity is exercising.

Plaintiffs contend that the Forsyth County ambulance service is not shielded by governmental immunity because it qualifies as a proprietary function for four reasons. First, ambulance service was historically provided by private companies and frequently by funeral homes. Second, Forsyth County charged for the service. Third, Forsyth County's ambulance service was providing a service that a private individual, corporation or company could provide. Fourth, the ambulance service constituted a public enterprise.

Historically, government functions are those activities performed by the government which are not ordinarily performed by private corporations. *See Casey v. Wake County*, 45 N.C. App. 522, 523, 263 S.E.2d 360, 362 (1980). "Providing for the health and welfare of the citizens of the county is a legitimate and traditional function of county government." *Id.* at 524, 263 S.E.2d at 361. Since the responsibility for preserving the health and welfare of citizens is a traditional function of government, it follows that the county may operate government functions that ensure the health and welfare of its citizens. *See McCombs v. City of Asheboro*, 6 N.C. App. 234, 240, 170 S.E.2d 169, 173-174 (1969). An ambulance service does just this. It is also noteworthy that the legislature granted counties the power to operate ambulance services in all or part of their respective jurisdictions. N.C. Gen. Stat. § 153A-250(b) (1991). The focus is therefore on the nature of the service itself, not the provider of the service.

Plaintiffs contend that one of the major tests in labeling a government activity proprietary is whether a monetary fee is involved. They cite *Sides v. Hospital*, 287 N.C. 14, 213 S.E.2d 297 (1973), for the blanket proposition that when the county charges for its services the activity is proprietary, whether or not the operation is profitable. *Id.* at 23, 213 S.E.2d at 303. This is an erroneous statement of the law. In *Sides* our Supreme Court noted many cases in which the activities that were held to be proprietary in nature involved a monetary charge of some type, but indicated that the basis for the holding in each case was *not dependent* on the profit motive. *Id.* at 22-23, 213 S.E.2d at 303. The main issue is whether the activity is still governmental and

not proprietary in nature. *See Hickman v. Fuqua*, 108 N.C. App. 80, 84, 422 S.E.2d 449, 452 (1992).

The fact that Forsyth County charged a fee for its ambulance service does not alone make it a proprietary operation. *See id. See also McCombs*, 6 N.C. App. at 241, 170 S.E.2d at 174; *James v. Charlotte*, 183 N.C. 630, 632, 112 S.E. 423, 424 (1922). The test to determine if an activity is governmental in nature is "whether the act is for the common good of all without the element of . . . pecuniary profit." *McCombs*, 6 N.C. App. at 241, 170 S.E.2d at 174. As determined above, the establishment of the ambulance service is a government function. Under the provisions of N.C.G.S. § 153A-250(b), Forsyth County has the authority to charge a fee for the ambulance service. While it charged a flat fee of $225 for the service, Forsyth County operated the ambulance service at losses averaging nearly two million dollars annually over a ten year span. The governmental nature of the ambulance service, to provide for the health and care of its citizens, is not altered by the charging of a fee; the fee is assessed only to help defray the costs of operating the system.

Plaintiffs next argue that the Forsyth County ambulance service is a proprietary activity because it is providing a service that any private individual or corporation could provide. Activities which can be performed *only* by a government agency are shielded from liability, while activities that can be performed by either private persons or government agencies may be shielded, depending on the nature of the activity. *See Britt v. Wilmington*, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952). This interpretation of *Britt* is the only way to reconcile its holding with other cases. For example, children may be educated by either public schools or private schools, but public schools are still granted governmental immunity. *See Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996). Private citizens may haul off and dispose of leaves just like government employees, but government leaf haulers are afforded governmental immunity. *See Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 323, 420 S.E.2d 432, 435 (1992). Because private companies may run ambulance services similar to Forsyth County's does not transform the county's into a proprietary function.

Finally, plaintiffs argue that the ambulance service is actually a form of public transportation as listed in N.C. Gen. Stat. § 153A-274 (1991). Plaintiffs contend that since ambulances transport members of the general public they are means of public transportation. As a

means of public transportation, plaintiffs contend, the ambulance service is also a public enterprise. *Id.* As a public enterprise, the ambulance service could not be shielded from liability because public enterprises are proprietary by nature. *See Gregory v. City of Kings Mountain*, 117 N.C. App. 99, 104, 450 S.E.2d 349, 353 (1994).

As defined by N.C. Gen. Stat. § 160A-601 (1994), public transportation is

> transportation of passengers whether or not for hire by any means of conveyance, including but not limited to a street or elevated railway or guideway, subway, motor vehicle or motor bus, carpool or vanpool, either publicly or privately owned and operated, *holding itself out to the general public for the transportation of persons* within or working within the territorial jurisdiction of the Authority . . .

Id. (emphasis added) Clearly, public transportation does not include an agency limited to the transportation of sick or injured persons to hospitals. To accept plaintiffs' argument would mean that a person could call 911 to get a ride to supper in an ambulance, or hail a ambulance as if it were a taxicab. If plaintiffs' argument were true, the county would not be able to limit its liability for ambulance services by the purchase of insurance, as it can under N.C. Gen. Stat. § 153A-435(b) (1991). Or all public transportation systems could be shielded from liability under governmental immunity, which they cannot do under current law. *See Gregory*, 117 N.C. App. at 104, 450 S.E.2d at 353. Plaintiffs' interpretation of the statutory definition of a public transportation system under N.C.G.S. § 153A-435(b) renders another provision of the same statute meaningless, which must not occur. *See Brown v. Brown*, 112 N.C. App. 15, 21, 434 S.E.2d 873, 878 (1993).

We hold, therefore, that this county-operated ambulance service is a governmental activity shielded from liability by governmental immunity. As concluded above, providing for the health and care of its citizens is an historically governmental function, and ambulance care does just this. The fee involved is permitted by statute and not levied to advance a proprietary interest.

Other jurisdictions have also extended governmental immunity to ambulance services. The District of Columbia has held that government-provided ambulance services were akin to police and fire protection, regardless of user fees charged. *Wanzer v. District of*

Columbia, 580 A.2d 127 (D.C. App. 1990). In a wrongful death suit brought against the District, the court held that a government-operated ambulance service is similar to police or fire services in that its activity, by nature, is to protect the health, safety and general welfare of its citizens. *Id.* at 130 (citing numerous other cases). These services are all interconnected and vital to a community's health and safety. *Id.* The user fee did not make ambulance service distinguishable because the fee was designed only to generate revenue to offset the cost of maintaining the service. *Id.* at 131. Therefore, government-operated ambulance services should be afforded the same consideration given to fire and police activities. *See id. See also Buell v. Oakland Fire Protection District Bd.*, 605 N.E.2d 618 (Ill. App. 1992); *Pawlak v. Redox Corp.*, 453 N.W.2d 304 (Mich. App. 1990); *Mejia v. City of San Antonio*, 759 S.W.2d 198 (Tex. App.—San Antonio 1988); *King v. Williams*, 449 N.E.2d 452 (Ohio 1983).

By holding that government-operated ambulance services are shielded by governmental immunity, we are following a strong line of case law from other jurisdictions. We are also following similar decisions in our own jurisdiction. Other emergency care providers have been afforded the defense of governmental immunity. Firemen and 911 systems have been afforded governmental immunity from negligence claims because both activities fall under the definition of governmental activities. *Davis v. Messer*, 119 N.C. App. 44, 52, 457 S.E.2d 902, 907 (1995). Police officers have been afforded the defense because they too are functioning under the definition of governmental activities. *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). Government-operated ambulance services, like fire, police and 911 services, serve the health, safety and well-being of citizens. The protection of governmental immunity should be extended to protect government-operated ambulance services as well.

We acknowledge that the modern tendency is to restrict rather than expand the application of governmental immunity. *See Casey*, 45 N.C. App. at 523, 263 S.E.2d at 361. However, we are of the opinion that the operation of government-operated ambulance services is clearly a government function that should have immunity.

[2] Plaintiffs also contend that the trial court's granting of defendants' motion for summary judgment was in error because the actual amount of damages is a question for the jury to decide. In response to defendants' motion pursuant to Rule 8(a)(2) of the North Carolina Rules of Civil Procedure, plaintiffs indicated that the total monetary

relief they would be seeking was $73,000. Defendant Forsyth County was insured for only those negligence claims of $250,000 or more; it did not waive its immunity for claims totaling less than $250,000. N.C.G.S. § 153A-435(b) (1991). *See also Hallman*, 124 N.C. App. at 438, 477 S.E.2d at 181; *Overcash*, 83 N.C. App. at 25, 348 S.E.2d at 527. Since the amount plaintiffs were seeking was less than the insurance minimum for liability, Forsyth County had not waived its governmental immunity. *See Hallman*, 124 N.C. App at 438, 477 S.E.2d at 181. The filing of a motion under Rule 8(a)(2), in essence, erects a hurdle to overcome in negligence cases where there is an insurance policy minimum to reach before liability is waived. *Id.* Here, plaintiffs could not clear that hurdle.

Plaintiffs' final issue on appeal is whether the trial court erred in granting defendants' motion for summary judgment because Forsyth County held liability insurance for damages in negligent acts in excess of $250,000 and this did not act as a complete bar to plaintiffs' claim. Plaintiffs' contend that, at best, the insurance policy may only mitigate defendants' damages.

The purchasing of liability insurance does not serve as a complete waiver of governmental immunity. *See Overcash*, 83 N.C. App. at 23, 348 S.E.2d at 526. Purchasing liability insurance waives governmental immunity only as provided. *See Hallman*, 124 N.C. App. at 438, 477 S.E.2d at 181. In this case, defendant county has waived its governmental immunity for negligence claims totaling $250,000 or more. As established above, plaintiffs could not recover $250,000 as they never claimed as much. As such, Forsyth County was immune from suit and the trial court properly granted the motion for summary judgment. *See id.*

Defendants have established the defense of governmental immunity in this case. Accordingly, the trial court did not err in granting defendants' motion for summary judgment.

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

SARAH LUTZ THOMAS (NOW TIDWELL) PLAINTIFF-APPELLEE v. LEWIS RAY THOMAS, DEFENDANT-APPELLANT

No. COA98-1113

(Filed 17 August 1999)

1. Child Support, Custody, and Visitation— support—modification improper—solely based on increase in obligor's income

The trial court erred in modifying the original child support order because although a significant involuntary decrease in the obligor's income may satisfy the necessary showing of changed circumstances to justify a modification, a modification is improper if based solely upon the ground that the obligor's income has increased.

2. Child Support, Custody, and Visitation— support—attorney fees—specific findings required

The trial court erred in awarding attorney fees to plaintiff-mother in a child support case because it failed to make specific findings that: (1) the mother was acting in good faith; (2) the mother's means were insufficient to defray the expenses of the suit; and (3) the father refused to provide the support which was adequate under the circumstances existing at the time of the institution of this action.

Judge GREENE dissenting in part.

Appeal by defendant-appellant from judgment entered 28 April 1998 by Judge James T. Bowen, District Court, Cleveland County. Heard in the Court of Appeals 8 June 1999.

Corry, Cerwin & Luptak, by Clayward C. Corry, Jr. and Todd R. Cerwin for the defendant-appellant.

Teddy & Meekins, P.L.L.C., by David R. Teddy for the plaintiff-appellee.

WYNN, Judge.

Plaintiff mother and defendant father married on 21 December 1974 and conceived three children during their union. Following their separation on 19 June 1986, District Court Judge George W. Hamrick awarded custody of the three children to the mother and ordered the

father to pay $1,300.00 per month for child support—$500.00 for each of the two older children and $300.00 for the younger child.

The father complied with this order until July 1996 when he unilaterally reduced his child support to $800.00 per month following the oldest child's eighteenth birthday and graduation from high school. Thereafter, the mother filed a motion in the cause seeking modification of the original child support order to increase the amount of child support to be paid by the father.

Following a hearing on her motion, District Court Judge James T. Bowen increased the father's child support obligation from $1,300.00 per month to $1,766.00 per month and awarded the mother reasonable attorney's fees. This appeal followed.

I.

[1] On appeal, the father first contends that the trial court erred in modifying the original child support order because it made insufficient findings of fact to support an increase in support. We agree.

A child support order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C. Gen. Stat. § 50-13.7(a) (1995). The moving party has the burden of showing changed circumstances. *See Padilla v. Ludsth*, 118 N.C. App. 709, 457 S.E.2d 319 (1995).

In the case *sub judice*, the trial court found that:

> 30. Since the entry of the aforesaid child support [o]rder there has been a substantial change in circumstances such that it would be appropriate for this Court to modify the prior Court Order. The substantial change in circumstances include the following:
>
> (a) Since the entry of the Court's Order the [father's] gross income has substantially increased. In addition, the [father's] net worth has substantially increased since 1986 to the point where he is now worth approximately $3,500,000.00.
>
> (b) One of the minor children born to the marriage of the [mother] and [father] has reached the age of 18 and graduated from high school.
>
> (c) The [father's] child support obligation has not been computed using the most recent child support statutory guidelines published by the Conference of Chief District Court Judges and

published jointly by the North Carolina Administrative Office of the Courts and the Department of Human Resources in accordance with N.C.G.S. § 50-13.4(c).

(d) The needs of the minor children have increased since 1986 when the original child support [was] entered.

At the outset, we note that the trial court's finding as to the oldest child's eighteenth birthday and graduation from high school is an insufficient finding to show a substantial change in circumstances to support an increase in child support. Court ordered child support payments terminate when a child has: (1) reached age eighteen and (2) graduated from high school. *See* N.C. Gen. Stat. § 50-13.4 (c) (1995); *see also Leak v. Leak*, 129 N.C. App. 142, 497 S.E.2d 702 (1998).

Further, the trial court's finding that the father's child support obligation was not computed using the most recent child support statutory guidelines is an insufficient finding to show a substantial change in circumstances needed to support an increase in child support. *See* 1994 Child Support Guidelines (Child Support Guidelines do not apply if the parents' combined adjusted income is higher than $12,500 per month ($150,000 per year); *see also Taylor v. Taylor*, 118 N.C. 356, 362, 455 S.E.2d 442, 447 (1995), *reversed on other grounds by* 343 N.C. App. 50, 468 S.E.2d 33 (1996).

Moreover, the trial court's finding that the needs of the minor children have increased since the entry of original child support order is insufficient to show a substantial change in circumstances because there is no evidence in the record relating to the reasonable needs of the children. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). (stating that "[e]vidence must support findings; findings must support conclusions; conclusions must support the judgment. . . ."); *Brooker v. Brooker*, 133 N.C. 285, 515 S.E.2d 234 (1999) (holding that since the evidence in the record supported the trial court's ultimate findings that the child's needs had increased since the entry of the prior order, such findings as to the child's needs were sufficient to support the trial court's changed circumstances conclusion).

Consequently, the sole factor supporting the trial court's determination that there had "been a substantial change in circumstances such that it was appropriate . . . to modify the prior" court order of child support was its remaining finding that since the initial custody

order, the father's annual income had increased from $150,000.00 to $273,351.00.

It is well established that an increase in child support is improper if based solely upon the ground that the support payor's income has *increased*. *See Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991) (stating that "[w]ithout evidence of any change of circumstances affecting the welfare of the child or an increase in need . . . an increase for support based solely on the ground that the support payor's income has increased is improper"); *see also Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963) (holding that an increase in the allowance provided for in a separation agreement for support and maintenance of the parties' minor children is not warranted in absence of evidence of a change in condition or of a need for an increase, particularly where the increase is sought solely on the ground that the father's income has increased).

In fact, this Court in distinguishing *Padilla*, *supra*, 118 N.C. App. at 709, 457 S.E.2d at 319 (holding that a significant involuntary *decrease* in a child support obligor's income may satisfy the necessary showing of changed circumstances to support a change in a child support obligation even though there is no evidence of a change in the child's needs) from *Davis v. Risely*, 104 N.C. App. 798, 411 S.E.2d 171 (1991) (holding that a supporting spouse's failure to make the threshold showing of changed circumstances in support of his motion to modify the child support order in a divorce decree precluded recalculation of his child support obligation in accordance with the most recent revision of the child support guidelines) stated that:

> [p]roving changed circumstances based on a decrease in income was not a viable option for the supporting party in *Davis* because his income had increased. Thus, he needed to show changed circumstances by some other means, such as showing a change in the children's needs.

Padilla, 118 N.C. App. at 713, 457 S.E.2d at 321.

However, the dissent in the instant case cites a treatise, 3 SUZANNE REYNOLDS & KENNETH M. CRAIG, *North Carolina Family Law*, § 229, p. 190 (Supp. 1997, 4th ed.) and *Padilla*, for the position that the evidence of an increase in the father's annual income "is sufficient to support the conclusion that there has been a substantial change in circumstances within the meaning of N.C. Gen.

Stat. § 50-13.7, even in the absence of any showing that the needs of the children have changed."

> Specifically, that treatise states:
>
> [i]t now appears clear however, that a modification may occur upon a showing of a change in circumstances relating to the ability of the parents to pay support without regard to any change in the needs of the child.

3 SUZANNE REYNOLDS & KENNETH M. CRAIG, *North Carolina Family Law*, § 229 at 190. Nonetheless, all of the cases cited by the treatise in support of that proposition involve an involuntary *decrease* in the obligor's income.[1] *Id.* In effect, the treatise's proposition applies only to situations where the child support obligor's income has *decreased*.[2] *Id.*

Moreover, our holding in *Padilla* does not encompass a situation where the child support obligor's income has *increased*. *See id; see also McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531 (1995); *Pittman v. Pittman*, 114 N.C. App. 808, 443 S.E.2d 96 (1994). Thus, an increase in income alone is not enough to prove a change of circum-

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1. *O'Neal v. Wynn*, 64 N.C. App. 149, 306 S.E.2d 822 (1983), *aff'd* 310 N.C. 621, 313 S.E.2d 159 (1984); *Pittman v. Pittman*, 114 N.C. App. 808, 443 S.E.2d 96 (1994) (trial court erred in dismissing father's motion to modify child support because father's loss of job could constitute substantial change of circumstances which would support reduction in his support payments); *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, *discretionary review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995) (significant involuntary decrease in obligor's income satisfies requirement of changed circumstance even in the absence of any change affecting the child's welfare); *Hamil v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, *discretionary review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995) (significant involuntary decrease in obligor's income satisfies requirement of changed circumstances even in the absence of any change affecting the child's needs); *Padilla v. Lusth*, 118 N.C. App. 709, 457 S.E.2d 319 (1995) (significant involuntary decrease in obligor's income satisfies requirement of changed circumstances even in the absence of any change affecting the child's needs); *Askew v. Askew*, 119 N.C. App. 242, 458 S.E.2d 217 (1995) (notwithstanding that the needs of the children had not changed, a substantial change of circumstances could be found to exist based on a parent's ability to pay); *Schroader v. Schroader*, 120 N.C. App. 790, 463 S.E.2d 790 (1995) (involuntary decrease in income sufficient alone to constitute changed circumstances even in the absence of a change in the child's needs).

2. We disagree with the dissent's footnote characterization of our reading of cases holding that an *increase* in income alone is insufficient to support a change in circumstances. We further note that income was not the sole factor used to support a change of circumstances in *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E.2d 522 (1975); rather there was also evidence that the cost of supporting the children had increased substantially since the original support order. *Id.* at 523, 211 S.E.2d at 524.

stances to support a child support obligation. *See Greer* 101 N.C. App. at 351, 399 S.E.2d at 399; *Fuchs*, 260 N.C. at 635, 133 S.E.2d at 487.

Because the trial court's finding that the father's income had substantially increased was the sole ground supporting its determination that changed circumstances existed to warrant a child support increase, this order must be vacated and remanded. Upon remand, the trial court should consider whether any change of circumstances exists which would affect the children's welfare or an increase in their needs. Since, there is no evidence in the record regarding the children's reasonable needs, the trial court may admit new evidence if necessary to make findings as to the children's reasonable needs. *See Ingle v. Ingle*, 53 N.C. App. 227, 232, 280 S.E.2d 460, 463 (1981).

We further note that evidence and findings relating to the children's reasonable needs are necessary for the trial court's determination of the amount of support because this is not a child support guideline case. *See Taylor*, 118 N.C. App. at 362, 455 S.E.2d at 447 (quoting *Newman v. Newman*, 64 N.C. App. 125, 127, 306 S.E.2d 540, 542, *disc. rev. denied*, 309 N.C. 822, 310 S.E.2d 351 (1983) (stating that "[i]n determining child support on a case-by-case basis, the order 'must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount' ").

Accordingly, the trial court's order increasing support was not based on sufficient findings of fact and must be vacated and remanded to allow the court to admit new evidence and make findings of fact relating to the children's reasonable needs.

II.

[2] Secondly, the father argues that the trial court erred in awarding the mother reasonable attorney's fees. Specifically, he asserts that the trial court failed to make the required findings under N.C. Gen. Stat. § 50-13.6.

N.C. Gen. Stat. § 50-13.6 provides that:

> [i]n an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith

> who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding . . . .

N.C. Gen. Stat. § 50-13.6 (1995).

Hence, the court must make the following findings of fact prior to awarding attorney's fees to an interested party in a proceeding for a modification of child support: (1) the party is acting in good faith, (2) the party has insufficient means to defray the expenses of the suit; and (3) the party ordered to pay support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. *See Quick v. Quick*, 67 N.C. App. 528, 313 S.E.2d 233 (1984).

Here, the trial court failed to make specific findings that: (1) the mother was acting in good faith, (2) the mother's means were insufficient to defray the expenses of the suit; and (3) the father refused to provide the child support which was adequate under the circumstances existing at the time of the institution of this action. Thus, this award of attorney fees must also be vacated and remanded for a new award based on appropriate findings of fact.

Vacated and remanded.

Judge MARTIN concurs.

Judge GREENE dissenting in part.

Judge GREENE dissenting in part.

In this case, an order was entered in 1986 directing Defendant to pay child support to Plaintiff. At that time, Defendant's gross annual income was approximately $150,000.00. On 14 May 1997, Plaintiff filed a motion in the cause requesting the 1986 order be modified to increase the child support payments. In support of the motion, Plaintiff alleged Defendant's income had "increased significantly."

After a hearing on the motion, the trial court first determined that there had "been a substantial change in circumstances such that it was appropriate . . . to modify the prior" court order of child support.

In support of this determination, there is evidence in the record and the trial court found that Defendant's gross annual income had increased to $273,351.00. This evidence and finding is sufficient to support the conclusion that there has been a substantial change of circumstances within the meaning of N.C. Gen. Stat. § 50-13.7, even in the absence of any showing that the needs of the children have changed.[1] 3 Suzanne Reynolds, *Lee on North Carolina Family Law* § 229, at 190 (Supp. 1997) ("[A] modification may occur upon a showing of a change in circumstances relating to the ability of the parents to pay support without regard to any change in the needs of the child."); *Padilla v. Lusth*, 118 N.C. App. 709, 713, 457 S.E.2d 319, 321 (1995) (child support order can be modified upon showing that there has been "a change in the supporting party's circumstances"). On this point, I therefore disagree with the majority and would not permit reconsideration of this question on remand.

Having determined there existed a substantial change of circumstances, the trial court then proceeded to set the amount of child support. Because this was not a Guidelines case,[2] the trial court was required to set support in an amount "to meet the reasonable needs of the child[ren] for health, education, and maintenance, having due

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1. In holding that an increase in the supporting parent's income cannot alone constitute a changed circumstance, I believe the majority misreads our case law. For example, the *Greer* opinion does nothing more than restate the general principle that evidence of a change in the needs of the children is necessary in order to constitute a change in circumstances sufficient to modify a child support order. More recent cases from this Court have made it clear that a change in the ability of the parents to pay support is also a changed circumstance. *See Pittman v. Pittman*, 114 N.C. App. 808, 810, 443 S.E.2d 96, 97 (1994); *Padilla v. Lusth*, 118 N.C. App. 709, 713, 457 S.E.2d 319, 321 (1995). Although the reported cases, for the most part, involve decreases in parental income, the language does not limit its application to decreases and is indeed broad enough to cover both increases and decreases in parental income. *See Gibson v. Gibson*, 24 N.C. App. 520, 523, 211 S.E.2d 522, 524 (1975) (supporting parent's increase in income was a fact properly used to justify increase in child support). Furthermore, there can be no justification for permitting a non-custodial supporting parent to seek reduction of his child support obligation based on his reduced earnings and at the same time prohibiting a custodial recipient parent from seeking increased child support based on an increase in the supporting parent's income. Finally, if the Guidelines are applicable, because determination of child support does not now require a determination of the needs of the child and is based primarily on the incomes of the parties, any substantial change in the incomes of the parties should constitute a changed circumstance.

2. When total gross adjusted income of the parents exceeds $12,500.00 per month, the Guidelines do not apply and support is to be set in accordance with N.C. Gen. Stat. § 50-13.4(c). *Taylor v. Taylor*, 118 N.C. App. 356, 362-63, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33, *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996).

regard to the estates, earnings, conditions, accustomed standard of living of the child[ren] and the parties, the child care and homemaker contributions of each party." N.C.G.S. § 50-13.4(c) (Supp. 1998). There is no evidence and no finding in this record regarding the reasonable needs of the children and for this reason, I agree the order of support must be reversed and remanded. On remand, the trial court must take new evidence as may be offered by the parties regarding the reasonable needs of the children and enter a new order setting the amount of child support. *See Ingle v. Ingle*, 53 N.C. App. 227, 232, 280 S.E.2d 460, 463 (1981).

I fully agree with the majority on the award of attorney's fees. The lack of findings by the trial court requires this matter likewise be reversed and remanded.

STATE OF NORTH CAROLINA v. VICTOR KENNETH HOLSTON AKA ROBERT VERNON YOUNG

No. COA98-987

(Filed 17 August 1999)

1. **Evidence— impeachment—prior violent conduct—specific instance—probative of truthfulness**

The trial court did not err in a first-degree murder case by denying defendant's right to cross-examine a State's witness with regard to that witness' prior violent conduct because a specific instance of violent conduct is not admissible for impeachment purposes unless it is probative of truthfulness.

2. **Constitutional Law— right to be present at all stages—unwillingness to come into courtroom—jury recess—not a trial proceeding**

The trial court did not violate defendant's right to be present at all stages of his capital trial when it discussed with defendant's attorney and the State, in defendant's absence, his unwillingness to come into the courtroom because the jury was in recess at the time of the alleged violation and the conversation concerning his presence in the courtroom was not in the nature of a "trial proceeding."

3. Evidence— expert—exclusion of conversations with defendant—harmless error—substantially the same

The trial court did not err in a first-degree murder case by refusing to allow defendant's expert to relate the content of his conversations with defendant, after conducting a voir dire, on the grounds that the probative value of such testimony was outweighed by its confusion because any error was harmless in light of the fact that the information was substantially the same evidence presented to the jury through the expert's other answers.

4. Evidence— work product—privilege waived

The trial court did not err in requiring defendant's attorney to produce to the State his notes summarizing defendant's previous medical records, after conducting a voir dire, because even if those notes constitute work product, the privilege was waived when defendant's attorney provided those same notes to an expert who relied on them for his testimony.

5. Evidence— impeachment—prior conviction—more than ten years ago—credibility—more probative than prejudicial

The trial court did not err in a first-degree murder case by allowing the State to impeach defendant with a prior conviction for attempted robbery that occurred more than ten years ago because defendant's credibility was central to the resolution of this case and his prior conviction was more probative than prejudicial. N.C.G.S. § 8C-1, Rule 609(b).

Appeal by defendant from judgment filed 10 February 1997 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 18 May 1999.

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

W. David Lloyd for defendant-appellant.

GREENE, Judge.

Victor Holston (Defendant) appeals from a jury conviction of first-degree murder.

The evidence at trial tended to show that in the months leading up to 15 May 1993 Defendant and Pierre Brown (Brown), the victim

in this case, lived together and had a drug dealing partnership. Prior to 15 May 1993, their relationship had gone "sour." On the day in question, Brown showed up at their house with four other friends. Defendant testified that, "he was afraid because he knew [he] was going to die or be hurt real bad because Brown had told him to get out of the house, and he had not moved out." After an initial conversation, Brown and Defendant walked alone to the street. Defendant then shot Brown five times and claims the shooting was in self defense.

At trial, the State contended Defendant acted with premeditation and deliberation when he shot Brown. The State called the victim's best friend, who was present on 15 May 1993, to testify against Defendant. Defendant, in his effort to impeach the witness on cross-examination, attempted to present evidence that the witness had on at least one occasion shot at other individuals in a drug turf dispute while acting as the victim's enforcer. The State objected and the trial court sustained the objection.

One morning during the middle of trial, but before the jury had been seated after an overnight recess, the trial judge informed Defendant's attorney and the State that Defendant was refusing to cooperate in being transported from the jail to the courthouse; that he had refused to get dressed; had advised jail personnel that if he did come to court, he would disrupt the proceedings; and that while feigning sickness, had refused to allow nurses to examine him. The trial court advised counsel that it could not go forward without Defendant's presence and that Defendant, while having the ability to stand trial, did not have the inclination. The trial court ordered the bailiffs to bring Defendant to the courtroom using as little force as necessary. Later, Defendant entered the courtroom and the trial resumed.

After the State rested, Defendant presented psychiatrist Dr. Billy Royal (Dr. Royal) as an expert witness. Earlier, Dr. Royal had conducted a series of interviews with Defendant in order to determine if he had a mental illness. Prior to his testimony, however, the State requested the trial court preclude Dr. Royal from relating to the jury any statements made by Defendant to him. The trial court ruled that it would conduct a *voir dire* at the conclusion of Dr. Royal's testimony and, at that time, determine whether any of Defendant's statements to Dr. Royal would be admissible. Until that time, Dr. Royal would be precluded from testifying as to any statements made to him by Defendant.

Dr. Royal testified that based on several interviews with Defendant, he diagnosed Defendant as suffering from a "paranoid personality disorder." This illness, Dr. Royal concluded, could have prevented Defendant from acting with premeditation and deliberation on 15 May 1993. His mental illness, Dr. Royal opined, caused Defendant to misinterpret the acts of others as threatening.

The trial court sustained all objections to questions soliciting Defendant's statements to Dr. Royal made during the interviews. Dr. Royal did explain, in general terms, that Defendant's behavior, as observed in these interviews, was very mistrustful and uncooperative. Additionally, he testified that the way Defendant talked about himself and the way he perceived others was consistent with the pathology of a "paranoid personality disorder." Dr. Royal, for example, stated Defendant was unwilling to cooperate with Dr. Royal because he had a "fear that [his answers would be] used against him," he "did not trust [Royal]," he "felt that he had to be eternally vigilant in terms of surviving," and he "was very concerned about what [Royal] was about and [Royal] had to use all [his] skills to get him to talk."

At the end of cross-examination and in the absence of the jury, *voir dire* was conducted with respect to specific comments Defendant had made to Dr. Royal. Defendant's attorney summarized for the trial court what Dr. Royal would have told the jury had he been allowed to testify. This summary revealed that Defendant: (1) refused to answer any of Dr. Royal's questions because Dr. Royal would be able to "see into his mind" and think that he was crazy; (2) did not want a psychiatric defense of any kind; (3) thought his attorneys and Dr. Royal were collaborating with the State; and (4) covered up his true feelings about things because he did not want people to see inside the shell of a person and was basically willing to take whatever comes in life to prevent that. Dr. Royal took the stand and testified there were no other direct statements Defendant made to him, in addition to those related by Defendant's attorney, which formed the basis of his opinion.

Following *voir dire*, the trial court ruled "that [while] such comments were probative of showing how Dr. Royal formed the basis of his opinions as to those matters of mental state at the time in question . . . they would be outweighed . . . [by] the confusion that would result from putting [Defendant's statements] in through [Dr. Royal]." Thus, the trial court refused to allow Defendant to present his statements to Dr. Royal into evidence.

In addition to the above-mentioned interviews with Defendant, Dr. Royal testified he also had relied on Defendant's attorney's oral summary to him of another psychologist's evaluation in forming his opinion that Defendant suffered from a paranoid personality disorder. Before Dr. Royal took the stand, Defendant's attorney provided him with a handwritten summary of this evaluation, which summary had been prepared by Defendant's attorney after the attorney had reviewed Defendant's medical records, including a report from another psychologist. After an in-camera hearing, the trial court found as a fact that Dr. Royal had relied on these notes in his testimony and the State was entitled, over Defendant's objections, to be provided a copy of the notes.

After Defendant's psychiatrist testified, Defendant testified in support of his claim of self-defense. Previously, the State gave written notice that it intended to impeach Defendant, if Defendant took the stand, with a 1981 conviction for second-degree attempted robbery in New York. Defendant objected and contended that he had been paroled in January of 1984 for that offense, and thus impeachment was barred under Rule 609 of the North Carolina Rules of Evidence. After conducting a *voir dire* and hearing extensive argument, as reflected in fifteen pages of the transcript, the trial court ruled that "the credibility of the Defendant would be central to his defense of self-defense . . . the court has weighed the probative value with respect to credibility against any prejudicial effect . . . and does find the evidence [of the 1981 conviction] should be admissible under 609, in the interests of justice."

On his cross-examination, Defendant was asked about, and admitted he pleaded guilty to, the 1981 conviction for attempted robbery in the second degree in New York, for which he received a sentence of eighteen to fifty-four months. He also admitted that he had again pleaded guilty in 1985 to second-degree attempted robbery, for which he was sentenced to six years to life, and for which he was released on parole in 1992.

The issues are whether: (I) it was error not to allow Defendant to impeach the State's witness with questions about the prior violent activity of that witness; (II) it was error for the trial court to discuss with trial counsel, in the absence of Defendant, administrative matters involving Defendant's refusal to cooperate; (III) it was error to prevent Dr. Royal from relating the statements made by Defendant to him and used by him to form the basis of his expert opinion of

Defendant's mental state at the time of the homicide; (IV) the State can call upon the court's compulsory process for the production of portions of Defendant's attorney's work product where those notes were given to the expert witness and relied on by that witness in his trial testimony; and (V) it was error under Rule 609 to allow into evidence Defendant's prior conviction for attempted robbery when Defendant was released from time served for that conviction more than ten years before the start of the 1997 trial.

I

[1] Defendant contends the trial court erred in denying him the right to cross-examine a State's witness with regard to that witness's prior violent conduct. We disagree.

Under Rule 608(b), evidence of a specific instance of conduct is not admissible for impeachment purposes unless it "is in fact probative of truthfulness." *State v. Lamb*, 321 N.C. 633, 647, 365 S.E.2d 600, 607 (1988); *see* N.C.G.S. § 8C-1, Rule 608(b) (1992). Evidence of specific instances of violent conduct of a party against others is irrelevant to the question of a person's truthfulness. *Lamb*, 321 N.C. at 647, 365 S.E.2d at 607. Because the testimony Defendant sought to elicit in this case related to instances of violence of the witness, the trial court properly sustained the State's objections.

II

[2] Defendant argues his unwaivable right to be present at all stages of his capital trial was violated when the trial court discussed in his absence, with Defendant's attorney and the State, his unwillingness to come into the courtroom. We disagree.

As a general proposition, a defendant is entitled to be present "at each and every stage of trial." *State v. Buchanan*, 330 N.C. 202, 215, 410 S.E.2d 832, 840 (1991). A time of jury recess is not considered a stage of the trial, unless during that recess some "trial proceedings" are conducted. *Id.* at 217, 410 S.E.2d at 841. In this case, the jury was in recess at the time of the alleged violation and the conversation concerning Defendant's presence in the courtroom was not in the nature of a "trial proceeding." Accordingly, Defendant's constitutional rights were not violated.

III

[3] As a general proposition, an expert, who is qualified to offer his findings and diagnosis of a defendant, also must be permitted

to testify "as to the content of the conversations with [a] defendant in order to show the basis for his diagnosis." *State v. Ward*, 338 N.C. 64, 106, 449 S.E.2d 709, 732 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995); *see* N.C.G.S. § 8C-1, Rule 803(4) (1992); *cf.* N.C.G.S. § 8C-1, Rule 705 (1992). "The [trial] court [, however,] should . . . exercise care in the manner in which such testimony is elicited, so that the jury may understand that the case history does not constitute factual evidence, unless corroborated by other competent evidence." *Ward*, 338 N.C. at 106, 449 S.E.2d at 732. Furthermore, the testimony must be consistent with "the rules of competency, relevancy and materiality," *McClain v. Otis Elevator Co.*, 106 N.C. App. 45, 49, 415 S.E.2d 78, 80 (1992); *State v. Baldwin*, 330 N.C. 446, 457, 412 S.E.2d 31, 38 (1992) (if "content of the conversations" is not "reasonably necessary" for an explanation of the basis of the expert's conclusions, then trial court is justified in excluding the evidence as not relevant), and its probate value must not be outweighed by its prejudicial value, *Baldwin*, 330 N.C. at 456; 412 S.E.2d at 37; N.C.G.S. § 8C-1, Rule 403 (1992).

In this case, the trial court refused to allow Dr. Royal, Defendant's expert, to relate the content of his conversations with Defendant on the grounds that the probative value of such testimony was outweighed by "the confusion that would result from putting [Defendant's statements] in through [Dr. Royal]." We can reverse that ruling only upon a showing that it "was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986). Assuming, without deciding, the trial court did abuse its discretion, any error was harmless, as substantially the same information as that contained in the excluded testimony was presented to the jury in answers given by Dr. Royal to other questions. *See Ward*, 338 N.C. at 106, 449 S.E.2d at 732. Although the admitted evidence is somewhat different from the excluded statements of Defendant, the differences are not material and Defendant has not met his burden of showing there is a reasonable possibility a different result would have been reached had the excluded evidence been admitted. *See* N.C.G.S. § 15A-1443(a) (1997).

IV

[4] Work product is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 840-41 (1977). The doctrine applies in criminal as well as civil cases. *Id.*

Assuming, without deciding, Defendant's attorney's summary of Defendant's previous medical records constitutes work product, the privilege was waived in this case. *Id.* (work product privilege can be waived). The waiver occurred when Defendant's attorney provided Dr. Royal, prior to Dr. Royal's testimony, the very notes he now contends should be shielded from discovery and Dr. Royal relied on those notes in his testimony. *See id.* (State waived privilege when it called witness and witness made use of work product in his testimony).

V

[5] Rule 609 allows a defendant's prior convictions to be offered into evidence when he takes the stand and thereby places his credibility at issue. *State v. Chandler*, 100 N.C. App. 706, 710, 398 S.E.2d 337, 339 (1990); N.C.G.S. § 8C-1, Rule 609(a) (1992). Evidence of a conviction is not admissible, however, if more than "10 years has elapsed since the date of the conviction or of the release of the witness from the confinement." N.C.G.S. § 8C-1, Rule 609(b) (1992). Nonetheless, a conviction that is outside this ten-year rule is admitted properly if the trial court makes "findings as to the specific facts and circumstances which demonstrate the probative value [substantially] outweighs the prejudicial effect" of the evidence.[1] *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986); *see* N.C.G.S. § 8C-1, Rule 609(b). Some factors properly considered by the trial court in determining if a conviction over ten years old should be admitted include: the impeachment value of the prior crime(s); the remoteness of the prior crime(s); and the centrality of the defendant's credibility. 4 Joseph M. McLaughlin, *Weinstein's Federal Evidence* § 609.04[2][a] (2d ed. 1999).

In this case, the trial court conducted an extensive hearing on the Rule 609(b) motion and entered findings of fact revealing that it believed the credibility of Defendant's testimony was central to the resolution of this case and that evidence of the 1981 conviction was therefore more probative than prejudicial. Although the findings are minimal, we believe they are legally sufficient in this case, as they indicate the trial court exercised meaningful discretion in weighing the probative value of the 1981 conviction against its prejudicial effect. Furthermore, Defendant's credibility was central to the resolution of this case. He testified he acted in self defense and this testi-

1. There is a rebuttable presumption that "prior convictions more than ten years old tend to be more prejudicial to a defendant's defense than probative of his general character for truthfulness." *State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 164 (1991).

mony was in direct contradiction to all the evidence offered by the State. The evidence of the 1981 conviction for attempted robbery was a factor properly presented to the jury for their consideration in evaluating Defendant's credibility.[2] *See State v. Lynch*, 337 N.C. 415, 420, 445 S.E.2d 581, 583 (1994) (robbery is a crime of dishonesty and a prior conviction is admissible under Rule 609(b)).

No Error.

Judges WYNN and MARTIN concur.

STATE OF NORTH CAROLINA v. JERRY ALFRED COBLE

No. COA98-1164

(Filed 17 August 1999)

1. **Homicide— attempted second-degree murder—specific intent to kill—underlying malice**

The trial court did not err in holding the crime of attempted second-degree murder does exist in North Carolina when a specific intent to kill is implicit in the underlying malice.

2. **Homicide— attempted second-degree murder—jury instructions—intent to kill—no premeditation and deliberation**

The trial court did not err in instructing the jury on attempted second-degree murder because the jury could conclude that defendant did have intent to kill, but had not undertaken the premeditation and deliberation required for a conviction of attempted first-degree murder.

Appeal by defendant from judgment entered 26 March 1998 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 20 May 1999.

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2. Even assuming the trial court erred in admitting the 1981 attempted robbery conviction, Defendant has not met his burden of showing there is a reasonable possibility the jury would have reached a different result had this evidence not been admitted. N.C.G.S. § 15A-1443(a) (1997).

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

Cheshire, Parker, Schneider, Wells & Bryan, by Joseph B. Cheshire, V, and John Keating Wiles, for defendant-appellant.

EDMUNDS, Judge.

Late on the evening of 24 April 1997, defendant drove his tractor-trailer truck past the home of his cousin, Gary Paul Williams. As he did so, defendant sounded the truck's air horn. The blast was loud and lingered long enough to awaken Williams' young children. Williams, having seen the trailer of defendant's truck parked at a nearby Texaco, drove to that service station to ascertain the reason for the noise. When he arrived, Williams did not see defendant, so he put gas in his car. After paying for the fuel, however, Williams spotted defendant and approached him. Following a brief confrontation, a fight ensued, during which defendant repeatedly threatened to kill Williams if he could get to his gun.

The combatants separated when Williams pushed defendant away. Defendant retrieved a pistol from his truck while Williams ran into the Texaco and hid. Defendant took a long look into the service station, then fired shots, both into the air and into Williams' vehicle, while yelling obscenities and threatening Williams' life. When the police arrived, defendant was looking in the service station and pointing a firearm inside. After securing defendant, the police recovered a loaded 9 mm Baretta on defendant's person and a .380 pistol and clip from defendant's tractor-trailer truck.

Defendant was indicted and tried for the attempted murder of Williams, in violation of N.C. Gen. Stat. § 14-17 (Cum. Supp. 1998). Over defendant's objection, the trial court instructed the jury on attempted second-degree murder, in addition to attempted first-degree murder. The jury found defendant guilty of attempted second-degree murder, and the court imposed a sentence of 100 to 129 months imprisonment.

I.

[1] Initially, defendant raises the issue whether the offense of attempted second-degree murder may logically exist. He argues that while the offense of second-degree murder does not require a specific intent to kill, attempt does require an intent to commit the underlying crime. *See State v. Brayboy*, 105 N.C. App. 370, 413 S.E.2d 590, *disc.*

review denied, 332 N.C. 149, 419 S.E.2d 578 (1992). Therefore, defendant contends, "because one cannot specifically intend a crime of general, or non-specific, intent, such as second degree murder," conviction of attempted second-degree murder is a "legal impossibility." Although defendant has raised an important issue and briefed it cogently, we disagree, and hold that the crime of attempted second-degree murder does exist in North Carolina.

We begin our analysis by reviewing earlier cases on this issue. Although prior cases discussed "attempted murder" without specifying whether the degree was first or second, the first case that specifically addressed attempted second-degree murder is *State v. Lea*, 126 N.C. App. 440, 485 S.E.2d 874 (1997), which involved a shootout between two vehicles on a highway. Although no one was hit, one of the vehicles crashed, injuring a number of individuals. The driver of the other vehicle was charged with attempted second-degree murder, while his passenger, who did the shooting, was charged with attempted first-degree murder. The defendant driver argued that he could not be charged with any attempt, because the evidence demonstrated completed actions. This Court disagreed, and affirmed the conviction, holding that the defendant's actions constituted conduct that fell short of a completed offense. *See id.* at 445, 485 S.E.2d at 877.

Attempted second-degree murder came before this Court again in *State v. Cozart*, 131 N.C. App. 199, 505 S.E.2d 906 (1998), *disc. review denied*, 350 N.C. 311, —— S.E.2d —— (1999), where the defendant, convicted of attempted first-degree murder, contended that the jury also should have been instructed as to attempted second-degree murder. Accepting defendant's premise that the offense of attempted second-degree murder existed, this Court held that there was insufficient evidence to support such an instruction. Our Supreme Court, faced with a similar argument, reached a similar result in *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357 (1998).

We are constrained and guided by our precedent. Thus, while North Carolina appellate courts previously have assumed the existence of attempted second-degree murder and have shown no skepticism toward the existence of the crime, they have never directly confronted the challenge raised here by defendant. Because this Court has been advertent to logical inconsistencies in the law, *see Lea*, 126 N.C. App. 440, 485 S.E.2d 874 (holding that attempted felony murder is a logical impossibility), we find guidance in our previous ready acceptance of the offense of attempted second-degree murder.

Next, we turn to an analysis of the applicable law. The elements of second-degree murder are: (1) the killing (2) of another (3) with malice. N.C. Gen. Stat. § 14-17 (Cum. Supp. 1998). For the purposes of this case, the difference between first-and second-degree murder is that first-degree murder requires proof of specific intent to kill formed after premeditation and deliberation. Therefore, a conviction of second-degree murder is both logically and factually possible where the defendant intended to kill, as long as that intent was not formed after premeditation and deliberation. *See State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981); *State v. Poole*, 298 N.C. 254, 258 S.E.2d 339 (1979). This possibility results because, even in the absence of premeditation and deliberation, a defendant convicted of second-degree murder will still harbor malice. Our Supreme Court has held that the element of malice may be established by three different types of proof: (1) "express hatred, ill will or spite"; (2) commission of an inherently dangerous act (or omission to act when there is a legal duty to do so) in such a reckless and wanton manner "as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) a condition of mind that prompts a person to take the life of another intentionally, or to intentionally inflict serious bodily injury, which proximately results in death, without just cause, excuse, or justification. *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). To support a conviction of second-degree murder, the State must prove that the defendant acted with any of these three types of malice. Therefore, there are second-degree murders in which the defendant intended to kill, and second-degree murders in which there was no specific intent to kill, but the defendant nevertheless acted with malice.

The elements of attempt are: " '(1) an intent by an individual to commit a crime; (2) an overt act committed by the individual calculated to bring about the crime; and (3) which falls short of the completed offense.' " *Lea*, 126 N.C. App. at 445, 485 S.E.2d at 877 (quoting *State v. Gunnings*, 122 N.C. App. 294, 296, 468 S.E.2d 613, 614 (1996)). Whether one can be guilty of attempted second-degree murder depends upon the defendant's state of mind. If the actor intends to kill the victim, but acts without premeditation and deliberation, the actor is guilty of attempted second-degree murder. Conversely, if the actor is aware that his or her conduct will certainly result in death (though in fact it does not), but the intent is not to kill, the actor cannot be guilty of attempted second-degree murder. Because intent to commit the underlying offense is a necessary element of attempt, it follows that there can be an attempt to commit those forms of

second-degree murder in which the malice element contains the intent to kill; conversely, if the type of malice does not entail an intent to kill, there may be no attempt. Therefore, compelled as we now are to confront the issue squarely, we conclude that attempted second-degree murder does exist as a crime in North Carolina.[1]

However, because this analysis also indicates that attempted second-degree murder exists only where a specific intent to kill is implicit in the underlying malice, it becomes incumbent upon the trial court to examine the underlying malice in every case where attempted second-degree murder is a possible verdict. If the court finds as a matter of law that the element of malice in the case involves a specific intent to kill, the court should instruct the jury on a possible verdict of attempted second-degree murder. On the other hand, if the underlying malice does not entail a specific in-

1. In reaching this result, we have surveyed other jurisdictions and have observed that a state's definition of the elements of second-degree murder frequently determines whether or not the offense of attempted second-degree murder exists. *See, e.g., Huitt v. State*, 678 P.2d 415 (Alaska App. 1984) (holding no offense of attempted second-degree murder where statute allows conviction without proof of intent to kill); *State v. Gray*, 654 So. 2d 552 (Fla. 1995) (holding second-degree murder is a general intent crime and, therefore, attempted second-degree murder exists); *Fenstermaker v. State*, 912 P.2d 653 (Idaho App. 1995) (holding offense of attempted second-degree murder exists where there is evidence defendant intended to kill); *People v. Lopez*, 655 N.E.2d 864 (Ill. 1995) (holding no offense of attempted second-degree murder where statutory definition of second-degree murder includes voluntary manslaughter); *State v. Shannon*, 905 P.2d 649 (Kan. 1995) (holding no offense of attempted second-degree murder where second-degree murder defined only as unintentional but reckless killing of another under circumstances manifesting indifference to human life); *State v. Guin*, 444 So. 2d 625 (La. App. 1983) (holding offense of attempted second-degree murder exists only where defendant has specific intent to kill); *State v. Huff*, 469 A.2d 1251 (Me. 1984) (holding defendant must act with specific intent to cause death of another in order to be convicted of attempted murder); *State v. Earp*, 571 A.2d 1227 (Md. App. 1990) (holding specific intent to kill indispensable element of attempted second-degree murder); *Ramos v. State*, 592 P.2d 950 (Nev. 1979) (holding no offense of attempted second-degree murder where that crime is defined as an unpremeditated depraved-heart offense); *State v. Lyerla*, 424 N.W.2d 908 (S.D. 1988) (holding no offense of attempted second-degree murder where state's definition of second-degree murder involves culpable mental state of recklessness but not intent), *appeal dismissed, cert. denied*, 488 U.S. 999, 102 L. Ed. 2d 767 (1989); *see also*, Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 59, at 428 (1st ed. 1972); Barbara Kritchevsky, *Criminal Attempt—Murder Two: The Law in Tennessee after* State v. Kimbrough, 28 U. Mem. L. Rev. 3 (Fall 1997). Although these cases are not authoritative for this Court, we are struck by the consistency with which other courts find the offense exists where, and only where, the defendant has intent to kill. North Carolina's expansive definition of malice as an element of second-degree murder requires this Court to hold that the offense of attempted second-degree murder exists here even though other states, with a more restrictive definition that does not include an intended killing, reach a different result.

tent to kill, attempted second-degree murder must not be submitted as a possible verdict.

In the case at bar, the jury was instructed:

> [T]o find the defendant guilty of attempted second degree murder, the State must prove two things beyond a reasonable doubt. First, that the defendant Jerry Alfred Coble intended to commit second degree murder, that is, the defendant *intended to unlawfully kill a human being*, Gary Paul Williams, with malice, but without premeditation and deliberation.
>
> Second, that at the time the defendant had this *intent*, he performed an act which was calculated to bring about second degree murder, but which fell short of the completed offense, and which came so close to bringing it about that in the ordinary and likely course of things, he would have completed that crime had he not been stopped or prevented from completing his apparent course of action.

(Emphasis added.) This instruction was adequate under the rule we enunciate today. This assignment of error is overruled.

II.

[2] Next, defendant argues that even if such an offense exists in North Carolina, "the instruction was not warranted by the evidence in the case." The jury was instructed on both attempted first-degree murder and attempted second-degree murder. The evidence at trial was that the victim, Williams, approached defendant at his tractor-trailer truck and asked him what the problem was. Defendant responded by throwing a punch. Williams placed defendant in a headlock and the fight continued towards the side of the Texaco. While holding defendant in the headlock, Williams drove defendant's head into the side of the building, causing him to fall. As defendant lay on his back, Williams began hitting him in the face and told defendant that he "wasn't scared of him anymore." Defendant came after Williams again, tripped over a round plate in the parking lot, and grabbed Williams around the waist. Williams again placed defendant in a headlock. Defendant shoved Williams against the tailgate of defendant's pickup truck and stated, "If I get to my truck and get my gun, I'm going to kill you." Williams testified that defendant made that same threat three or four times. Defendant then yelled to his stepson to get his gun; the stepson refused. After defendant complained that he was choking and could not breathe, Williams released his hold on

defendant and pushed him away. The stepson yelled to Williams to run because defendant was going to get his gun. Williams ran into the Texaco and hid behind a freezer. Defendant approached the window of the Texaco. Witnesses heard gunshots and saw defendant shoot into Williams' car. The witnesses also overheard defendant say to Williams "I'm going to kill you," testified that defendant appeared to be "very, very mad," "looked like a madman," and was screaming that he would kill Williams.

This evidence supports an interpretation that defendant's response to finding himself on the losing end of a fight he initiated was violent rage. Our courts have long acknowledged that while only "legal provocation" can give rise to perfect or imperfect self defense, lesser forms of provocation exist that may negate premeditation and deliberation and thereby reduce first-degree murder to second-degree murder. *See State v. Watson*, 338 N.C. 168, 177, 449 S.E.2d 694, 700 (stating that "words or conduct . . . may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree"), *reconsideration and stay of mandate denied*, 338 N.C. 523, 457 S.E.2d 302 (1994), *and cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995); *State v. Thomas*, 118 N.C. 1113, 24 S.E. 431 (1896). The evidence here was sufficient both to support an instruction on attempted second-degree murder and for the jury, deliberating the alternative verdicts, to conclude that defendant did have intent to kill but had not undertaken the premeditation and deliberation required for a conviction of attempted first-degree murder.

Defendant's assignments of error are overruled. Defendant's conviction is affirmed.

No error.

Judges WALKER and McGEE concur.

DENNIS RHONEY, CO-ADMINISTRATOR OF THE ESTATE OF VINCENT WADE RHONEY AND PATSY C. RHONEY, CO-ADMINISTRATOR OF THE ESTATE OF VINCENT WADE RHONEY, PLAINTIFFS v. TONY KONA FELE, DEVON VONSHELL FURTICK, AND NURSEFINDERS OF INDIANAPOLIS, INC., T/A D/B/A NURSEFINDERS OF CHARLOTTE, DEFENDANTS

No. COA98-1299

(Filed 17 August 1999)

1. **Employer and Employee— summary judgment—negligence—no employer-employee relationship**

In a negligence case arising out of a fatal automobile accident, the trial court did not err in granting summary judgment in favor of corporate defendant Nursefinders, who recruits pools of nurses to supply supplemental staff to area medical facilities, because there was no genuine issue of material fact as to whether defendant-nurse Tony Fele, who was involved in the accident, was Nursefinders' employee. Nursefinders' role was similar to that of a broker or other middleman, and Nursefinders exercised insufficient control over Fele to create an employee-employer relationship.

2. **Joint Venture— summary judgment—imputed negligence—no joint venture**

In a negligence case arising out of a fatal automobile accident, the trial court did not err by granting summary judgment against plaintiffs on their claim of imputed negligence by joint venture because plaintiffs have not forecast evidence that defendant-nurse Tony Fele, who was involved in the accident, had an equal, legal right to control the conduct of corporate defendant Nursefinders "with respect to prosecution of the common purpose."

Appeal by plaintiffs from order and judgment entered 3 September 1998 by Judge James E. Lanning in Catawba County Superior Court. Heard in the Court of Appeals 10 June 1999.

Sigmon, Sigmon & Isenhower, by W. Gene Sigmon and Amy Rebecca Sigmon, and Sigmon, Clark, Mackie, Hutton & Hanvey, P.A., by E. Fielding Clark, II, for plaintiff-appellants.

Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by Harvey L. Cosper, Jr. and John A. Stoker, for defendant-appellee Nursefinders of Indianapolis, Inc.

EDMUNDS, Judge.

Plaintiffs appeal the trial court's grant of summary judgment in favor of defendant Nursefinders, contending that the trial court's grant of defendant's summary judgment motion was erroneous. We affirm.

Corporate defendant Nursefinders recruits pools of nurses in various geographical regions to supply supplemental staff to area medical facilities. A hospital needing additional nursing staff could call Nursefinders and request that a nurse be sent to the hospital for a specific shift. Nursefinders would contact a member of its pool and offer the work, which the nurse was free to accept or reject. If the nurse accepted, Nursefinders paid the nurse a portion of the payment it received from the hospital. Defendant Fele (Fele) was a member of Nursefinders' nursing pool. While driving from Charlotte to a hospital in Hickory, where he had agreed to provide nursing services, Fele was involved in a fatal automobile accident with Vincent Wade Rhoney. The accident occurred as Fele attempted to pull into a service station to call the hospital for final directions. Fele was driving an automobile owned by his wife, defendant Furtick.

Plaintiffs, co-administrators of the estate of their son, initiated this action for property damage and wrongful death. In their amended complaint, plaintiffs alleged that the negligence of Fele was to be imputed to Nursefinders by virtue of joint venture and by an employee-employer relationship, and that Nursefinders was negligent in its supervision of Fele. Nursefinders moved for summary judgment, and on 31 August 1998, the trial court granted Nursefinders' motion, effectively finding that Fele was an independent contractor. Plaintiffs appeal, contending that summary judgment as to one of several defendants affected their substantial right to have issues pertaining to the death of the victim determined in a single proceeding. The trial court certified the case for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. We agree that granting Nursefinders' motion affects plaintiffs' substantial right and that this appeal is properly before this Court. *See* N.C. Gen. Stat. § 1-277(a) (1996).

[1] We first address the relationship between defendants Fele and Nursefinders. Plaintiffs contend the trial court erred in granting summary judgment for Nursefinders because there was a genuine issue of material fact as to whether Fele was Nursefinders' employee. Nursefinders responds that Fele was an independent contractor, and

that even if Fele were an employee, any negligence on his part occurred outside the scope of his employment and may not be imputed to Nursefinders. "Whether one is an independent contractor or an employee is a mixed question of law and fact. The factual issue is: What were the terms of the parties' agreement? Whether that agreement establishes a master-servant or employer-independent contractor relationship is ordinarily a question of law." *Yelverton v. Lamm*, 94 N.C. App. 536, 538, 380 S.E.2d 621, 623 (1989) (citing *Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941)). Therefore, as an initial matter we must determine whether there were issues of material fact as to the terms of the parties' agreement.

Although Fele and Nursefinders did not have a written contract expressly setting out the nature of their relationship, the evidence is uncontested that Fele was a member of Nursefinders' labor pool; that Nursefinders would contact Fele about a potential assignment; that Fele had the option of accepting or refusing the potential assignment; that if he accepted an assignment, Fele would ordinarily pick up a packet concerning the work at Nursefinders' office; and that the packet included a map, directions to the hospital, and the name and telephone number of a contact person at the hospital. There was also evidence that Nursefinders typically matched a nurse in its pool with the type of service requested, set the rate schedule for the provided nurse, billed the medical facility for the nurse's work at an hourly rate, paid the nurse while retaining a portion of those billed funds, and withheld various state and federal taxes from those payments to the nurse. If the medical facility was more than fifty miles from Charlotte, Nursefinders charged the hospital a higher rate and paid the nurse more. Nursefinders required the nurse to provide his or her own transportation to the medical facility.

These facts (and others discussed below) are uncontested; consequently there are no issues of material fact as to the parties' agreement. Therefore, we must next determine as a matter of law whether this agreement created an employer-employee relationship or set up an independent contractor. Generally, "[a]n independent contractor is 'one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.' " *Cook v. Morrison*, 105 N.C. App. 509, 513, 413 S.E.2d 922, 924 (1992) (quoting *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 923 (1988)). We must consider " 'whether the party for whom the work is

being done *has the right to control the worker with respect to the manner or method of doing the work*, as distinguished from the right merely to require certain definite results conforming to the contract.' " *Grouse v. DRB Baseball Management*, 121 N.C. App. 376, 381, 465 S.E.2d 568, 571 (1996) (quoting *Scott v. Lumber Co.*, 232 N.C. 162, 165, 59 S.E.2d 425, 426-27 (1950)).

Our Supreme Court has enunciated a more specific analysis, which this Court applied in *Gordon v. Garner*, where we stated:

> In *Hayes v. Elon College*, our Supreme Court concluded that the central issue in determining whether one is an independent contractor or an employee is whether the hiring party "retained the right of control or superintendence over the contractor or employee as to details." The [C]ourt then went on to explain that there are generally eight factors to be considered, none of which [is by itself] determinative, when deciding the degree of control exercised in a given situation. These factors include whether:
>
> The person employed (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

127 N.C. App. 649, 658-59, 493 S.E.2d 58, 63 (1997) (footnotes omitted) (quoting *Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944)), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 86 (1998).

Gordon involved review of an order granting summary judgment, as does the instant case. In *Gordon*, a trucking company maintained a pool of independent truck owner-operators who could be contracted to deliver sand if the company's trucks were busy. One of these pool truckers was involved in an accident. We concluded from an examination of the record on appeal that summary judgment was appropriate because the pool driver (Garner) was an independent contractor rather than an employee. In applying the *Hayes* test to the facts in *Gordon*, this Court focused on several facts: (1) that Garner was engaged in an independent business, (2) that Garner had inde-

pendent use of his special skills and training in the execution of his work, (3) that the purported employer trucking company "exercised no direct control over the particular daily activities of Garner," (4) that no representative of the purported employer ever instructed Garner on the particulars of the operation of his affairs other than directions to his destination at the customer's business, (5) that Garner was free to decide when and how long he wanted to work and when he would take breaks, and (6) that Garner had the right to seek other employment. *Id.* at 659-60, 493 S.E.2d at 63-64.

Another instructive case is *Youngblood*, 321 N.C. 380, 364 S.E.2d 433, in which our Supreme Court held that, for Worker's Compensation Act purposes, a plaintiff who was injured while demonstrating use of specialized tools to defendant's employees was also an employee. There, the Court applied four factors, which were supported by the preponderance of the evidence adduced at trial. "Payment of a fixed contract price or lump sum ordinarily indicates that the worker is an independent contractor, while payment by a unit of time, such as an hour, day, or week, is strong evidence that he is an employee." *Id.* at 384, 364 S.E.2d at 438 (citations omitted). The Court also considered the purported employee's freedom to secure assistance (either equipment or labor) in performing required tasks and noted that "[a] lack of this freedom indicates employment." *Id.* at 385, 364 S.E.2d at 438. Next, the Court addressed scheduling. "[W]here the worker must conform to a particular schedule and perform his job only during hours when the [purported employer's] employees are available, the relationship is normally one of employment." *Id.* The fourth factor that the Court applied was control of the employment. "The right to fire is one of the most effective means of control. An independent contractor is subject to discharge only for cause and not because he adopts one method of work over another. An employee, on the other hand, may be discharged without cause at any time." *Id.* (citations omitted). In considering this final factor, the Court went on to note that "[w]here a worker is to be paid by a unit of time, it may be fairly inferred that he has no legal right to remain on the job until it is completed. The employer may discharge him with no obligation other than to pay wages for the units of time already worked." *Id.* (citation omitted).

Guided by the principles set out in *Gordon*, *Hayes*, and the other cases cited above, we now turn to the case at bar. The following factors support a finding that Fele was an independent contractor: (1) as a registered nurse, Fele was engaged in an independent profession;

(2) Fele could and did provide nursing services through other placement services; (3) Fele exercised his duties and responsibilities as a nurse at the hospital, free from supervision by Nursefinders; (4) Fele's work through Nursefinders was sporadic rather than regular; (5) Fele was able to accept or reject a job assignment offered by Nursefinders; and (6) Nursefinders did not provide Fele with valuable equipment. *See Barber v. Going West Transportation, Inc.*, 134 N.C. App. 428, 517 S.E.2d 914 (1999). On the other hand, the following factors support a finding that Fele was an employee of defendant Nursefinders: (1) Fele was paid an hourly rate with overtime and incentive pay, rather than a lump sum for a particular assignment; (2) Fele was not free to select his assistants; (3) Fele was not able unilaterally to choose his own time to work under Nursefinders' auspices; (4) Nursefinders received payment for Fele's services from the hospital and, after deducting Nursefinders' share and paying state and federal taxes, forwarded the remaining wages to Fele; (5) Nursefinders could terminate its relationship with Fele; and (6) Nursefinders provided Fele with a work packet and directions to the assigned place of work. We do not purport to list every factor suggested by the parties in their briefs and arguments; those listed above appear to us most significant in determining this issue. Moreover, a mere recitation of factors is insufficient. We must also weigh these factors, bearing in mind the admonition of *Gordon* and *Hayes* that the key factor is "control."

These factors demonstrate that while Nursefinders exercised control over extraneous aspects of Fele's work, such as the dates and times when work was offered and collection of his salary, Nursefinders exercised no control over Fele's nursing, the function for which hospitals sought him. To the contrary, Fele was a free agent who could and did maintain similar arrangements with other suppliers of medical personnel, and who could and did accept or reject work offered to him through Nursefinders, as suited him. Conversely, Nursefinders could not compel Fele to take any particular assignment. Once Fele accepted work proposed by Nursefinders, Fele was not under any control by Nursefinders while working. Apparently the relationship could be terminated at will by either party at any time. Thus, Nursefinders' role was similar to that of a broker or other middleman. We therefore agree with the trial court that, as a matter of law, Nursefinders exercised insufficient control to create an employee-employer relationship between Fele and Nursefinders. Accordingly, we affirm the trial court's granting of Nursefinders' motion for summary judgment. This assignment of error is overruled.

[2] Plaintiffs next contend that the trial court erred by granting summary judgment on their claim of imputed negligence by joint venture. "Joint venture" is synonymous with "joint adventure." *See Pike v. Trust Co.*, 274 N.C. 1, 8, 161 S.E.2d 453, 460 (1968) (citations omitted). For a joint adventure to exist, "[t]here must be (1) an agreement, express or implied, to carry out a single business venture *with joint sharing of profits*, and (2) an *equal right of control* of the means employed to carry out the venture." *Edwards v. Bank*, 39 N.C. App. 261, 275, 250 S.E.2d 651, 661 (1979). "The control required for imputing negligence under a joint enterprise theory is not actual physical control, but the *legal right* to control the conduct of the other with respect to the prosecution of the common purpose." *Slaughter v. Slaughter*, 93 N.C. App. 717, 721, 379 S.E.2d 98, 101 (citation omitted), *disc. review allowed*, 325 N.C. 273, 384 S.E.2d 519 (1989), *review dismissed as improvidently allowed*, 326 N.C. 479, 389 S.E.2d 803 (1990). Here, plaintiffs have forecast no evidence that Fele had an equal, legal right to control the conduct of Nursefinders "with respect to prosecution of the common purpose." *Id.* For that reason, summary judgment as to the claim of joint venture was properly granted. This assignment of error is overruled.

Affirmed.

Judges WALKER and McGEE concur.

ANTOINETTA DEMETRIA FULTON, PLAINTIFF v. ZOTIS KENNETH MICKLE, DEFENDANT

No. COA98-1046

(Filed 17 August 1999)

1. Process and Service— notice—summary judgment—failure to strictly adhere to statutory requirements

The trial court did not err in granting summary judgment for unnamed defendant Integon General Insurance Corporation in a case arising out of an automobile accident when plaintiff served a copy of the summons and complaint on Integon by regular mail to its claims examiner because: (1) the process was not sent certified or registered mail, return receipt requested, and (2) process

was not addressed to an officer, director, or agent authorized to receive service of process.

2. Notice— actual—summary judgment—no presumption because did not strictly adhere to rules—statute of limitations barred claim

The trial court did not err in granting summary judgment for unnamed defendant Integon General Insurance Corporation in a case arising out of an automobile accident because although Integon had actual notice of the proceedings, plaintiff is not entitled to any presumption that the claims examiner acted as an agent of Integon for purposes of receiving process since her method of service did not meet the requirements of Rule 4 and plaintiff filed her second complaint after it was already time-barred by the statute of limitations.

Appeal by plaintiff from order entered 5 March 1998 by Judge Michael E. Beale in Guilford County Superior Court. Heard in the Court of Appeals 21 April 1999.

Joseph L. Anderson & Associates, P.C., by Joseph L. Anderson, for plaintiff-appellant.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for unnamed defendant-appellee Integon Insurance Corporation.

No brief filed for defendant-appellee Zotis Kenneth Mickle.

TIMMONS-GOODSON, Judge.

Antoinetta Demetria Fulton ("plaintiff") appeals from an order granting summary judgment to unnamed defendant Integon General Insurance Corporation ("Integon") as to all claims alleged in plaintiff's complaint. For the reasons articulated in the following analysis, we affirm the ruling of the trial court.

On 24 April 1994, plaintiff sustained personal injuries and property damage when an automobile driven by Zotis Kenneth Mickle ("defendant") collided with plaintiff's vehicle. Plaintiff instituted a negligence action against defendant on 14 August 1996. After learning that defendant was uninsured, plaintiff mailed a copy of the summons and complaint to her insurance company, Integon, by regular mail on 16 August 1996. She addressed the process to the attention of Integon Claims Examiner Tammy Collins. After Integon received a copy of the complaint, plaintiff's attorney and Mary Levenson, senior attorney at

Integon, corresponded several times regarding extensions of time for Integon to file a responsive pleading in light of a potential settlement. Several weeks passed, however, and settlement negotiations broke down. Integon filed an answer on 9 December 1996, which included motions to dismiss for lack of jurisdiction, insufficiency of service of process, and insufficiency of process. The three-year statute of limitations on plaintiff's claim ran on 24 April 1997. On 20 October 1997, prior to the hearing on Integon's motions, plaintiff voluntarily dismissed her complaint without prejudice and, on 3 November 1997, plaintiff refiled her action.

The new summons and complaint were served on Integon via the Commissioner of Insurance on 23 November 1997. Integon filed an answer on 8 December 1997, asserting as an affirmative defense that the applicable statute of limitations had expired. Thereafter, Integon filed a motion for summary judgment, and following a hearing on the motion, the trial court entered summary judgment for Integon on 5 March 1998. Plaintiff appeals.

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[1] By this appeal, plaintiff contends that the trial court erred in entering summary judgment for Integon. Plaintiff argues that despite her noncompliance with the statutes governing service of process on a domestic corporation, Integon received actual notice of the complaint and, thus, service of the original summons and complaint was valid. We must disagree.

Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). A defendant moving for summary judgment bears the burden of showing that no triable issue of fact exists on the record before the court or that the plaintiff's claim is fatally flawed. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). In deciding whether to grant or deny the motion, the trial court must draw all inferences of fact against the moving party and in favor of the party opposing summary judgment. *Id.* at 378, 218 S.E.2d at 381. On appeal from a ruling by the trial court on a motion for summary judgment, the question for our determination is whether the court's conclusions of law were correct. *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987).

Under Rule 4(j)(6) of the Rules of Civil Procedure, service of process on a corporation may be accomplished in one of the following manners:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or [of] process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

N.C.R. Civ. P. 4(j)(6). In addition, section 58-16.30 of the General Statutes provides, in part, that:

> As an alternative to service of legal process under G.S. 1A-1, Rule 4, the service of process upon any insurance company . . . licensed or admitted and authorized to do business in this State under the provisions of this Chapter may be made by the sheriff or any other person delivering and leaving a copy of the process in the office of the Commissioner with a deputy or any other person duly appointed by the Commissioner for that purpose[.] . . . Service may also be made by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Commissioner.

N.C. Gen. Stat. § 58-16.30 (Cum. Supp. 1997).

Generally, where a statute specifically prescribes the method by which to notify a party against whom a proceeding is commenced, service of the summons and complaint must be accomplished in that manner. *Nissan Motor Corp. v. Fred Anderson Nissan*, 111 N.C. App. 748, 756, 434 S.E.2d 224, 228 (1993), *rev'd on other grounds*, 337 N.C. 424, 445 S.E.2d 600 (1994). Similarly, " 'a person relying on the service of a notice by mail must show strict compliance with the requirements of the statute.' " *In re Appeal of Harris*, 273 N.C. 20, 24, 159 S.E.2d 539, 543 (1968) (quoting 66 C.J.S., *Notice* § 18(e)(1), p. 663).

Although defective service of process may sufficiently give the defending party actual notice of the proceedings, "such actual notice does not give the court jurisdiction over the party." *Johnson v. City of Raleigh*, 98 N.C. App. 147, 149, 389 S.E.2d 849, 851 (1990).

In the instant case, plaintiff served Integon by mailing a copy of the summons and complaint, regular mail, to the Claims Examiner, Tammy Collins. Under Rule 4(j)(6)c of the Rules of Civil Procedure, this method of service fails in two respects: First, the process was not sent certified or registered mail, return receipt requested, and second, the process was not addressed to an officer, director, or agent authorized to receive service of process. Plaintiff's failure to strictly adhere to the statutory requirements of service by mail rendered the 16 August 1996 service on Integon invalid.

[2] Nevertheless, plaintiff contends that because Integon received actual notice of the proceedings, "the spirit of Rule 4, if not the letter, was satisfied," and service on Integon was valid. In support of this proposition, plaintiff points to our decision in *Fender v. Deaton*, 130 N.C. App. 657, 503 S.E.2d 707 (1998), *disc. review denied*, 350 N.C. 94, — S.E.2d — (1999), and the North Carolina Supreme Court's decision in *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984). However, the cases upon which defendant relies are readily distinguishable from the present case and, thus, have no bearing on the facts before us.

In *Fender*, the plaintiffs attempted service of the summons and complaint by certified mail, pursuant to Rule 4(j)(1)c. The certified mail was addressed to the defendant at his law firm, and defendant's wife, an employee of the firm who regularly received, opened, and distributed the mail within the office, accepted and signed for the mailed process. The defendant received the summons and complaint the following day. After attempting service, the plaintiffs' attorney filed an affidavit stating that "a copy of the summons and complaint was deposited in the United States Post Office for mailing by certified mail, return receipt requested, and addressed to defendant." 130 N.C. App. at 658, 503 S.E.2d at 707. Upon motion of the defendant, the trial court dismissed the plaintiff's complaint for lack of proper service under Rules 12(b)(4) and (5). On appeal, this Court concluded that "[t]he affidavit filed by the plaintiffs . . . together with the signed receipt by [the defendant's wife], established a presumption that she acted as agent for defendant in receiving and signing for the certified mail." *Id.* at 663, 503 S.E.2d at 710. Because the defendant failed to rebut this presumption, we held that the requirements for service of

process under Rule 4 of the Rules of Civil Procedure had been satisfied. *Id.* at 663, 503 S.E.2d at 711.

Unlike the plaintiffs in *Fender*, plaintiff, in the present case, addressed the summons to Integon Claims Examiner Tammy Collins, who was not an officer, director, or agent authorized to accept service of process. Moreover, plaintiff sent the process by regular, rather than certified mail. Under these circumstances, plaintiff is not entitled to any presumption that Collins was acting as an agent of Integon for purposes of receiving process. Pursuant to our holding in *Fender*, the method of service employed by plaintiff did not meet the requirements of Rule 4.

In *Maready*, a deputy sheriff personally delivered a copy of a summons to Maready in the reception area of his law firm. However, the copy actually delivered was of a summons directed to another defendant, C. Roger Harris. On appeal from a decision of this Court affirming the trial court's dismissal of the summons and complaint as to Maready for insufficient service of process, the Supreme Court stated the following:

> Obviously, the deputy sheriff in Forsyth County simply delivered Maready a copy of the summons directed to Harris. It is also obvious that no amount of diligence by the plaintiff or her counsel would have revealed this mistake by the deputy sheriff.
>
> Although the copy of the summons actually handed to the defendant Maready was a copy of the wrong summons, we are persuaded that . . . the mandates of Rule 4 have been met.

311 N.C. at 543, 319 S.E.2d at 917.

Here, unlike in *Maready*, the record does not show a mistake in delivery of the summons and complaint that was beyond plaintiff's control. Indeed, the record reveals that plaintiff had ample opportunity to cure the defect in service prior to the expiration of the statute of limitations. When Integon filed its answer on 9 December 1996, it asserted the insufficiency of service of process as one of its defenses. At that time, plaintiff still had in excess of four months—until 24 April 1997—to achieve proper service upon Integon. Given these facts, plaintiff's reliance on *Maready* is misplaced.

For the foregoing reasons, we hold that plaintiff's original complaint was improperly served upon Integon and that plaintiff's second complaint, filed 23 November 1997, was time-barred. Therefore, the

trial court correctly entered summary judgment for Integon. In addition, we have examined plaintiff's remaining arguments and find them to be without merit.

The order granting summary judgment for Integon is

AFFIRMED.

Judges LEWIS and HORTON concur.

STEVEN BUELTEL, PLAINTIFF v. LUMBER MUTUAL INSURANCE COMPANY, ALSO KNOWN AS LUMBER INSURANCE COMPANIES, DEFENDANT

No. COA98-1006

(Filed 17 August 1999)

1. Declaratory Judgments— actual controversy—restrictive non-competition provision

The trial court did not err in a declaratory judgment case by finding an actual controversy exists involving an agreement containing a restrictive non-competition provision because the parties were not asking the trial court to interpret the document in anticipation of future acts, but in light of past and present action.

2. Declaratory Judgments— restrictive non-competition provision—validity and enforceability of a contract

The trial court did not err in a declaratory judgment action by holding the agreement containing a restrictive non-competition provision was void and unenforceable because although the trial court may not nullify a duly probated will except upon appeal, it may determine the validity and enforceability of a contract under the Declaratory Judgment Act. N.C.G.S. § 1-254.

3. Contracts— choice of law—exception to place where contract made—restrictive non-competition provision

The trial court's order granting summary judgment for plaintiff-former employee in a declaratory judgment action involving an agreement containing a restrictive non-competition provision is reversed and remanded because it is unclear whether the agreement was construed and interpreted under North Carolina or Massachusetts law. Massachusetts law governs in this case

because when a choice of law provision is included in a contract, the parties intend to make an exception to the presumptive rule that the contract is governed by the law of the place where it was made.

Appeal by defendant from judgment entered 1 April 1998 by Judge J. Marlene Hyatt in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 April 1999.

Mitchell, Rallings, Singer, McGirt, & Tissue, PLLC, by Allan W. Singer, for plaintiff-appellee.

Jackson, Lewis, Schnitzler & Krupman, by Edwin G. Foulke, Jr. and Kristin E. Toussaint, for defendant-appellant.

HUNTER, Judge.

Briefly, the evidence presented to the trial court indicates that in April 1994, plaintiff Steven Bueltel ("Bueltel") was hired as a sales associate by defendant Lumber Mutual Insurance Company ("Lumber Mutual"), a company engaged in the business of writing insurance policies to lumber and related industries. At that time, Lumber Mutual asked Bueltel to execute an employment contract which contained confidentiality and non-competition restrictions, and he complied. Bueltel was promoted to sales associate in November 1994 and to account representative in February 1995. In 1996, Lumber Mutual requested that Bueltel sign a second, amended employment contract ("Agreement"), which he did on 25 February 1996. The Agreement was necessary because Lumber Mutual was in the process of standardizing its employment contract with its employees, who would thereafter be subject to standard terms and conditions of employment. Bueltel was not offered a promotion or additional compensation, commission, bonuses or sales territory in exchange for his signature on the Agreement. The Agreement contained a more restrictive non-competition provision, a more expansive description of "policyholder," and a clause which stated that it was to be construed and enforced under the laws of Massachusetts.

On 1 April 1997, Bueltel was promoted to account executive; however, he resigned from his position with Lumber Mutual on 24 June 1997. On 1 July 1997, Bueltel began a new job selling insurance for Indiana Lumbermens Mutual, a competitor of Lumber Mutual. Lumber Mutual corresponded with Bueltel several times from June to August 1997, informing him that he had continuing obligations to

Lumber Mutual pursuant to the Agreement and requesting that he discontinue violating confidentiality and non-competition clauses found therein. Bueltel filed a declaratory judgment action against Lumber Mutual on 26 November 1997, asking the court to construe the rights and liabilities of the parties and declare the Agreement unenforceable. Beultel moved for summary judgment, which was granted on 1 April 1998. Lumber Mutual appeals.

[1] Defendant Lumber Mutual first contends that the trial court did not have jurisdiction under the North Carolina Declaratory Judgment Act to hear Bueltel's action because no actual controversy existed between the parties at the time his action was filed.

"Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement." *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986). "[T]he existence of an actual controversy is necessary to the court's subject matter jurisdiction." *Id.* at 585, 347 S.E.2d at 30. For there to be an "actual controversy," there must be more than a mere disagreement between the parties and litigation must "appear unavoidable." *Id.* at 589, 347 S.E.2d at 32 (*quoting Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)).

Our review indicates that future or anticipated action of a litigant does not give subject matter jurisdiction to our courts under the Declaratory Judgment Act. Like the present case, non-competition provisions were at issue in *Sharpe*, where plaintiffs sought a declaration that such provisions were an unfair restraint on trade. However, our Supreme Court held that because there was no evidence of a practical certainty that the plaintiffs would compete with the defendant or that they had the intention of doing so if the provisions in the note were declared invalid, no justiciable controversy existed between the parties at the time the action was filed. *Sharpe*, 317 N.C. at 590, 347 S.E.2d at 32.

In *Wendell v. Long*, 107 N.C. App. 80, 418 S.E.2d 825 (1992), plaintiffs were property owners in a residential subdivision and asked the court, under the Declaratory Judgment Act, to declare the restrictive covenants in their neighbors' deeds valid. This action would prohibit the defendants' proposed construction project. This Court held that no actual controversy existed between the parties that would satisfy the jurisdictional requirement, because the plaintiff's complaint did

"not allege that defendants have acted in violation of these covenants, but [rather] that they anticipate some future action to be taken by defendants which would result in a violation." *Id.* at 83, 418 S.E.2d at 826.

Unlike *Wendell* and *Sharpe*, the present case was not instituted because action in violation of the Agreement was anticipated or likely. Lumber Mutual communicated to Bueltel in the months prior to suit that he was actually in the process of violating the Agreement and that legal action may be taken against him. We have examined the pleadings and record in the present case to determine whether there is an actual controversy sufficient to confer jurisdiction under the Declaratory Judgment Act. Plaintiff seeks a judgment as to whether or not his past and present actions violate the contract. Lumber Mutual, in its answer, asks the Court to find the contract valid and grant it injunctive relief by prohibiting the plaintiff from *further* action in violation thereof. The parties were not asking the court to interpret the document in anticipation of future acts, but in light of past and present action. Therefore, an actual controversy exists and we find no error by the trial court on this issue.

[2] Secondly, defendant relies on *Farthing v. Farthing* for its contention that the trial court erred because it did not have the power to declare the Agreement void and unenforceable under the North Carolina Declaratory Judgment Act.

The Declaratory Judgment Act provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

N.C. Gen. Stat. § 1-254 (1996). "The Declaratory Judgment Act . . . is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments." *Farthing v. Farthing*, 235 N.C. 634, 635, 70 S.E.2d 664, 665 (1952). In *Farthing*,

the North Carolina Supreme Court ruled that the trial court could construe a duly probated will, but it did not have the power to nullify it. Although not explored in detail in *Farthing*, this holding apparently relied on the rule that an executor named in a will may apply to the clerk of the superior court to have the will admitted to probate, N.C. Gen. Stat. § 31-12 (1984), and "[s]uch record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal." N.C. Gen. Stat. § 31-19 (1984). While exclusive original jurisdiction in probate matters is vested in the superior court division, the clerk of court

> is given exclusive original jurisdiction in the administration of decedents' estates except in cases where the clerk is disqualified to act. In most instances, therefore, the Superior Court Judge's probate jurisdiction is, in effect, that of an appellate court because his jurisdiction is derivative and not concurrent.

In re Estate of Longest, 74 N.C. App. 386, 390, 328 S.E.2d 804, 807, *disc. review denied*, 314 N.C. 330, 333 S.E.2d 488 (1985) (citations omitted). Therefore, the validity of a will is a probate matter and cannot be challenged except by appeal of an order of the clerk of court to the superior court. The validity of a contract, however, is a different matter.

In *Townsend v. Harris*, 102 N.C. App. 131, 401 S.E.2d 132, *disc. review denied*, 328 N.C. 734, 404 S.E.2d 878, *cert. denied*, 502 U.S. 919, 116 L. Ed. 2d 270 (1991), this Court affirmed the trial court's ruling in favor of defendant on her counterclaim that the contingency fee contract at issue was void as being against public policy pursuant to the Declaratory Judgment Act. Thus, it is clear that while the superior court may not nullify a duly probated will except upon appeal, it certainly may determine the validity and enforceability of a contract under the Declaratory Judgment Act. To interpret this Act otherwise would render it useless. We conclude the trial court did not err on this issue.

[3] Next, defendant contends that the restrictive covenant in the Agreement is valid and enforceable under Massachusetts law. Plaintiff contends that the Agreement should be interpreted under North Carolina law and, therefore, it is invalid and unenforceable because contrary to North Carolina law, (1) the "forum" selection clause resulted from unequal bargaining power; (2) there is failure of consideration; and (3) the non-competition restriction is unenforceable.

Plaintiff mistakenly refers to the choice of law provision in the Agreement as a forum selection clause. The Agreement does not mention where suit must be brought, but unambiguously states that it is "a Massachusetts contract and shall be construed and enforced under and be governed in all respects by the laws of the Commonwealth of Massachusetts, without regard to the conflict of laws principles thereof." Plaintiff contends that a contract is governed and interpreted by the law of the state in which it is executed; therefore, the Agreement is governed by North Carolina law. Our Supreme Court has held that "the interpretation of a contract is governed by the law of the place where the contract was made." *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). However, in the same case, the Court also stated that "where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Id.* In *Land Co.* these two rules coincided for the contract was executed in Virginia and the contract had a choice of law provision in favor of Virginia.

The court is to interpret a contract according to the intent of the parties to the contract, unless such intent is contrary to law. *Duke Power v. Blue Ridge Elec. Membership Corp.*, 253 N.C. 596, 117 S.E.2d 812 (1961). "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). Based on the foregoing, and following the logic of *Land Co.*, it is apparent that when a choice of law provision is included in a contract, the parties intend to make an exception to the presumptive rule that the contract is governed by the law of the place where it was made. The Agreement here states that the law of Massachusetts is to apply to its construction and enforcement "in all respects." Choice of law provisions are not contrary to the laws of this state. The parties' intent must rule and we therefore hold that Massachusetts law applies to the construction and enforcement of the Agreement in all respects. Plaintiff's arguments that the Agreement is invalid under North Carolina law are therefore without merit.

We are unable to determine from the order of the trial court whether it construed and interpreted the Agreement under North Carolina or Massachusetts law. Therefore, we hold that order of the trial court granting summary judgment for plaintiff is reversed and remanded for proceedings in accordance with this opinion.

Reversed and remanded.

Judges WYNN and WALKER concur.

STATE OF NORTH CAROLINA v. SHEILA RENEE BURGESS

No. COA98-1001

(Filed 17 August 1999)

1. **Evidence— videotaped interview—second-degree murder—felony child abuse—no prejudicial error**

The trial court did not commit prejudicial error in a felony child abuse and second-degree murder case when it allowed the State, over objection, to show a videotape of a televised interview of defendant-mother where the news reporter's commentary cast doubt on defendant's account of the events because: (1) the interview was initiated by defendant; (2) the trial court gave a limiting instruction on the videotape and ordered the jury to disregard the news reporter's commentary; (3) defendant, during her own testimony, corroborated most of the information contained in the television interview; and (4) defendant has admitted that the first story was not true and has failed to show how she was prejudiced by the fact that the news reporter did not believe her false story.

2. **Evidence— character—State's case-in-chief—felony child abuse—second-degree murder—opened the door**

The trial court did not err in a felony child abuse and second-degree murder case when it allowed the State to put defendant-mother's character into evidence during its case-in-chief because defendant opened the door to the State's subsequent questions concerning her character for violence by attempting to paint a picture of herself as a good mother during the cross-examination of a neighbor.

3. **Sentencing— child abuse—aggravating factor—"very young"—not a necessary element**

The trial court did not err in a felony child abuse and second-degree murder case when it found as an aggravating factor, on the felony child abuse conviction, that the three-week old infant victim was "very young" because this finding was not a necessary element to prove felonious child abuse.

Appeal by defendant from judgments entered 17 April 1998 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 12 May 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Anita LeVeaux-Quigless, for the State.

William G. Causey, Jr. and Assistant Public Defender Susan Burch, for defendant-appellant.

HUNTER, Judge.

Defendant appeals her conviction for felony child abuse and second-degree murder of her infant child, Cheyenne Summer Kelly ("Cheyenne"). Briefly, the evidence presented at trial tended to show that defendant, one of eight children, dropped out of high school when she was fifteen years old and pregnant. Her father died that same year. She had four children by four different men before she turned twenty-two and was once married to an older man who physically assaulted her. She abused both alcohol and cocaine. At the time of the incident, defendant lived with her boyfriend, Robbie Patton ("Patton"), in High Point, North Carolina with her then three-week old daughter, Cheyenne. Her other three children were in the custody of the North Carolina Department of Social Services.

On 23 November 1997, defendant took Cheyenne to a bar near her home where she was seen drinking excessively. At approximately 12:30 a.m., defendant was seen leaving the bar with the child who seemed fine. Defendant testified that when she returned home, she caught her boyfriend, Patton, kissing the landlord's daughter and they began arguing. During the argument, Patton grabbed Cheyenne and began shaking her. Defendant grabbed the child and fell on her as she tried to escape from Patton. When Patton left, defendant testified that Cheyenne was fine. She fell asleep on the couch with Cheyenne resting on her stomach, but when she awoke the next morning at 7:00 a.m., Cheyenne was bruised and unresponsive. Initially, defendant repeatedly claimed that Cheyenne fell off her chest and was injured. At trial, however, she claimed that Patton caused the injuries and then asked her to lie to law enforcement officials on his behalf since he was on parole. Patton's testimony differed from defendant's. He denies arguing with defendant and shaking Cheyenne. He testified that defendant smoked pot, took anti-depressants and enjoyed drinking.

On the morning of 24 November 1997, Patton drove defendant, defendant's mother and Cheyenne to High Point Regional Hospital. Cheyenne was immediately transported to Brenner's Childrens' Hospital where she died on 27 November 1997 from severe brain trauma. Numerous physicians and hospital personnel testified that Cheyenne's injuries were not consistent with defendant's story but were the result of having been repeatedly violently shaken. They were an extreme example of the "shaken baby syndrome" and were not the result of an accidental fall. Many believed the injuries occurred only hours before Cheyenne was seen at the hospital. This theory was corroborated by the pathologist.

Defendant was indicted on 20 January 1998 for felony child abuse and second-degree murder. Her case was tried 13 April 1998 in Guilford County Superior Court and defendant was found guilty as charged. The trial judge found in aggravation that the victim was very young and in mitigation that the defendant's age and immaturity at the time of the commission of the offense significantly reduced her culpability. However, the judge then found that the aggravating factors outweighed the mitigating factors and sentenced defendant to 196-245 months for second-degree murder and 31-47 months for felony child abuse, the sentences to run consecutively. Defendant appealed.

[1] In her first assignment of error, defendant contends the trial court erred in allowing, over objection, the State to show a videotape of a televised interview of defendant. During the interview, taken at defendant's request at her home, the news reporter made several comments that cast serious doubt on defendant's story and, during the commentary, left the distinct impression that she did not believe defendant's account of the events occurring on 24 November 1997. Eventually the trial court gave a limiting instruction on the videotape and told the jury to disregard the news reporter's commentary. Defendant argues that the biased videotaped interview merely duplicated earlier testimony, it undermined her credibility, lacked probative value and was highly prejudicial to her defense pursuant to Rule 403. We disagree.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Rule 403 of the North Carolina Rules of Evidence provides that even relevant evidence may

be excluded if its probative value is substantially outweighed by its prejudicial effect. Whether the evidence should be excluded is a decision within the trial court's discretion. *State v. Robertson*, 115 N.C. App. 249, 444 S.E.2d 643 (1994). "Hence, the trial court's decision will not be disturbed, unless it 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (*quoting State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

In the case *sub judice*, defendant, after contacting the news station, proceeded to tell the same story she had repeatedly told health care professionals in the emergency room, pathologists, social workers, law enforcement officers and her mother. Later, after talking to a defense attorney, defendant recanted this story. We find the first description of the story as told to her family, police, doctors and the news reporter to be relevant to show how she lied consistently concerning the cause of the injuries leading to Cheyenne's death.

However, assuming *arguendo* that it was error to admit the videotape, we hold it was not prejudicial in light of the other evidence properly admitted at trial. First, the interview was initiated by defendant. Second, we note that the court gave a limiting instruction on the videotape and later ordered the jury to disregard the commentary of the news reporter. Third, defendant, during her own testimony, corroborated most of the information contained in the televised interview. Finally, defendant has admitted that the first story was not true and has failed to show how she was prejudiced by the fact that the news reporter did not believe her false story. In light of the court's limiting instruction, we cannot find that the trial court's decision permitting the State to introduce the videotape was an unreasoned one. We discern no error.

[2] Next, defendant contends the trial court erred in allowing the State to put defendant's character into evidence during its case-in-chief in violation of N.C.R. Evid. 404(b). Rule 404(b) provides that 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. Defendant asserts that the State was erroneously allowed, over objection, to present specific instances of violent conduct by defendant (use of baseball bat in fight with Patton and breaking all the windows in Patton's car) to prove defendant's character for vio-

lence in order to show the likelihood that she shook her child to death on 24 November 1997. We disagree.

Our review of the transcript indicates that defendant opened the door to the State's subsequent questions concerning defendant's character for violence. During the State's case-in-chief, defendant, upon cross-examination, asked a neighbor, Betty Phillips, if defendant was a good mother and kept the baby clean; asked Officer Morris of the High Point Police Department if defendant's family had a history of abuse; and asked Patton if defendant kept a clean house. In rebuttal, the State presented evidence that, contrary to the picture being painted by the defense, defendant was not a good mother.

> "[T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially."

State v. Hudson, 331 N.C. 122, 154, 415 S.E.2d 732, 749 (1992), *cert. denied*, 506 U.S. 1055, 122 L. Ed. 2d 136, *reh'g denied*, 507 U.S. 967, 122 L. Ed. 2d 776 (1993) (*quoting State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). "Defendant cannot invalidate a trial by . . . eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State." *State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990) (*quoting State v. Chatman*, 308 N.C. 169, 177, 301 S.E.2d 71, 76 (1983)); *see State v. Syriani*, 333 N.C. 350, 378, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993), *reh'g denied*, 510 U.S. 1066, 126 L. Ed. 2d 707 (1994). This assignment of error is overruled.

[3] In her final assignment of error, defendant contends the trial court erred in finding as an aggravating factor on the felony child abuse conviction that the victim was of a very young age since the victim's age had already been used as an element of the crime. Defendant relies on N.C. Gen. Stat. § 15A-1340.16(d) to assert that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." Here, defendant contends, since the age of the victim was an element of felonious child abuse, the trial judge was precluded from considering the victim's age

as an aggravating factor, *see* N.C. Gen. Stat. § 15A-1340.16(d)(11) (1997). The North Carolina Supreme Court held otherwise in *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

For a conviction of felony child abuse (as of 1 January 1995), the State must prove that defendant is a parent or caregiver to a child less than sixteen years old and that defendant intentionally inflicted serious physical injury upon the child. N.C. Gen. Stat. § 14-318.4(a) (1993); *State v. Qualls*, 130 N.C. App. 1, 502 S.E.2d 31 (1998), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999). "The age of the victim, while an element of the offense, spans sixteen years, from birth to adolescence. The abused child may be vulnerable due to its tender age, and *vulnerability* is clearly the concern addressed by this factor." *Ahearn*, 307 N.C. at 603, 300 S.E.2d at 701 (emphasis in original).

N.C. Gen. Stat. § 15A-1340.16(d)(11) allows the trial court to find as an aggravating factor that the victim was "very young, or very old, or mentally or physically infirm, or handicapped." Here, the fact that Cheyenne was *very young* (3 weeks old) was "not an element necessary to prove felonious child abuse, and was therefore properly considered as an aggravating factor." *Ahearn*, 307 N.C. at 603, 300 S.E.2d at 701. This assignment of error is overruled.

We have reviewed the remaining assignments of error and find that they have been either abandoned or are without merit. Defendant received a fair trial, free of prejudicial error.

No error.

Judges JOHN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. JEROME BRANCH, DEFENDANT

No. COA98-1000

(Filed 17 August 1999)

1. Sentencing— Fair Sentencing Act—Structured Sentencing Act—combined sentences not permitted

The trial court did not err in a breaking and entering and larceny case by resentencing defendant based on the theory that offenses committed prior to 1 October 1994 could not be com-

bined with offenses committed after that date, because defendant's offenses committed on 19 September 1994 were controlled by the Fair Sentencing Act and his offenses committed on 4 October 1994 were subject to the Structured Sentencing Act.

2. Sentencing— plea bargain—consolidated offenses not required

The trial court did not violate defendant's plea bargain in a breaking and entering and larceny case by failing to consolidate the two offenses under Structured Sentencing even though the offenses occurred under different sentencing schemes because the guilty plea was made before the discrepancy in sentencing schemes was brought to the trial court's attention, and the State kept its end of the bargain by dismissing two other breaking and entering charges.

3. Sentencing— resentencing hearing—trial court as a matter of law can vacate an invalid sentence

The trial court did not unlawfully hold a resentencing hearing in a breaking and entering and larceny case since the Department of Correction's letter alerting the trial court of its erroneous sentence was not a motion for appropriate relief, and the trial court as a matter of law has authority to vacate the invalid sentence and resentence defendant accordingly even if the term of court has expired.

4. Appeal and Error— preservation of issues—constitutional questions—not raised in trial court or in a motion

Defendant in a breaking and entering and larceny case did not properly raise the issues of the violation of double jeopardy and his due process rights because constitutional questions not raised to the trial court or in a motion will not be considered on appeal.

Appeal by defendant from order entered 27 January 1998 by Judge Robert H. Hobgood in Franklin County Superior Court. Certiorari granted 24 March 1998. Heard in the Court of Appeals 28 April 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. Harris, for the State.

N.C. Prisoner Legal Services, Inc., by Kathryn L. VandenBerg, for defendant-appellee.

LEWIS, Judge.

Defendant pled guilty on 30 January 1995 to two counts each of breaking and entering and of larceny. The first offense was committed 19 September 1994; the second committed 4 October 1994. Both offenses were combined and on 30 January 1995 defendant was sentenced to twelve to fifteen months in jail under the guidelines of the Structured Sentencing Act of 1994. The Department of Correction contacted the Clerk of Superior Court in Franklin County and informed the court that offenses committed prior to 1 October 1994 could not be combined with offenses committed after that date. Accordingly defendant was resentenced in May 1995. Before resentencing, defendant acknowledged, both verbally and in writing, that he could receive a maximum punishment of ten years plus ten years for the September charges and a maximum of 60 months for the October charges. At the resentencing hearing defendant received twelve to fifteen months for the offenses committed 4 October 1994 under the Structured Sentencing Act. Under the Fair Sentencing Act defendant received ten years for the offenses committed 19 September 1994. Defendant filed a motion for appropriate relief 23 January 1998, and that motion was denied and dismissed on 27 January 1998.

Defendant argues that the May 1995 resentencing was illegal for four reasons: (1) there was no prohibition on consolidating offenses committed before and after the implementation of the Structured Sentencing Act of 1994; (2) the new sentence violated defendant's earlier plea bargain; (3) the resentencing hearing was unlawful; and (4) the increased sentence was illegal. We disagree with all of defendant's arguments on appeal and affirm the resentencing.

[1] First, defendant contends that there was no outright ban against consolidating offenses committed before the implementation of the Structured Sentencing Act, N.C. Gen. Stat. § 15A-1340.10 *et seq.* (1997), with offenses committed after the act was implemented. The implementation of the Structured Sentencing Act is analogous to the implementation of the Fair Sentencing Act of 1981, N.C. Gen. Stat. § 15A-1340.1 (1988) (repealed 1993). Sentences for offenses committed before the effective date of the Fair Sentencing Act were in accord with the law as it existed before that date. *See State v. Burton*, 114 N.C. App. 610, 615, 442 S.E.2d 384, 387 (1994); *State v. Jones*, 66 N.C. App. 274, 279, 311 S.E.2d 351, 354 (1984). Similarly, offenses that were committed prior to 1 October 1994, the effective date of the

Structured Sentencing Act, fall under the sentencing guidelines of the Fair Sentencing Act as a matter of law. *See Burton*, 114 N.C. App. at 610, 442 S.E.2d at 387. Therefore, the conviction for breaking and entering and larceny committed 19 September 1994 was controlled by the Fair Sentencing Act, and the breaking and entering and larceny committed 4 October 1994 was subject to the Structured Sentencing Act. *Id. See also* N.C.G.S. § 15A-1340.1 to -1340.7; N.C.G.S. §§ 15A-1340.10 *et seq.* Defendant's first argument is without merit.

[2] Defendant next contends that the new sentence violated his earlier plea bargain. Defendant claims that in exchange for his guilty plea the State would consolidate the two offenses under Structured Sentencing even though it knew that the offenses occurred under different sentencing schemes. This is an improper interpretation of the plea bargain. The actual terms were that in exchange for a guilty plea on the aforementioned charges the State would dismiss two other breaking and entering charges, provided that defendant began serving his sentence for the plea after he completed the ten year sentence he was then currently serving. The transcript clearly demonstrates that the sentences were consolidated after the plea was entered. The guilty plea was made before the discrepancy in sentencing schemes was brought to the trial court's attention. The plea bargain was not violated by the resentencing because the State kept its end of the bargain and did not reinstate the two other charges. *See State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993). *See also U.S. v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986) (applying North Carolina law).

[3] Defendant's next issue on appeal is that the resentencing hearing was unlawful. Defendant first contends that the resentencing hearing was unlawful because the state illegally filed a motion for appropriate relief. Specifically, defendant argues that the letter from the Department of Correction alerting the trial court of the erroneous sentence was, in essence, a motion for appropriate relief, and this motion was not filed within the statutory period of 10 days. N.C. Gen. Stat. § 15A-1416 (1997). We disagree.

A motion for appropriate relief is a post-verdict or post-sentencing motion made to correct errors occurring during and after a criminal trial. *State v. Small*, 131 N.C. App. 488, 494, 508 S.E.2d 799, 803 (1998). To properly file a written motion for appropriate relief, it must state the grounds for the motion, set forth the relief sought, be timely filed with the clerk, and be served in accordance to N.C. Gen.

Stat. § 15A-951(b) (1997). N.C. Gen. Stat. § 15A-1420 (1997). This letter was not a motion for appropriate relief. It was a form letter, alerting the trial court to its error in applying the law as to the sentence. Upon learning of its error the trial court vacated its previous unlawful sentence and imposed a sentence using the appropriate applicable law. *See State v. Rollins*, 131 N.C. App. 601, 607, 508 S.E.2d 554, 558 (1998) (previous sentence vacated for the purpose of resentencing when prior sentence invalid).

Defendant also contends that the resentencing hearing was illegal because the trial court had no jurisdiction over the matter because the term of court had expired. If a judgment is invalid as a matter of law, North Carolina Courts have the authority to vacate the invalid sentence and resentence the defendant accordingly, even if the term has ended. *See State v. Bonds*, 45 N.C. App. 62, 64, 262 S.E.2d 340, 342 (1980).

> Specifically, N.C.G.S. [§] 15A-1415(b)(8) allows relief to be granted when a prison sentence was "*unauthorized at the time imposed*, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." If resentencing is required, the trial division may enter an appropriate sentence. N.C. Gen. Stat. 15A-1417(c).

Id. at 63-64, 262 S.E.2d at 342 (emphasis added). Defendant's sentence for the breaking and entering committed 19 September 1994 was unauthorized at the time imposed because it applied inappropriate sentencing law. *See Burton*, 114 N.C. App. at 615, 442 S.E.2d at 387. As a matter of law, the conviction for the offenses committed 19 September 1994 were subject to the Fair Sentencing Act. *Id.* As a matter of law, the offenses committed 4 October 1994 were punishable as prescribed by the Structured Sentencing Act. N.C.G.S. § 15A-1340.10. As such, the trial court was authorized to resentence defendant using correct law.

[4] Defendant's final argument on appeal is that the increased sentence was illegal because it violated double jeopardy and due process under the Constitution. This argument is not properly before this Court.

> In order to preserve a question for appellate review, *a party must have presented to the trial court a timely request, objection or motion*, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not appar-

ent from the context. . . . *Any such question which was properly preserved for review by action of counsel . . . may be made the basis of an assignment of error in the record on appeal.*

N.C.R. App. P. 10(b)(1) (1999) (emphasis added). In the resentencing hearing and in his motion for appropriate relief defendant failed to address the increased sentence; he argued only that the sentences should have been consolidated. In addition, defendant never addressed the constitutionality of the resentencing. Our Supreme Court has made it clear that constitutional questions not raised to the trial court or in a motion will not be considered on appeal. *See State v. Gibbs*, 335 N.C. 1, 42, 436 S.E.2d 321, 344 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Since he failed to make the constitutional argument either at the resentencing hearing or in his motion for appropriate relief, defendant may not present the argument to this Court. *See id.*

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

FELICIA L. WILSON, PLAINTIFF v. CARDELL WILSON, SR., DEFENDANT

No. COA98-1128

(Filed 17 August 1999)

Appeal and Error— domestic violence protective order—dismissed as moot

Defendant-husband's appeal from a domestic violence protective order prohibiting him from possessing a firearm for a one-year period is moot because the order already expired and defendant is no longer attempting to avoid dismissal from his position with the Department of Corrections since he resigned.

Appeal by defendant from order entered 23 April 1998 by Judge Alfred W. Kwasikpui in Bertie County District Court. Heard in the Court of Appeals 9 June 1999.

No brief filed for plaintiff-appellee.

Rosbon D. B. Whedbee for defendant-appellant.

TIMMONS-GOODSON, Judge.

Cardell Wilson (defendant) appeals from a Domestic Violence Protective Order entered 23 April 1998 prohibiting him from possessing a firearm for the effective period of the order—one year from the date of entry. For the reasons hereinafter stated, we dismiss the appeal as moot.

At the time of the incident resulting in the Domestic Violence Protective Order, defendant and his wife, Felicia Wilson (plaintiff), were separated. During the separation, plaintiff remained in the marital home with the parties' three minor children. Defendant visited the residence on 12 April 1998, as plaintiff and her children were preparing to vacate the premises. Several of plaintiff's relatives were present to assist plaintiff with the packing and moving. Upon entering the home, defendant saw that a stereo belonging to the parties was being prepared for moving. When defendant began unplugging and removing the stereo components, an altercation erupted between him and plaintiff's brother. Plaintiff intervened, attempting to break up the fight, whereupon defendant shoved her against the wall twice and knocked her to the floor.

On 15 April 1998, plaintiff obtained an Ex Parte Domestic Violence Protective Order. The matter came on for hearing, and the trial court entered a Domestic Violence Protective Order on 23 April 1998. Under the terms of the order, defendant was prohibited from possessing and/or purchasing a firearm for the effective period of the order. The order stated that it was to be in effect for one year from the date of its entry, i.e., until 23 April 1999. Defendant, who is an Intensive Probation Officer with the North Carolina Department of Correction, filed a motion for relief from the order requesting that he be permitted to possess any such firearm as was issued to him by the State of North Carolina for use in the course of his employment. The trial court denied the motion on 21 May 1998. Defendant appeals.

Defendant brings forward several assignments of error on appeal. We note, at the outset, that defendant's assignments regarding the constitutionality of the Domestic Violence statute are deemed abandoned, since defendant has failed to cite any authority to support his arguments. N.C.R. App. P. 28(b)(5). The remainder of defendant's assignments deal primarily with the same issue: whether the trial court committed reversible error in prohibiting defendant from pos-

sessing or purchasing a firearm when there was no factual basis to support such a prohibition. After examining the record, however, we conclude that defendant's appeal is moot.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996).

> " 'Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.' An appeal which presents a moot question should be dismissed. Judicial power only extends to concrete, justiciable, and actual controversies properly brought before the court and each decision of law must be based on specific facts established by stipulation or by appropriate legal procedure."

Shella v. Moon, 125 N.C. App. 607, 609, 481 S.E.2d 363, 364 (1997) (quoting *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994) (citations omitted)).

The record in the instant case reveals that the Domestic Violence Protective Order expired on 23 April 1999. Therefore, the provision regarding defendant's use or possession of a firearm is no longer operative. Furthermore, it appears from the record that by requesting relief from the order, defendant was seeking to avoid dismissal from his position with the Department of Correction. Insofar as defendant resigned from his position on 29 July 1998, the issues raised by this appeal are moot. Accordingly, defendant's appeal is dismissed.

Notwithstanding our dismissal of defendant's appeal, we urge trial judges to exercise caution in completing the standard Domestic Violence Protective Order, Form AOC-CV-306. While we appreciate the convenience such forms provide the trial courts, given the large number of domestic violence cases filed, we stress the importance of ensuring that each finding of fact, conclusion of law, and mandate of the order is supported by competent evidence. *See Brandon v. Brandon*, 132 N.C. App. 646, 652, 513 S.E.2d 589, 593 (1999) (specifically disapproving of the preprinted Form AOC-CV-306). Where the provisions of a Domestic Violence Protective Order are not sup-

ported by the facts, the order will be reversed. *Price v. Price*, 133 N.C. App. 440, 514 S.E.2d 553 (1999).

For the foregoing reasons, defendant's appeal is dismissed.

Dismissed.

Judges JOHN and HUNTER concur.

JANET L. KARNER AND LYMAN G. WELTON, PLAINTIFFS AND LORETTA LEE PENDERGRAST, APRILLE L. SHAFFER AND SHELLY JORDAN, INTERVENOR PLAINTIFFS v. ROY WHITE FLOWERS, INC., ROY J. WHITE, JR., MARGARET C. WHITE, AND EDWARD A. WHITE, DEFENDANTS

No. COA98-80

(Filed 7 September 1999)

1. **Deeds— restrictive covenants—residential purposes only—motion to require joinder—proper party—necessary party**

The trial court did not err in denying plaintiff's motion to require joinder of the non-litigant residential property owners on the basis that defendants' changed conditions defense could result in the invalidation of the restrictive covenants in the residential subdivision because all landowners in the subdivision are not necessary parties, but instead merely proper parties since their interest is fully represented by the present parties.

2. **Statute of Limitations— incorporeal hereditaments—restrictive covenant—encroachment—prescriptive easement**

The trial court did not err in utilizing N.C.G.S. § 1-50(a)(3)'s six-year statute of limitations for injury to incorporeal hereditaments, instead of a twenty-year statute of limitations extinguishing restrictive covenants upon adverse use for the prescriptive period, since the present case involves a restrictive covenant rather than an encroachment and/or prescriptive easement.

3. **Deeds— restrictive covenant—directed verdict—aware or reasonably aware of violation**

The trial court erred in directing verdict for defendants based on a six-year statute of limitations pursuant to N.C.G.S.

§ 1-50(a)(3) on lots 1, 2, and 3 because there is conflicting evidence whether plaintiffs were aware or should have reasonably been aware of a continual violation of the restrictive covenant on those lots from 5 October 1989 to 5 October 1995. However, the trial court did not err in directing verdict for lot 4 because it has been openly used for non-residential purposes for at least twenty-two years before this suit was instituted, and evidence of vacating and demolishing a building which has continually been used for commercial purposes does not indicate in and of itself that the property has returned to a residential use.

Judge GREENE dissenting.

Appeal by Janet L. Karner, Lyman G. Welton, Loretta Lee Pendergrast and Aprille L. Shaffer from order of 9 May 1996 and judgment entered 11 February 1997 by Judge Marvin Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 1999.

James, McElroy & Diehl, P.A., by Paul P. Browne and Law Offices of Kenneth T. Davies, by Kenneth T. Davies, for plaintiff-appellants.

Odom & Groves, P.C., by George J. Miller and L. Holmes Eleazer, Jr., for defendant-appellees.

HUNTER, Judge.

Briefly, the record reveals that the parties are all property owners in Elizabeth Heights, a neighborhood in Charlotte which was developed as a residential subdivision around the turn of the century. Each of the conveyances of lots in Elizabeth Heights to the original grantees, and their heirs and assigns, contained a restrictive covenant that encumbered the lots for use for residential purposes only.

In 1995, defendants began to clear four (4) of their six (6) lots in Elizabeth Heights. After it was reported in a local newspaper that defendants intended to demolish three vacant houses on the property in question and construct a 5,300 square foot commercial building, plaintiffs filed a complaint 5 October 1995 seeking, *inter alia,* to enjoin defendants from erecting a commercial structure. Defendants answered and raised several affirmative defenses, including a defense that the action was barred by N.C. Gen. Stat. § 1-50(a)(3), the

six-year statute of limitations for injury to an incorporeal hereditament, and that the use and character of the neighborhood had changed over the years to such an extent that it was not desirable or economically feasible to use the properties for residential purposes and such covenant should be annulled by the court.

On 18 March 1996, plaintiffs moved the trial court to require defendants to join all other landowners within the relevant area as third party defendants. The court denied plaintiffs' motion in an order entered 9 May 1996.

The case came on for trial and following the presentation of evidence by both parties, the trial court entered an order of directed verdict against plaintiffs on the grounds that their claims were barred by N.C. Gen. Stat. § 1-50(a)(3). Plaintiffs appeal the denial of their motion for joinder and the directed verdict as to lots one (1) through four (4).

I. Joinder

[1] First, plaintiffs argue that the trial court erred in denying their motion to require joinder of the non-litigant property owners in Elizabeth Heights. Plaintiffs contend that defendants' changed conditions defense could result in the invalidation of the restrictive covenants which apply to Elizabeth Heights; consequently, all landowners in the subdivision are "necessary parties" because their property rights could therefore be affected.

The removal of restrictive covenants is an equitable action based upon whether changed conditions of an area are a "substantial departure" from the purposes of the original plan, and is a matter to be decided in light of the specific circumstances of each case. *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 667, 268 S.E.2d 494, 499, *reh. denied*, 301 N.C. 107, 273 S.E.2d 442 (1980). Rule 19 of the North Carolina Rules of Civil Procedure provides that those who are united in interest must be joined as plaintiffs or defendants. N.C. Gen. Stat. § 1A-1, Rule 19(a) (1990). The court may determine any claim before it when the rights of others not before the court are not prejudiced, but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action. N.C. Gen. Stat. § 1A-1, Rule 19(b) (1990). A necessary party "is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the contro-

versy without his presence[;]" however, a proper party "is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others." *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971). While "necessary parties" must be joined in an action, "proper parties" may be joined, and whether proper parties will be ordered joined rests within the sound discretion of the trial court. *Id.*

Plaintiffs assert that under *Sheets v. Dillon*, 221 N.C. 426, 20 S.E.2d 344 (1942), all property owners in Elizabeth Heights must be joined as necessary parties in the present case. In *Sheets*, the plaintiff sought to enforce a contract of sale of real property, which the defendant refused to complete after learning of residential restrictive covenants in the plaintiffs' chain of title. The trial court found that the defendant was not required to act under the contract. The plaintiff raised the issue of changed conditions in the neighborhood, asserting that the residential covenants were no longer valid, and our Supreme Court remanded the case, stating:

> [T]here is some evidence that plaintiff acquired title under a general scheme or at least tending to show that other grantees of the original grantor may be interested in attempting to so prove. It follows that the original grantor is, and its other grantees *may be*, interested in the enforcement of the covenant plaintiff seeks to annul.
>
> The judgment herein is not conclusive as to any one other than plaintiff and defendant. Plaintiff's predecessor in title and those who may claim that the covenant was inserted pursuant to a general plan or scheme of development are not estopped from hereafter asserting their rights thereunder. Under such circumstances equity will not require defendant to comply with his contract in direct violation of the stipulation that the property is to be conveyed free of restrictive covenants. If plaintiff desires to have this covenant invalidated and stricken from the deed of the original grantee, he must bring in the interested parties and give them a day in court.

Id. at 431-32, 20 S.E.2d at 347-48 (emphasis added). We interpret *Sheets* to stand for the proposition that if one party seeks to "annul" or invalidate a restrictive covenant in equity, based on changed conditions, the interest of other property owners, who may challenge this cause of action, must be represented in the suit. In *Sheets*, the plaintiff property owner sought to annul restrictive covenants, and the

defendant had no property interest in the subject property. Therefore, the interest of other landowners, who may have contested the invalidation, was not represented.

To the contrary, in the present case, the interest of landowners wishing to either oppose or support the assertion of changed conditions is fully represented by the present parties. Other landowners in Elizabeth Heights are not necessary parties for the court to determine whether or not the character of the neighborhood has changed to such an extent that the residential covenants should be annulled. Nor are they necessary for the court to determine any other issue presented in this case. If other landowners in Elizabeth Heights choose to join either the plaintiffs or defendants as parties in this suit, the court could order their joinder as proper; however, the joinder of each individual landowner is not necessary for the action to proceed. Accordingly, we hold that the record reveals no abuse of discretion by the trial court in its denial of the motion for joinder of all property owners in Elizabeth Heights in the present action.

II. Statute of Limitations

[2] Plaintiffs assert that the trial court erred in entering a directed verdict under the authority of N.C. Gen. Stat. § 1-50(a)(3), a six-year statute of limitation "[f]or injury to any incorporeal hereditament," because the correct statute of limitation in the present case is the "prescriptive period" of twenty years.

Plaintiffs filed suit to enforce a restrictive covenant. "A restrictive covenant is a servitude, commonly referred to as a negative easement, and an easement is an incorporeal hereditament." *Hawthorne v. Realty Syndicate, Inc.*, 43 N.C. App. 436, 440, 259 S.E.2d 591, 593 (1979), *aff'd*, 300 N.C. 660, 268 S.E.2d 494, *reh. denied*, 301 N.C. 107, 273 S.E.2d 442 (1980) (citation omitted). The term "incorporeal hereditament" derives from English law and is defined as:

> Anything, the subject of property, which is inheritable and not tangible or visible. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. A right growing out of, or concerning, or annexed to, a corporeal thing, but not the substance of the thing itself.

Black's Law Dictionary 726 (6th ed. 1990). This Court has held that N.C. Gen. Stat. § 1-50(a)(3) requires that an action for injury to any "incorporeal hereditament" be brought within six years, and applies

to restrictive covenants. *Hawthorne*, 43 N.C. App. at 440, 259 S.E.2d at 593.

Plaintiffs argue that the statute of limitations rule enunciated in *Hawthorne* does not apply in the present case. They contend that their claims are subject to a twenty-year "statute of limitations" because they are seeking an injunction and "[a]n easement may be extinguished by adverse use by the owner of the servient property for the prescriptive period." *Skvarla v. Park*, 62 N.C. App. 482, 488, 303 S.E.2d 354, 358 (1983). Plaintiffs rely on *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298, *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984), for this proposition. The defendant's home in *Bishop* was partially erected on the plaintiff's property in 1973 and plaintiffs sued in 1980 on the basis of continual trespass, seeking removal of the building from their property. The Court noted that in the case of an actual encroachment, a plaintiff "is limited to a single recovery of all damages." *Bishop*, 66 N.C. App. at 383, 311 S.E.2d at 300. The Court held that any claim for relief for actual removal of the structure as in an action for compensation for the easement or for the fee by adverse possession was not barred "until defendants had been in continuous use thereof for a period of twenty years so as to acquire the right by prescription." *Id.* at 384, 311 S.E.2d at 301. The Court apparently relied upon the rule that to obtain such a prescriptive easement in North Carolina,

> a claimant must prove: (1) that its use of the easement was adverse, hostile, or under a claim of right, (2) that the use has been open and notorious, (3) that the use was continuous and uninterrupted for a period of twenty years, and (4) that there is substantial identity of the easement for this twenty year period.

Boger v. Gatton, 123 N.C. App. 635, 637, 473 S.E.2d 672, 675, *review denied*, 344 N.C. 733, 478 S.E.2d 3 (1996) (*citing Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900-01 (1974)).

Plaintiffs' novel argument, while provoking, lacks merit. The present case is distinguishable from *Bishop* in that a residential restrictive covenant is at issue rather than an encroachment and/or prescriptive easement. While other jurisdictions have found in accordance with the plaintiffs' contention, *Jinkins v. City of Jal*, 386 P.2d 599 (N.M. 1963) (applicable period of limitations in a suit to enjoin violation of restrictive covenant as to use of land was 10-year period of prescription and not three- or four-year statutes of limita-

tion), we have found no authority under the laws of this state which support the position that restrictive covenants may be "extinguished" upon adverse use for a prescriptive period. Because plaintiff has failed to show an exception to the rule announced in *Hawthorne*, we find no error. N.C. Gen. Stat. § 1-50(a)(3) is the applicable statute of limitations in the present case; therefore, plaintiffs' case is barred if this six-year statute of limitation is satisfied.

III. Accrual of Statute of Limitations Defense

[3] Plaintiffs contend that even under N.C. Gen. Stat. § 1-50(a)(3), their action was timely brought because the lots in question were not used for non-residential purposes in a manner that was continuous, open and notorious for the full six-year statutory period.

The trial court found that "there is no dispute between and among the parties that the Defendants have used the subject six (6) parcels of property for non-residential uses in a continuous, open and notorious manner . . . for a period of time in excess of six (6) years prior to filing of the plaintiffs' Complaint on October 5, 1995." Therefore, the trial court concluded that plaintiffs' suit was barred by N.C. Gen. Stat. § 1-50(a)(3) and granted a directed verdict for the defendants.

In ruling on a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the non-movant. This means that the evidence in favor of the non-movant must be taken as true, resolving all conflicts in the non-movant's favor and entitling him to the benefit of all reasonable inferences. *Freeman v. Development Co.*, 25 N.C. App. 56, 212 S.E.2d 190 (1975). If plaintiffs fail to present evidence of each element of their claim for relief, they will not survive a directed verdict motion, *Felts v. Liberty Emergency Service*, 97 N.C. App. 381, 388 S.E.2d 619 (1990), and there must be more than a scintilla of evidence to support each element of the plaintiffs' claim. *Tedder v. Alford*, 128 N.C. App. 27, 493 S.E.2d 487 (1997), *disc. review denied*, 348 N.C. 290, 501 S.E.2d 917 (1998). Finally, a directed verdict should not be granted when conflicting evidence has been presented on contested issues of fact. *Brewer v. Cabarrus Plastics*, 130 N.C. App. 681, 504 S.E.2d 580 (1998), *disc. review denied*, 1999 WL 386187 (N.C. Sup. Ct. Feb. 4, 1999).

Before considering plaintiffs' assignments of error, we must first review the rule as to when the statute of limitation begins running:

> Generally, a cause of action accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. . . . "[A]s soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury."

Liptrap v. City of High Point, 128 N.C. App. 353, 355, 496 S.E.2d 817, 819, *disc. review denied*, 348 N.C. 73, 505 S.E.2d 873 (1998) (citations omitted). In *Hawthorne, supra*, the trial court had found that the action to enjoin defendants from using their property for commercial uses "was brought within three years after the first non-residential use of the defendants' property;" therefore, the statute of limitations did not bar the suit. *Hawthorne*, 43 N.C. App. at 439, 259 S.E.2d at 593. This Court agreed, stating: "G.S. 1-50(3) requires that an action for injury to any incorporeal hereditament be brought within six years. Plaintiffs' action was clearly brought within this period." *Id.* at 440, 259 S.E.2d at 593.

Under *Liptrap* and *Hawthorne*, it is clear that the statute of limitations begins running as to the violation of a restrictive covenant when the plaintiff first becomes aware or should have reasonably become aware of the violation. Therefore, if the plaintiff is aware, or should reasonably be aware of the violation continually for six years, a valid defense exists under N.C. Gen. Stat. § 1-50(a)(3). *Cf. Williamson v. Pope*, 60 N.C. App. 539, 299 S.E.2d 661 (1983) (the court cannot presume that adjoining property owners acquiesce to a violation of a restrictive covenant when they were formerly informed that a violation did not exist, and brought suit once they became aware of violation, thus laches does not bar their suit).

First, plaintiffs contend that the lots in question were not in violation of the restrictive covenants at the time the lawsuit was filed, therefore a statute of limitations defense in the present case is inapplicable. Plaintiffs argue that defendants had vacated any structures on the lots at issue in the summer of 1995 and demolished them at the time suit was brought on 5 October 1995; therefore, assuming *arguendo* that violations of the restrictive covenants had existed prior to the property becoming vacant, the offending use ceased when the lots became vacant, and the residential restrictive covenant again became enforceable because the applicability of a covenant is renewed once the violation ceases. Plaintiffs' cite *Schoenhals v. Close*, 451 S.W.2d 597 (Tx. App. 1970) to support their argument.

In *Schoenhals*, the appropriate statute of limitations was four (4) years, and the plaintiffs brought an action to enjoin the operation of a beauty shop in the garage of a home in their neighborhood. The neighborhood was subject to a residential restrictive covenant. The record revealed that defendant Schoenhals had converted the inside of his garage into a beauty shop in late 1959. In January of 1960 Schoenhals' daughter, Griggs, opened the beauty shop for commercial operation. In October of 1960, the Closes (plaintiffs), purchased the house next to the Schoenhals' lot. At that time, the beauty shop was in operation, and remained in commercial operation until some time in 1964. Griggs did some work in the beauty shop for some ten (10) members of her church on a charitable basis from 1964 until July 1969. Plaintiff Close made over $30,000.00 in improvements to his property during the period from 1964 to 1969 when commercial activity surrounding the beauty shop had ceased. Griggs made arrangements to resume commercial operations of the beauty shop in July 1969, at which point the plaintiff brought suit to enjoin the commercial operation for violation of a restrictive covenant. The court found that the determinative question was whether a party who acquires a right through the statute of limitations to operate a commercial enterprise in contravention of a restrictive covenant may lose that right by abandonment. Answering in the affirmative, the court stated:

> A restriction may become unenforceable with respect to a particular lot in a tract under the defenses of the statute of limitations, waiver, or laches. Even though a party has violated a restrictive covenant and is able to continue to do so under one of the foregoing defenses, the restrictive covenant will continue to exist, "even if the violation as it exists, continues." If the violation ceases, the covenant will once more become effective and will bar any future violations. Any other result would, in effect, seriously impair the usefulness and value of restrictive covenants, as any prospective purchaser of a home in a residential area could never be certain that a previous violation of a restrictive covenant in the neighborhood had not rendered that covenant ineffective.

Schoenhals, 451 S.W.2d at 599-600 (citation omitted). The court noted that the beauty shop ceased its commercial activity some time in 1964, and from the outside, a casual observer would not have noticed anything unusual about the garage during that period. The court found that "[w]hen appellants ceased to violate the restrictive covenant, they waived the rights they may have acquired during the

previous operation of the beauty shop." *Id.* at 600. Likewise, "[n]one of the neighbors would have been able to maintain a suit during this period as the appellants were not at that time violating the restrictive covenant." *Id.* The Texas Court of Appeals held that the defendants' violation in 1969 started the running of the statute of limitations once again; therefore, plaintiffs were not barred by Texas' four-year statute of limitations when they filed suit in ten days after learning of commercial activity in the defendants' garage. *Id.*

We agree with the reasoning in the *Schoenhals* case. Although the violation of the restrictive covenant for the statutory period may be asserted as a defense, such violation does not invalidate the restrictive covenant in perpetuity. The violation must exist continually, and plaintiff must be aware or should have reasonably been aware of it, for the full statutory period in order for a valid defense to exist under N.C. Gen. Stat. § 1-50(a)(3). Therefore, our inquiry now turns to whether the plaintiffs were or should have been reasonably aware of the continued non-residential use of lots one (1), two (2), three (3), and four (4), from 5 October 1989 to 5 October 1995, satisfying the six-year statute of limitations and therefore barring the present action, which was filed on 5 October 1995.

The evidence presented by the plaintiffs to the trial court indicates that two neighbors testified that the house on lot one (1) was vacant from the summer of 1989, when Tim Irby moved from the house, until the time of the commencement of this action, and that there was no apparent use of the property, as the windows were boarded up, no signage was attached to the property, and no one was seen going in or out of the house. Defendants presented evidence to the trial court indicating that Tim Irby lived in the building on lot one (1) from 1983 to the summer of 1989, where he openly operated a business, "Everything on East," during that time. From the time Irby left in 1989 until shortly before the October 1995 demolition of the building, defendants presented evidence that the structure was commercially used for storage of various items related to the flower shop business "Roy White Flowers, Inc."

As to lot two (2), plaintiffs presented evidence which indicated that the house located thereon was occupied as a residence by Mitchell Cooper and others from July 1988 until 30 September 1989 in a "boarding house type situation." Cooper testified that his lease was residential, requiring a $50.00 deposit for a waterbed. He also testified that the rent payments to defendant Edward A. White varied over

the term of the lease because the lease provided for monthly rent of $700.00 for the first six (6) people, and $100.00 for each additional individual living in the home. Defendants presented evidence that Mr. Cooper used the house on lot two (2) "in a non-residential manner as a place for his business, a rock-and-roll band, to practice music." They presented evidence that Cooper installed sound-dampening material to improve acoustics for and to reduce noise from the practices. Defendants also presented evidence that the house was vacant from 30 September 1989 until it was rented by Tom Brown in November 1989. At some point before the summer of 1990, Brown opened a small consignment shop named "The Girl Can't Help It" on the first floor of the house. Plaintiffs contend Brown also used the structure for a residence. The house became vacant in September 1995 and was torn down in October 1995.

In regards to lot three (3), it is uncontested that it has been a vacant, grassy lot since the early 1980s when the building thereon was destroyed by fire. Defendants' evidence indicated that during the time that Mitchell Cooper occupied the house on lot two (2), from July 1988 to 30 September 1989, he and his house and/or band-mates used lot three (3) for parking. It also indicated that from October 1989 to September 1995, the vacant lot was used for overflow parking from defendant Roy White's business, that from 1983 to 1989 it was used for parking for Mr. Irby's business on lot one (1), and from the spring of 1990 to sometime in 1995, it was used for parking for Mr. Brown's business on lot two (2). Plaintiffs presented testimony by Lyman G. Welton, who had lived in the neighborhood since 1980 and had walked past lot three (3) "hundreds of time[s]," that he had "very rarely" seen cars parked on lot three (3) between 1980 and the date of commencement of this case. Mitchell Cooper testified that he never saw any employees of defendant Roy White Flowers, Inc. use lot three (3) for parking between July 1988 and October 1995. Plaintiffs also presented evidence that the "grassy" lot was never paved or improved in any manner.

Viewing the evidence in the light most favorable to plaintiffs, we hold that there is conflicting evidence as to whether plaintiffs were aware or should have reasonably been aware of a violation of the residential restrictive covenant on lots one (1), two (2), and three (3) from 5 October 1989 to 5 October 1995 and therefore this issue could not have been determined by the trial court as a matter of law. We hold the directed verdict was in error and this issue should have gone to the jury.

The evidence indicates that lot four (4) had been used for non-residential purposes for at least twenty-two (22) years when this suit was instituted. The building on lot four (4) was openly used for and operated as a food cooperative business from 1973 until 1987. From 1987 until shortly before demolition of the building on the lot in 1995, the building was openly used to house "Bucky Adams Pet Grooming," a small dog grooming business. Defendants presented evidence that the house was demolished for commercial development, therefore, commercial activity never ceased. Plaintiffs presented evidence that the house on lot four (4) was vacated for about five (5) or six (6) months and was eventually demolished prior to the commencement of litigation in this case. The vacation and demolishment of a building which has continually been used for commercial purposes does not indicate in and of itself that the property has returned to a residential use. Plaintiffs did not present a scintilla of evidence that they were not aware or should not have reasonably been aware that commercial use of the property continued after the pet grooming business vacated the premises. Viewing the evidence in the light most favorable to plaintiffs, we hold that there is no conflicting evidence as to whether plaintiffs were aware or should have reasonably been aware of a violation of the restrictive covenant on lot four (4) from 5 October 1989 to 5 October 1995. Therefore, the trial court did not err in granting a directed verdict pursuant to N.C. Gen. Stat. § 1-50(a)(3) in regards to lot four (4).

Based on the foregoing, we affirm the trial court's denial of joinder, application of N.C. Gen. Stat. § 1-50(a)(3), and directed verdict as to lot four (4), and reverse and remand the directed verdict as to lots one (1), two (2), and three (3).

Affirmed in part; reversed and remanded in part.

Judge JOHN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not agree that the trial court correctly denied plaintiffs' motion for joinder of all property owners in Elizabeth Heights in the present action. I therefore would reverse the trial court on this issue and remand for joinder of all property owners in Elizabeth Heights. Further, I would not address the issues relating to the statute of limitations.

Plaintiffs contend that all property owners in Elizabeth Heights are necessary parties to this action, and I agree.

When there is a uniform plan of development for real property and a restrictive covenant placed on that property is in dispute, all the owners of lots in that development are "necessarily interested parties in any action against or by [any] lot owner." *Hillcrest Building Co. v. Peacock*, 7 N.C. App. 77, 82, 171 S.E.2d 193, 196 (1969); *see also Muilenburg v. Blevins*, 242 N.C. 271, 276, 87 S.E.2d 493, 497 (1955). It follows that all the lot owners must be made parties to the action. *See Hillcrest Building Co.*, 7 N.C. App. at 83, 171 S.E.2d at 196; *see also* N.C. Gen. Stat. § 1A-1, Rule 19(a) (1990). If the same restrictive covenants are placed in all the deeds conveying property within the area, it is presumed for the purpose of ascertaining necessary parties that the property was sold pursuant to a general plan of development. *See Muilenburg*, 242 N.C. at 276, 87 S.E.2d at 497.

This case involves an attempt by a property owner in Elizabeth Heights to annul a restrictive covenant. All of the original conveyances of lots in the Elizabeth Heights subdivision contained a restrictive covenant allowing only residential use by the grantees, their heirs and assigns. Therefore, since there is no evidence in this record that the property in Elizabeth Heights was not sold pursuant to a general scheme or plan of development, all of the owners in Elizabeth Heights are necessary parties and must be joined in this action.

KANWALJOT G. CHANCE, PLAINTIFF v. DAVID JAMES HENDERSON, DEFENDANT

No. COA98-889

(Filed 7 September 1999)

1. Judgments— stipulated separation agreement—lack of consent—trial court reads agreement or evidence that parties understood

In a case involving a stipulated agreement hearing addressing child support, child custody, visitation, alimony, property division, and attorney fees, the trial court did not err in failing to set aside an order as void for lack of consent because: (1) the trial court can read the agreement in open court; or (2) it has to be

reasonably apparent from the record that both parties either read or understood the stipulated terms. Although plaintiff's attorney rather than the trial court read the stipulated terms of settlement, the record reflects that both parties understood the stipulated terms because both answered affirmatively when the judge asked if the settlement as read by plaintiff's attorney was fair and equitable and fully reflected what had been agreed upon.

2. Estoppel— equitable—stipulated separation agreement—lack of consent—ratification by subsequent actions

Although defendant-husband attempted to withdraw his consent following a hearing but prior to entry of an order concerning a stipulated agreement addressing child support, child custody, visitation, alimony, property division, and attorney fees, the trial court did not err in failing to set aside the order as void for lack of consent because subsequent actions of defendant ratified and validated the order. Equitable estoppel precludes defendant from denying the validity of the order in light of: (1) his later efforts to modify, correct, and enforce stipulated terms of the order; (2) the fact he failed on two occasions to perfect appeals directed at the order; and (3) the fact he acquiesced in his counsel's reliance on the order to deter action by the Department of Social Services.

Appeal by defendant from order filed 20 March 1998 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 18 March 1999.

Morgenstern & Bonuomo, P.L.L.C., by Barbara R. Morgenstern, for plaintiff-appellee.

Donna Ambler Davis, P.C., by Donna Ambler Davis, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's order denying his motion pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4) (1990) (Rule 60). We hold the trial court did not err.

Relevant facts and procedural history include the following: Plaintiff and defendant married in 1975 and separated 7 March 1994, entering into a separation agreement 23 March 1994. However, plaintiff subsequently filed suit 5 August 1994 to set aside the agreement,

the first action in an extensive period of litigation between the parties involving issues of child custody, support and visitation, and interim allocation of marital assets.

A 23 June 1995 hearing (the hearing) was scheduled on certain pending motions. At the hearing, defendant's counsel informed the trial judge, Judge Richard W. Stone (Judge Stone), that the parties had settled all pending issues. Both plaintiff and defendant were present and placed under oath, whereupon plaintiff's counsel read the settlement terms aloud in open court. The stipulated agreement addressed custody and visitation arrangements, alimony, child support, property division and attorney's fees, and provided a "mutual release of all other claims whatsoever pending between the parties." Judge Stone inquired into each of the proposed terms, mediated discussion between the parties on additional issues, and questioned plaintiff and defendant individually as to whether the recited settlement was their final and full agreement. Defendant replied, "Yes, sir." Defendant's counsel thereafter noted that both parties had been placed under oath and "stipulate[d] the formal order [wa]s going to be entry [sic] by consent of counsel."

In an affidavit filed in support of his Rule 60 motion, defendant indicated he had withdrawn consent to the stipulated agreement "within hours" of the hearing and instructed his attorney not to sign the order agreed upon in open court. However, on 11 July 1995, defendant's attorney sent correspondence to the Rockingham County Department of Social Services (the Department), relating the parties had reached a settlement on 23 June 1995 and agreed to dismiss all pending issues. The letter was copied to Judge Stone, plaintiff's counsel and defendant.

On 21 July 1995, plaintiff's counsel tendered a proposed order (the Order) to Judge Stone containing the terms agreed upon at the hearing. Defendant's counsel informed Judge Stone defendant had withdrawn his consent to the agreement, leaving counsel with no authority to acquiesce in the Order. Judge Stone instructed that the Order be modified to reflect it was prepared at his request and, following such modification, signed the Order 21 July 1995, *nunc pro tunc* 23 June 1995, without the signature of defendant's counsel. Defendant appealed 21 August 1995, but the appeal was dismissed 4 June 1996 for failure to be perfected in a timely manner. Defendant appealed the dismissal 7 June 1996, which appeal was subsequently dismissed on grounds identical to the earlier appeal.

Following entry of the Order, defendant advanced three motions for modification, correction or enforcement of the stipulated terms therein. On 29 September 1995, defendant filed a "Motion in the Cause to Modify a Prior Order," involving custody provisions of the Order. On 22 February 1996, defendant filed a "Motion to Correct Order," addressing visitation provisions of the Order, which Judge Stone granted 27 June 1996. Finally, on 20 June 1996, defendant filed a "Motion for Contempt," complaining plaintiff had not abided by terms of the Order.

On 24 June 1996, Judge Stone granted defendant's earlier motion for recusal and, on 25 September 1996, the parties consented to transfer of all pending matters to Guilford County. On 19 November 1997, defendant filed a motion pursuant to Rule 60(b)(4) (defendant's Motion) to set aside the Order as void for lack of consent. Defendant's Motion was heard and denied by Judge Susan E. Bray (Judge Bray) in a 20 March 1998 order (Judge Bray's order). Defendant appeals.

[1] In his first assignment of error, defendant challenges the Order as void, asserting the trial court failed to follow requirements set forth in *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985), governing oral stipulations. This argument is unfounded.

Inter alia, Judge Bray's order contained the following findings of fact:

> 1. The plaintiff [and defendant] w[ere] present in Court and represented by [their] attorney[s].
>
> 2. . . . Plaintiff's attorney then read the terms of the settlement into the record. At the conclusion of the announcement of the terms of the stipulated settlement, the presiding Judge . . . inquired of each party as to whether he or she consented to the terms of the stipulation and agreed that the provisions were fair and equitable, to which inquiry both parties indicated their consent.

Judge Bray further concluded as a matter of law:

> 2. At the June 23, 1995, hearing, Judge Stone complied with the requirements of *McIntosh* . . . by having the terms of the stipulated settlement read into the record, and by then contemporaneously inquiring as to whether the parties understood the terms of the agreement and whether they agreed to abide by those

> terms. Because both parties indicated they consented to and agreed to be bound by the terms . . . the consent order is a valid and binding order.

A consent judgment is a contract of the parties that may be sanctioned and entered upon the records of a court, *see Highway Commission v. Rowson*, 5 N.C. App. 629, 631, 169 S.E.2d 132, 134 (1969), but the "power of [a] court to sign a consent judgment depends upon the unqualified consent of the parties," *King v. King*, 225 N.C. 639, 641, 35 S.E.2d 893, 895 (1945). To set a consent judgment aside for lack of consent, there must be proper allegation and proof by the party attacking the judgment that consent was not given. *Nickels v. Nickels*, 51 N.C. App. 690, 693, 277 S.E.2d 577, 579, *disc. review denied*, 303 N.C. 545, 281 S.E.2d 392 (1981). While the trial court's findings of fact are conclusive on appeal when supported by competent evidence, its conclusions drawn from such facts are subject to appellate review. *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 615, 219 S.E.2d 787, 790 (1975). However, " 'a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court,' " *Burwell v. Wilkerson*, 30 N.C. App. 110, 112, 226 S.E.2d 220, 221 (1976) (quoting *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)), and a decision made thereon will not be disturbed on appeal absent an abuse of discretion, *Harrington v. Harrington*, 38 N.C. App. 610, 612, 248 S.E.2d 460, 461 (1978).

Defendant first claims Judge Stone violated *McIntosh* by allowing plaintiff's counsel to recite the stipulated terms rather than Judge Stone reading the agreement himself. Defendant is mistaken.

In pertinent part, *McIntosh* provides:

> [i]f . . . oral stipulations are not reduced to writing, [duly executed and acknowledged,] it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms . . . and agreed to abide by those terms of their own free will.

McIntosh, 74 N.C. App. at 556, 328 S.E.2d at 602. However, our courts have not construed *McIntosh* rigidly "as requiring the *trial court* to read [the stipulations] to the parties," *Watson v. Watson*, 118 N.C. App. 534, 539, 455 S.E.2d 866, 868 (1995) (emphasis added), but

rather as providing either that the trial court read the agreement in open court *or* that it be reasonably apparent from the record that both parties either read or understood the stipulated terms, *see id.* at 538-39, 455 S.E.2d at 868 (although trial court did not read stipulated terms to parties in open court, subsequent order valid because both parties were present, represented by counsel, and indicated they either had read or understood the terms).

In the case *sub judice*, both parties were present, represented by counsel, and placed under oath prior to the recitation of the stipulated terms by plaintiff's attorney. During counsel's statement of the settlement, the parties discussed additional provisions and the trial court intervened to clarify new terms and conditions. The following exchange occurred thereafter:

COURT: Is this your stipulation and agreement, [plaintiff]?

. . . .

PLAINTIFF: Yes.

COURT: And the provisions for the distribution of marital property is fair and equitable?

PLAINTIFF: Yes, they are.

COURT: [Defendant], is this your agreement and stipulation as outlined by [plaintiff's attorney] and some subsequent conversation here that the court reporter got on the record?

DEFENDANT: Yes.

COURT: And the provisions for the distribution of property are equitable?

DEFENDANT: I don't think they're equitable, but I will not challenge it.

COURT: Well, equitable doesn't necessarily mean equal.

. . . .

[DEFENDANT'S COUNSEL]: It means fair.

DEFENDANT: Okay.

COURT: That's your full agreement?

DEFENDANT: Yes, sir.

Therefore, although the stipulated terms of settlement were read by plaintiff's attorney rather than the trial court, the record reflects that both parties answered affirmatively when Judge Stone asked if the settlement as read by plaintiff's counsel was fair and equitable and fully reflected what had been agreed upon. Based upon Judge Stone's extensive inquiry into the consent and understanding of the parties, we hold it is reasonably apparent from the record that both plaintiff and defendant understood the stipulated terms, *see Watson*, 118 N.C. App. at 538, 455 S.E.2d at 868, and that the consent of defendant to the oral stipulations as read by plaintiff's counsel was valid. Notwithstanding, there remains the issue of defendant's subsequent attempt to withdraw such consent following the hearing, but prior to entry of the Order.

[2] For a valid consent order, the parties' consent to the terms, *King*, 225 N.C. at 641, 35 S.E.2d at 895, "must still subsist at the time the court is called upon" to sign the consent judgment, *Lee v. Rhodes*, 227 N.C. 240, 242, 41 S.E.2d 747, 748 (1947) (citations omitted). If a party repudiates the agreement by withdrawing consent before entry of the judgment, the trial court is "without power to sign [the] judgment." *Id.* at 242, 41 S.E.2d at 749.

In the case *sub judice*, defendant insists he notified his attorney "within hours" of the settlement hearing that he was withdrawing his consent to the oral stipulations and would not authorize counsel's signature to the Order. Although informed of this alleged circumstance at the time of presentation of the Order, Judge Stone nonetheless signed and entered the Order without defendant's consent or the signature of his attorney. Notwithstanding, we conclude subsequent actions of defendant ratified and validated the Order, and that defendant was thereby estopped from challenging the Order.

In this regard, Judge Bray's order contained the following findings of fact:

> 4. On July 11, 1995, defendant's then counsel . . . wrote a letter to . . . the Rockingham County Department of Social Services in which he stated . . . "the parties reached a settlement on all pending issues."
>
> 5. On September 29, 1995, the defendant filed a . . . "Motion in Cause to Modify a Prior Order" in which the defendant alleges . . . "[o]n July 21, 1995, *nunc pro tunc* June 23, 1995, a Consent Order and Judgment was entered awarding the Plaintiff

> and the Defendant the joint custody [sic] care and control of the minor children" . . . alleg[ing] that there had been a substantial change of circumstances since the entry of the . . . consent order.
>
> 6. On February 5, 1996, the defendant served the plaintiff with a . . . "Motion to Correct Order" . . . request[ing] that the Court modify the July 21, 1995, consent order and judgment to correct a mistake in the visitation provisions. . . . [T]he relief requested by the defendant was granted . . . [and] defendant's counsel then drafted an order . . . entered June 27, 1996.

Judge Bray then concluded in pertinent part:

> 3. The defendant's counsel indicated the defendant's consent to the entry of the . . . consent order in a letter . . . copied to the Judge more than two weeks after the stipulated settlement was announced.
>
> 4. The defendant acquiesced in the validity of the . . . consent order by filing two motions subsequent to the entry of said consent order in which he requested a modification of its terms. Moreover, the defendant's counsel ratified the . . . consent order by drafting an order entered June 27, 1996, which provides that, except as modified, the terms of the . . . consent order remain in full force and effect.

We note in addition that defendant on two occasions failed to perfect appeals arising from the Order in question.

Where a party engages in positive acts that amount to ratification resulting in prejudice to an innocent party, the circumstances may give rise to estoppel. *Howard v. Boyce*, 254 N.C. 255, 265-66, 118 S.E.2d 897, 905 (1961). Further,

> "[a] party who, with knowledge of the facts, accepts the benefits of a transaction, may not thereafter attack the validity of the transaction to the detriment of other parties who relied thereon."

Yarborough v. Yarborough, 27 N.C. App. 100, 105-06, 218 S.E.2d 411, 415, *cert. denied*, 288 N.C. 734, 220 S.E.2d 353 (1975) (quoting 3 Strong's N.C. Index 2d *Estoppel* § 4); *see Lowry v. Lowry*, 99 N.C. App. 246, 253, 393 S.E.2d 141, 145 (1990) (wife's acceptance of agreement benefits for three years ratified contract, and wife therefore estopped from claiming agreement not settlement she authorized); *see also Amick v. Amick*, 80 N.C. App. 291, 294-95, 341 S.E.2d 613,

614-15 (1986) (defendant estopped from denying validity of separation agreement where plaintiff relied upon and performed obligations pursuant to terms thereof), and *Mayer v. Mayer*, 66 N.C. App. 522, 531-35, 311 S.E.2d 659, 666-68, *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984) (husband who actively participated in wife's procurement of invalid divorce from her prior husband estopped from denying validity of that divorce).

It must be interjected at this point that the estoppel under consideration is "quasi" or equitable estoppel, under which

> one is not permitted to injure another by taking a position inconsistent with prior conduct, regardless of whether the person had actually relied upon that conduct.

Id. at 532, 311 S.E.2d at 666. Under "true" estoppel, "one party induces another to rely to his damage upon certain representations." *Id.* (quoting Comment b, Restatement (Second) of Conflict of Laws § 74 (1971)).

Application of equitable estoppel in general is dependent upon the parties' actions along with the facts and circumstances of each individual case. *See Mayer*, 66 N.C. App. at 534-35, 311 S.E.2d at 667-68. In the case *sub judice*, we particularly note defendant's efforts to modify, correct and enforce stipulated terms of the Order. For example, although defendant's affidavit indicated he withdrew consent within "hours of the agreement," his attorney's 11 July 1995 letter to the Department, mailed eighteen days following the hearing, reflects defendant's acknowledgment and approval of the Order. The letter, copied to Judge Stone, plaintiff's counsel *and defendant*,

> place[ed] [the Department] on notice . . . [that] the parties reached a settlement on all pending issues . . . [and agreed to drop all motions] including [a] Motion . . . requesting assistance from [the] agency.

Nothing in the record indicates defendant objected to or repudiated the foregoing statement of his attorney.

In addition, defendant's 29 September 1995 verified motion to modify provisions of the Order regarding custody of the parties' minor children alleged that, subsequent to entry of the Order, plaintiff purposefully deprived defendant of custodial rights stipulated in the Order, providing grounds for modification thereof. Also, in his 22 February 1996 motion to correct a mistake in the visitation provisions

of the Order, defendant relied upon a transcript of the 23 June 1995 hearing and alleged

> [t]he Consent Order of June 23, 1995 contains a mistake . . . [and] Defendant is in need of an Order of this Court correcting the language of the June 23, 1995 Order to accurately reflect *the parties agreement which was entered into in open court.*

(emphasis added). Specifically, defendant requested that the court "modify the June 23, 1995 Order entered . . . and redraft the Order to conform with what was *agreed upon by the parties.*" (emphasis added). Judge Stone granted the motion and entered an order 27 June 1996 modifying certain visitation provisions of the Order and decreeing that "[a]ll other provisions of the Consent Order and Judgment . . . shall remain in full force and effect except as specifically modified" therein. The record contains no interjection of an objection or appeal by defendant of this order. Finally, in a 20 June 1996 motion, defendant sought to hold plaintiff in contempt for her failure to abide by visitation terms of the Order.

Defendant thus on two occasions failed to perfect appeals directed at the Order, acquiesced in his counsel's reliance upon the Order to deter action by the Department, twice filed motions for modification or correction of the Order citing its entry by agreement in open court, declined to object to or appeal an order providing that all terms of the Order were to remain in full force and effect, and, most significantly, sought to have plaintiff held in contempt for violation of the Order, thereby not only seeking enforcement of provisions therein but also to penalize plaintiff for failing to comply with the Order.

In view of the foregoing facts and circumstances, *see Mayer*, 66 N.C. App. at 534-35, 311 S.E.2d at 667-68, we hold defendant may not now avoid the terms of the Order which he acknowledged, acquiesced in and attempted to modify and enforce over a two year period. *See Hill v. Hill*, 94 N.C. App. 474, 479, 380 S.E.2d 540, 544 (1989) (wife bound by subsequent ratification of property settlement agreement). Moreover, defendant's actions also affected plaintiff's rights and obligations under the Order. *See Yarborough*, 27 N.C. App. at 105-06, 218 S.E.2d at 415. Defendant in essence ratified and affirmed the Order and is now estopped from seeking to avoid its effect.

Prior to concluding, we acknowledge that a consent order signed without the consent of each party is void, *Highway Commission*, 5

N.C. App. at 632, 169 S.E.2d at 134, and emphasize that equitable estoppel is a "personal disability of the party attacking the [order]; it is not a function of the [order] itself," *Mayer*, 66 N.C. App. at 536, 311 S.E.2d at 668. As this Court in *Mayer* explained in rejecting a husband's reliance upon his wife's invalid divorce in which he had participated:

> We are not unmindful of [husband's] argument that to estop him from questioning the divorce's validity would have, as he puts it, the effect of validating a marriage which G.S. § 51-3 declares a nullity. There is a difference, however, between declaring a marriage valid and preventing one from asserting its invalidity. The theory behind the equitable estoppel doctrine is not to make legally valid a void divorce or to make an invalid marriage valid, but rather, to prevent one from . . . avoid[ing] obligations as a spouse. . . . It is a personal liability of the party attacking the divorce judgment; it is not a function of the divorce decree itself.

Id. (citations omitted). The effect of our decision, therefore, is not to make a void court order valid, but rather to preclude defendant, by virtue of his ratification thereof, from subsequently attacking the validity of the Order.

As to defendant's remaining arguments, suffice it to say we have carefully considered each and find them unpersuasive.

In short, Judge Bray's findings of fact, supported by the evidence and therefore conclusive on appeal, *Wynnewood Corp.*, 27 N.C. App. at 615, 219 S.E.2d at 790, sustain her determination that defendant ratified the Order by his actions and was thus equitably estopped from challenging the validity thereof. Judge Bray therefore did not abuse her discretion in denying defendant's Motion. *See Burwell*, 30 N.C. App. at 112, 226 S.E.2d at 221.

Affirmed.

Judges WALKER and McGEE concur.

ALLEN J. WRIGHT, JR., PETITIONER-APPELLANT v. BLUE RIDGE AREA AUTHORITY, RESPONDENT-APPELLEE

No. COA98-1093

(Filed 7 September 1999)

Veterans— hiring preference—mental health, mental retardation, and substance abuse authorities

The trial court erred by affirming the advisory decision of the State Personnel Commission holding that local area mental health, mental retardation, and substance abuse authorities did not have to apply a veteran's preference to plaintiff-veteran's job application since the clear, unambiguous language of the pertinent statutes establishes that N.C.G.S. § 126-83 makes the N.C.G.S. § 128-15 preference applicable to local area authorities covered by N.C.G.S. § 126-5(a)(2).

Appeal by petitioner from judgment entered 5 June 1998 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 19 April 1999.

Ferguson, Stein, Wallas, Adkins, Gresham and Sumter, P.A., by John Gresham and S. Luke Largess, for petitioner-appellant.

Matney and Associates, P.A., by David E. Matney, III., for respondent-appellee.

JOHN, Judge.

On appeal, petitioner contends the trial court erred by affirming "the advisory decision of the State Personnel Commission [SPC] issued on June 16, 1997 and subsequently adopted by Respondent." We reverse the trial court.

Pertinent facts and procedural history include the following: Petitioner Allen J. Wright, Jr., a sixty-six year old, African-American armed services veteran, served in the Korean War between 1951 and 1953. He subsequently earned a Bachelor of Science degree in accounting and accumulated over thirty-four years of experience in the field of accounting.

On 15 February 1996, petitioner applied for and was denied an Accounting Tech III position with respondent Blue Ridge Area Authority. The position was offered to an individual with no military background.

On 3 June 1996, petitioner filed a Petition for Contested Case Hearing with the Office of Administrative Hearings alleging, *inter alia*, that respondent's denial of employment was based upon its failure to apply a Veteran's Preference (the Preference) to his application as required by N.C.G.S. § 128-15 (1999). In the parties' "Stipulation of Factual Issues" contained in the record, respondent concedes it "does not apply veteran's preferences in making employment decisions, including the decision to fill the position at issue in this case."

Petitioner and respondent subsequently filed cross-motions for partial summary judgment and, on 22 October 1996, the Administrative Law Judge (the ALJ) granted partial summary judgment in favor of respondent, holding the Preference inapplicable "to those persons covered by N.C.G.S. § 126-5(a)(2) (1999)," including "employees of area authorities such as respondent." Subsequently, the ALJ issued a 20 December 1996 Recommend Decision dismissing all remaining issues. The SPC promulgated a Recommendation for Decision to Local Appointing Authority on 16 June 1997, recommending that respondent adopt the ALJ's findings and conclusions save for a single minor modification. On 30 June 1997, petitioner was notified by respondent that it had "concurred in the [SPC's] recommendation."

On 25 August 1997, petitioner filed a Petition for Judicial Review seeking, *inter alia*, review by the trial court of the Preference issue. After hearing from both parties, the court entered judgment 5 June 1998, affirming the SPC's determination that respondent was "not obligated to afford Petitioner a Veteran's Preference in hiring." Petitioner appeals.

The sole issue presented for our determination is

> whether local area mental health authorities are obligated to provide military veterans a preference under G.S. § 128-15 in considering their applications for employment.

Petitioner maintains respondent is required to accord the Preference by logical construction of N.C.G.S. § 126-83 (1999), G.S. §§ 126-5(a)(2) and 128-15, and by this Court's decision in *Davis v. Vance County DSS*, 91 N.C. App. 428, 372 S.E.2d 88 (1988).

We observe initially that judicial review of administrative agency decisions is governed by N.C.G.S. § 150B-51(b) (1995), whereby

> the appellate court [must] determine whether the superior court utilized the appropriate scope of review and, if so, whether the superior court did so correctly.

In re Declaratory Ruling by N.C. Comm'r of Ins., 134 N.C. App. 23, 25, 517 S.E.2d 134, —— (1999) (citation omitted). Further,

> [t]he nature of the error asserted by the party seeking review dictates the appropriate manner of review: if the appellant contends the agency's decision was affected by a legal error, *de novo* review is required . . . .

Id. (citations omitted); *see also Brooks Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988) ("[i]ncorrect statutory interpretation by an agency constitutes an error of law under G.S. 150B-51(b) and allows [appellate] court to apply a *de novo* review"). In the case *sub judice*, it is apparent from the trial court's judgment that it applied the appropriate *de novo* scope of review, *see Declaratory Ruling*, 134 N.C. App. at 25, 517 S.E.2d at ——, and we therefore proceed to examine the SPC's decision *de novo* in order to determine whether the trial court committed legal error, *see id.*

It is appropriate to commence with a complete review of all applicable statutes. While G.S. § 126-5(a) was amended effective 1 November 1998, the amendment did not substantially affect our decision herein.

First, respondent is an area "mental health, developmental disabilities, and substance abuse services," N.C.G.S. § 122C-101 (1996), authority, organized and operating under N.C.G.S. § 122C-116 (1996). As such, respondent is a "local political subdivision of the State," G.S. § 122C-116, which, "[f]or the purpose of personnel administration," N.C.G.S. § 122C-154 (1996), is governed by the State Personnel System (the System) set out in N.C.G.S. § 126-1 *et seq.* (1999), unless otherwise provided, G.S. § 122C-154. The System is a mode of personnel administration applicable to State government and to "local employees paid entirely or in part from federal funds. . . ." G.S. § 126-1.

The applicable version of G.S. § 126-5(a) (1995) includes the following as employees subject to the System:

> (1) All State employees not herein exempt, and

> (2) . . . *all employees of area mental health, mental retardation, substance abuse authorities*, and to employees of local social services departments, public health departments, and local emergency management agencies that receive federal grant-in-aid funds; and the provision of this Chapter may apply to such other county employees as the several boards of county commissioners may from time to time determine.

G.S. § 126-5(a)(1)&(2) (emphasis added).

In addition, N.C.G.S. § 126-80 (1999) grants the Preference to the foregoing employees as follows:

> It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and in recognition of the time and advantage lost toward the pursuit of a civilian career, veterans shall be granted preference in employment for positions subject to the provisions of this Chapter with every State department, agency, and institution.

However, G.S. § 126-83, entitled "Exceptions," operates to exclude certain employees within the System from the Preference:

> Notwithstanding G.S. 126-5, and notwithstanding provisions in that section that only certain Articles of this Chapter apply to some employees, this Article [establishing the Preference] applies to all persons covered by this Chapter [126] except those exempted by G.S. 126-5(c)(2), G.S. 126-5(c)(3), G.S. 126-5(c)(4), G.S. 126-5(c1), G.S. 126-5(c2), or G.S. 126-5(c3), *but* this Article *does not apply* [*i.e.*, the Preference not granted] to those persons covered by G.S. 126-5(a)(2). G.S. 128-15 shall apply to those persons exempted from coverage of this Article, but shall not apply to any person covered by this Article.

G.S. § 126-83 (emphasis added).

Finally, in terms identical to G.S. § 126-80, G.S. § 128-15 accords the Preference to employees "with every State department, agency, and institution," *id.*, as follows:

> (a) It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and in recognition of the time and advantage lost toward the pursuit of a civilian career, veterans shall be

> granted preference in employment with every State department, agency, and institution.

G.S. § 128-15(a).

It is well established that "[w]hen multiple statutes address a single matter or subject, they must be construed together, in *pari materia*, to determine the legislature's intent." *Taylor v. City of Lenoir*, 129 N.C. App. 174, 178, 497 S.E.2d 715, 719 (1998). Statutes so construed must be harmonized, "to give effect, if possible, to all provisions without destroying the meaning of the statutes involved." *Whittington v. N.C. Dept. of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990). In the case *sub judice*, we conclude that the provisions of G.S. §§ 126-5(a)(2), 126-83 and 128-15, construed in *pari materia*, accord the Preference to those employees identified in G.S. § 126-5(a)(2), but excluded under G.S. § 126-83, and described by G.S. § 126-83 as being covered under G.S. § 128-15.

To begin, respondent, an area mental health, mental retardation, substance abuse authority, is subject to the System as provided in G.S. § 126-5(a)(2). G.S. § 126-5(a)(2); *see also* G.S. § 122C-116 (personnel administration of area authorities governed by Chapter 126 unless otherwise provided). G.S. § 126-80 accords the Preference to veterans "for positions subject to the provisions of . . . Chapter [126, *i.e.*, the System] with every State department, agency and institution." G.S. § 126-80. Taking into consideration only the foregoing sections, therefore, G.S. § 126-80 unambiguously mandates that those employers subject to G.S. § 126-5(a)(2), including respondent, must grant the Preference.

However, G.S. § 126-83 designates two categories of employees "[e]xcept[ed]" from the Preference set forth in G.S. § 126-80. The first deals with employees falling within listed statutory sections, including G.S. § 126-5(c)(2), G.S. 126-5(c)(3), G.S. 126-5(c)(4), G.S. 126-5(c1), G.S. 126-5(c2), and G.S. 126-5(c3), *see* G.S. § 126-83, not applicable to the dispute herein.

The second category excepts "those persons covered by G.S. § 126-5(a)(2)," G.S. § 126-83, including employees of "area mental health, mental retardation, substance abuse authorities," G.S. § 126-5(a)(2), such as respondent. Thus, nothing else appearing at this point, respondent would not be required to grant the Preference in selecting employees.

Nonetheless, those persons excepted by G.S. § 126-83 from the (G.S. § 126-80) Preference are expressly designated as "those persons" to whom G.S. § 128-15 "shall apply":

> G.S. § 128-15 shall apply to those persons exempted from coverage of this Article, but shall not apply to any person covered by this Article.

G.S. § 126-83.

Lastly, G.S. § 128-15 mandates that the Preference be afforded to employees of "every State department, agency, and institution." G.S. § 128-15. Notwithstanding, respondent insists the section is not applicable to it as an area mental health, mental retardation, substance abuse authority. We disagree.

First, as opposed to the restrictive phrase "State employee," G.S. § 128-15 utilizes more expansive terminology, *i.e.*, employee of "every State department, agency, and institution." G.S. § 128-15. *See State v. Baker*, 229 N.C. 73, 77, 48 S.E.2d 61, 65 (1948) (legislature presumed to have "comprehended the import of the words its employed to express its intent"). Further, as noted above, respondent is a "local political subdivision of the State," G.S. § 122C-116, and its employees are subject to the System, G.S. § 122C-154. Finally, this Court has previously viewed *sub silentio* an employee of an area mental health, mental retardation and substance abuse authority as a State employee who therefore must contest a dispute with the authority before the SPC. *See Hill v. Morton*, 115 N.C. App. 390, 391-93, 444 S.E.2d 683, 684-85, *disc. review allowed*, 337 N.C. 692, 448 S.E.2d 523 (1994), *review improvidently allowed*, 340 N.C. 355, 457 S.E.2d 300 (1995); *see also Clay v. Employment Security Comm.*, 111 N.C. App. 599, 603, 432 S.E.2d 873, 875-76 (1993), *rev'd on other grounds*, 340 N.C. 83, 457 S.E.2d 725 (1995) (only avenue for appeal by applicant for state employment alleging grievance against the State is to SPC under N.C.G.S. § 126-36.1 (1999)).

In sum, construing G.S. § 126-83 and G.S. § 128-15 in *pari materia* and giving effect to all provisions thereof, *see Taylor*, 129 N.C. App. at 178, 497 S.E.2d at 719, and *Whittington*, 100 N.C. App. at 606, 398 S.E.2d at 42, we believe the intent of our General Assembly was to provide unambiguously, pursuant to G.S. § 126-83, that employees of the System designated in G.S. § 126-5(a)(2) are expressly excluded from the Preference afforded by G.S. § 126-80 but, if qualified under G.S. § 128-15, are entitled to the Preference thereunder applicable to

all employees of State departments, agencies and institutions, specifically including G.S. § 126-5(a)(2) employees. *See* G.S. § 126-83. Accordingly, under G.S. § 126-83 and G.S. § 128-15, respondent must provide the Preference to applicants for employment meeting the veteran qualification.

Respondent counters that G.S. § 126-5(a)(2) employees do not fall within the category of "exempted" employees subject to G.S. § 128-15. Respondent seeks to distinguish use of the word "exempted" in G.S. § 126-83 from the phrase "does not apply" in that section. According to respondent, G.S. § 126-5(a)(2) employees were not expressly deemed "exempt" within G.S. § 126-83 as were employees under the statutory sections specifically designated in G.S. § 126-83. We believe respondent's reading of G.S. § 126-83 is far too strained.

We note that the title "Exceptions" was given to G.S. § 126-83 by our General Assembly, thus indicating its intended function of providing "exceptions" to the G.S. § 126-80 Preference. Thus, among the "exceptions" is that G.S. § 126-80 shall "not apply to those persons covered by G.S. 126-5(a)(2)," G.S. § 126-83, and that G.S. § 128-15 "shall apply to those persons exempted from coverage of [G.S. § 126-80]," G.S. § 126-83. To adopt respondent's convoluted construction of G.S. § 126-83 would lead to misinterpretation of the specified operation of the section, that is, to set forth "Exceptions" to the Preference granted in G.S. § 126-80.

The term "*exempted*," as used in the last sentence of G.S. § 126-83, thus creates an overall "[e]xception" so as to allow receipt of the G.S. § 128-15 Preference by any employee excluded or exempted by G.S. § 126-83 from entitlement to the G.S. § 126-80 Preference. Simply stated, under G.S. § 126-83, the Preference provided in G.S. § 126-80 applies except as to those employees described or named in G.S. § 126-83, to whom the G.S. § 126-80 Preference "shall not apply." G.S. § 126-83. As to these employees, the Preference provided in G.S. § 128-15 does "apply."

Both parties cite *Davis v. Vance County Department of Social Services*. The decision is the sole reported case interpreting G.S. § 128-15, and we agree with respondent's concession that our holding therein

> implicitly and indirectly supports the conclusion that [] G.S. § 128-15 applies to employees covered under [] G.S. § 126-5(a)(2).

In *Davis*, the petitioner, a local employee subject to the System pursuant to G.S. § 126-5(a)(2), applied for promotion to a position requiring a four-year college degree. *Davis*, 91 N.C. App. at 429, 372 S.E.2d at 88-89. The petitioner was not selected by respondent, Vance County Department of Social Services (DSS), because he had not obtained a four-year degree and thereby lacked the minimum educational requirement for the position. *Id.* The petitioner instituted suit against DSS, asserting the G.S. § 128-15 Preference was applicable and that his military service might serve as an educational equivalent or substitute. *Id.* at 431, 372 S.E.2d at 90. This Court rejected the petitioner's argument in *Davis*, observing that

> *[a]lthough the statute awards a preference rating of ten points to veterans who apply for employment with the State or any of its departments*, it states nowhere that the minimum requirements specified for a position may be ignored. In fact, the statute specifically states that "[a]ll the departments or institutions of the State, or their agencies, shall give preference in appointments and promotional appointments to *qualified* veteran applicants. . . ."

Id. (emphasis added).

Significantly, this Court did not rule that the *Davis* petitioner was ineligible for the Preference under G.S. § 128-15, but rather that the Preference did not serve to qualify him for a position he was otherwise unqualified to hold. Thus, this Court implicitly ruled that DSS, a local social services department covered under G.S. § 126-5(a)(2), was subject to the mandate of G.S. § 128-15.

However, we note the scope of *Davis* is limited and that the case was decided prior to the 1991 revision of G.S. § 126-83, which added the last sentence explicitly applying G.S. § 128-15 to employees excepted thereunder from the G.S. § 126-80 Preference. The 1991 amendment to G.S. § 126-83 may be seen as a legislative clarification of *Vance*, *i.e.*, to make explicit what had only been implied in the opinion. *See Blackmon v. N.C. Dept. of Correction*, 118 N.C. App. 666, 673, 457 S.E.2d 306, 310 (1995), *aff'd*, 343 N.C. 259, 470 S.E.2d 8 (1996) ("it is appropriate to assume the legislature is aware of any judicial construction of a statute").

In any event, we hold the clear, unambiguous language of each pertinent statute establishes that G.S. § 126-83 makes the G.S. § 128-15 Preference applicable to local area authorities covered by

G.S. § 126-5(a)(2). Accordingly, the judgment of the trial court is reversed and this matter remanded to that court with instruction that it further remand to respondent, the Local Appointing Authority, *see* N.C.G.S. § 126-37(b1) (1999), for disposition not inconsistent with our opinion herein.

Reversed and remanded with instructions.

Chief Judge EAGLES and Judge EDMUNDS concur.

FIRE BAPTIZED HOLINESS CHURCH OF GOD OF THE AMERICAS, INC., PLAINTIFF v. CARL McSWAIN, VIRGINIA McDOWELL, THELMA CHAMBERS, JEFFREY ROSS, AND JACKIE WILLIAMS, TRUSTEES OF FIRE BAPTIZED HOLINESS CHURCH OF GOD OF THE AMERICAS, A/K/A MT. SINAI BAPTIST CHURCH, A/K/A WESTSIDE PRAISE AND WORSHIP CENTER; AND FIRE BAPTIZED HOLINESS CHURCH OF GOD OF THE AMERICAS, MT. SINAI CHURCH, A/K/A MT. SINAI BAPTIST CHURCH, A/K/A WESTSIDE PRAISE AND WORSHIP CENTER, DEFENDANTS

No. COA98-694

(Filed 7 September 1999)

1. Churches and Religions— connectional relationship— directed verdict—judgment notwithstanding the verdict

The trial court did not err in denying plaintiff-church denomination's motions for directed verdict and for judgment notwithstanding the verdict on the issue of the fee simple ownership of property in possession of defendants, representing the local church, because although plaintiff was a connectional church organization in relation to defendants prior to defendants' split from plaintiff, defendants were not in a connectional relationship with plaintiff with respect to property matters.

2. Churches and Religions— denomination's published rules

Although the language of plaintiff-church denomination's published rules indicate that properly recorded local church property belongs to the denomination, and that a local church seeking to secede from the denomination could not keep such property, the trial court did not err in determining that plaintiff is

not entitled to the pertinent property in the possession of defendants, representing the local church, because the deeds for the property were not recorded as set forth in the denomination's published rules since: (1) the denomination clearly expressed its disapproval of defendants' plan to acquire the pertinent property; (2) defendants acquired the property, despite the disapproval, by using its own money; and (3) plaintiff did nothing to enforce the published rules at the time of its violation.

3. Churches and Religions— local church—no prior ownership

Although defendants, representing the local church, did not own property independently before joining plaintiff-church denomination, the trial court did not err in concluding plaintiff and defendant lacked a connectional relationship with regard to property matters because a seceding church's property rights, the local church in the instant case, are not limited to the property it owned prior to joining a denomination.

4. Evidence— lay opinion—harmless error

Even if the trial court erred in admitting, over objection, certain lay opinion testimony regarding the ownership of church property, the error was harmless because it merely corroborated unchallenged testimony from other witnesses without adding any new substantive information.

Appeal by plaintiff from judgment filed 2 February 1998 by Judge Timothy L. Patti in Cleveland County Superior Court. Heard in the Court of Appeals 16 March 1999.

Smith Helms Mulliss & Moore, L.L.P., by Matthew M. Sawchak and Mary M. Dillon, for plaintiff-appellant.

Ali Paksoy, Jr., and Brenda S. McLain, for defendant-appellees.

LEWIS, Judge.

Plaintiff Fire Baptized Holiness Church of God of the Americas, Inc. ("the denomination") filed a complaint on 20 March 1996 against defendants ("the Shelby church"), seeking a declaration that it was the fee simple owner of property then in possession of the Shelby church. In its answer and counterclaim, the Shelby church asked the trial court to declare the newly formed Westside Praise and Worship Center the fee simple owner of the property.

At the close of all the evidence at trial, the jurors were asked to determine two issues: first, whether the denomination was a connectional church organization; and second, whether the Shelby church, prior to 20 October 1994, was in a connectional relationship with the denomination with respect to property matters. The jury found that the denomination was a connectional church but that the Shelby church was not in a connectional relationship with the denomination with respect to property matters. Judgment was entered for the Shelby church, and the denomination's claims were dismissed with prejudice. The denomination's motion for judgment notwithstanding the verdict was denied, just as its earlier motion for a directed verdict at the close of its evidence had been. From the judgment filed 2 February 1998, the denomination appeals.

To better understand the nature of this case, it is important to first understand some background of the denomination and the Shelby church. The denomination is now over one hundred years old, with a claimed international membership of over 24,000. It is organized into three dioceses, each headed by a bishop. The bishops ordain elders to act as the bishops' representatives to local churches. The denomination assigns pastors to its local churches, and the local churches raise the money to pay these pastors. The Shelby church joined the denomination in the 1930s. The Shelby church raised money to submit at the denomination's annual convention, and the denomination would sometimes give money to the Shelby church for various expenses.

At the center of the present debate is ownership of certain property in Shelby. The facility on Pickney Street that housed the Shelby church beginning in 1937 was condemned in 1970. The Reverend Samuel Ervin, the pastor of the Shelby church in 1970, located another church building on Blanton Street owned by the Davidson Memorial Baptist Church, which agreed to sell this property to the Shelby church and to acquire the condemned property on Pickney Street. In January 1970, Davidson Memorial deeded its property to the "Trustees of the Fire Baptized Holiness Church of God of the Americas, Mt. Sinai Church"; this same name appeared as the grantor on the deed to the Pickney Street property. The Shelby church purchased the Blanton Street property for $25,000 by making a down payment of $5,000 ($2,500 in the form of property traded, and the remaining $2,500 to be raised by the Shelby church) and by covering the balance with a $20,000 mortgage.

This transaction was undertaken without the approval or permission of the denomination, and in spite of a statement made by a bishop within the denomination that both the Blanton Street property and its accompanying financial obligations were too large and unnecessary for the Shelby church. The denomination nevertheless provided a matching gift of $1,000 toward the down payment, but the Shelby church raised money for the remaining portion of the down payment, the mortgage payments and funding for subsequent renovations.

In a 1983 condemnation action brought against the "Trustees of the Fire Baptized Holiness Church of God of the Americas, Mt. Sinai Church," the City of Shelby paid the Shelby church approximately $28,800 for a parking lot and boarding house on the Blanton Street property. This was done without the permission or approval of the denomination. The Shelby church used these proceeds to buy three new parcels of property and to pay for church renovations, relocation of the fellowship hall, and improvements to the church sanctuary. When the condemnation proceeds did not cover all of the renovation expenses, the Shelby church took out a second mortgage on the church property, without the permission or approval of the denomination, for $25,000 in 1990. The Shelby church neither sought nor received assistance from the denomination in making these renovations.

In October 1994, the Shelby church voted to end its affiliation with the denomination. On 3 January 1996, the trustees of "the Fire Baptized Holiness Church of God of the Americas, Mt. Sinai Church" conveyed the church property to themselves as trustees of the Westside Praise and Worship Center. It was this conveyance that led to the denomination's legal action against the Shelby church, and the Shelby church's success at trial has led to the denomination's appeal to this Court.

[1] The denomination's first argument on appeal is that the trial court erred by denying the denomination's motions for directed verdict and for judgment notwithstanding the verdict. Within this argument the denomination makes three separate contentions: (1) that the jury's finding that the denomination is connectional, with nothing more, justified judgment for the denomination; (2) that the nature of the deed required judgment for the denomination; and (3) that "the verdict that the Shelby church and the [denomination] lacked a connectional relationship on property matters does not support the judgment."

Although constitutional guarantees and the concept of separation of church and state preclude us from ruling on purely ecclesiastical issues, our courts "do have jurisdiction as to civil, contract and property rights which are involved in, or arise from, a church controversy." *A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 412, 308 S.E.2d 73, 85 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 649 (1984). In deciding these issues, a central question is whether the church is connectional or congregational. As established in *Simmons v. Allison*, 118 N.C. 763, 24 S.E. 716 (1896) and summarized more recently in *Looney v. Community Bible Holiness Church*, 103 N.C. App. 469, 473, 405 S.E.2d 811, 813 (1991),

> [c]onnectional churches are governed by large bodies and individual congregations bear the same relation to the governing body as counties bear to the State. Congregational churches are independent republics, governed by the majority of its [sic] members and subject to control or supervision by no higher authority. Although congregational churches often associate together for mission purposes, these associations are strictly voluntary and have no governmental authority over the individual congregations.

Id. (citations omitted). One early Supreme Court case in this state cited the Protestant Episcopal, Methodist, Presbyterian and Roman Catholic churches as examples of connectional churches and the Baptist, Congregational and Christian churches as congregational. *Conference v. Allen*, 156 N.C. 524, 526, 72 S.E. 617, 618 (1911).

There seems to be little dispute that the denomination and the Shelby church were generally in a connectional relationship prior to the Shelby church's split from the denomination. The question before us is whether this is dispositive of the issue of property ownership, or whether the relationship could be connectional in some respects and congregational in others. In *Looney*, the jury determined that the denomination was a connectional church organization but that the local church was not in a connectional relationship with the denomination with respect to property matters. *Looney*, 103 N.C. App. at 470-71, 405 S.E.2d at 811-12. This Court found no error in the verdict based on "the nature of the property transactions themselves." *Id.* at 474, 405 S.E.2d at 813. The Court noted that under the facts of that case,

> [w]hen the defendant local church affiliated with the plaintiff denominational church, the property was deeded to trustees of,

> or for, the local church, not to the denominational church or to trustees of, or for, the denominational church. This pattern was followed in all property transactions during the entire period of affiliation. Thus this evidence created a jury question as to whether *as to church property* the local church intended to establish a connectional relationship with the denominational church.

Id. Because *Looney* established that a church could be congregational as to property matters though connectional in other ways, the denomination's argument that the jury's finding of a connectional relationship was enough, standing alone, to justify judgment for the denomination is unconvincing.

Unlike the local church in *Looney*, however, the Shelby church never owned any property before it was associated with the denomination. The first Shelby church property was purchased in 1937, and the deed for this property granted it to the "Trustees of the Fire Baptized Holiness Church of God of the Americas/Mt. Sinai Church and their successors in office." Subsequent deeds involving the local church in 1970, 1984, 1986, and 1996 were similarly titled with the name of the denomination followed by the name of the local church. The denomination claims that General Statute section 61-3 required judgment in its favor.

[2] According to the denomination, section 61-3 "provides that all church property 'shall be and remain forever to the use and occupancy of that church or denomination . . . for which the [church property was] so purchased, given, granted or devised.' " *See* N.C. Gen. Stat. § 61-3 (1989). Such a reading ignores the language of the statute that specifies that this be done "according to the intent expressed in the conveyance, gift, grant or will . . . ." *Id.* The Shelby church argues that the lack of specificity in the deeds, which named both the denomination and the Shelby church as the grantees of church property, fails to demonstrate the intent of the grantor and that this question was properly resolved by the jury. The denomination, citing *A.M.E. Zion*, 64 N.C. App. at 414-15, 308 S.E.2d at 86-87, claims any dispute on this point was not a question of fact for the jury but a question of law to be resolved by the trial court by consulting the church discipline.

The rules of the denomination are enumerated in the *Discipline of the Fire Baptized Holiness Church of God of the Americas* ("the *Discipline*"), published by the denomination. In the 1970

Discipline, Section 4 of Article XVI, "Directions Regulating Deeds, Titles, Etc.", read as follows: "Let it be specified in each deed to church property that it shall be for the use and benefit of the ministry and membership of the Fire Baptized Holiness Church of God of the Americas." In the 1994 *Discipline*, Article XVIII bore the same title as Article XVI above, and Section 4 stated, "It shall be specified in each deed to church property that it shall be for the use and benefit of the ministry and membership who are worshipping according to the customs and usages of the Fire Baptized Holiness Church of God of the Americas."

The deeds presented as evidence at trial and included as exhibits on appeal do not make these required specifications. There is no mention of the purpose of the property or any reference to the customs and usages of the denomination. Instead, the deeds simply include the names of both the denomination and the Shelby church as grantees.

Under the language of the *Discipline*, it seems clear that local church property that is recorded as specified in the *Discipline* belongs to the denomination, and that a local church seeking to secede from the denomination could not keep such property. Here, though, the deeds were not recorded as set out in the *Discipline*. Furthermore, evidence at trial indicated that the decision to move into a new sanctuary in 1970 did not meet with the approval of the denomination. According to Section 2 of the *Discipline*'s articles on property in both 1970 and 1994, the local church's board of trustees was required to receive the approval of the bishop or ruling elder before securing any warranty deeds. This was not done by the trustees of the Shelby church. In fact, the denomination clearly expressed its *disapproval* of the Shelby church's plan to acquire the property now in dispute, but the Shelby church nevertheless did so, using its own money. We find that it would be inequitable, if not unconstitutional, for a court of this state to enforce the *Discipline* against the Shelby church *nunc pro tunc* when the denomination made no effort to enforce it at the time of any violations. As was true in *Looney*, "[t]he discipline of the denominational church manifest an implied assent of local churches to denominational control of local church property. This evidence, if not contradicted, would make the plaintiffs' case." Similarly to *Looney*, this evidence was contradicted. The question at trial then became one of the Shelby church's desire for independence prior to its ultimate secession from the denomination, and this question was one of fact to be resolved by the jury.

[3] The denomination's third contention within its first argument is that the verdict that the Shelby church and the denomination lacked a connectional relationship with regard to property matters did not support the take-nothing judgment against the denomination. The denomination emphasizes that in both *A.M.E. Zion* and *Looney*, the local churches were permitted to keep the property they owned independently before joining the connectional denomination. According to the denomination, the verdict in this action is inconsistent with *A.M.E. Zion* and *Looney*, since the Shelby church owned no property before joining the denomination and it therefore cannot keep the property acquired during its affiliation with the denomination.

We do not read *A.M.E. Zion* or *Looney* to limit a seceding church's property rights to that property it owned prior to joining a denomination. It is our understanding that references in these cases to taking property "independently owned prior to and retained during its limited affiliation with the general church", *see Looney*, 103 N.C. App. at 473-74, 405 S.E.2d at 813 (citing *A.M.E. Zion*, 64 N.C. App. at 413-14, 308 S.E.2d at 86), were based on decisions prior to *Looney*'s explicit acceptance of a connectional church being congregational as to property matters. In *A.M.E. Zion*, we remanded the case and stated that "upon remand, the major question to be answered . . . *is whether the defendant local church was in fact in a hierarchical relationship with the plaintiff parent body with respect to property matters*." *A.M.E. Zion*, 64 N.C. App. at 416, 308 S.E.2d at 87. Because that case involved different names on the deeds, we further stated that "[u]pon retrial, a determination must be made as to whether 'Union Chapel Methodist Church' would be entitled to fee simple ownership of lands deeded to a Methodist Episcopal Church in the 1873 deed and to an A.M.E. Zion Church in the 1976 deed." *Id.* at 416, 308 S.E.2d at 88. This indicates to us that ownership of property acquired over 100 years after the local church joined the denomination could have been kept by the local church when it left the denomination, depending upon the nature of the relationship between the denomination and local church. Although *Looney* recited the same "independently owned prior to" language as *A.M.E. Zion*, the ultimate result was that the local church was permitted to keep both the church property it acquired prior to joining the denomination in 1955 and the new sanctuary it constructed in 1972 and 1973, before leaving the denomination in 1988. In light of this interpretation of these cases, the denomination's argument fails. The trial court properly denied the denomination's motions for directed verdict and for judgment notwithstanding the verdict.

[4] The denomination's second argument on appeal is that the trial court erred by admitting, over objection, certain lay opinion testimony regarding the ownership of church property. The denomination objected to the testimony of Jackie Williams, who testified that the words "Mt. Sinai" were on the deeds "because it belonged to the members of Mt. Sinai"; of Jeffrey Ross, who stated that it was his understanding and intent as a trustee that the property belonged to the Shelby church; and of Reverend Verlon Pompey, who claimed it was his understanding that the property was to be held by the trustees of the church for the Shelby church. The denomination argues on appeal that the court's admission of the opinions expressed on these points by these witnesses was improper. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (1992) (stating that lay witness must testify from his personal knowledge); N.C. Gen. Stat. § 8C-1, Rule 701 (1992) (limiting lay opinions to those which are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue"); *see also Beam v. Kerlee*, 120 N.C. App. 203, 216, 461 S.E.2d 911, 921 (1995) (precluding testimony of the legal conclusion that a party "owns" property by adverse possession), *cert. denied*, 342 N.C. 651, 467 S.E.2d 703 (1996).

We hold that even if the trial court erred in admitting this testimony, the error was not reversible. "Where improperly admitted evidence merely corroborates testimony from other witnesses, we have found the error harmless." *State v. Wynne*, 329 N.C. 507, 519, 406 S.E.2d 812, 818 (1991). Reverend Ervin, who served as pastor of the Shelby church at the time of the 1970 property change, testified without objection that the congregation of the Shelby church intended to own the property and that "Mt. Sinai" was on the deeds "because the people thought they were buying the church for Mt. Sinai." Clara Louise Williams, a trustee of the Shelby church at that same time, stated without objection that she intended and understood that the trustees of the Shelby church would own the building and property. Similarly, the denomination did not object to Reverend Pompey's testimony that his understanding during the transactions in the 1980s was that the Shelby church owned the property and that he understood and intended throughout the time of his affiliation with the Shelby church that the property belonged to the local congregation.

In light of these facts, the testimony to which the denomination objected merely corroborated the unchallenged testimony without adding any new substantive information. Any error in admitting the

challenged testimony was harmless, and defendant's second argument is without merit.

For the reasons set out above, we hold that the parties to this action received a fair trial, free of prejudicial error.

No error.

Judges GREENE and HORTON concur.

STATE OF NORTH CAROLINA v. LARRY D. STANFIELD

No. COA98-1160

(Filed 7 September 1999)

1. **Evidence— not an expert—testimony about experience—belated recollections**

The trial court did not err in a robbery case by allowing the testimony of a detective, who was not testifying as an expert, regarding the belated recollection process of trauma victims because he was relating his own experience instead of stating an opinion. Further, the detective did not suggest any reasons why belated recollections occurred, he did not vouch for the accuracy of such recollections, and he gave no opinion as to the credibility of the victim-witnesses.

2. **Evidence— cross-examination of defendant—robbery—prior convictions—no plain error**

The trial court did not commit plain error in a robbery case when it permitted the State to cross-examine defendant about his prior convictions for possession of cocaine because although some of the forms of the questions were objectionable, the substance of the questions were appropriate since the prosecutor limited his inquiry to the facts supporting the conviction without eliciting extraneous prejudicial details.

3. **Evidence— cross-examination of defendant—robbery—defendant's attitude towards criminal laws in general—no plain error**

The trial court did not commit plain error in a robbery case by permitting the State to cross-examine defendant about his atti-

tude concerning the esteem that he holds for criminal laws in general because even if this evidence was inadmissible, defendant failed to show that a different result would have been reached but for the error, or that the error was so fundamental as to result in a miscarriage of justice.

4. Criminal Law— codefendant pled guilty—mistrial not required

The trial court did not err in a robbery case by failing to declare a mistrial after a codefendant pled guilty outside of the presence of the jury because when the jury returned, the trial court gave the pattern jury instruction that the codefendant's case was no longer before the jury, its disposition was of no concern to them, and their deliberations as to defendant should not be affected in any way.

5. Constitutional Law— self-incrimination—robbery—acting in concert—codefendant not required to testify

The trial court did not err in a robbery case when it did not allow defendant to call his codefendant to testify after the codefendant pled guilty outside the presence of the jury and claimed he would invoke his Fifth Amendment privilege not to incriminate himself if called as a witness because defendant did not proffer the evidence he sought to elicit from his codefendant and merely wanted the jury to speculate. In addition, the fact that defendant was being tried on the theory of acting in concert meant the codefendant's admission of his involvement would not exonerate defendant.

6. Evidence— prior crime or act—codefendant—harmless error

Although the trial court erred in a robbery trial by admitting irrelevant evidence of a codefendant's prior bad acts involving drug dealing after the codefendant pled guilty, it was harmless error in light of the substantive evidence against defendant.

7. Robbery— motion to dismiss—acting in concert

The trial court did not err in a robbery case based on the theory of acting in concert by failing to grant defendant's motion to dismiss because viewed in the light most favorable to the State, the evidence was sufficient to show that defendant shared a common purpose with his codefendant. While the codefendant used a

gun to take the personal property of both victims, defendant blocked one victim's attempt to exit from his car, defendant told the victim to keep his hands where they could be seen, and defendant took that victim's jewelry.

Appeal by defendant from judgment entered 7 May 1998 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 10 June 1999.

Michael F. Easley, Attorney General, by Emmett B. Haywood, Assistant Attorney General, for the State.

Tisdale & Menefee, P.A., by Donald K. Tisdale, for defendant-appellant.

EDMUNDS, Judge.

On 13 July 1997, victims Tyrone Campbell (Campbell) and Reggie McKinney (McKinney) drove to the home of LuWanda Corn in Winston-Salem. Campbell and McKinney remained in the car while Campbell, the driver, began talking to Ms. Corn. Co-defendant Cory Beck (Beck), who was defendant's brother and was also known as Cory Stanfield, was on the porch of the Corn home. After the conversation between Corn and Campbell had continued for a few minutes, Beck yelled to Campbell and McKinney, asking if they had any "weed." When McKinney answered in the negative, Beck approached the driver's side of the car. Interrupting Campbell's conversation with Corn, Beck pulled a gun on the two men in the car and demanded their jewelry. Before McKinney and Campbell were able to comply, defendant walked up to the passenger side door, said "What's up? What's up?," and told McKinney to keep his hands where they could be seen. He stood against the side of the car so that McKinney could not open the door to run. Campbell surrendered some rings he was wearing to Beck, who hit Campbell with his pistol. McKinney told police after the robbery and again at trial that he handed his watch and gold necklace to Beck. However, Campbell initially told police that McKinney handed his (McKinney's) jewelry to defendant Stanfield, but later testified at trial that he did not know to whom McKinney handed his watch and necklace, though he added that Beck reached into the car. Beck told Campbell and McKinney not to look at him, to leave, and not to return or call the police. The victims left but called the police. McKinney later picked defendant out of a photo lineup and identified him at trial.

[1] Defendant's first assignment of error pertains to discrepancies between statements made by McKinney and Campbell. McKinney's trial testimony also included some detail not in his written statement, e.g., that, during the robbery, defendant approached the car saying, "What's up? What's up?," then told McKinney to keep his hands where they could be seen. After the investigating detective testified as to the written statement taken from McKinney and after defense counsel elicited on cross-examination the discrepancies between the victims' statements, the prosecution asked the following series of questions on redirect examination:

> Q. Okay. What has been your experience with trauma victims, Officer Tollie?
>
> A. It's been—
>
> [overruled objection]
>
> A. It's been my experience [and] training both that with trauma victims often facts about an event may occur—may come back to them several hours or even several days after it's over and they calm down. As a matter of fact, it's my procedure in dealing with someone that is a victim of a violent crime that I leave my card with my number on it stating to them, [i]f you remember something tomorrow or next week that you didn't tell me tonight, feel free to call and I'll take it and annotate it to my report.

Defendant characterizes this testimony by the detective as expert testimony regarding the recollection process of trauma victims and claims that the court erred in admitting this testimony when the witness had not been qualified as an expert. Defendant also asserts this testimony is a statement of the detective's opinion as to the credibility of the witnesses. We disagree. The law in North Carolina is settled that an expert may not express an opinion as to the believability of another witness. In *State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986), during a first-degree rape trial, a pediatrician stated, "I think [the victim is] believable." The *Aguallo* Court applied *State v. Heath*, 316 N.C. 337, 340, 341 S.E.2d 565, 567-68 (1986), in which our Supreme Court stated that the official commentary of Rule 608 of the North Carolina Rules of Evidence establishes that " 'expert testimony on the credibility of a witness is not admissible.' " In *Heath*, after being asked her opinion as to whether a mental condition could have caused the witness to fabricate a story, the witness' psychologist responded, "There is nothing in the record or current behavior that

indicates that she has a record of lying." *Id.* Our Supreme Court held that this statement was improper expert testimony that bolstered the credibility of the witness. *See id.*

In contrast, even assuming the detective was testifying as an expert in this portion of his testimony (he had not been formally qualified or tendered as an expert but testified that he had investigated between 350 and 375 incidents involving trauma), he was not stating an opinion, but was instead relating his experience. His testimony was a recitation of the procedure he followed when working with trauma victims and the reason he followed it. The officer did not suggest any reason such belated recollection occurs, nor did he vouch for the accuracy of such recollection. Unlike the cases cited above, this testimony contained no opinion as to the credibility of the witness. This assignment of error is overruled.

[2] Defendant next argues that the trial court committed plain error when it permitted the State, when cross-examining defendant about his prior convictions, to inquire into details that went beyond the nature of the crime, time and place of conviction, and punishment imposed. *See State v. Bishop*, 346 N.C. 365, 488 S.E.2d 769 (1997). Because defendant failed to object to this line of questions, he carries the burden of showing "(i) that a different result 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." *Id.* at 385, 488 S.E.2d at 779. The particular portion of cross-examination to which defendant now objects is as follows:

> Q. And you've been convicted of possession with intent to sell and deliver cocaine?
>
> A. Well, I got convicted of simple possession.
>
> Q. I'm sorry. I thought you told [defense counsel] you were convicted of possession with intent to sell.
>
> A. That's what I was charged with. It cost me several thousand dollars. I got it down to simple possession.
>
> Q. So you plea bargained that case?
>
> A. Yes, sir, I did.
>
> Q. Is that the one in Danville, Virginia, in 1996?
>
> A. Yes, sir, it is.

Q. And you were put on probation?

A. Yes, sir, I was.

Q. For how long?

A. I can't even remember.

. . . .

Q. . . . And almost within a year you had some more cocaine on you, didn't you?

A. Well, in fact, that charge that I was charged for in '96 that was from, like, four years ago. I had been living in Winston-Salem. They had just—They had just recently caught up with me. And I took a plea bargain.

. . . .

Q. . . . [I]n July of '97, three days before this crime, you were convicted of possession of cocaine again, were you not?

A. What do you mean three days before this crime?

Q. Well, this crime occurred on July 13 of '97.

A. From what I understood this wasn't a crime. It was a simple assault. From what I understand these guys are making up this story.

Q. Okay. Well, from July the 13th of 1997—You were convicted on July 10th of '97 of possession of cocaine, were you not, Mr. Stanfield?

A. On July the 10th?

Q. Yes, sir.

A. Yes, I was.

Q. So, in other words, you ignored your probation from the [Commonwealth] of Virginia; is that correct?

A. Well it was transferred to the state of North Carolina.

Q. But, anyway, you were on probation to stay away from drugs. And from a court order from Virginia, North Carolina, wherever, Mr. Stanfield, you ignored that court order, did you not?

A. Yes, sir.

Q. And got convicted again of the same drug; isn't that right?

A. Yes, sir.

Our review of this transcript satisfies us that the State's questions did not exceed the permissible scope of inquiry concerning defendant's prior convictions. Although some of these questions were objectionable as to form where the prosecutor asked about the underlying facts rather than the conviction itself ("[a]nd almost within a year you had some more cocaine on you, didn't you?"), no objection was made. *See* N.C. Gen. Stat. § 8C-1, Rule 609 (1992). Moreover, the substance of the questions was appropriate. The prosecutor limited his inquiry to the facts supporting the conviction and did not elicit extraneous prejudicial details. *Compare State v. Rathbone*, 78 N.C. App. 58, 336 S.E.2d 702 (1985), *disc. review denied*, 316 N.C. 200, 341 S.E.2d 582 (1986), *with State v. Wilson*, 98 N.C. App. 86, 389 S.E.2d 626 (1990). Where defendant's answers demonstrated confusion or evasion, the prosecutor properly sought clarification. This assignment of error is overruled.

[3] Defendant also asserts that the trial court committed plain error by permitting the State to inquire about defendant's attitude concerning the law in general, referring to the following exchange:

Q. . . . So your attitude about the criminal laws of North Carolina or any other state, you don't hold them in any high esteem, do you?

A. Well, selling drugs—First of all, selling drugs is against the law anywhere. So for me to be convicted of selling drugs, I had to have sold the drugs. That's against the law. So same scenario.

Q. Yes, sir. So you don't have any respect for the criminal laws, do you?

A. No, it's not that. It's just what I chose to do at that time.

Defendant did not object to this line of questioning.

Although a party may cross-examine a witness with respect to any evidence that tends to show feeling or bias of the witness with respect to a party or cause, *see State v. McCall*, 31 N.C. App. 543, 230 S.E.2d 195 (1976), "the criminal laws" are neither party nor cause. Nevertheless, assuming *arguendo* that this evidence was inadmissible, defendant has failed to meet his burden of showing (1) that a different result probably would have been reached but for the error

or (2) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *See Bishop*, 346 N.C. 365, 488 S.E.2d 769. This assignment of error is overruled.

[4] Defendant next asserts that the trial court improperly denied his motion for mistrial after Beck pled guilty outside the presence of the jury. We disagree. "The decision to grant a mistrial is within the trial court's discretion." *State v. Jaynes*, 342 N.C. 249, 280, 464 S.E.2d 448, 467 (1995) (citations omitted), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). A trial court should grant a mistrial " 'only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict.' " *State v. Marlow*, 334 N.C. 273, 287, 432 S.E.2d 275, 283 (1993) (quoting *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623, *sentenced vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990)). "[A] trial court's decision regarding a motion for mistrial will not be disturbed on appeal absent a clear showing that the trial court abused its discretion." *Id.* Here, Beck entered his guilty plea outside the presence of the jury. When the jury returned, the trial judge gave the pattern instruction that the co-defendant's case was no longer before the jury, that its disposition was of no concern to them, and that their deliberations as to defendant should not be affected in any way. The procedure followed by the trial court has been approved by this Court. *See State v. Dewalt*, 16 N.C. App. 546, 192 S.E.2d 665 (1972). This assignment of error is overruled.

[5] Defendant also argues that the trial court committed reversible error by not allowing him to call Beck to testify on his behalf. After Beck pled, the court ascertained in the absence of the jury that, if called as a witness, he would invoke his Fifth Amendment privilege not to incriminate himself. The court then instructed defendant's attorney not to call Beck. Our Supreme Court has admonished trial courts to exercise caution in deciding whether to allow a party to call a witness who will plead the Fifth Amendment.

> [T]here are two difficulties that may arise when a witness is presented and then refuses to testify by asserting his Fifth Amendment privilege. The first is that it permits the party calling the witness to build or support his case out of improper speculation or inferences that the jury may draw from the witness' exercise of the privilege, which cannot be adequately corrected by trial court instruction. The second concern is that it encroaches

> upon the constitutional right to confrontation because the presentation of the exercise of the privilege cannot be tested for relevance or value through cross-examination. As a result of these difficulties, "the trial judge must weigh a number of factors in striking a balance between the competing interests." Such a balancing will be left to the discretion of the trial court in determining whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice in accordance with Rule 403 of the Rules of Evidence.

State v. Pickens, 346 N.C. 628, 639, 488 S.E.2d 162, 167-68 (1997) (internal citations omitted). In *Pickens*, the defendant sought to call his former co-defendant (Arrington) to the witness stand. Outside of the jury's presence, Arrington had exercised his Fifth Amendment privilege against self-incrimination, and the defendant alleged it was error to prevent him from calling Arrington to the stand to exercise the privilege before the jury. The defendant wanted to show that Arrington fired the weapon that caused the victim's death; however, our Supreme Court held that the defendant was tried under a theory of acting in concert, making Arrington's assertion of his constitutional privilege "immaterial." Thus, the Court held that the trial court did not abuse its discretion in denying the defendant's request.

Defendant here argues that the trial court abused its discretion by denying defendant's request to call Beck. We disagree. Defendant never made a proffer as to what evidence he sought to elicit from Beck; instead, defendant maintains that he had "the right of having the jury make whatever inferences it might from the assertion by [Beck] of [his] Fifth Amendment rights." In other words, he wanted the jury to speculate in the hope that the speculation might be to his benefit. The trial court weighed a privilege expressly protected by the U.S. Constitution against this nebulous hope and decided correctly. Moreover, defendant, like the defendant in *Pickens*, was being tried under the theory of acting in concert. Because Beck's admission of his own involvement would not exonerate defendant, Beck's claiming his Fifth Amendment privilege was immaterial to defendant's defense. The trial court did not abuse its discretion. This assignment of error is overruled.

[6] Defendant next argues that the trial court erred by admitting testimony about the bad acts of his co-defendant Beck after Beck pled guilty. This evidence was elicited during cross-examination of defense witnesses and related to Beck's drug dealing. Because

defendant did not object to this testimony at trial, we review admission of the testimony for plain error. *See Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. Here, the evidence in question was consistent with testimony taken prior to Beck's plea. Nevertheless, once Beck was out of the trial, evidence of his bad acts unrelated to the instant offense had no probative value and could only serve to prejudice defendant. However, we hold that the error in admitting the evidence was harmless. There was substantial other evidence of defendant's guilt, and we see no possibility that a different result could have been reached if this testimony pertaining to the co-defendant had been excluded. This assignment of error is overruled.

[7] Finally, defendant contends that the court erred by failing to grant his motion to dismiss at the conclusion of all the evidence. " 'In passing upon a defendant's motion to dismiss, the court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference.' " *State v. Tucker*, 347 N.C. 235, 243, 490 S.E.2d 559, 563 (quoting *State v. Aikens*, 342 N.C. 567, 573, 467 S.E.2d 99, 103 (1996)), *cert. denied*, 523 U.S. 1061, 140 L. Ed. 2d 649 (1998). The State's case against defendant was based on a theory of acting in concert.

> Where the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. That which is essentially evidence of the existence of concerted action should not, however, be elevated to the status of an essential element of the principle. Evidence of the existence of concerted action may come from other facts. It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 356-57, 255 S.E.2d 390, 395 (1979).

Viewed in the light most favorable to the State, the evidence showed that Beck used a gun while taking the personal property of Campbell and McKinney. McKinney testified that defendant blocked his exit from the car, told him to keep his hands where they could be

seen, and took his jewelry. This is sufficient evidence to establish beyond a reasonable doubt that defendant shared a common purpose with Beck. Accordingly, the trial court properly denied defendant's motion. This assignment of error is overruled.

No error.

Judges WALKER and McGEE concur.

SHARON TOLER, EMPLOYEE, PLAINTIFF v. BLACK AND DECKER, EMPLOYER, CIGNA INSURANCE COMPANY, INSURER, DEFENDANTS

No. COA98-1037

(Filed 7 September 1999)

1. Workers' Compensation— credibility—determination by Full Commission

The Court of Appeals was bound by the Industrial Commission's decision reversing the deputy commissioner's determination that plaintiff-employee lacked credibility based on her uncorroborated version of the events because: (1) the Full Commission ultimately determines credibility, whether from a cold record or from live testimony; and (2) the Full Commission is not required to demonstrate that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness.

2. Workers' Compensation— competent evidence

Despite the abundance of evidence to the contrary indicating plaintiff-employee had previously been treated for psychological concerns, there was competent evidence provided by the testimony of a psychologist to support the Industrial Commission's determination that plaintiff is also entitled to compensation for psychiatric problems exacerbated by her compensable work-related neck injury.

Appeal by defendants from opinion and award filed 3 June 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 May 1999.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Vickie L. Burge, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Karen K. Prather, for defendant-appellants.

LEWIS, Judge.

Plaintiff claims to have injured her neck on her job for defendant-employer on or about 16 August 1993, but did not report any neck injury to her supervisor or the plant nurse until 1 September 1993 at the earliest. There were no witnesses to the alleged injury. Plaintiff stated in a recorded interview that she did not start noticing problems until "just a few days later" than 16 August, when, in her words, "I had woke up and my neck [was] hurting like it was stiff like I had [a] cold in my neck." Plaintiff continued working and made no mention of any neck problems to her doctor until 8 September 1993, according to the medical records of Dr. Robert Fletcher. Dr. Fletcher referred plaintiff to Dr. Inad Atassi, a neurosurgeon. After an MRI, Dr. Atassi found a mild central disc protrusion and recommended a conservative treatment.

Plaintiff's family physician, Dr. John Blue, examined plaintiff and could make "very little objective findings" to support plaintiff's subjective complaints of neck pain; an MRI showed no disc herniation. Upon Dr. Blue's referral, Dr. Michael C. Pare examined plaintiff in November 1994 and found that "[t]he pain in her neck ha[d] pretty much disappeared." When plaintiff visited Dr. Emory Sadler for psychological evaluation on 6 February 1995, she was "not sure of the cause of her pain and . . . listed weak muscles as her best guess as to what is wrong." On that same date, she indicated in an interview with Dr. Jessie Leak that she "realize[d] that her current state of mind is impacting her pain complaint" and "denie[d] any type of trauma or accident related to this" pain in an interview with a physical therapist.

It was not until 21 April 1995, over twenty months after purportedly sustaining this injury to her neck, that plaintiff filed a Form 18 in the Industrial Commission to officially give notice of the accident to her employer. Deputy Commissioner George T. Glenn II received plaintiff's testimony and other evidence on 28 March 1996 and filed an opinion and award on 18 June 1997. In that opinion and award, the deputy commissioner concluded that "[p]laintiff did not sustain an injury by accident or specific traumatic incident arising out and in the

course and scope of her employment with defendant-employer on August 16, 1993" and that "[p]laintiff has failed to prove by the greater weight of the evidence that she is entitled to recover any further workers' compensation benefits in this matter." Plaintiff's claim was denied, and she appealed to the full Commission.

The full Commission made in part the following findings of fact:

> 4. . . . . The initial Form 19 completed by defendants indicated that plaintiff complained only about her right hand and arm. When plaintiff received a copy of the Form 19, she had the nurse correct the omission by completing another Form 19 regarding plaintiff's neck pain.
>
> 5. Defendants initially sent plaintiff to see Dr. Robert Fletcher for her [unrelated] hand and arm pain. Plaintiff also informed Dr. Fletcher of her neck pain during her first visit on 1 September 1993, but he did not note the neck pain until her next visit on 8 September 1993.
>
> . . . .
>
> 17. The Full Commission accepts the testimony of plaintiff regarding the circumstances of her work related injury and continued pain as credible.

The full Commission, with one commissioner dissenting, then reversed the deputy commissioner and concluded that plaintiff was entitled to compensation for both her neck injury and the "aggravation and exacerbation of plaintiff's [post-traumatic stress disorder] and depression, which was a natural and unavoidable consequence of her compensable injury . . . ." Commissioner Sellers dissented from the full Commisison's opinion and award, stating in part,

> The undersigned is unable to find plaintiff's testimony credible regarding the occurrence of a compensable work-related neck injury. There are too many inconsistencies between plaintiff's testimony, her prior recorded statements and medical records. The medical evidence shows that plaintiff's neck pain had no sudden onset, there was no objective physical evidence for the pain, and plaintiff delayed reporting neck problems and had no witnesses to the alleged injury.

Defendants appeal.

[1] Defendants' first argument on appeal is that the full Commission, reviewing only a cold record, failed to demonstrate "that it gave due consideration to the general rule that the hearing officer is the better judge of plaintiff's credibility in this case." We agree entirely with defendants and with Commissioner Sellers' dissent on this point, but are unable to reverse the full Commission here under *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, — S.E.2d — (1999). This Court, in recent years, has encouraged the full Commission to follow the common-sense approach that prevails throughout the law and acknowledge when reversing the deputy commissioner's credibility findings that, as between a hearing officer who can observe the demeanor of witnesses and a reviewing board that has only paper in front of it, the hearing officer is in the better position to determine whether live testimony is credible. *See generally 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), and its progeny.

As noted in the citation above, our Supreme Court previously denied discretionary review to the plaintiff in *Sanders*. Nevertheless, that Court has since overruled this approach to credibility in workers compensation actions, stating,

> Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate, as *Sanders* states, "that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one." *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226. To the extent that *Sanders* is inconsistent with this opinion, it is overruled.

Adams, 349 N.C. at 681, 509 S.E.2d at 413-14. It could be argued that these references to "the Commission" and its role in credibility determinations are vague, since technically the hearing officer is a member of the Commission, though not the full Commission. This would seem a question best resolved in the statute by the Legislature. Until then, defendants in the action currently before us acknowledged in a letter to this Court that *Adams*, filed after their brief was submitted, is adverse to their position; we are bound by *Adams*.

Plaintiff was fortunate to have two members of the full Commission lend receptive eyes to her plight in their reading of the material before them. By piecing together enough printed testimony to yield a result favorable to plaintiff and in spite of the deputy commissioner's implicit determinations of plaintiff's lack of credibility, the full Commission deemed plaintiff's uncorroborated version of the events credible. Had *Sanders* not been overruled, defendants' first argument would be a solid one. In light of the current state of the law, we hold that it must fail.

[2] Defendants' second argument pertains to the full Commission's conclusion that the aggravation and exacerbation of plaintiff's post-traumatic stress disorder ("PTSD") and depression is compensable. Defendants claim this conclusion was reached in error, arguing that "the record is devoid of evidence of a causal connection between plaintiff's psychiatric problems and her alleged work injury." Because it is not our prerogative to weigh the evidence, *see Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), we must disagree.

During the live testimony before the deputy commissioner, the following exchange took place between defense counsel and plaintiff:

> Q. Prior to the alleged neck injury, had you ever had problems with depression before?
>
> A. No, ma'am.
>
> Q. Had you ever had any problems with feeling anxious or having anxiety attacks?
>
> A. No, ma'am, not until about the last three—from the time I went to Sandra [Windham], that was when the things was coming on, and I didn't know what it was. I just felt like I couldn't breathe my heart was beating so fast.

Plaintiff's medical records, however, told a different story. Medical records from plaintiff's family doctor, Dr. Blue, indicated that plaintiff had been treated for psychological concerns since at least 24 May 1993, when she was diagnosed as suffering from "anxiety/depression." She enumerated many stressors in her life and indicated that she had "[n]oticed crying spells for no reason for the last y[ea]r." Plaintiff was given medication for her psychological issues, and returned for a follow-up "of her depression," according to medical

records, on 15 June 1993. She recounted recent stressful events involving her boyfriend at that visit, stated that her appetite had decreased and that she had episodes of crying. Dr. Blue noted plaintiff's "Anxiety/Depression, still poorly controlled."

Psychological evaluations after August of 1993 delved into plaintiff's problems in greater detail. The evidence of record is overwhelming that plaintiff had suffered from a variety of unpleasant experiences in her life that led to her psychological problems, but respecting her privacy we will not recount them here. While most of the doctors who evaluated plaintiff agreed that the alleged neck injury had no bearing on her psychological disorders, Ms. Windham, a masters-level psychologist, stated at certain points in her deposition that "the [neck] injury exacerbated the P.T.S.D.," that "[t]he depression is related to the work injury," and that "it appeared that the injury just really intensified the P.T.S.D. and, in my opinion, added to her psychological distress or pain."

Despite the abundance of evidence to the contrary, there is competent evidence in the record, however thin, in the form of Ms. Windham's deposition to indicate that plaintiff's neck injury had a role in exacerbating her pre-existing PTSD and depression. However, the full Commission's findings of fact go further:

> 18. Plaintiff sustained an injury by accident in the course and scope of her employment on 16 August 1993, as a direct result of a specific traumatic incident of the work assigned to her. This resulted in an injury to her neck.
>
> 19. Plaintiff has a chronic pain disorder as a *natural and unavoidable consequence* of her neck injury.
>
> 20. Before 16 August 1993, plaintiff had PTSD and depression, but these conditions were not disabling.
>
> 21. As a *natural and unavoidable consequence* of the pain from the neck injury, plaintiff's pre-existing PTSD and depression were aggravated and exacerbated.
>
> 22. Since August 1994, as a result of the work-related injury to plaintiff's neck, the chronic pain from that injury, and the aggravation and exacerbation of her PTSD and depression, plaintiff has been unable to work and earn the wages in her former position with defendant-employer or in any other employment.

(emphasis added). While we recognize that "[t]he findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence," *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977), the full Commission cited and we can find no evidence in the record to indicate that the exacerbation and aggravation of plaintiff's psychological problems was a "natural and unavoidable consequence" of this injury.

Fortunately for plaintiff, though, it does not appear in our law that the aggravation and exacerbation of her preexisting condition must have been a "natural and unavoidable consequence" of her work-related injury for her to be compensated for her psychological problems in this case. The language employed by the majority of the full Commission was without basis in the record, but was not required under the very case cited to support the relevant conclusion of law:

> 2. The aggravation and exacerbation of plaintiff's PTSD and depression, which was a *natural and unavoidable consequence* of her compensable injury, is also compensable. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981).

(emphasis added). According to our Supreme Court in *Morrison*,

> When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.

Id. at 18, 282 S.E.2d at 470. The plaintiff in *Morrison* suffered from pre-existing physical infirmities and not psychiatric problems. In a case cited by plaintiff on appeal, *Hill v. Hanes Corp.*, 319 N.C. 167, 353 S.E.2d 392 (1987), the plaintiff was compensated for depression caused—not exacerbated—by his work-related injury.

If compensation is available for physical injuries caused by an accident, physical injuries exacerbated by an accident, and psychiatric problems caused by an accident, we know of no compelling reason for the Commission not to award compensation for psychiatric problems exacerbated by an accident. Even if there is no competent evidence in the record to support the Commission's findings and conclusions that the exacerbation here was a "natural and unavoidable

consequence" of the injury, there was evidence in the form of Windham's testimony to establish the exacerbation normally required to result in compensation. As such, defendants' second argument is without merit and the opinion and award of the full Commission is affirmed.

Plaintiff indicated in one session with Windham that she did not want to ever return to work. As a result of *Adams*, she may well find this wish granted.

Affirmed.

Chief Judge EAGLES and Judge HORTON concur in the result.

STATE OF NORTH CAROLINA v. KWAME JAMAL TEAGUE

No. COA98-1176

(Filed 7 September 1999)

1. Jury— voir dire—circumstantial evidence—impartiality

The trial court did not err in a kidnapping, robbery, and murder case by allowing the State's voir dire questions informing the prospective jurors that: (1) only the three people charged with the crimes knew what happened to the victims and none would testify against the others, because these statements properly informed the jury that the State would be relying on circumstantial evidence and inquired as to whether the lack of eyewitnesses would cause the jurors any problems; and (2) there would be evidence that on the night of the crimes the victims may have been looking for drugs, because the statement was a proper inquiry to determine the impartiality of the jurors.

2. Evidence— subsequent crime or act—accomplice—harmless error

Although the trial court erred in admitting irrelevant evidence of an accomplice's robbery and attack of another person following the kidnapping, robbery, and murder of the two victims, it was harmless error in light of the substantive evidence against defendant.

3. Constitutional Law— self-incrimination—handwriting samples

The trial court did not err in admitting evidence that defendant refused to comply with a search warrant to obtain samples of his handwriting because the Fifth Amendment privilege against compulsory self-incrimination does not extend to physical characteristics such as handwriting and blood samples.

4. Witnesses— expert testimony—intent to cause death

The trial court did not err in admitting the forensic expert's testimony that one of the victim's gunshot wounds to the head was consistent with an intent to cause death because "intent to cause death" is not a precise legal term with a definition that is not readily apparent. Even if it was error to admit the testimony, it was harmless in light of the other substantive evidence supporting the conclusion that both victims' deaths were consistent with a specific intent to cause their death.

Appeal by defendant from judgment entered 31 May 1996 by Judge Wiley Bowen, Superior Court, Wayne County. Heard in the Court of Appeals 19 August 1999.

Margaret Creasy Ciardella for the defendant.

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

WYNN, Judge.

In November 1995, a jury found that defendant Kwame Jamal Teague—along with Edward Lemons and Larry Leggett—kidnapped, robbed, and murdered Margaret Strickland and Bobby Stroud. The trial court sentenced the defendant to two life terms for the first-degree-murder convictions, two terms of fourteen years for the first-degree-kidnapping convictions, and two terms of twelve years for the armed-robbery convictions—all sentences to run consecutively.

The State's evidence at trial tended to show that on 22 January 1994 the gunshot bodies of Ms. Strickland and Mr. Stroud were found in a field located near Goldsboro, North Carolina. Investigating officers found shell casings and shoe impressions near the bodies. Thereafter, the investigators found at Leggett's and Lemons' house—located near the crime scene—a pair of shoes in Lemons' suitcase matching the imprints at the crime scene.

On 27 January 1994, the investigators located the vehicle that Ms. Strickland had borrowed from her mother two days prior to the discovery of the bodies. On a cassette tape in that vehicle, the investigators discovered the defendant's fingerprint.

In an interview with the investigators, the defendant admitted to helping plan and participating in the robbery of the victims. He stated that after the robbery, he urged the other men to leave the field; but instead, Lemons refused to leave and shot Mr. Stroud. He stated that he then ran away from the field.

On appeal, defendant does not dispute the sufficiency of the State's evidence; instead, he opposes several trial court rulings involving the State's jury *voir dire* and the admission of evidence. To the extent that the defendant has failed to comply with the North Carolina Rules of Appellate Procedure in bringing this appeal, we exercise our discretion under Appellate Rule 2 and address the merits of the case.

I. JURY *VOIR DIRE*

In North Carolina, our trial courts allow counsel wide latitude in examining jurors on *voir dire;* and, the extent and manner of the inquiry rests within the trial judge's discretion. *See State v. Locklear*, 349 N.C. 118, 142, 505 S.E.2d 277, 291 (1998). Thus, to successfully challenge the extent and manner that the trial judge allowed *voir dire* of jurors, the defendant must show an abuse of that discretion. *See id.*

[1] The defendant argues that the State's *voir dire* questions as to (1) the absence of eyewitness testimony and (2) the victims' possible involvement with drugs, constituted "staking out" questions which caused the jurors to pledge themselves to a future course of action.

In *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980), our Supreme Court held that during *voir dire*, counsel should not "fish" for answers to legal questions before the judge has instructed the jurors on applicable principles.

> Counsel should not engage in efforts to indoctrinate, visit with or establish 'rapport' with jurors. Jurors should not be asked what kind of verdict they would render under certain named circumstances.

Id. at 682, 268 S.E.2d at 455.

In this case, the prosecutor informed the prospective jurors that only the three people charged with the crimes know what happened to the victims. He stated that none of the three would testify against the others and therefore the State did not have any eyewitness testimony to offer. The defendant challenges the prosecutor's inquiry to the prospective jurors that:

> Knowing that and knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious . . . to decide based on circumstantial evidence and I would require more than circumstantial evidence to return a conviction of guilty of first degree murder.

We hold that these statements did not violate any of the rules enunciated in *Phillips*. *See State v. Clark*, 319 N.C. 215, 221, 353 S.E.2d 205, 208 (1987) (holding that the prosecuting attorney's question, which merely informed jurors that the State would rely on circumstantial evidence and asked them whether a lack of eyewitnesses would cause them problems, was not improperly argumentative or hypothetical, did not improperly "precondition" jurors to believe there were no eyewitnesses, and was not designed to ask what kind of verdict the jury would render under certain named circumstances) (quoting *Phillips*, 300 N.C. at 682, 268 S.E.2d at 455). Rather, these statements properly (1) informed the jury that the State would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems.

The prosecutor also stated to the prospective jurors that there would be evidence that on the night of the crimes, the victims may have been looking for drugs. The defendant challenges the prosecutor's statement that:

> The question for you to consider if that information should come out and I am certain it will and you hear that information, do you feel like that you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs involved in the drug environment and became victims as a result of that.

We hold that the prosecutor properly made this inquiry to determine the impartiality of jurors. *See State v. Williams*, 41 N.C. App. 287, 291-92, 254 S.E.2d 649, 653 (1979) (holding that the trial court did not err in permitting the district attorney to tell prospective jurors on *voir dire* that a proposed sale of marijuana was involved in the case

to be tried when the attorney's statements were made to inquire as to whether any of them would be unfair and impartial for that reason).

The defendant next argues that the trial court improperly limited *voir dire* of a prospective juror in violation of the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution and Article I, Section 19 and 24 of the North Carolina Constitution. He asserts that the trial court erred in sustaining the State's objections to the following questions regarding the prospective juror's possible bias toward law enforcement officers:

> Q. Okay. Do you feel indebted in any way to these officers? Would you feel that way when they came into Court? If so, let us know?
>
> A. Well, I would tend to.
>
> MR. JACOBS: Object.
>
> THE COURT: Sustained.
>
> Q. (Mr. Jones) Would you tend to, based on your relationship with these officers, be predisposed towards anything they might say?
>
> MR. JACOBS: Object.
>
> THE COURT: Sustained.
>
> Q. Would you tend to give anymore weight to what these officers may say?
>
> A. I would trust them.
>
> Q. Do you think that will anyway predispose you toward a decision before you heard all the evidence?
>
> MR. JACOBS: Object. Object to the form of the question.
>
> THE COURT: Sustained.
>
> Q. (Mr. Jones) Due to the fact that there are police officers involved in this case and this may apply to all of you, do you believe that a police officer's testimony is worthy of any more weight than a lay witness.
>
> MR. JACOBS: Object.
>
> THE COURT: Sustained. Form of the question.

The record reveals that the trial court gave the defendant ample opportunity to inquire into the juror's potential bias in favor of law enforcement. *See Locklear*, 349 N.C. at 142, 505 S.E.2d at 291. In fact, the defense counsel continued to inquire into the possibility of the prospective juror's bias in favor of potential witnesses—who were members of law enforcement—following the State's objections to the questions at issue in this case. Notably, the trial court apparently sustained the objections based on the improper form of the questions because the trial court allowed the defense counsel to rephrase the questions. Furthermore, the defendant subsequently excused the prospective juror. *See State v. Elliot*, 344 N.C. 242, 266, 475 S.E.2d 202, 211 (1996).

In sum, we find no abuse of discretion on the part of trial court in the manner and extent to which he allowed *voir dire* of the prospective jurors.

II. ADMISSION OF EVIDENCE

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). With some exceptions, all relevant evidence is generally admissible. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (1992). However, "[e]vidence which is not relevant is not admissible." *Id.*

[2] The defendant argues—and we agree—that the trial court erred in admitting evidence of Lemon's robbery and attack of another person following the victims' deaths because that evidence was not relevant to the issue of the defendant's involvement with the victims' deaths.

However, to prove prejudicial error "an appellant must show that there is a reasonable possibility that, had the error not been committed a different result would have been reached at trial." *State v. Martin*, 322 N.C. 229, 238-39, 367 S.E.2d 618, 623-24 (1988). In light of the substantive evidence against the defendant, we cannot hold that the result would have been different had the evidence surrounding Lemon's subsequent crime been excluded. Therefore, the resulting error constituted harmless error.

[3] Secondly, the defendant asserts that the trial court erred in admitting evidence that he refused to comply with a search warrant to obtain samples of his handwriting.

However, the "Fifth Amendment privilege against compulsory self-incrimination does not extend to physical characteristics such as handwriting and blood samples." *See Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L. Ed.2d 908 (1966). Thus, a defendant's refusal may be admissible and is not treated the same as a defendant's failure to testify. *See State v. McNeil*, 99 N.C. App. 235, 243, 393 S.E.2d 123, 127 (1990) (holding the testimony that a defendant refused to allow a rape victim to view him immediately after his arrest near the crime scene was properly admitted); *cf. State v. Roberts*, 243 N.C. 619, 91 S.E.2d 589 (1956) (holding that comment may not be made regarding the failure of a defendant to testify in a criminal prosecution). Given the relevancy of defendant's refusal to comply with the search warrant, the trial court's admission of this evidence was proper.

[4] Finally, the defendant contends that the forensic expert's testimony—that one of the victim's "gunshot wounds to the head was consistent with an intent to cause death"—was irrelevant and highly prejudicial. We disagree.

Expert witness testimony is admissible if it will " 'assist the jury to draw certain inferences from facts because the expert is better qualified' than the jury to form an opinion on the particular subject." *State v. Fletcher*, 92 N.C. App. 50, 56, 373 S.E.2d 681, 685 (1988) (quoting *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984)); *see* N.C. Gen. Stat. § 8C-1, Rule 702 (1992). In fact, experts are permitted to give their opinion even though "it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704 (1992).

An expert, however, may not testify as to a legal standard that has been met. *See State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986). Despite this rule, a medical expert is not precluded from testifying to his or her opinion that the defendant could not form a "specific intent to kill." *See State v. Daniel*, 333 N.C. 756, 429 S.E.2d 724 (1993). The reason is because the term "specific intent to kill" is not a precise legal term with a definition which is not readily apparent. *Id.*

Here the defendant challenges the expert's opinion testimony that one of the victim's "gunshot wounds to the head was consistent with an intent to cause death." Under the facts present in this case, we find the term "intent to cause death" to be synonymous with the term "specific intent to kill." Thus, the term "intent to cause death" is

not a precise legal term with a definition which is not readily apparent. *Id.* Consequently, the trial court's admission of the expert witness testimony was proper.

Even assuming *arguendo* that the trial court's admission of the expert witness testimony constituted an error, such error was harmless because the State presented other substantive evidence supporting the conclusion that both victims' deaths were consistent with a specific intent to cause their death. *See State v. Marshall*, 92 N.C. App. 398, 404, 374 S.E.2d 874, 877 (1988).

We conclude that the defendant was given a fair trial, free of prejudicial error.

No prejudicial error.

Judges JOHN and EDMUNDS concur.

FRANCES B. ROGERS, PLAINTIFF v. SPORTSWORLD OF ROCKY MOUNT, INC., RAWL INDUSTRIES, INC., SPORTSWORLD OF ROCKY MOUNT LIMITED PARTNERSHIP, AND T.J.O., INC., DEFENDANTS

No. COA98-972

(Filed 7 September 1999)

1. Negligence— contributory—inconsistent verdict

The trial court erred in instructing the jury to reconsider its allegedly inconsistent verdict finding plaintiff contributorily negligent, yet still awarding damages to plaintiff. The trial court should have accepted the verdict of contributory negligence barring plaintiff from recovery and should have treated the damages answer as surplusage.

2. Witnesses— expert fees—subpoena required

The trial court erred in ordering defendant T.J.O., Inc. to pay plaintiff's expert witness expenses as costs because the expert witness was not served with a subpoena.

Appeal by defendant T.J.O., Inc. from judgment entered 23 October 1997 by Judge Abraham Penn Jones in Nash County Superior Court. Heard in the Court of Appeals 31 March 1999.

Hux, Livermon & Armstrong, L.L.P., by H. Lawrence Armstrong, Jr., for plaintiff-appellee.

Higgins, Frankstone, Graves & Morris, P.A., by David J. Hart, for defendant-appellant T.J.O., Inc.

TIMMONS-GOODSON, Judge.

On 23 January 1993, Frances B. Rogers ("plaintiff") and her family visited Sportsworld of Rocky Mount, Inc., a family-oriented recreational facility where patrons pay a fee to skate on a polished wooden floor. Plaintiff paid an admission fee and obtained skates supplied by Sportsworld. The rental attendant failed to examine the skates to determine if they were in good operating condition. After putting on the skates, plaintiff entered the skating rink and began skating in a counter-clockwise direction. When plaintiff was approximately one-half to three-fourths of the way around the rink, she noticed the skate on her right foot would "stop and release" which prevented her from skating smoothly. Plaintiff was not aware of the specific cause of the problem. Plaintiff could not locate a rink employee to assist her, so she crossed the rink on the defective skate to get to her husband who was located near the side of the rink. When she approached the side of the rink, plaintiff proceeded to exit the rink on her own by stepping up with her right foot first. As plaintiff planted her right foot and brought her left foot forward, the skate on her right foot suddenly unlocked and "jerked to the right," causing plaintiff to fall, breaking her right ankle.

On 22 January 1996, plaintiff filed a complaint alleging negligence against Sportsworld of Rocky Mount, Inc., Rawl Industries, Inc., Sportsworld of Rocky Mount Limited Partnership, and T.J.O., Inc. ("T.J.O.") (collectively "defendants"). At the conclusion of plaintiff's case, all defendants filed motions for directed verdict. The trial court granted the motions of defendants Sportsworld of Rocky Mount, Inc., Rawl Industries, Inc., and Sportsworld of Rocky Mount Limited Partnership, but denied the motion of defendant T.J.O.

During the trial, plaintiff contended that defendant T.J.O. was negligent by failing to use proper care in inspecting and repairing the roller skate; renting a defective skate to plaintiff; having an unreasonably unsafe condition on the premises; and failing to provide adequate supervision and assistance to skaters. Defendant T.J.O. countered with evidence that plaintiff was contributorily negligent by failing to remove herself from the rink in the most expeditious manner after discovering she was skating on a defective skate.

Plaintiff's case against T.J.O. proceeded to the jury. The issues submitted to the jury were answered as follows:

1. Was the plaintiff injured by the negligence of the defendant?

   ANSWER: Yes.

2. Did the plaintiff by her own negligence contribute to her injury?

   ANSWER: Yes.

3. What amount, if any, is plaintiff entitled to recover from defendant for damages due to her injuries?

   ANSWER: $15,500.00.

When the verdict was read, the judge instructed the jury as follows:

> After I received your verdict sheet, it's incumbent upon me to inform you that in North Carolina a yes response on Issue Number Two as to contributory negligence precludes your making any answer on Issue Number Three. In light of that, I'm going to ask you to go back to the jury room and reconsider your answer on Number Two and Number Three—your answers.

After deliberating approximately 20 minutes, the jury returned to the courtroom having changed their answer to issue #2 from "Yes" to "No." The jury also changed their answer to issue #3 by reducing the damages award from $15,500.00 to $10,000.00. The second verdict was accepted by the court and the judgment was entered. Additionally, the court assessed $1,000.00 in cost to defendant. Defendant T.J.O. excepted and appealed.

The issues presented by this appeal are (1) whether the trial court erred in concluding that the original jury verdict was "inconsistent" and in resubmitting the issues of contributory negligence and damages to the jury, and (2) whether the trial court erred in assessing witness' fees to defendant T.J.O. as part of the costs of the action.

[1] Defendant T.J.O. first argues that "the trial court erred in refusing to enter judgment on the first verdict returned by the jury and striking its finding as to damages." We agree.

In North Carolina, a jury may be requested to return either a general or special verdict. N.C. Gen. Stat. § 1A-1, Rule 49(a) (1990). Usually, civil cases are resolved by a general verdict, which is con-

sistent with the proper function of a jury to consider the law and facts to achieve justice for the parties. *See Porter v. R.R.*, 97 N.C. 66, 2 S.E. 580 (1887). Rule 49(a) of the Rules of Civil Procedure defines a general verdict as "that by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant." N.C.G.S. § 1A-1, Rule 49(a). "In arriving at a general verdict, the jurors take the law as given by the court and apply the law to the facts as they find them to be and reach a general conclusion[.]" *State v. Ellis*, 262 N.C. 446, 449, 137 S.E.2d 840, 843-44 (1964). A verdict is not complete until it is accepted by the court. *Edwards v. Motor Co.*, 235 N.C. 269, 272, 69 S.E.2d 550, 552 (1952). However,

> "it is the duty of the presiding judge, before accepting a verdict, to scrutinize its form and substance to prevent insufficient or inconsistent findings from becoming a record of the court. Therefore, where the findings are indefinite or inconsistent, the presiding judge may give additional instructions and direct the jury to retire again and bring in a proper verdict[.]"

Id. When the findings are consistent, yet rejected by the court as a matter of law, the appellate court will remand the cause for appropriate proceedings. *See id.* at 272, 69 S.E.2d at 553.

While no North Carolina case has defined the phrase "inconsistent verdict," previous cases with similar procedural facts as the case at bar have invariably held that when a jury finds both that plaintiff was injured by the negligence of defendant and that plaintiff by her own negligence contributed to her injury, and subsequently assesses damages, plaintiff is not entitled to recover. *Jordan v. Flake*, 264 N.C. 362, 363, 141 S.E.2d 486, 487 (1965); *Swann v. Bigelow*, 243 N.C. 285, 90 S.E.2d 396 (1955); *Butler v. Gantt*, 220 N.C. 711, 18 S.E.2d 119 (1942); *Allen v. Yarborough*, 201 N.C. 568, 160 S.E. 833 (1931). "On the contrary, the defendant is entitled to judgment on the verdict, for such a verdict is not essentially inconsistent." *Jordan*, 264 N.C. at 363, 141 S.E.2d at 457.

The facts in *Swann* are similar to the case at bar. In *Swann*, the jury determined that the defendant was negligent and the plaintiff was contributorily negligent, yet awarded damages to plaintiff. The trial court instructed the jury that its answers were inconsistent and directed it to reconsider its verdict as to contributory negligence and damages. The jury reconvened and changed its contributory negligence answer from "yes" to "no." The Supreme Court held that the trial court erred because the jury's original answers were not incon-

sistent. The Supreme Court further held that the court should have accepted the verdict and rendered judgment thereon, treating the damages answer as surplusage. *Swann*, 243 N.C at 286, 90 S.E.2d at 397.

We conclude that the case at bar is in accordance with *Swann*. Thus, it is clear that the presiding judge committed error in holding that the jury's first answers to issues #2 and #3 were "inconsistent." On the jury's first verdict sheet, they made factual findings that both plaintiff and defendant T.J.O. were negligent. Thus, under the general doctrine of contributory negligence, plaintiff was barred from any recovery. *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 454, 406 S.E.2d 856, 861 (1991). Therefore, we conclude that the jury's answer to issue #3 awarding damages to plaintiff was surplusage and must be stricken and disregarded in rendering judgment. *See Summey v. Cauthen*, 283 N.C. 640, 649, 197 S.E.2d 549, 555 (1973) (recognizing that if the jury finds the plaintiff contributorily negligent, any damage award in the plaintiff's favor must be stricken and disregarded).

[2] Lastly, defendant T.J.O. argues that the trial court did not have the authority to order the company to pay expert witness expenses as costs. We agree.

A trial court may only award costs in accordance with statutory authority. *Town of Chapel Hill v. Fox*, 120 N.C. App. 630, 632, 463 S.E.2d 421, 422 (1995). The statutes governing the assessment of costs are North Carolina General Statutes sections 6-20 (1997) and 7A-314 (1995). *Brandenburg Land Co. v. Champion International Corp.*, 107 N.C. App. 102, 103, 418 S.E.2d 526, 528 (1992). Witness' fees are not recognized as costs unless an expert witness is subpoenaed. *Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271, *cert. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Unless otherwise provided by law, costs may be allowed or not, in the discretion of the trial court. *Id.* Section 7A-314(d) of the General Statutes states that "[a]n expert witness, . . . shall receive such compensation and allowances as the court, . . . in its discretion, may authorize." N.C. Gen. Stat. § 7A-314(d) (Cum. Supp. 1998).

In the present case, Dr. Gregory Nelson and Dr. Adolpho H. Marsigli provided expert deposition testimony. Dr. Nelson testified that he was not served with a subpoena. Therefore, the trial court abused its discretion and erroneously assessed Dr. Nelson's $700.00 expert witness fee upon defendant. It is unclear whether Dr. Marsigli

was subpoenaed. During Dr. Marsigli's deposition testimony, he appeared not to know whether he was subpoenaed. In fact, as defendant T.J.O. contends, it appeared that Dr. Marsigli was unsure of exactly what a subpoena was. Based on this evidence, it is not appropriate for this Court to examine whether the trial court's assessment of Dr. Marsigli's expert witness costs was an abuse of discretion. Thus, we remand this question to the trial court to determine whether Dr. Marsigli was subpoenaed and to consider if a different cost assessment would be appropriate. *See id.*

We reverse the judgment of the trial court and remand this case for entry of judgment in accordance with this opinion.

Reversed and Remanded.

Judges LEWIS and HORTON concur.

RAQUEL VALLES DE PORTILLO, GUARDIAN AD LITEM FOR CARLOS ISAAC PORTILLO VALLES, MINOR AND ZAIDA VIVER, GUARDIAN AD LITEM FOR DOMINIQUE L. VIVER, MINOR AND JAZMIN M. VIVER, MINOR CHILDREN OF JUAN PORTILLO RIVAS (DECEASED), PLAINTIFFS v. D.H. GRIFFIN WRECKING CO., INC., EMPLOYER, AND CIGNA PROPERTY & CASUALTY CO., CARRIER, DEFENDANTS

No. COA98-869

(Filed 7 September 1999)

1. **Workers' Compensation— death benefits—natural parent—general guardian—appointed person**

The Industrial Commission erred by holding that death benefits payable to a minor child in the custody of a natural parent can be made through a general guardian, but the Commission properly determined that such payments can be made through some other person as appointed by a court of competent jurisdiction.

2. **Workers' Compensation— sanctions and attorney fees—nonpayment excused—appeal brought by insurer**

The Industrial Commission did not abuse its discretion when it refused to assess sanctions and attorney fees against defendants for refusal to make death benefit payments to the child's guardian ad litem mother because the Executive Secretary ordered payments could only be made to a general guardian, a

mandate with which defendant could not comply, and the appeal was brought by plaintiff instead of the insurer.

Appeal by plaintiff from opinion and award entered 20 April 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 March 1999.

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

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare, for defendants-appellees.

TIMMONS-GOODSON, Judge.

This appeal presents an issue of first impression in this State: whether the Industrial Commission may order that death benefits payable to a minor child in the custody of a natural parent be paid to the minor child "through a general guardian or some other person as appointed by a court of competent jurisdiction." We conclude that a general guardian is not a proper recipient of death benefits due a minor child in the custody of a natural parent. However, the Commission may order that such payments be made through "some other person as appointed by a court of competent jurisdiction." Therefore, we modify and affirm.

Juan Portillo-Rivas ("decedent") died on 18 January 1995 as a result of a compensable injury suffered while cutting down a steel sign pole which struck him. A claim for death benefits pursuant to North Carolina General Statutes section 97-38 (1991) was made on behalf of decedent's three alleged, illegitimate minor children: Carlos Isaac Portillo Valles ("Carlos"); Dominique L. Viver ("Dominique"); and Jazmin M. Viver ("Jazmin") (collectively, "plaintiffs"). Carlos' mother, Raquel Valles de Portillo, filed the action as his guardian ad litem. The mother of Dominique and Jazmin, Zaida Viver ("Viver"), served as their guardian ad litem.

By Agreement of Final Settlement and Release ("Agreement"), D.H. Griffin Wrecking Company, Inc. and Cigna Property & Casualty Company (collectively, "defendants") agreed to pay $112.27 per week on behalf of two of decedent's three illegitimate children, Jazmin and Carlos, until they reached the age of 18. Deputy Commissioner Edward Garner, Jr. entered an order approving the agreement. Neither the Order of the Deputy Commissioner nor the Agreement

specifically addressed the issue of who was to be the proper recipient of benefits paid on behalf of Jazmin and Carlos. Because of this omission, defendants refused to pay benefits to Jazmin and Carlos until a guardian was appointed. Plaintiffs subsequently filed motions with the Executive Secretary to order defendants to pay pursuant to the Agreement. Plaintiffs also requested penalties and attorneys' fees.

On 21 January 1997, the Executive Secretary entered an order directing defendants to pay benefits to Jazmin and Carlos through a general guardian. The Order cited Industrial Commission Rule 604, which provides that compensation payable to a minor child shall not be paid directly to the guardian ad litem. Instead, the Executive Secretary ordered that compensation be paid pursuant to North Carolina General Statutes sections 97-48 and 97-49.

Defendants began paying benefits on behalf of Carlos through his general guardian. Defendants did not make any payments on behalf of Jazmin for whom no general guardian had been appointed. Jazmin was in the custody of a natural parent, her mother. Counsel for Jazmin appealed to the Industrial Commission.

On 20 April 1998, the Commission held that "the interest of all parties would be best protected by an order providing that payments shall be made only to the general guardian or to some other proper person as appointed by a court of competent jurisdiction." Counsel for Jazmin appeals the Commission's order.

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[1] Plaintiff argues that the Commission erred in ordering the appointment of "a general guardian or some other person as appointed by a court of competent jurisdiction" as the proper recipient of the benefits paid on behalf of Jazmin. Specifically, plaintiff argues that a mother is the natural guardian of a minor, therefore, a Clerk of Superior Court lacks the authority to appoint a guardian for a minor.

Pursuant to Rule 604(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission, minors are allowed to file suit through a guardian ad litem. However, under Rule 604(2), in no event shall any compensation be paid directly to the guardian ad litem. Instead, Rule 604(2) provides that "compensation payable to a minor or incompetent shall be paid as provided in N.C.Gen Stat. § 97-48 and N.C. Gen. Stat. § 97-49."

North Carolina General Statutes section 97-48 states in pertinent part that compensation relieving the employer of any liability may be paid "to a *widow or widower* for her or his use, or for her or his use and the use of the child or children." N.C. Gen. Stat. § 97-48(a) (1991) (emphasis added). Once the compensation is paid to the widower or widow, his or her written receipt thereof shall acquit the employer. *Id.* However, the Industrial Commission may change the terms of any award "with respect to whom compensation for the benefit of such minors or incompetents shall be paid" in order to protect the interests of such minors and incompetents. *Id.*

In the case *sub judice*, Viver acted as Jazmin's guardian ad litem. Therefore, under Rule 604(2), Viver is precluded from receiving payments on behalf of Jazmin. Similarly, Viver is not the decedent's widow for purposes of North Carolina General Statute section 97-48. Therefore, payment of compensation to her would not acquit the employer of liability for compensation owed. N.C.G.S. § 97-48(a) (1991).

The Commission, in its discretion, had the authority to change the terms of the award and order that it would be in the best interest of the child for Viver to receive death benefit payments on Jazmin's behalf. However, the Commission chose not to do so and ordered the appointment of a general guardian or some other person as appointed by a court of competent jurisdiction.

We agree with plaintiff that a Clerk of Superior Court may not appoint a "general guardian" for a minor if a natural guardian, such as a biological mother, exists. N.C. Gen. Stat. § 35A-1224(a) (1995). However, the General Statutes hold that a Clerk of Superior Court may appoint "some other proper person" for Jazmin, which may include a guardian of the estate. *See* N.C. Gen. Stat. § 35A-1224(a) (1995). A guardian of the estate is intrusted with the control of a minor's property. N.C. Gen. Stat. § 35A-1202(9) (Cum. Supp. 1998). However, a guardian of an estate does not limit in any way or diminish the parental rights of a parent or natural guardian. *Id.* Jazmin clearly has an estate consisting of death benefits under the Workers Compensation Act.

Our scope of review of the Commission's discretionary order granting or denying relief is extremely limited. Such an order may be reversed on appeal only in those exceptional cases in which manifest abuse of discretion is clearly demonstrated from the record. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). We have already

concluded that the evidence of the apparent conflicts between Chapter 35 and North Carolina General Satutes section 97-48 was adequate to support the Commission's conclusion. We find no abuse of discretion by the Commission in ordering the appointment of some other person as appointed by a court of competent jurisdiction to receive benefits on behalf of Jazmin.

For the reasons stated, we modify the Commission's order by vacating that portion providing that defendant pay death benefits on Jazmin's behalf through "a general guardian" and affirm that portion of the order providing that such benefits be paid "through some other proper person as appointed by a court of competent jurisdiction."

[2] Finally, plaintiff requested that the Full Commission impose sanctions and attorney's fees on defendants based on their refusal to make payments to the guardian ad litem for Jazmin. Sanctions may be assessed if payment of compensation is not timely made "unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment." N.C. Gen. Stat. § 97-18(g) (Cum. Supp. 1998). In the present case, nonpayment was excused by the Commission because the Executive Secretary ordered that payments be made only to a general guardian, a mandate with which defendant could not comply.

Attorney's fees may be awarded where there has been an appeal "brought by the insurer." N.C. Gen. Stat. § 97-88 (1991). In the case *sub judice*, the appeal was brought by plaintiff. Therefore, we conclude that the Industrial Commission did not abuse its discretion when it refused to assess sanctions and attorney's fees against defendants.

MODIFIED AND AFFIRMED.

Judges MARTIN and HUNTER concur.

REGINALD B. INMAN, PLAINTIFF-APPELLANT v. SYLVIA M. INMAN, DEFENDANT-APPELLEE

No. COA98-1029

(Filed 7 September 1999)

Appeal and Error— preservation of issues—timely objection—timely notice

Plaintiff-husband did not preserve his right to appeal the trial court's decision that the separation and property settlement agreement did not bar defendant-wife from seeking equitable distribution of property acquired by the parties after their reconciliation because he did not make a timely objection to the trial court's ruling pursuant to N.C. R. App. P. 10(b)(1), and he did not appeal from the entry of the trial court's order within thirty days of its entry pursuant to N.C. R. App. P. 3(c).

Appeal by plaintiff from judgment entered 17 April 1998 by Judge V. Bradford Long in Randolph County District Court. Heard in the Court of Appeals 17 August 1999.

C. Orville Light for the plaintiff-appellant.

O'Briant, Bunch, Robins & Stubblefield, by Julie H. Stubblefield, for the defendant-appellee.

HORTON, Judge.

Reginald B. Inman (plaintiff) and Sylvia M. Inman (defendant) were married on 18 October 1987 and separated on 14 April 1991. On 19 April 1991, the parties entered into a settlement of all matters arising from their marriage. In the portion of their "Separation Agreement and Property Settlement" (Agreement) labeled "Separation Agreement" the parties agreed to live separate and apart from each other, and in the portion labeled "Property Agreement" they agreed on a division of their real and personal property. In a portion of the Agreement labeled "Final Provisions" the parties agreed that they were making a settlement under the North Carolina Equitable Distribution Act and were executing the Agreement pursuant to the provisions of N.C. Gen. Stat. § 50-20(d) (1995). The Agreement contained the following provision relating to the effect of a reconciliation on the property settlement portion of the Agreement:

> 11. EFFECT OF RECONCILIATION ON PROPERTY SETTLEMENT. In the event of reconciliation and resumption of the marital relationship between the parties, the provisions of this Agreement for settlement of property rights shall nevertheless continue in full force and effect without abatement of any term or provision hereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of reconciliation.

The parties reconciled in April 1992 and lived together as husband and wife until May 1995, at which time they again separated. The plaintiff filed for absolute divorce in September 1996. The defendant filed a verified answer, in which she asserted counterclaims for equitable distribution, postseparation support, permanent alimony, and attorney fees. The plaintiff then filed a reply to the defendant's counterclaims, pleading the Agreement in bar, and praying that the defendant's counterclaims be dismissed with prejudice.

On 11 February 1997, a judgment of absolute divorce was entered without prejudice to the other pending claims. On 10 June 1997, the trial court considered plaintiff's motion to dismiss and concluded that the portion of the Agreement "purporting to waive the Defendant's rights to future alimony and/or support is void as against public policy." The trial court further concluded that the defendant's counterclaim for equitable distribution was barred by the Agreement as to property acquired before the reconciliation of the parties; however, as to property acquired after the parties reconciled the trial court ruled that equitable distribution was not barred. The order was signed by the trial court on 10 June 1997 and filed on 11 June 1997 in the Office of the Clerk of Court for Randolph County. The record reflects no objection to the order by either party, nor was notice of appeal entered by either party.

After numerous continuances, a pretrial order was executed by all parties and counsel on 3 February 1998. The order provided in pertinent part as follows:

> 2. Plaintiff and Defendant were married October 18, 1987 then separated April, 1991 and entered into a Separation Agreement and Property Settlement. Plaintiff contends that he and the Defendant reconciled on or about May 1, 1992, the Defendant contends that she and the Plaintiff reconciled sometime in April, 1992. Only property acquired after the reconcilia-

tion and improvements made to Plaintiff's property after the date and time of reconciliation are included.

3. The Plaintiff and Defendant again separated May 19, 1995.

4. The date of valuation is May 19, 1995.

5. An equal division is an equitable division.

The pretrial order then set out several issues with regard to classification, valuation, and distribution of those items of property acquired after the parties' reconciliation. Following a bench trial on 18 March 1998, the trial court concluded that the parties had acquired marital property valued at a total of $13,909.65 after their reconciliation. The trial court further found that all marital property was in the possession of the plaintiff, and distributed all items of marital property to plaintiff. Plaintiff was ordered to pay a distributive award of $6,954.82 (one-half of the value of the marital estate) to the defendant within ten days.

On 15 April 1998, plaintiff caused a notice of appeal to be filed with the Clerk and served a copy of the same on counsel for the defendant. No written judgment had been entered at that time. The Notice of Appeal read as follows:

> NOW COMES the Plaintiff by and through counsel, and excepts and gives Notice of Appeal to the North Carolina Court of Appeals from the Judgment of the Court on March 18, 1998, entered in this cause on _____, and filed on _____, the Honorable V. Bradford Long presiding.
>
> The Plaintiff, by and through his counsel of record, specifically objects and takes exception to those parts of the judgment entered in this cause as aforesaid to wit, the Plaintiff's Motion to Dismiss.
>
> The Plaintiff reserves further exceptions to be served with the Case on Appeal in this cause.

A written equitable distribution judgment was entered on 17 April 1998.

On appeal, plaintiff argues one question: "Does the separation agreement and property settlement as written bar the defendant from claiming equitable distribution in property acquired after a reconcili-

ation?" We hold that plaintiff did not preserve his right to appeal from the order entered on 11 June 1997 in which the trial court ruled that the separation and property settlement agreement did not bar defendant from seeking equitable distribution of property acquired by the parties after their reconciliation.

Rule 3 of the North Carolina Rules of Appellate Procedure specifically directs that an "[a]ppeal from a judgment or order in a civil action . . . must be taken within 30 days after its entry." N.C.R. App. P. 3(c). The notice of appeal must be filed with the clerk of superior court, served on opposing parties, and "shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken . . . ." N.C.R. App. P. 3(d). In this case, the plaintiff did not appeal from the entry of the trial court's order filed 11 June 1997, which partially denied his plea in bar, within thirty days of its entry.

Our Supreme Court has recently ruled that, if an interlocutory order is entered during the pendency of litigation, a party can later seek appellate review of that interlocutory order under the provisions of N.C. Gen. Stat. § 1-278, which provides that "[u]pon an appeal from a *judgment*, the court may review any *intermediate order* involving the merits and necessarily affecting the judgment." *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51, 510 S.E.2d 156, 159 (1999). In *Floyd*, however, the Supreme Court makes it clear that the right to appeal from such intermediate orders is not unlimited: first, N.C. Gen. Stat. § 1-278 applies only to orders which are interlocutory and thus not immediately appealable; second, the appellant must have preserved his right to appeal by a "timely objection to the order" from which he seeks to appeal. *Id.* In *Floyd*, the ruling to which appellant objected was made during the actual trial of the case and only days before final judgment in that case. The Supreme Court recited in its opinion the actions of the appellant in *Floyd* which preserved the right of appeal:

> In the instant case, the order compelling election of remedies was entered on 1 May 1995, two days before the end of the trial. The record on appeal reflects that *plaintiffs' timely objection to the order was overruled. . . .*
>
> As noted, *plaintiffs duly objected to the election of remedies order at trial* and gave timely notice of appeal from the 19 May 1995 final judgment entered by the trial court. Accordingly, pursuant to N.C.G.S. § 1-278, we find that the interlocutory order

> compelling election of remedies entered on 1 May 1995 was reviewable on appeal along with the final judgment of 19 May 1995. Furthermore, we note that it is quite clear from the record that plaintiffs sought appeal of the election order. *The objection at trial to the election order properly preserved the question for appellate review. See* N.C.R. App. P. 10(b)(1).

Id. at 51-52, 510 S.E.2d at 159 (emphasis added).

Rule 10(b)(1) of the Rules of Appellate Procedure provides in part that

> [i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. . . . Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal *by objection noted or which by rule or law was deemed preserved or taken without any such action*, may be made the basis of an assignment of error in the record on appeal.

N.C.R. App. P. 10(b)(1) (emphasis added). In this case, plaintiff made no such objection to the ruling of the trial court which partially denied his plea in bar, nor did he preserve his right to appeal in any other manner. Thus, assuming *arguendo* that the order of 11 June 1997 was an interlocutory order, that order is not reviewable on this appeal.

As to the equitable distribution judgment entered herein on 17 April 1998 from which plaintiff did enter notice of appeal, he brings forward no assignments of error with regard to the judgment, subjecting his appeal to dismissal. In the interests of justice, however, we have carefully reviewed the entire record and find no reason to disturb the judgment of the trial court.

Appeal dismissed.

Judges GREENE and TIMMONS-GOODSON concur.

EDWARD W. ANDERSON, PLAINTIFF v. ATLANTIC CASUALTY INSURANCE COMPANY, DEFENDANT

No. COA98-1466

(Filed 7 September 1999)

1. **Appeal and Error— appealability—interlocutory order—summary judgment denied—certification erroneous—no just reason for delay**

   The trial court's attempt to grant Rule 54(b) certification based on the order denying defendant's motion for summary judgment fails because the claims have not been finally adjudicated, and the trial court's determination that there is "no just reason for delay" of the appeal is not binding on appellate courts.

2. **Appeal and Error— appealability—interlocutory order—substantial right**

   Defendant's appeal from the denial of his summary judgment motion, based on the issues of whether plaintiff's action is barred by a general release and whether N.C.G.S. § 20-279.21(b)(4) prevents plaintiff from compelling defendant to participate as a named defendant, does not involve a substantial right entitling defendant to an immediate appeal.

Appeal by defendant from order entered 16 September 1998 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 August 1999.

Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by James W. Pope and John A. Stoker, for defendant-appellant.

No brief for plaintiff-appellee.

JOHN, Judge.

Defendant purports to appeal the trial court's order denying its motion for summary judgment. Defendant's appeal is interlocutory and must be dismissed.

Plaintiff filed the instant action *pro se* seeking the "balance" of damages incurred in a 1 October 1994 automobile collision. Plaintiff alleged that at all pertinent times he maintained in effect a policy of automobile insurance issued by defendant providing, *inter alia*, underinsured motorist ("UIM") coverage.

Defendant subsequently moved for summary judgment asserting the action "[was] improperly brought against [defendant] as named defendant in violation of [N.C.G.S. § 20-279.21(b)(4) (1993)]," and that plaintiff's claim was barred as a matter of law by virtue of plaintiff's execution of a general release without preserving his right to pursue a UIM claim against defendant. The trial court denied defendant's motion.

[1] It is well-settled that an order denying a motion for summary judgment is interlocutory, and 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); *see also Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) (grant of partial summary judgment, as an order not completely disposing of case, is interlocutory and there is ordinarily no right of appeal). This rule "prevent[s] 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). As our Supreme Court has noted,

> [t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.

Veazey v. Durham, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950).

Nonetheless, immediate appeal may be permitted pursuant to N.C.G.S. § 1A-1, Rule 54(b) (1990) (Rule 54(b)) ("court may enter a final judgment . . . only if there is no just reason for delay and it is so determined in the judgment"), or under N.C.G.S. § 1-277 (1996) and N.C.G.S. § 7A-27(d) (1995) (interlocutory order may be appealed if trial court's decision deprives appellant of substantial right). *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).

Although "denial of a motion for summary judgment is not a final judgment," *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) (citations omitted), this matter was certified by the trial court pursuant to Rule 54(b) as being immediately appealable. However, Rule 54(b) "does not authorize the appeal of claims that have not been finally adjudicated." *Kirkman v. Wilson*, 86 N.C. App. 561, 564, 358 S.E.2d 550, 552 (1987); *see also Industries, Inc. v.*

Insurance Co., 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) (trial court's denomination of its decree as "a final . . . judgment does not make it so"); *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983) (trial court's finding "there is no just reason for delay" "does not make the denial of summary judgment immediately appealable because it is not a final judgment"); *Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147, *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991) ("denial of a motion for summary judgment is not a final judgment, and is generally not immediately appealable, even if the trial court has attempted to certify it for appeal under Rule 54(b)"); *Fraser*, 75 N.C. App. at 655, 331 S.E.2d at 218 (orders were not final determinations of defendants' rights and were dismissed on appeal despite trial court's Rule 54(b) certification).

Similarly, the trial court's determination that there is "no just reason for delay" of appeal, while accorded deference, *see DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998), cannot bind the appellate courts because "ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court," *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984); *see also McNeil v. Hicks*, 111 N.C. App. 262, 264, 431 S.E.2d 868, 869 (1993), *disc. review denied*, 335 N.C. 557, 441 S.E.2d 118 (1994) (Rule 54(b) certification "is not dispositional when the order appealed from is interlocutory"). Further, "application of the substantial right analysis" is "prerequisite to the [trial] court's" determination there existed "no just reason to delay the appeal." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 249, 507 S.E.2d 56, 61-62 (1998).

In the case *sub judice*, there has been no adjudication as to any claim against defendant within the meaning of Rule 54(b) and thus no final judgment has been entered. *See Howze v. Hughs*, 134 N.C. App. 493, 495, 518 S.E.2d 198, 199 (1999) (order denying motion to dismiss "leaves the issues as to *all* parties and *all* claims open for future adjudication by the court" (emphasis in original)). Hence, the trial court's attempt at Rule 54(b) certification was ineffective because it cannot by certification make its decree "immediately appealable [if] it is not a final judgment." *Lamb*, 308 N.C. at 425, 302 S.E.2d at 871; *see also Industries*, 296 N.C. at 491, 251 S.E.2d at 447.

[2] Notwithstanding, defendant also argues the court's order denying its motion for summary judgment affects a substantial right. *See*

Cagle, 111 N.C. App. at 247, 431 S.E.2d at 803 (denial of motion for summary judgment, even if trial court has attempted to certify it for appeal under Rule 54(b), generally not appealable unless affecting a "substantial right"). Under G.S. §§ 1-277(a) and 7A-27(d)(1), an otherwise interlocutory order may be appealed upon a showing that: (1) the order affects a right that is indeed "substantial," and (2) "enforcement of that right, absent immediate appeal, must be 'lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.' " *First Atl. Mgmt. Corp.*, 131 N.C. App. at 250, 507 S.E.2d at 62 (citation omitted).

We first note the trial court's attempted certification for appeal reflects no basis upon which it determined there existed "no just reason for delay," thus we are unable to conclude it applied the requisite substantial right analysis prior to certification. *See id.* at 249, 507 S.E.2d at 61 (appellate review facilitated when trial court sets forth basis for determination for "no just reason to delay"). Further, while it is true our courts have recognized that matters involving the defense of sovereign immunity affect a substantial right and may thus be immediately appealable, *Southern Furniture Co. v. Dept. of Transportation*, 122 N.C. App. 113, 115, 468 S.E.2d 523, 525 (1996), *disc. review improvidently allowed*, 346 N.C. 169, 484 S.E.2d 552 (1997), defendant's attempts to analogize the case *sub judice* to one involving the defense of absolute or qualified immunity fail.

In the case *sub judice*, the issues presented on appeal concern whether plaintiff's action is barred by a general release and whether G.S. § 20-279.21(b)(4) prevents plaintiff from compelling defendant to participate as a named defendant herein. Indeed, the only possible "injury" defendant will suffer if not permitted immediate appellate review is the necessity of proceeding to trial before the matter is reviewed by this Court. Avoidance of trial is not a substantial right entitling a party to immediate appellate review. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983).

Based on the foregoing, defendant's appeal must be dismissed.

Appeal dismissed.

Judges HUNTER and SMITH concur.

PORTIA REESE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CARLO REESE, PLAINTIFF v. LEE TODD BARBEE, DEFENDANT

No. COA98-1487

(Filed 7 September 1999)

1. Appeal and Error— law of the case—same issue—earlier appellate ruling binding

Although this appeal involves a different defendant-unnamed uninsured motorist insurer, the doctrine of law of the case provides that the earlier appellate ruling on the same issue of the applicable limitations period for service upon an insurance company providing coverage for an uninsured motorist is binding on this case because both appeals arose out of a single action, involve the same facts, and raise the identical issue of law.

2. Collateral Estoppel and Res Judicata— claims precluded—issues precluded

Although this appeal involves a different defendant-unnamed uninsured motorist insurer, plaintiff is precluded by res judicata from re-litigating the identical issue of the applicable limitations period for service upon an insurance company providing coverage for an uninsured motorist.

Appeal by plaintiff from order entered 14 September 1998 by Judge B. Craig Ellis in Wake County Superior Court. Heard in the Court of Appeals 16 August 1999.

Currie, Becton & Stewart, by Elwood Becton and Pipkin, Knott, Clark & Berger, L.L.P., by Michael W. Clark and Ashmead P. Pipkin, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Stephanie Hutchins Autry, for unnamed defendant-appellee North Carolina Farm Bureau Mutual Insurance Company, Inc.

Yates, McLamb & Weyher, L.L.P., by Rodney E. Pettey, for defendant-appellee Lee Todd Barbee.

JOHN, Judge.

Plaintiff appeals the trial court's order allowing unnamed defendant North Carolina Farm Bureau Mutual Insurance Company's (Farm Bureau) motion to dismiss. We affirm the trial court.

Pertinent factual and procedural information includes the following: On 15 July 1994, defendant Lee Todd Barbee (defendant) was involved in an automobile collision with a vehicle in which Carlo Reese (decedent), the son of plaintiff Portia Reese, was a passenger. Decedent subsequently died from injuries allegedly sustained in the collision.

On 26 July 1996, plaintiff commenced the instant wrongful death action, seeking recovery from unnamed defendants Nationwide Mutual Insurance Company (Nationwide) and North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) under the uninsured motorist provisions of respective insurance policies which plaintiff claimed provided coverage for decedent. Only Farm Bureau is involved in the present appeal.

An original summons and subsequent alias and pluries summonses were obtained until successful service upon defendant occurred on 10 October 1996. Summons was not issued to Farm Bureau until 25 April 1997 and was served 28 April 1997. In its answer, Farm Bureau raised, *inter alia*, the defense that plaintiff's claims were barred by the statute of limitations.

Summons upon Nationwide was not issued until 24 April 1997, and its subsequent motion to dismiss on grounds plaintiff's claims were barred by the applicable limitations period was allowed by the trial court. On plaintiff's appeal, this Court affirmed the ruling, holding the action against Nationwide had not been commenced within two years of decedent's death on 28 July 1994 as required by N.C.G.S. § 1-53(4) (1996). *Reese v. Barbee*, 129 N.C. App. 823, 501 S.E.2d 698 (1998), *aff'd*, 350 N.C. 60, 510 S.E.2d 374 (1999).

Farm Bureau filed a similar motion to dismiss plaintiff's claim on 17 June 1998. The motion was allowed and plaintiff appeals.

Plaintiff maintains this Court is not bound by the previous opinion in *Reese*, noting that our Supreme Court, being evenly divided, stated the decision was without precedential value. *Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999). Farm Bureau responds that the earlier decision nonetheless constituted the law of the instant case and, further, that the doctrine of res judicata compels affirmance of the trial court's order. We conclude Farm Bureau has the better of the argument.

> Where an appellate court decides questions and remands a case for further proceedings, its decisions on those questions become

> law of the case, both in the subsequent proceedings in the trial court and upon a later appeal, where the same facts and the same questions of law are involved.

Sloan v. Miller Building, Corp., 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997).

[1] Although the present appeal involves a different unnamed defendant, both the current and previous appeals arose out of a single action, involve the same facts, and have raised the identical issue of law. Moreover, both Nationwide and Farm Bureau became parties pursuant to N.C.G.S. § 20-279.21(b)(3)(a) (1993). Accordingly, the earlier appellate ruling on the issue raised herein is binding under the doctrine of law of the case. *See also In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989) (subsequent panel of Court of Appeals bound by decision of earlier panel on same issue, even if in a different case, unless precedent has been overturned by a higher court).

[2] In addition, the doctrine of res judicata prevents a plaintiff, who has once litigated an issue and had it finally determined adversely, from re-litigating the identical issue against a second defendant. *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 170, 105 S.E.2d 655, 657 (1958). In the case *sub judice*, the issue of the applicable limitations period for service upon an insurance company providing coverage for an uninsured motorist has earlier been litigated by plaintiff and determined adversely to her. The circumstance that the present appeal involves a different uninsured motorist insurer is of no consequence. *See id.*

Affirmed.

Judges HUNTER and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 AUGUST 1999

AKINS v. CITY OF THOMASVILLE No. 98-1142-2	Davidson (96CVS1423) (95CVS1977)	Affirmed in part, Reversed in part, and remanded
BETHUNE v. BETHUNE No. 98-762	Harnett (96CVD1209)	Affirmed
BRENNER v. MAIER No. 98-886	Watauga (94CVS220)	Affirmed
BUCHANAN v. CITY OF THOMASVILLE No. 98-1621-2	Davidson (97CVS2409)	Affirmed
CITY OF CHARLOTTE v. BLYTHE CONSTR., INC. No. 98-870	Mecklenburg (95CVS5154)	I. No error as to defendant's appeal. II. Affirmed as to plaintiff's appeal.
CLAYTON v. McCLINTOCK No. 98-900	Guilford (96CVS7980)	Affirmed
CRAIG v. CLEARY No. 98-809	Durham (95CVS0029)	No Error
DONALDSON v. N.C. DEP'T OF HUMAN RES. No. 98-1277	Craven (96CVS1654)	Affirmed
HARTWELL v. MAHAN No. 98-890	Davidson (95CVD950)	Affirmed
HILL v. MORTON No. 98-983	Forsyth (91CVS5839)	Vacated in part and dismissed in part
JORDAN v. JORDAN No. 98-1244	Davie (97CVD407)	Affirmed
LINEBERGER v. NATIONWIDE MUT. INS. CO. No. 98-1063	Gaston (98CVS1750)	Affirmed
LYNN v. BURNETTE No. 98-1303	Durham (96CVS02815)	Dismissed
ROSS v. ROSS No. 98-967	Onslow (96CVD2454)	Affirmed
STATE v. GRAHAM No. 98-955	New Hanover (97CRS8961)	No Error
STATE v. HOWIE No. 98-1030	Mecklenburg (95CRS56350)	No Error

STATE v. SOUSA No. 98-1123	Rowan (96CRS00459) (96CRS00460) (96CRS00461) (96CRS00462) (96CRS00463) (96CRS00464) (96CRS00465)	No Error
STATE v. STANLEY No. 98-1139	Johnston (98CRS2550)	New Trial
WILLIAMS v. CITY OF WILMINGTON No. 98-788	Ind. Comm. (545262)	Affirmed

FILED 7 SEPTEMBER 1999

ADAMS v. RJRA-I TRUST No. 98-1311	Forsyth (96CVS5021)	No Error
BEAVERS v. UNLIMITED TREE SERV. No. 98-1627	Ind. Comm. (453229)	Affirmed
CANEEL COVE HOMEOWNERS ASS'N v. COURTLAND DEV., INC. No. 98-598	New Hanover (91CVS2808)	Reversed
COLLIER v. STAMPER No. 98-1344	Guilford (93CVS7876)	Affirmed
GOGGINS v. BALATSIAS No. 98-1195	Mecklenburg (97CVS16564)	Affirmed
GORE v. KINSTON SERV., INC. No. 98-1158	Ind. Comm. (633744)	Affirmed
GUILFORD COUNTY v. TURLINGTON No. 98-1256	Guilford (87CVD2868)	Affirmed
HANSEN v. HANSEN No. 98-1043	Wake (96CVD08358)	Remanded for purposes of clerical modification and affirmed.
HELMS v. BAUCOM No. 98-1279	Union (97CVS00241)	New Trial
IN RE APPEAL OF TWENTIETH CENTURY HEATING, CO. No. 98-1178	Prop. Tax Comm. (96PTC169)	Affirmed
IN RE GILLESPIE No. 99-294	Buncombe (98J106)	Affirmed

IN RE McMILLIAN No. 98-1138	Cumberland (98J6) (98J7)	Reversed and Remanded
IN RE SHANNON No. 99-150	Mecklenburg (97J1152)	Affirmed
PATRICK v. ALLSTATE INS. CO. No. 98-669-2	Pitt (97CVS434)	Reversed and Remanded
SAUNDERS v. EDENTON OB/GYN CTR. No. 98-1252	Ind. Comm. (308081)	Affirmed
SHUGART v. VESTAL No. 98-1177	Surry (97CVS448)	Affirmed
STATE v. ALLEN No. 98-679	Forsyth (94CRS2883)	No Error
STATE v. BAILEY No. 98-921	Forsyth (97CRS46057)	No Error
STATE v. BREEDEN No. 98-1041	Guilford (97CRS23303) (97CRS23304) (97CRS23305) (97CRS23306) (97CRS23307) (97CRS23308) (97CRS23309) (97CRS23310) (97CRS30884) (97CRS30885) (97CRS31516) (97CRS31517) (97CRS31518) (97CRS32623)	No Error
STATE v. BROOKS No. 99-62	Guilford (98CRS25787) (97CRS25788)	No Error
STATE v. CARDOZA No. 98-799	Mecklenburg (97CRS38164) (97CRS38165) (97CRS38166) (97CRS38167) (97CRS38169) (97CRS38172)	No Error
STATE v. CASE No. 99-236	Guilford (97CRS71676)	Affirmed

STATE v. DIXON No. 99-126	Rockingham (97CRS589)	No Error
STATE v. HARRIS No. 99-82	Union (97CRS7448) (97CRS7449) (97CRS7451) (97CRS7452) (97CRS10637)	No Error
STATE v. HELMS No. 98-1625	Durham (97CRS37855) (97CRS37856)	No Error
STATE v. HOLLARS No. 99-412	Alamance (98CRS1956)	No Error
STATE v. HUNT No. 99-224	Orange (97CRS9452)	No Error
STATE v. JOHNSON No. 99-165	Gaston (98CRS16246) (98CRS16247) (98CRS16248) (98CRS16249)	No Error
STATE v. LAMB No. 98-1141	Onslow (97CRS16373)	No Error
STATE v. LOFTIN No. 99-198	Forsyth (97CRS42311) (97CRS42312) (97CRS42351)	Affirmed
STATE v. MAULTSBY No. 99-42	Columbus (96CRS6083) (96CRS6084) (97CRS5871)	Affirmed
STATE v. MIMS No. 99-297	Alamance (98CRS9606) (98CRS9607) (98CRS9608) (98CRS20037)	No Error
STATE v. OKIJI No. 99-253	Guilford (97CRS61447) (97CRS61448) (97CRS61449) (97CRS61450)	No Error
STATE v. REYNOLDS No. 98-1548	Randolph (96CRS155) (96CRS12776)	No Error

STATE v. SARTORI No. 99-445	Haywood (96CRS2678) (96CRS2679)	No Error
STATE v. TAYLOR No. 99-269	Wayne (96CRS2012) (96CRS2013)	No Error
STATE v. VELASQUEZ No. 99-256	Davidson (97CRS22833) (97CRS22834)	No Error
STATE v. WALLACE No. 99-227	Durham (97CRS30977)	No Error
STATE v. WARD No. 99-325	Hyde (97CRS845) (97CRS846)	No Error
STATE v. WHITE No. 98-1596	Lee (97CRS5960) (97CRS5961)	No Error
STATE v. WHITE No. 99-299	Mecklenburg (97CRS5596) (95CRS30760)	No Error
STATE v. WILLIAMS No. 99-173	Mecklenburg (97CRS10980)	Affirmed
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AGENCY

Leased automobile—negligence action—liability of rental agency—The trial court erred in a personal injury action arising from an automobile accident by denying defendant-Auto Rental's motion for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a) where defendant had stipulated that it owned and had registered a leased vehicle involved in the accident, which prima facie established agency under N.C.G.S. § 20-71.1(b), but defendant presented positive, contradicting evidence tending to show that it had no agency relationship with the driver. Defendant was entitled to a peremptory instruction that the jury must find for defendant on the agency issue if it believed Auto Rental's evidence. **Winston v. Brodie, 260.**

Leased automobile—personal injury action—liability of lessee for another driver—The trial court erred by failing to grant defendant Wyche's motion for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a) in a negligence action arising from an automobile accident where Wyche leased a vehicle which was being driven by another (Brodie) when the accident occurred. Although proof of ownership under N.C.G.S. § 20-71.1 creates a prima facie case of agency that permits but does not compel a finding for plaintiff, there was no persuasive evidence or authority supporting classification of a lessee as owner or vicarious owner of the leased vehicle. **Winston v. Brodie, 260.**

APPEAL AND ERROR

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ciency of process, insufficiency of service of process, and failure to state a claim upon which relief can be granted is based merely on procedural grounds and does not affect their substantial right to due process. **Howze v. Hughs, 493.**

Appealability—interlocutory order—substantial right—Defendant's appeal from the denial of his summary judgment motion, based on the issues of whether plaintiff's action is barred by a general release and whether N.C.G.S. § 20-279.21(b)(4) prevents plaintiff from compelling defendant to participate as a named defendant, does not involve a substantial right entitling defendant to an immediate appeal. **Anderson v. Atlantic Casualty Ins. Co., 724.**

Appealability—interlocutory order—substantial right—not appealed immediately—In an action arising from the rebuilding of a sewer line partially outside the original easement, the court's conclusion that a taking had occurred affected a substantial right and the City was required to appeal within 30 days. The Court of Appeals nevertheless reviewed the issue in the interests of judicial economy and found it without merit. **Concrete Machinery Co. v. City of Hickory, 91.**

Appealability—interlocutory order—summary judgment denied—certification erroneous—no just reason for delay—The trial court's attempt to grant Rule 54(b) certification based on the order denying defendant's motion for summary judgment fails because the claims have not been finally adjudicated, and the trial court's determination that there is "no just reason for delay" of the appeal is not binding on appellate courts. **Anderson v. Atlantic Casualty Ins. Co., 724.**

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Appealability—summary judgment—res judicata—substantial right—The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and entitles a party to an immediate appeal. **Little v. Hamel, 485.**

Appealability—summary judgment denial—An appeal from the denial of a summary judgment was dismissed where appellant did not argue that the denial of his motion affected a substantial right. **Adams v. Samuels, 372.**

Appealability—summary judgment denial—claim preclusion not involved—dismissed—An appeal from the denial of summary judgment was dismissed where defendants contended that their appeal was based upon claim preclusion based upon an earlier decision to permanently enjoin plaintiff from sending this matter to arbitration. Although the same parties are involved, the claims are different in that the earlier action involved the timeliness of the attempt to arbitrate and this action involved a claim of default on a promissory note. **Adams v. Samuels, 372.**

Assignment of error—required—The denial of a motion to dismiss under forum non conveniens was affirmed where defendant failed to assign error to the trial court's conclusion of law. **Fran's Pecans, Inc. v. Greene, 110.**

Authority not cited—contention abandoned—A contention concerning the ability of a corporation to enter into a contract during a period in which its charter was suspended was deemed abandoned where no authority was cited. **South Mecklenburg Painting Contractors v. Cunnane Group, 307.**

Domestic violence protective order—dismissed as moot—Defendant-husband's appeal from a domestic violence protective order prohibiting him from possessing a firearm for a one-year period is moot because the order already expired and defendant is no longer attempting to avoid dismissal from his position with the Department of Correction since he resigned. **Wilson v. Wilson, 642.**

Law of the case—same issue—earlier appellate ruling binding—Although this appeal involves a different defendant-unnamed uninsured motorist insurer, the doctrine of law of the case provides that the earlier appellate ruling on the same issue of the applicable limitations period for service upon an insurance company providing coverage for an uninsured motorist is binding on this case because both appeals arose out of a single action, involve the same facts, and raise the identical issue of law. **Reese v. Barbee, 728.**

Law of the case—workers' compensation lien—It is the law of this case that a workers' compensation carrier is entitled to a compensation lien on judgment proceeds in the amount of the total workers' compensation "paid or to be paid"

APPEAL AND ERROR—Continued

to the injured employee where both the Supreme Court and the Court of Appeals held in prior appeals that the carrier was entitled to this lien pursuant to an unappealed superior court judgment in the employee's action against the tortfeasor. **Hieb v. Lowery, 1.**

Mootness—exception—capable of repetition yet evading review—The trial court properly dismissed as moot claims arising from the denial of variances to coastal erosion regulations following the eventual granting of a variance where plaintiff argued that the claims fell within the exception to mootness commonly known as capable of repetition yet evading review. There is no evidence that plaintiff's grievances evaded review; to the contrary, plaintiff has had ample opportunity to seek review through CAMA and the APA. **Shell Island Homeowners Ass'n v. Tomlinson, 286.**

Mootness—exception—voluntary cessation of illegal conduct—The trial court properly dismissed as moot claims arising from the denial of variances to coastal erosion regulations where a variance was eventually granted and plaintiff argued that its claims fell within the exception to mootness for cases in which a defendant voluntarily ceases its illegal conduct during the pendency of the appeal. Rather than ceasing an illegal practice, defendants have continually and consistently enforced CAMA regulations with respect to erosion control structures. **Shell Island Homeowners Ass'n v. Tomlinson, 286.**

Preservation of issues—argument first raised on appeal—Plaintiff's argument that the physical invasion of its property by inlet waters constituted a taking was not considered where the argument was raised for the first time on appeal. Plaintiff based its claims on the denial of its variance requests; a compensable taking based on a theory of physical invasion is an altogether separate category of regulatory taking. **Shell Island Homeowners Ass'n v. Tomlinson, 286.**

Preservation of issues—arguments of counsel—Arguments of counsel which were not part of the record were not addressed. N.C. R. App. P 10(a). **Leftwich v. Gaines, 502.**

Preservation of issues—constitutional questions—not raised in trial court or in a motion—Defendant in a breaking and entering and larceny case did not properly raise the issues of the violation of double jeopardy and his due process rights because constitutional questions not raised to the trial court or in a motion will not be considered on appeal. **State v. Branch, 637.**

Preservation of issues—no written order denying motion—An assignment of error in a child custody action to the denial of motions for revision prior to final judgment and for relief from final judgment was dismissed where the record did not contain a written order denying the motions. **Buckingham v. Buckingham, 82.**

Preservation of issues—timely objection—timely notice—Plaintiff-husband did not preserve his right to appeal because he did not make a timely objection to the trial court's ruling pursuant to N.C. R. App. P. 10(b)(1), and he did not appeal from the entry of the trial court's order within thirty days of its entry pursuant to N.C. R. App. P. 3(c). **Inman v. Inman, 719.**

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

port amount to be paid by the non-custodial parent on the ground that the child is receiving funds as a result of the obligor's disability. **Sain v. Sain, 460.**

No changed circumstances—modification improper—Having concluded that no changed circumstances justified modification of the prior custody order, the trial court erred in modifying the terms of the custody order. **Sain v. Sain, 460.**

Support—arrearage—failure to pay—willful or without lawful excuse—no finding—The trial court properly entered a judgment for a child support arrearage without evidence that defendant's failure to pay was willful or without lawful excuse. There is no such requirement. **Bogan v. Bogan, 176.**

Support—attorney fees—specific findings required—The trial court erred in awarding attorney fees to plaintiff-mother in a child support case because it failed to make specific findings that: (1) the mother was acting in good faith; (2) the mother's means were insufficient to defray the expenses of the suit; and (3) the father refused to provide the support which was adequate under the circumstances existing at the time of the institution of this action. **Thomas v. Thomas, 591.**

Support—modification improper—solely based on increase in obligor's income—The trial court erred in modifying the original child support order because although a significant involuntary decrease in the obligor's income may satisfy the necessary showing of changed circumstances to justify a modification, a modification is improper if based solely upon the ground that the obligor's income has increased. **Thomas v. Thomas, 591.**

Support—modification sua sponte—reduced payment to purge contempt—authority—The trial court properly entered judgment for a child support arrearage where plaintiff and defendant had entered a consent order on 15 June 1990 which included child support; the court held defendant in contempt on 19 September 1990 for failure to comply with the child support obligation; the court found on 17 October 1990 that defendant was unable to make the payments and ordered defendant to make a partial payment; and plaintiff subsequently filed a motion for a judgment on the arrearage. Although defendant contended that the court's October order constituted a modification of his obligation and that he owed no arrearage, the issue before the court related to defendant's contempt and the record does not indicate that the court intended to modify defendant's obligation. The court was well within its authority to allow defendant to purge himself of contempt upon payment of an amount less than he owed, but would have been without authority to sua sponte modify an existing order. Moreover, any modification would have applied only prospectively. **Bogan v. Bogan, 176.**

CHURCHES AND RELIGIONS

Connectional relationship—directed verdict—judgment notwithstanding the verdict—The trial court did not err in denying plaintiff-church denomination's motions for directed verdict and for judgment notwithstanding the verdict on the issue of the fee simple ownership of property in possession of defendants, representing the local church, because although plaintiff was a connectional church organization in relation to defendants prior to defendants' split from plaintiff, defendants were not in a connectional relationship with plaintiff with respect to property matters. **Fire Baptized Holiness Church v. McSwain, 676.**

CHURCHES AND RELIGIONS—Continued

Denomination's published rules—Although the language of plaintiff-church denomination's published rules indicate that properly recorded local church property belongs to the denomination, and that a local church seeking to secede from the denomination could not keep such property, the trial court did not err in determining that plaintiff is not entitled to the pertinent property in the possession of defendants, representing the local church, because the deeds for the property were not recorded as set forth in the denomination's published rules. **Fire Baptized Holiness Church v. McSwain, 676.**

Local church—no prior ownership—Although defendants, representing the local church, did not own property independently before joining plaintiff-church denomination, the trial court did not err in concluding plaintiff and defendant lacked a connectional relationship with regard to property matters because a seceding church's property rights, the local church in the instant case, are not limited to the property it owned prior to joining a denomination. **Fire Baptized Holiness Church v. McSwain, 676.**

CITIES AND TOWNS

Annexation—requirements—burden of proof—Reports and annexation ordinances reflecting adherence to the applicable requirements of N.C.G.S. § 160A-45 et seq. establish prima facie that an annexing authority has substantially complied with the statute and the burden lies with an annexation challenger to demonstrate the contrary. **Bali Co. v. City of Kings Mountain, 277.**

Annexation—requirements—police and fire protection—An annexation plan satisfied the requirements of N.C.G.S. § 160A-47(3)a where petitioners contended that the plan was defective in failing to provide additional police and fire services, but the court found that petitioners would receive services on a basis at least substantially equal to the current inhabitants and the record sustains the court's findings. The precise details of the extension of police and fire protection are not required. **Bali Co. v. City of Kings Mountain, 277.**

Annexation—requirements—residential purposes—condemned home—The trial court did not err when affirming an annexation in its finding regarding residential purposes where petitioners contended that the City included a condemned home as a "habitable" residence. The trial court properly noted in its judgment that the structure had been destroyed by fire, but provided that deletion of that structure from the calculation of the "urban purposes" percentage under N.C.G.S. § 160A-48(c)(3) did not affect the City's compliance with the section. **Bali v. City of Kings Mountain, 277.**

Annexation—requirements—residential purposes—mobile homes—An area being annexed qualified as being developed for urban purposes under N.C.G.S. § 160A-53(2) where petitioners maintained that some of the lots relied upon by the City were not used for residential purposes as required by the statute because they were occupied by mobile homes which were not "constructed" on the lots. The testimony of the City's consultant provided support for the court's findings that the mobile homes required necessary construction and improvements on-site after delivery. **Bali Co. v. City of Kings Mountain, 277.**

Annexation—requirements—use of topographic features—There was no error in an annexation challenge where petitioners contended that the City

CITIES AND TOWNS—Continued

neglected to utilize topographic features in fixing interior boundaries contrary to N.C.G.S. § 160A-48(e). The statute speaks of municipal boundaries rather than interior boundaries and the record shows that the properties taken as a whole form exterior municipal boundaries properly denominated by topographic features wherever practical. **Bali Co. v. City of Kings Mountains, 277.**

Public duty doctrine—negligent supervision—intentional tort—The public duty doctrine is not incompatible with negligent supervision and is inapplicable where the employee's tort is intentional, as opposed to grossly negligent. **Leftwich v. Gaines, 502.**

CIVIL PROCEDURE

Consolidation of actions—denial not prejudicial—No prejudice resulted to plaintiff from the allegedly premature denial of its motion to consolidate actions where the trial court properly dismissed the claims in this action as moot. **Shell Island Homeowners Ass'n v. Tomlinson, 286.**

Summary judgment—discovery pending—time lapsed—no extension requested—The trial court did not abuse its discretion when it heard defendants' motion for summary judgment while discovery was still pending in a case alleging slander per se and intentional infliction of emotional distress based on an unsubstantiated report of child abuse because once the local judicial district rule of 120 days for discovery had lapsed, plaintiff did not move "promptly" for a discovery conference, an order establishing a plan for discovery, and an order extending time for placing of the case on the ready calendar. N.C.G.S. § 1A-1, Rule 26(d). **Dobson v. Harris, 573.**

Summary judgment—motion to dismiss—matters outside the pleadings—motion based upon preemption by federal law—A motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) was not converted to a summary judgment motion by matters outside the pleadings where the motion to dismiss did not address the merits of the allegations but went only to the question of whether plaintiff's claims were governed by ERISA. **Schnitzlein v. Hardee's Food Sys., Inc., 153.**

Voluntary dismissal—subsequent 12(b)(6) dismissal—The trial court did not have jurisdiction to enter subsequent orders in an employment termination case where the trial court had notified defendants that it intended to grant their motion to dismiss on 15 June 1998, plaintiff filed a voluntary dismissal on 16 June 1998, and the trial court entered an order on 19 June dismissing the complaint with prejudice pursuant to N.C.G.S.§ 1A-1, Rule 12(b)(6). Although defendants contend that plaintiff rested his case at the close of the motion hearing on 10 June, defendants' motion to dismiss was based on their argument that plaintiff's claims were preempted by ERISA rather than on allegations set out in the complaint and plaintiff had not argued his case-in-chief. Moreover, plaintiff had a motion to amend his complaint pending when the motion hearing ended. **Schnitzlein v. Hardee's Food Sys., Inc., 153.**

CIVIL RIGHTS

Action against police officer—alleged unreasonable seizure and due process violation—material issue of fact—In an action against a police officer in his individual capacity arising from a confrontation at an automobile acci-

CIVIL RIGHTS—Continued

dent, the trial court correctly denied the defendants' motion for summary judgment on the issues of section 1983 violations and loss of consortium where the officer claimed qualified immunity. There are material issues of fact as to defendant's conduct and the actions of plaintiff. **Staley v. Lingerfelt, 294.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Claims precluded—issues precluded—Res judicata precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction. A judgment operates as an estoppel not only as to all matters actually determined or litigated, but also as to all relevant and material matters which the parties, in the exercise of reasonable diligence, should have brought forward for determination. **Little v. Hamel, 485.**

Claims precluded—issues precluded—Although this appeal involves a different defendant-unnamed uninsured motorist insurer, plaintiff is precluded by res judicata from re-litigating the identical issue of the applicable limitations period for service upon an insurance company providing coverage for an uninsured motorist. **Reese v. Barbee, 728.**

Insurance—anti-subrogation rule—ruling for one insurer—The Commissioner of Insurance was not collaterally estopped from enforcing the anti-subrogation rule against petitioner life, accident and health insurers following a judgment that the rule could not be enforced against one life, accident and health insurer. Even if collateral estoppel technically precluded the parties from relitigating issues decided by the superior court in the prior judgment, it would be inequitable to allow petitioners, even those with privity, to assert collateral estoppel in this case. **In re Declaratory Ruling by N.C. Comm'r of Ins., 23.**

Negligence action—prior declaratory judgment on insurance coverage—negligence claim not precluded—The trial court erred by granting summary judgment for defendants based upon collateral estoppel in a negligence action arising from a shooting at defendants' house where a trial court had previously concluded in a declaratory judgment action that a homeowner's policy did not provide coverage because plaintiff's injury was "expected or intended." **Key v. Burchette, 369.**

New or different grounds for relief—malpractice—fraud—The trial court erred by failing to grant summary judgment for defendants based on the doctrine of res judicata. Plaintiff's first action alleged legal malpractice and his second action alleged fraud because defendants failed to inform him that he had no claim in his lawsuit. Except in special circumstances, res judicata may not be avoided by shifting legal theories or by asserting a new or different ground for relief because a party is required to bring forth the whole case at one time. **Little v. Hamel, 485.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Miranda warning—not in custody—The trial court did not err in failing to suppress two of defendant's statements because Miranda warnings are not required simply because the person questioned is one whom the police suspect. Although the officer went to defendant's home to arrest him, defendant was not

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

in custody because he voluntarily went to the officer's patrol car and discussed the incident, he was explicitly told he was not under arrest, he sat in the front seat of the patrol car, and he made the alleged statements spontaneously and not in response to questioning. **State v. Dominie, 445.**

Out-of court statement—not introduced—no prejudice—There was no prejudicial error where defendant contended that his out-of-court statement to officers was taken in violation of his Miranda rights, but the State never introduced the statement into evidence. **State v. Chavis, 546.**

CONSPIRACY

Fraud—circumstantial evidence—sufficient—There was sufficient circumstantial evidence to support a jury's finding that the girlfriend of a town employee conspired with the employee fraudulently to discourage and outbid plaintiff for real property which plaintiff intended to purchase. **Leftwich v. Gaines, 502.**

CONSTITUTIONAL LAW

Arguments hypothetical and abstract—not considered—Plaintiff's constitutional arguments relating to the denial of variances for hardened coastal erosion control structures were hypothetical and abstract in the context of the dispute and were not ruled upon. **Shell Island Homeowners Ass'n v. Tomlinson, 286.**

Coastal management rules—equal protection and due process—Plaintiffs' due process and equal protection challenges to coastal management rules were properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs acknowledged in their complaint that they sought, received, and took full advantage of a variance granted pursuant to the challenged regulatory scheme. One who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Moreover, the protection of lands of environmental concern is a legitimate interest of government, as is the need for public access and use of ocean beaches, and the hardened structure rules are clearly rationally related to a legitimate government end. **Shell Island Homeowners Ass'n v. Tomlinson, 217.**

Coastal management rules—no violation of procedural and substantive due process—There was no violation of procedural and substantive due process in the denial of permits for plaintiffs to construct hardened erosion control structures to protect their property from the migration of an ocean inlet. **Shell Island Homeowners Ass'n v. Tomlinson, 217.**

Double jeopardy—heroin trafficking—prior conviction in federal court—not raised at trial—A heroin trafficking defendant's contention that prosecution in North Carolina following a federal conviction constituted double jeopardy was waived where not raised in the trial court. **State v. White, 338.**

Effective assistance of counsel—failure to object—opened the door—Defense counsel's failure to object to the social worker's testimony that the child sex abuse victim's statements were believable did not constitute ineffective assistance of counsel where defense counsel opened the door to this testimony. **State v. Pretty, 379.**

CONSTITUTIONAL LAW—Continued

Hearsay—unavailable witness—right to confrontation not violated—incompetency of child—necessary evidence—trustworthiness satisfied— The trial court did not violate defendant-father's constitutional right to confront the five-year-old child sex abuse victim when it admitted the child's hearsay statements because the unavailability of the child was due to her incompetency and the evidentiary importance of the child's statements demonstrate their necessity. **State v. Pretty, 379.**

Right to be present at all stages—ex parte conference—harmless error—conference recreated—opportunity to be heard—Although the trial judge erred in a first-degree murder case by holding an ex parte conference in his chambers with the prosecutor and defendant's standby counsel, without defendant's presence, the error was harmless in light of the facts that: (1) the substance of the conference was recreated by the judge and there is not reason to question the accuracy or completeness of his recitation; and (2) the trial judge gave defendant ample opportunity to object and otherwise be heard on the issue. **State v. Thomas, 560.**

Right to be present at all stages—unwillingness to come into courtroom—jury recess—not a trial proceeding—The trial court did not violate defendant's right to be present at all stages of his capital trial when it discussed with defendant's attorney and the State, in defendant's absence, his unwillingness to come into the courtroom because the jury was in recess at the time of the alleged violation and the conversation concerning his presence in the courtroom was not in the nature of a "trial proceeding." **State v. Holston, 599.**

Right to conduct own defense—standby counsel—pro se defendant—first-degree murder—defendant expressly requested—The trial court did not err in a first-degree murder case by permitting pro se defendant's standby counsel to approach the bench while the jury was present in the courtroom and argue legal issues outside of the jury's hearing because: (1) nothing in the record indicates that defendant was in any way prevented from conducting his own defense as he saw fit; (2) standby counsel's participation in the trial occurred either when the jury was absent from the courtroom or at bench conferences outside of the jury's hearing; and (3) in all instances, defendant expressly requested the assistance of the standby counsel. **State v. Thomas, 560.**

Right to counsel—right to be present—first-degree murder—pro se defendant—disruptive behavior—removal from courtroom—no jurors present—The trial court did not violate defendant's right to be present and his right to counsel in a first-degree murder case when it momentarily removed pro se defendant from the courtroom for disruptive behavior during a break in jury selection when no prospective jurors were present in the courtroom and the trial court was attempting to enter findings into the record regarding various discovery issues raised by defendant. N.C.G.S. § 15A-1032. **State v. Thomas, 560.**

Self-incrimination—handwriting samples—The trial court did not err in admitting evidence that defendant refused to comply with a search warrant to obtain samples of his handwriting because the Fifth Amendment privilege against compulsory self-incrimination does not extend to physical characteristics such as handwriting and blood samples. **State v. Teague, 702.**

CONSTITUTIONAL LAW—Continued

Self-incrimination—robbery—acting in concert—codefendant not required to testify—The trial court did not err in a robbery case when it did not allow defendant to call his codefendant to testify after the codefendant pled guilty outside the presence of the jury and claimed he would invoke his Fifth Amendment privilege not to incriminate himself if called as a witness because defendant did not proffer the evidence he sought to elicit from his codefendant, he merely wanted the jury to speculate, and the fact that defendant was being tried on the theory of acting in concert meant the codefendant's admission of his involvement would not exonerate defendant. **State v. Stanfield, 685.**

State—change of city council term—office not mandated by constitution—not unconstitutional—The trial court did not err by dismissing a claim that the General Assembly acted unconstitutionally in extending a city council term from two years to four years. The office is not mandated by the North Carolina Constitution and the General Assembly was within its authority in extending the term. **Crump v. Snead, 353.**

State—exclusive emolument—extension of city council term—Respondent did not receive an exclusive emolument under Article I, section 32 of the North Carolina Constitution where the General Assembly extended the term of his seat on the Rockingham City Council from two to four years. There was a reasonable basis for the legislature to conclude that the bill served the public interest and did not solely benefit respondent. **Crump v. Snead, 353.**

State—extension of city council term—participation in political process—The trial court did not err by concluding that a General Assembly bill extending a city council term from two to four years did not infringe upon petitioners' right to participate in the political process. Petitioners had the privilege of running for office, not the right, and neither petitioners' nor the public's rights were infringed. **Crump v. Snead, 353.**

State—separation of powers—insurance—anti-subrogation rule—The Commissioner of Insurance did not violate the doctrine of separation of powers by enforcing an anti-subrogation rule against life, accident and health insurers after a superior court had invalidated that rule with respect to one insurer since the Commissioner was not required to consider the superior court decision as the final judicial interpretation in any other applications of the rule. **In re Declaratory Ruling by N.C. Comm'r of Ins., 23.**

Taking without compensation—coastal management rules—hardened structures—The trial court properly dismissed plaintiffs' takings challenge to coastal management rules regarding hardened structures where plaintiffs failed to identify in the complaint any legally cognizable property interest which has been taken by defendants. The invasion of property and reduction in value which plaintiffs allege clearly stems from the natural migration of an inlet and plaintiffs did not cite any persuasive authority for the proposition that a littoral or riparian landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion and migration. **Shell Island Homeowners Ass'n v. Tomlinson, 217.**

CONTEMPT

Criminal—no specific findings of misconduct—The trial court did not err by denying defendant's motion to dismiss a contempt citation where the court did

CONTEMPT—Continued

not make specific findings of improper conduct before issuing the citation. The trial court judge was not required to make a specific finding of improper conduct because the language of the show cause order referred to punishment, defendant referred to the order as being for criminal contempt, and the order sought punishment for interfering with the administration of justice, a function of criminal contempt; unlike a citation for civil contempt, there is no requirement that the judge make a finding of improper conduct upon the issuance of a criminal contempt citation. **State v. Pierce, 148.**

Criminal—sufficiency of evidence—The trial court correctly denied defendant's motion to dismiss in a criminal contempt proceeding arising from juror misconduct where defendant argued that the State failed to present sufficient evidence in addition to defendant's own remarks, but ten of the twelve jurors testified that defendant had reported his own investigation of the Breathalyzer machine to them; defendant ate lunch alone on the second day of deliberations, supplying the opportunity to conduct an independent investigation; and defendant only displayed his uncommon familiarity with Breathalyzer machines after lunch on the second day. **State v. Pierce, 148.**

CONTRACTS

Choice of law—exception to place where contract made—restrictive non-competition provision—The trial court's order granting summary judgment for plaintiff-former employee in a declaratory judgment action involving an agreement containing a restrictive non-competition provision is reversed and remanded because it is unclear whether the agreement was construed and interpreted under North Carolina or Massachusetts law. **Bueltel v. Lumber Mut. Ins. Co., 626.**

No breach—not a third-party beneficiary—plain language of contract—The trial court did not err in dismissing plaintiff-employee's claim against defendant-security guard and defendant-security company for breach of contract because plaintiff was not a third-party beneficiary of the contract for guard service between defendant-employer and defendant-security company. **Holshouser v. Shaner Hotel Grp. Props. One, 391.**

CORPORATIONS

Corporate charter—revenue suspension—action on contract entered during—The trial court correctly granted summary judgment for defendant in an action for breach of a contract entered during a time when plaintiff's corporate charter was suspended under N.C.G.S. § 105-230. Although the effect of N.C.G.S. § 105-230 is not absolute, it prevents a corporation from conducting business as usual; plaintiff had no statutory right to enter into a contractual relationship with defendant and may not bring suit to enforce a contract entered into during the period of revenue suspension. Reinstatement is not relevant. **South Mecklenburg Painting Contractors v. Cunnane Group, 307.**

Corporate charter—revenue suspension—action on contract entered during—dissolution statute—The trial court correctly granted summary judgment for defendant on a contract entered during a revenue suspension of the corporate charter where plaintiff argued that N.C.G.S. § 55-14-05 permits the action.

CORPORATIONS—Continued

That statute mandates that a corporation may not carry on any business except as appropriate to wind up and liquidate its affairs during the period of dissolution. **South Mecklenburg Painting Contractors v. Cunnane Group, 307.**

Stock buyout agreement—determination of adjusted book value—The trial court did not err by granting summary judgment for plaintiff in an action to force specific compliance with a stock buyout agreement against a terminated employee. Where the value of a closely held corporation is determined by the use of its balance sheet as directed by a buyout agreement and is calculated by the accounting firm normally servicing that corporation in accordance with the terms of the agreement, the value determined by that accounting firm is presumptively correct in the absence of mathematical error, fraud, or evidence of a failure to follow generally accepted accounting practices. **Crowder Constr. Co. v. Kiser, 190.**

Stock buyout agreement—timing of tender—The trial court did not err by granting summary judgment for plaintiff in an action to enforce a stock buyout agreement against a terminated employee where the employee, defendant, argued that he was not required to immediately tender his stock options and that he could wait until the options were fully vested. The agreement's 90-day closing period expressed the parties' intent; moreover the adjusted book value was to be determined by reference to plaintiff's financial statement at the end of its last fiscal year prior to the date of defendant's termination. **Crowder Constr. Co. v. Kiser, 190.**

Stock buyout agreement—unconscionability—The trial court did not err by granting summary judgment for plaintiff in an action to force compliance with a stock buyout agreement against a terminated employee where defendant contended that enforcement of the agreement would be unconscionable. A trial court may decline to specifically enforce a stock restriction agreement entered into pursuant to N.C.G.S. § 55-6-27 if there has been a change of circumstances since the execution of the agreement such that enforcement would be unconscionable under the particular circumstances, using the settled definition of unconscionability from contract law. **Crowder Constr. Co. v. Kiser, 190.**

Stock buyout agreement—unconscionability—change in tax reporting—The trial court did not err by granting summary judgment for plaintiff in an action to enforce a stock buyout agreement against a terminated employee where the employee contended that a company decision to take a business expense deduction based on a loss arising from employee stock options caused defendant to incur a tax liability and made the stock purchase agreement unconscionable. The Court of Appeals declined to rewrite the buyout agreement; furthermore, defendant was not prejudiced by plaintiff's decision. **Crowder Constr. Co. v. Kiser, 190.**

CRIMINAL LAW

Codefendant pled guilty—mistrial not required—The trial court did not err in a robbery case by failing to declare a mistrial after a codefendant pled guilty outside of the presence of the jury because when the jury returned, the trial court gave the pattern jury instruction that the codefendant's case was no longer before

CRIMINAL LAW—Continued

the jury, its disposition was of no concern to them, and their deliberations as to defendant should not be affected in any way. **State v. Stanfield, 685.**

Consolidation of offenses—murder, assault, narcotics—The trial court did not err by refusing to dismiss charges of possession of cocaine and possession of drug paraphernalia where, although defendant argued that possession was a misdemeanor, possession of any amount of cocaine is felony and N.C.G.S. § 7A-271 gives a superior court jurisdiction to try a misdemeanor which may be properly consolidated for trial with a felony. **State v. Chavis, 546.**

Instructions—requested—incorrect statement of law—There was no error in a first-degree murder and kidnapping prosecution in the denial of defendant's requested instruction on the limited use of evidence concerning another murder where the tendered instruction would have incorrectly stated the law. **State v. Underwood, 533.**

Subject matter jurisdiction—failure to instruct jury—The trial court did not err in a heroin trafficking prosecution by not instructing the jury on subject-matter jurisdiction where the State's evidence tended to show that defendant became involved in drug dealing between New York City and Durham and was arrested in New York in possession of heroin. While defendant contended that the only drugs admitted into evidence were those in his possession when he was arrested in New York, the only crimes with which defendant was charged indisputably took place in North Carolina, the primary evidence against defendant was an accomplice's testimony, and defendant's possession of drugs in New York was introduced to corroborate the accomplice's testimony. **State v. White, 338.**

DAMAGES AND REMEDIES

Calculation of amount—fraud—loss of prospective real property purchase—expansion of business—A plaintiff may recover loss of bargain damages in a tort action if she establishes that the damages are the natural and probable result of the tortfeasor's misconduct and that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty. **Leftwich v. Gaines, 502.**

Leg shackles—pro se defendant—waiver—failed to object—The trial court did not commit prejudicial error in a first-degree murder case by requiring pro se defendant to appear before the jury in leg shackles because defendant waived this argument when he made no objection to his having to proceed in shackles. **State v. Thomas, 560.**

Punitive—action against police officer— capacity—The trial court correctly granted summary judgment in favor of a police officer in his official capacity on a punitive damages claim in a section 1983 action, but erred by granting summary judgment for the officer in his individual capacity. Punitive damages may not be awarded in a section 1983 action against either a municipality or a municipal officer acting in an official capacity. **Staley v. Lingerfelt, 294.**

DECLARATORY JUDGMENTS

Actual controversy—restrictive non-competition provision—The trial court did not err in a declaratory judgment case by finding an actual controversy

DECLARATORY JUDGMENTS—Continued

exists involving an agreement containing a restrictive non-competition provision because the parties were not asking the trial court to interpret the document in anticipation of future acts, but in light of past and present action. **Bueltel v. Lumber Mut. Ins. Co., 626.**

Restrictive non-competition provision—validity and enforceability of a contract—The trial court did not err in a declaratory judgment action by holding the agreement containing a restrictive non-competition provision was void and unenforceable because although the trial court may not nullify a duly probated will except upon appeal, it may determine the validity and enforceability of a contract under the Declaratory Judgment Act. N.C.G.S. § 1-254. **Bueltel v. Lumber Mut. Ins. Co., 626.**

DEEDS

Restrictive covenant—directed verdict—aware or reasonably aware of violation—The trial court erred in directing verdict for defendants based on a six-year statute of limitations pursuant to N.C.G.S. § 1-50(a)(3) on lots 1, 2, and 3 because there is conflicting evidence whether plaintiffs were aware or should have reasonably been aware of a continual violation of the restrictive covenant on those lots. However, the trial court did not err in directing verdict for lot 4 because it has been openly used for non-residential purposes for at least twenty-two years before this suit was instituted, and evidence of vacating and demolishing a building which has continually been used for commercial purposes does not indicate in and of itself that the property has returned to a residential use. **Karner v. Roy White Flowers, Inc., 645.**

Restrictive covenant—residential purposes only—motion to require joinder—proper party—necessary party—The trial court did not err in denying plaintiff's motion to require joinder of the non-litigant residential property owners on the basis that defendants' changed conditions defense could result in the invalidation of the restrictive covenants in the residential subdivision because all landowners in the subdivision are not necessary parties, but instead merely proper parties. **Karner v. Roy White Flowers, Inc., 645.**

DIVORCE

Alimony—findings supported by evidence—weight of unsupported findings not determined—The trial court erred by denying permanent alimony where three of the court's findings were not supported by the evidence; the matter was remanded where the weight the court assigned to those findings could not be determined. **Alvarez v. Alvarez, 321.**

Alimony—relevant factors—The trial court did not err by denying a claim for permanent alimony where plaintiff contended that the court based its decision on the sole factor of her constructive abandonment of her husband. The 1995 statute which replaced fault-based alimony with a need-based approach mandates consideration of listed relevant factors, with marital misconduct as only one of a number to be considered. The record shows that the court here considered the other relevant factors. N.C.G.S. § 50-16.3A(b). **Alvarez v. Alvarez., 321.**

Alimony—voluntary dismissal—recoupment of pendente lite payments—A voluntary dismissal of a counterclaim for permanent alimony after alimony

DIVORCE—Continued

pendente lite was paid was not a sham or a fraudulent manipulation of the Rules of Civil Procedure as contended by plaintiff in his effort to recoup the payments. The plain language of N.C.G.S. § 1A-1, Rule 41(a)(1) vests parties with the absolute authority to dismiss any of their claims at any time before they rest their case, plaintiff had filed no reply, there was no pending matter, and defendant was free to file her voluntary dismissal without permission of the court or notice to plaintiff. **Riviere v. Riviere, 302.**

Alimony pendente lite—credit—The statute which allowed a court to give a party credit for alimony pendente lite payments made prior to the denial of an award of permanent alimony was repealed by the 1995 amendments to the North Carolina alimony law. Any determination of credit for post-separation support payments must be calculated from the entry of the court's judgment. **Alvarez v. Alvarez, 321.**

Alimony pendente lite—motion to recoup—final alimony judgment—factors considered—The trial court erred by denying a motion to recoup alimony pendente lite payments following a voluntary dismissal of an alimony claim where the court appeared to base its decision on the misapprehension that a voluntary dismissal with prejudice was not a final judgment. When defendant voluntarily dismissed with prejudice her claim for permanent alimony based on adultery and abandonment, she conceded that none of the grounds entitling her to permanent alimony pursuant to N.C.G.S. § 50-16.2 existed. Such a dismissal was a final judgment on the merits. **Riviere v. Riviere, 302.**

DRUGS

Constructive possession—automobile—There was sufficient evidence in a trafficking prosecution from which the jury could find that defendant knowingly possessed cocaine where the cocaine was found in the back seat of a vehicle owned and driven by defendant; there was a passenger in the vehicle but defendant had direct access to the cocaine, which was found behind his seat; and the cocaine was hidden in a similar manner to a handgun which defendant admitted was there. **State v. Earhart, 130.**

EASEMENTS

Sewer line rebuilt—partially outside existing easement—no writing—The trial court did not err by concluding that a taking had occurred in an action arising from the rebuilding of a sewer line partially outside the existing easement where the City contended that the property owner had orally agreed to relocate the sewer line. There was no written document or memorandum showing an alteration of the original easement or the creation of a new easement and no indication in the record that the City Council had authorized the relocation or abandonment of the easement. **Concrete Machinery Co. v. City of Hickory, 91.**

EMINENT DOMAIN

Attorney fees—findings required—The award of attorney fees in a condemnation was remanded where the court did not make the findings required by N.C.G.S. §§ 40A-8(b) and (c). **Concrete Machinery Co. v. City of Hickory, 91.**

EMINENT DOMAIN—Continued

Dept. of Administration condemnation—authority—The trial court did not err by concluding that the State was authorized to condemn defendant's undivided one-fifth interest in land used for mosquito control and wildlife management (an ownership arrangement resulting from a prior judicial decision). The Department of Administration can act to condemn land using either its own authority, N.C.G.S. § 146-22.1(1)(Board of Transportation procedures) or the authority of the requesting agency. **State v. Coastland Corp., 269.**

Interest—prudent investor—compound interest—The trial court did not err in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding compound interest. Compound interest is warranted in condemnation cases if the evidence shows that the prudent investor could have obtained compound interest in the marketplace and the uncontradicted evidence here was that interest compounded annually could be realized by the prudent investor in today's financial markets. **Concrete Machinery Co. v. City of Hickory, 91.**

Interest—prudent investor—fourteen percent—The trial court did not err in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding fourteen percent interest after concluding that a taking had occurred where the court determined the return a prudent investor would reasonably realize based upon an investment one-half in certificates of deposit and one-half in the stock market. The statutory rate is presumptively reasonable under the prudent investor standard, but the owner shall be put in as good a position as if the property had not been taken and may demonstrate that the prevailing rates are higher than the statutory rate. Plaintiff here introduced evidence indicating a reasonable rate of return between 7.2 percent and 28.8 percent, while the City offered no evidence. **Concrete Machinery Co. v. City of Hickory, 91.**

Interest—rate—date of judgment to satisfaction—The trial court erred in an action arising from the rebuilding of a sewer line partially outside the original easement by awarding fourteen percent interest compounded annually from the date of the taking to the time the judgment is satisfied. Awarding fourteen percent interest after the date of judgment would be speculative and N.C.G.S. § 40A-53 specifically provides for interest in eminent domain actions from the date of judgment until its satisfaction at six percent. **Concrete Machinery Co. v. City of Hickory, 91.**

Interest acquired—less than fee simple—The State may acquire less than a fee simple interest in property. **State v. Coastland Corp., 269.**

Statement of public use—wildlife management lands—The statement of public use in a condemnation action was sufficient where it stated that the lands were an integral part of Wildlife Resources Commission facilities and N.C.G.S. § 146-22.1 specifically authorizes the Department of Administration to take title to lands necessary or convenient to the operation of state owned facilities. **State v. Coastland Corp., 269.**

EMOTIONAL DISTRESS

Intentional infliction—summary judgment—unsubstantiated allegation of child abuse—false report not extreme and outrageous—no medical evidence—The trial court did not err in granting summary judgment for both

EMOTIONAL DISTRESS—Continued

defendants on plaintiff's claim for intentional infliction of emotional distress in a case involving an unsubstantiated report of child abuse. **Dobson v. Harris, 573.**

EMPLOYER AND EMPLOYEE

Dispute resolution program—employment contract—The trial court erred by denying defendant's motion to compel dispute resolution and stay judicial proceedings where the court concluded that the dispute resolution program (DRP) was unenforceable due to lack of consideration. The evidence was sufficient to show that plaintiff knew that the terms of the DRP would apply to her should she continue her employment and both plaintiff and defendant were mutually bound by the terms of the DRP. **Howard v. Oakwood Homes Corp., 116.**

Summary judgment—negligence—no employer-employee relationship—In a negligence case arising out of a fatal automobile accident, the trial court did not err in granting summary judgment in favor of corporate defendant Nursefinders, who recruits pools of nurses to supply supplemental staff to area medical facilities, because there was no genuine issue of material fact as to whether defendant-nurse Tony Fele, who was involved in the accident, was Nursefinders' employee. **Rhoney v. Fele, 614.**

ESTOPPEL

Equitable—stipulated separation agreement—lack of consent—ratification by subsequent actions—Although defendant-husband attempted to withdraw his consent following a hearing but prior to entry of an order concerning a stipulated agreement addressing child support, child custody, visitation, alimony, property division, and attorney fees, the trial court did not err in failing to set aside the order as void for lack of consent because subsequent actions of defendant ratified and validated the order. **Chance v. Henderson, 657.**

EVIDENCE

Action for fraud and negligent supervision—motion in limine to forbid mention of criminal statute—denied—The trial court did not abuse its discretion in an action for fraud and negligent supervision of a town employee by denying defendant's motion in limine to exclude mention of the criminal statute which forbids the use of non-public information by town employees to their benefit. **Leftwich v. Gaines, 502.**

Chain of custody—cocaine—The trial court did not abuse its discretion in a prosecution for possession of cocaine with intent to sell and deliver by admitting crack and a cellophane cigarette wrapper where defendant contended that the State did not establish the proper chain of custody and that the cocaine was from an unrelated transaction. The testimony of the deputy who received the evidence from an undercover officer was sufficient to establish the link in the chain of custody and the undercover officer's lack of testimony about the cellophane wrapper is merely an arguably weak link, properly considered by the jury. **State v. Smith, 123.**

Character—State's case-in-chief—felony child abuse—second-degree murder—opened the door—The trial court did not err in a felony child abuse

EVIDENCE—Continued

and second-degree murder case when it allowed the State to put defendant mother's character into evidence during its case-in-chief because defendant opened the door to the State's subsequent questions concerning her character for violence by attempting to paint a picture of herself as a good mother during the cross-examination of a neighbor. **State v. Burgess, 632.**

Chiropractor's testimony—causation and permanency of injuries—The trial court did not err in a personal injury action arising from an automobile accident by allowing a chiropractor to testify as to the causation and permanency of plaintiff's injuries. **Winston v. Brodie, 260.**

Chiropractor's testimony—injuries to extremities—The trial court did not err in a personal injury action arising from an automobile accident by allowing a chiropractor to testify concerning injury to plaintiff's bodily extremities. Extremities, including the hand and arm, constitute parts of the body to which nerves radiate from the spine and which are therefore encompassed within the scope of chiropractic medicine. **Winston v. Brodie, 260.**

Compromise negotiations—statements offered for other purposes—The trial court erred in granting summary judgment for defendants, Board of Realtors, on the claim of breach of "good faith and fair dealing" because it improperly ruled the affidavit of plaintiff's attorney concerning statements made by defendants' attorney was inadmissible. Even if the statements were made in the context of a settlement negotiation, plaintiff did not offer these statements to prove its innocence of the charges against it, but instead to support a separate and distinct claim for damages. **Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, 468.**

Conversations within jury room—admissible in contempt proceeding—The trial court did not err in a criminal contempt proceeding arising from juror misconduct by admitting evidence of conversations which occurred within the jury room. The testimony falls squarely within the exception to N.C.G.S. § 8C-1, Rule 606(b) pertaining to extraneous prejudicial information improperly brought to the jury's attention. **State v. Pierce, 148.**

Cross-examination—impeachment of credibility—cumulative—The trial court did not abuse its discretion in a prosecution for robbery and assault by not allowing defendant to cross-examine a witness for the State regarding the witness's dismissal from the restaurant which was subsequently robbed. Defendant had cross-examined the witness and the jury had before it evidence with which to evaluate his credibility. The court properly exercised its broad discretion in limiting the scope of cross-examination. **State v. Grigsby, 315.**

Cross-examination of defendant—robbery—defendant's attitude towards criminal laws in general—no plain error—The trial court did not commit plain error in a robbery case by permitting the State to cross-examine defendant about his attitude concerning the esteem that he holds for criminal laws in general because even if this evidence was inadmissible, defendant failed to show that a different result would have been reached but for the error, or that the error was so fundamental as to result in a miscarriage of justice. **State v. Stanfield, 685.**

Cross-examination of defendant—robbery—prior convictions—no plain error—The trial court did not commit plain error in a robbery case when it per-

EVIDENCE—Continued

mitted the State to cross-examine defendant about his prior convictions for possession of cocaine because although some of the forms of the questions were objectionable, the substance of the questions were appropriate since the prosecutor limited his inquiry to the facts supporting the conviction without eliciting extraneous prejudicial details. **State v. Stanfield, 685.**

Cross-examination of witness—prior offense excluded—There was no error in a prosecution for murder, assault, and possession of narcotics arising from an incident at a food mart where the court prevented cross-examination of the store clerk about an alleged prior sexual offense. The State had asserted in pre-trial proceedings that there were no plea arrangements with the clerk and the court excluded the evidence for lack of relevance and undue prejudicial effect. **State v. Chavis, 546.**

Expert—exclusion of conversations with defendant—harmless error—substantially the same—The trial court did not err in a first-degree murder case by refusing to allow defendant's expert to relate the content of his conversations with defendant, after conducting a voir dire, on the grounds that the probative value of such testimony was outweighed by its confusion because any error was harmless in light of the fact that the information was substantially the same evidence presented to the jury. **State v. Holston, 599.**

Expert—underlying basis of opinion—voir dire not required—no prejudice from delay—The trial court did not err in failing to allow defense counsel to voir dire the State's expert witnesses before they testified at trial to determine the underlying basis of their opinion since the disclosure of these facts occurred during direct and cross-examination testimony, and defendant failed to show any prejudice from this delay. **State v. Pretty, 379.**

Hearsay—conversation between officers—explanation of subsequent conduct—The trial court did not err in a cocaine trafficking prosecution by allowing testimony of a conversation between two officers which led to one officer checking the license plate number of defendant's vehicle. The substance of the conversation was not inadmissible hearsay because it was admitted for the purpose of explaining subsequent conduct. **State v. Earhart, 130.**

Hearsay—negotiations—scope of agency—Statements made by defendants' attorney during negotiations with plaintiff's attorney that recant out-of-court statements concerning what certain of his unidentified clients told him were not hearsay because the statements concern a matter within the scope of the attorney's agency and were made during the existence of the agency relationship. **Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, 468.**

Hearsay—unavailable child—catchall exception—The trial court did not err in admitting the hearsay statements of the five-year-old child sex abuse victim in the trial of her father because the findings support the trial court's six-step inquiry assessing that the statements were admissible under the Rule 804(b)(5) catchall exception. **State v. Pretty, 379.**

Identification—in-court—hypnosis—essentially identical description before and after—The trial court did not err in allowing the witness' in-court identification of defendant because even though the witness had been hypnotized by the police, her description of the assailant remained essentially identical before and after hypnosis. **State v. Hall, 417.**

EVIDENCE—Continued

Identification—in-court—hypnotically refreshed descriptive details—failure to disclose hypnosis prior to testimony—harmless error—Although a witness' in-court testimony regarding "hypnotically refreshed" descriptive details of the assailant and the State's failure to disclose the hypnosis prior to the witness' testimony were improper, the tardy disclosure is mitigated because the disclosure was: (1) prior to the witness' identification testimony and the comprehensive voir dire hearing on admissibility thereof, and (2) immediately upon the prosecutor's discovery of the witness' hypnosis. **State v. Hall, 417.**

Identification—in-court not tainted by out-of-court—The trial court did not err in a prosecution for possession of cocaine with intent to sell and deliver by admitting an in-court identification of defendant where defendant argued that the in-court identification had been tainted by an out-of-court identification. The suggestiveness of the out-of-court identification did not rise to a level conducive to irreparable mistaken identification and, as the officer had ample time to observe defendant at the scene of each crime, any uncertainty goes to the weight and not the admissibility of the testimony. **State v. Smith, 123.**

Identification—in-court—viewing defendant at trial—The trial court properly denied defendant's request to suppress a witness' identification of defendant at trial as a participant in another robbery because the identification was not tainted by the fact that the witness observed defendant in open court. **State v. Hall, 417.**

Identification—pre-trial—suggestive—no irreparable misidentification—The trial court did not err in a prosecution for possession of cocaine with intent to sell and deliver by admitting an officer's pre-trial identification of defendant where the officer was shown a page from defendant's high school yearbook on which he was the only black male and below which his name was clearly printed, and the officer knew that she was identifying a black male and had been told defendant's name. The pre-trial identification was unnecessarily suggestive, but did not result in the strong probability of misidentification because the officer had ample opportunity to view defendant at the time of each crime, the officer was trained to maintain a high degree of attention when observing suspects and was aware that she would later identify defendant, she gave a detailed description of defendant, and she exhibited a high degree of certainty when shown the high school yearbook. **State v. Smith, 123.**

Identification—voir dire not held on motion to suppress—There was no prejudicial error in a prosecution for possession of cocaine with intent to sell and deliver in the trial court's failure to conduct a voir dire outside the presence of the jury on defendant's motion to suppress identification testimony. Although the court should have conducted a voir dire, the identification was not based on impermissibly suggestive procedures and the clear weight of the evidence shows several indicia of reliability. **State v. Smith, 123.**

Impeachment—prior conviction—more than ten years ago—credibility— **more probative than prejudicial**—The trial court did not err in a first-degree murder case by allowing the State to impeach defendant with a prior conviction for attempted robbery that occurred more than ten years ago because defendant's credibility was central to the resolution of this case and his prior conviction was more probative than prejudicial. N.C.G.S. § 8C-1, Rule 609(b). **State v. Holston, 599.**

EVIDENCE—Continued

Impeachment—prior violent conduct—specific instance—probative of truthfulness—The trial court did not err in a first-degree murder case by denying defendant's right to cross-examine a State's witness with regard to that witness' prior violent conduct because a specific instance of violent conduct is not admissible for impeachment purposes unless it is probative of truthfulness. **State v. Holston, 599.**

Lay opinion—harmless error—Even if the trial court erred in admitting, over objection, certain lay opinion testimony regarding the ownership of church property, the error was harmless because it merely corroborated unchallenged testimony from other witnesses without adding any new substantive information. **Fire Baptized Holiness Church v. McSwain, 676.**

Motion to suppress—denied without findings—There was no prejudicial error in a prosecution for trafficking in cocaine where the trial court denied defendant's motion to suppress without making findings. The only contradictory evidence presented by defendant was that he did not give consent to search his vehicle. Since probable cause existed for the search, evidence of defendant's consent is not relevant and the failure to make findings and conclusions is not prejudicial. **State v. Earhart, 130.**

MtDNA testing—admissible—Testing of mtDNA is sufficiently reliable to warrant admission into evidence. **State v. Underwood, 533.**

Not an expert—testimony about experience—belated recollections—The trial court did not err in a robbery case by allowing the testimony of a detective, who was not testifying as an expert, regarding the belated recollection process of trauma victims because he was relating his own experience instead of stating an opinion, he did not suggest any reasons why belated recollections occurred, he did not vouch for the accuracy of such recollections, and he gave no opinion as to the credibility of the victim-witnesses. **State v. Stanfield, 685.**

Other crimes—common scheme—homicide—In a prosecution for the kidnapping and first-degree murder of a rival for a girlfriend, there was no abuse of discretion in the admission of evidence of the murder of the girlfriend's mother where the State used the evidence to show that defendant had a common scheme to hurt the girlfriend, there was substantial evidence from which a jury could conclude that defendant killed the mother, and the evidence clearly shows several significant similarities. **State v. Underwood, 533.**

Other crimes—no chilling effect on testimony—The admission of evidence of a second murder in a first-degree murder prosecution did not impermissibly discourage defendant from testifying where defendant's decision not to testify was purely tactical and not constitutional. **State v. Underwood, 533.**

Prior crime or act—codefendant—harmless error—Although the trial court erred in a robbery trial by admitting irrelevant evidence of a codefendant's prior bad acts involving drug dealing after the codefendant pled guilty, it was harmless error in light of the substantive evidence against defendant. **State v. Stanfield, 685.**

Prior crime or act—other robberies—corroboration—intent, motive, and plan—The trial court did not err in admitting evidence of other robberies involving defendant because it was relevant and admissible under Rule 404(b) either to

EVIDENCE—Continued

corroborate the accounts of other witnesses or to show defendant's intent, motive, and plan to commit armed robbery at the time of the victim's murder. **State v. Hall, 417.**

Privileged communications—physician-patient—waiver—filing of malpractice suit—discovery procedures required—The filing of a medical malpractice suit by a patient against the physician constitutes a limited implied waiver of the physician-patient privilege to the extent the defendant-physician may reveal the confidential information contained in the defendant-physicians's own records to third parties where it is reasonably necessary to defend against the suit. However, in this case the films were not in the possession of a defendant in the underlying malpractice action and could only be disclosed pursuant to statutorily authorized discovery procedures or plaintiff's authorization. **Jones v. Asheville Radiological Grp., 520.**

Relevance—action against town employee—mayor's remarks—The trial court did not abuse its discretion in an action for negligent supervision of a town employee by admitting remarks by the mayor about the employee. The remarks were relevant and the court thrice gave a limiting instruction. **Leftwich v. Gaines, 502.**

Scientific testing—standard for admissibility—The following factors should be considered in determining whether scientific evidence is reliable: whether the theory or technique can be or has been tested, whether the theory has been subjected to peer review and publication, whether the theory has been submitted to the scrutiny of the scientific community, the known or potential rate of error, and the general acceptance in a relevant scientific community. North Carolina emphasizes the reliability of the scientific method and not its popularity within a scientific community. **State v. Underwood, 533.**

Subsequent crime or act—accomplice—harmless error—Although the trial court erred in admitting irrelevant evidence of an accomplice's robbery and attack of another person following the kidnapping, robbery, and murder of the two victims, it was harmless error in light of the substantive evidence against defendant. **State v. Teague, 702.**

Value of property—owner's opinion—The trial court did not err in an action for fraud by admitting plaintiff's opinion as to the value of her property. **Leftwich v. Gaines, 502.**

Videotaped interview—second-degree murder—felony child abuse—no prejudicial error—The trial court did not commit prejudicial error in a felony child abuse and second-degree murder case when it allowed the State, over objection, to show a videotape of a televised interview of defendant-mother where the news reporter's commentary cast doubt on defendant's account of the events. **State v. Burgess, 632.**

Work product—privilege waived—The trial court did not err in requiring defendant's attorney to produce to the State his notes summarizing defendant's previous medical records, after conducting a voir dire, because even if those notes constitute work product, the privilege was waived when defendant's attorney provided those same notes to an expert who relied on them for his testimony. **State v. Holston, 599.**

FRAUD

Damages—town employee's self-dealing—loss of property—There was sufficient evidence of damages to withstand motions for directed verdict and j.n.o.v. in a fraud action against a town and its Building Official where the Official's (Gaines') false representation as to his opinion on zoning was a maneuver calculated to make plaintiff hesitate long enough for his girlfriend (Wray) to purchase the property and the loss of the property thwarted plaintiff's plan to expand her framing business. **Leftwich v. Gaines, 502.**

Sufficiency of evidence—purported opinion—town employee's self-dealing—A statement purporting to be opinion may be the basis for fraud if the maker of the statement holds an opinion contrary to the opinion he or she expresses and the maker intends to deceive the listener. **Leftwich v. Gaines, 502.**

Sufficiency of evidence—victim deceived—In action arising from the purchase of a commercial corner lot by the girlfriend of a town's Chief Building Official, the evidence that plaintiff was deceived by defendant-Gaines' misrepresentations was sufficient to withstand defendants' motions for directed verdict and j.n.o.v. where plaintiff testified that she became doubtful about purchasing the property because of Gaines' statements. **Leftwich v. Gaines, 502.**

GIFTS

Check—not paid before death—not a gift—The trial court erred by deciding that a check mailed to decedent's son made payable to decedent's wife constituted a completed gift to the wife where the bank had not paid the check when the donor died. Decedent's death revoked the relationship with the bank and precluded the bank from honoring the check; the check is a part of the decedent's probate estate. **Huskins v. Huskins, 101.**

Contents of safe—combination mailed to son—no gift to wife—The trial court erred by granting summary judgment for plaintiff-wife in an action to determine whether certain monies represented completed gifts where defendants argued that decedent's mailing of the combination of a safe to his son before committing suicide was not a gift of the contents of the safe to his wife. Although there was a notation that the contents of the safe belonged to Mrs. Huskins, there is a serious question about whether mailing the combination to the son was a constructive delivery of the contents to the wife. **Huskins v. Huskins, 101.**

GOVERNMENTAL IMMUNITY

After-school program—staff members—capacity—The trial court did not err in a personal injury action arising from an after-school program by not granting summary judgment for staff members based on governmental immunity. Although the complaint did not specify whether these defendants were sued in their official or individual capacities, the action was filed prior to *Meyer v. Walls*, 347 N.C. 97, and *Mullis v. Sechrest*, 347 N.C. 548, and the Court of Appeals examined the course of the proceedings and the allegations in the pleadings, which reflected an intent to sue these defendants in their individual capacities. **Schmidt v. Breeden, 248.**

Board of Education—after school program—The trial erred by failing to direct partial summary judgment for the Board of Education in a personal injury

GOVERNMENTAL IMMUNITY—Continued

action arising from an after-school enrichment program. Application of the principles in *Britt v. Wilmington*, 236 N.C. 446, and *Kiddie Korner v. Board of Education*, 55 N.C. App. 134, compels the inclusion of the program within the class of activities regarded as traditional governmental functions. **Schmidt v. Breeden, 248.**

Capacity not stated in complaint—presumed official—The trial court erred by denying summary judgment for defendants on the basis of governmental immunity where there was no statutory waiver, no waiver by the purchase of insurance, plaintiff did not state in the complaint that the suit was against defendants in their individual capacities, and the pleading contains numerous allegations which plainly indicate that defendants are being sued in their official capacities. **Johnson v. York, 332.**

Partition proceeding—not barred by sovereign immunity—Though not necessary to the decision, the Court of Appeals held that sovereign immunity does not bar a suit for partition against the State. Partition proceedings are in rem and, although the statutes seem to address in rem jurisdiction as separate from personal jurisdiction, the case law comports with the general understanding that in rem is but one type of personal jurisdiction. Sovereign immunity is a defense to a claim of personal jurisdiction; however, rather than suing the State, petitioner here is merely seeking through a special proceeding to have what already belongs to him. A petition for partition in its initial stages is not a suit against the State such that the doctrine of sovereign immunity applies. **Coastland Corp. v. N.C. Wildlife Resources Comm'n, 343.**

GRAND JURY

Jurisdiction—offenses outside county—A grand jury had jurisdiction to indict defendant for cocaine and drug paraphernalia offenses in Randolph County where defendant was apprehended in Chatham County after he attempted to evade police in a high speed chase from Randolph County, defendant's car (in which the contraband was found) was continuously in sight of an officer from the time he spotted it until it crashed, and the car placed was in the custody of the police when it was returned to Randolph County. **State v. Chavis, 546.**

HIGHWAYS AND STREETS

Cartway—appeal to superior court—no final order by clerk—A superior court order in a cartway proceeding (under a now repealed portion of the statute) was vacated where a final judgment or order had not been entered by the clerk and the trial court lacked jurisdiction. N.C.G.S. § 136-68 (Cum. Supp. 1997). **Jones v. Winckelmann, 143.**

HOMICIDE

Attempted second-degree murder—jury instructions—intent to kill—no premeditation and deliberation—The trial court did not err in instructing the jury on attempted second-degree murder because the jury could conclude that defendant did have intent to kill, but had not undertaken the premeditation and deliberation required for a conviction of attempted first-degree murder. **State v. Coble, 607.**

HOMICIDE—Continued

Attempted second-degree murder—specific intent to kill—underlying malice—The trial court did not err in holding the crime of attempted second-degree murder does exist in North Carolina when a specific intent to kill is implicit in the underlying malice. **State v. Coble, 607.**

Felony murder—assault—store clerk protected by bullet resistant glass—The trial court did not err by denying defendant's motions to dismiss a first-degree murder charge based upon felony murder arising from an assault where defendant fired at a store clerk who was protected by bullet resistant glass and then shot and killed a customer. Despite the bullet proof resistant glass, the store clerk was placed in apprehension and fear for his safety and other people in the store were clearly terrified; whether on transferred intent or shooting directly at the victim, the evidence of assault was sufficient. **State v. Chavis, 607.**

First-degree murder—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss a first-degree murder charge based upon premeditation and deliberation or to set aside the conviction where it could be inferred by defendant's actions that he deliberately engaged in a confrontation using deadly force. **State v. Chavis, 607.**

First-degree murder—sufficiency of evidence—intervening factor determined by jury—The trial court did not err in denying defendant's motion to dismiss the first-degree murder charge based on insufficiency of the evidence since none of the eyewitnesses saw him inflict the fatal wound to the victim's heart, even though they saw him inflict other wounds to the victim, because the possibility of an intervening factor is a matter for the determination of the jury. **State v. Thomas, 560.**

Sufficiency of evidence—There was substantial evidence to support the reasonable inference that the victim was kidnapped and murdered by defendant. **State v. Underwood, 533.**

IMMUNITY

Summary judgment—county-operated ambulance service—governmental nature of services—not a proprietary function—The trial court did not err in granting summary judgment in favor of defendants based on governmental immunity because: (1) the governmental nature of ambulance service is not altered by the charging of a fee; (2) the fact private companies may run ambulance services similar to this one does not transform it into a proprietary function; (3) an agency limited to the transportation of sick or injured persons to hospitals does not mean it is a public transportation system with a proprietary nature; and (4) governmental-operated ambulance services should be afforded the same consideration given to fire, police, and 911 services activities. **McIver v. Smith, 583.**

Summary judgment—county-operated ambulance service—not a complete waiver if purchase insurance—The trial court did not err in granting summary judgment in favor of defendants based on governmental immunity because defendant Forsyth County was insured for only those negligence claims of $250,000 or more, it did not waive its immunity for claims totaling less than $250,000, and plaintiffs indicated the total monetary relief they would be seeking was $73,000. **McIver v. Smith, 583.**

INDICTMENT AND INFORMATION

Spelling of defendant's name—correction—The trial court did not err in a prosecution for robbery and assault by allowing the State to amend the indictment on the first day of the trial to correct the spelling of defendant's last name. Although a change in the name of the victim is a substantial change, a change in the spelling of defendant's name to add one letter is not a substantial alteration. Defendant cannot seriously argue that he was unaware of the charges against him. **State v. Grigsby, 315.**

INSURANCE

Anti-subrogation rule—equal protection—The anti-subrogation rule promulgated by the Commissioner of Insurance for life, accident and health policies did not violate the equal protection clauses of the state or federal constitutions because of a prior superior court decision invalidating the rule with respect to one insurer. **In re Declaratory Ruling by N.C. Comm'r of Ins., 23.**

Anti-subrogation rule—liberty to contract—The anti-subrogation rule promulgated by the Commissioner of Insurance for life, accident and health insurance forms did not impermissibly interfere with the constitutional liberty of insurers to contract. **In re Declaratory Ruling by N.C. Comm'r of Ins., 23.**

Anti-subrogation rule—not delegation of legislative power—Statutory authorization of the Commissioner of Insurance to promulgate a rule prohibiting subrogation provisions in life or accident and health insurance forms did not amount to an unconstitutional delegation of legislative power to an administrative agency. **In re Declaratory Ruling by N.C. Comm'r of Ins., 23.**

Anti-subrogation rule—statutory authority—The Commissioner of Insurance had authority under N.C.G.S. § 58-50-15(a) to promulgate a rule prohibiting conventional subrogation provisions in life or accident and health insurance contracts. **In re Declaratory Ruling by N.C. Comm'r of Ins., 23.**

Garage—shooting during repossession—no coverage—Summary judgment was properly granted for plaintiff in a declaratory judgment action to determine whether there was coverage under a "garage operations" policy for acts alleged in a wrongful death action which arose from a shooting during the recovery of a car which had been held until payment of a repair bill. Since defendants had available legal remedies but instead attempted to repossess the car by means not authorized by law, defendants' actions were not necessary or incidental to the garage operations. **N.C. Farm Bureau Mt. Ins. Co. v. Weaver, 359.**

INTEREST

Workers' compensation lien—prejudgment and post-judgment interest—A workers' compensation carrier was not entitled to prejudgment or post-judgment interest on the amount of its lien on judgment proceeds from the claimants' action against the third-party tortfeasor. **Hieb v. Lowery, 1.**

JOINT VENTURE

Summary judgment—imputed negligence—no joint venture—In a negligence case arising out of a fatal automobile accident, the trial court did not err by granting summary judgment against plaintiffs on their claim of imputed negli-

JOINT VENTURE—Continued

gence by joint venture because plaintiffs have not forecast evidence that defendant-nurse Tony Fele, who was involved in the accident, had an equal, legal right to control the conduct of corporate defendant Nursefinders "with respect to prosecution of the common purpose." **Rhoney v. Fele, 614.**

JUDGMENTS

Consent—consent withdrawn between signed memorandum and formal judgment—A consent judgment memo was a final judgment where it was not merely rendered in open court, but was a document which was represented by the parties as their full agreement, presented to the court, signed by the parties and the judge, and filed by the clerk of court. The directive for a "final order" was only contained in the order so that a more formal entry of judgment would be entered into the records and that second, more formal document was merely surplusage. Plaintiff's attempt to rescind his consent between the judgment memo and the formal entry of judgment was ineffectual. **Buckingham v. Buckingham, 82.**

Stipulated separation agreement—lack of consent—trial court reads agreement or evidence that parties understood—In a case involving a stipulated agreement hearing addressing child support, child custody, visitation, alimony, property division, and attorney fees, the trial court did not err in failing to set aside an order as void for lack of consent because: (1) the trial court can read the agreement in open court; or (2) it has to be reasonably apparent from the record that both parties either read or understood the stipulated terms. **Chance v. Henderson, 657.**

JURISDICTION

Long arm—injury to person or property in state—The trial court did not err by denying defendant-Centennial Foods' motion to dismiss for lack of personal jurisdiction where defendant argued that N.C.G.S. § 1-75.4(4)(a) requires proof of an actual injury within the state, but the statute requires only an allegation of injury; the injuries alleged here all occurred with the implementation of defendant's solicitation and sales to North Carolina customers in the fall of 1997, by which time plaintiff had relocated its headquarters to North Carolina and could claim injury within the state; these local injuries were the result of activities by defendant outside of North Carolina; and the sales and solicitation activities admitted by defendant in the fall of 1997 are proximate enough in time to fulfill the statute's requirements. **Fran's Pecans, Inc. v. Greene, 110.**

Minimum contacts—sufficient—Defendant had sufficient minimum contacts to justify the exercise of personal jurisdiction without violating due process where defendant mailed at least 1,937 sales catalogs to North Carolina residents, sold products to 239 North Carolina residents, generating over $12,000 in sales, and defendant could expect to use North Carolina courts to enforce the sales contracts. **Fran's Pecans, Inc. v. Greene, 110.**

Subject matter—claim included in general motion—The trial court did not err by dismissing a claim for relief added in an amendment where the dismissal was pursuant to a motion "to dismiss the above captioned action pursuant to Rule 12(b)(1) . . . ." The motion was addressed to all of the claims alleged in plain-

JURISDICTION—Continued

tiff's original and amended complaints; moreover, subject matter jurisdiction may be raised at any time, even on appeal. **Shell Island Homeowners Ass'n v. Tomlinson, 286.**

Subject matter—constitutional claims—exhaustion of administrative remedies—not required—Dismissal of constitutional claims arising from coastal management rules and regulations for lack of subject matter jurisdiction due to failure to exhaust administrative remedies was not proper. Exhaustion of administrative remedies was not required as to these claims. **Shell Island Homeowners Ass'n v. Tomlinson, 217.**

Subject matter—failure to exhaust administrative remedies—The trial court did not err by dismissing plaintiffs' claims for lack of subject matter jurisdiction in an action challenging Coastal Resources Commission rules where plaintiffs failed to exhaust all available administrative remedies prior to filing this action. Although plaintiffs argued the futility of administrative remedies, they pointed to no authority for the premise that an agency's rules prohibiting a certain activity render the administrative remedies to contest that prohibition inadequate and futile. **Shell Island Homeowners Ass'n v. Tomlinson, 217.**

Subject matter—mootness—The trial court did not err by granting defendants' motion to dismiss for lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(1) where the essence of the relief sought by plaintiff was a determination that the denial of plaintiff's requests for variances under N.C.G.S. § 113A-123(b) effected a regulatory taking of plaintiff's property, but the granting of plaintiff's fourth variance request rendered moot the issues relating to the earlier variance requests. **Shell Island Homeowners Ass'n v. Tomlinson, 286.**

JURY

Juror related to district attorney staff member—mistrial denied—The trial court did not abuse its discretion in a prosecution for first-degree murder, assault and cocaine possession by denying defendant's motion for a mistrial where it was learned during the sentencing phase that the jury foreperson and the district attorney's witness coordinator were related. **State v. Chavis, 546.**

Juror related to district attorney staff member—not revealed by prosecutor—sufficiency of court's inquiry—Defendant was not denied his due process rights where it was revealed during the sentencing proceeding for first-degree murder that the jury was related to the district attorney's witness coordinator and the trial court denied defendant's motion for a mistrial without conducting a voir dire of the juror. **State v. Chavis, 546.**

Voir dire—circumstantial evidence—impartiality—The trial court did not err in a kidnapping, robbery, and murder case by allowing the State's voir dire questions informing the prospective jurors that: (1) only the three people charged with the crimes knew what happened to the victims and none would testify against the others; and (2) there would be evidence that on the night of the crimes the victims may have been looking for drugs. **State v. Teague, 702.**

JUVENILES

Murder—transfer to superior court—trial as adult—petition adequate—The trial court did not err by transferring a juvenile to superior court for trial as

JUVENILES—Continued

an adult on a charge of first- degree murder without a transfer hearing following a finding of probable cause. The juvenile petition adequately charged the offense in a clear and concise manner and informed the juvenile of the charge against him; if he needed further clarification of the charge, he could have filed a motion for a bill of particulars. The court properly transferred the juvenile automatically without a juvenile transfer hearing. N.C.G.S. § 7A-608. **In re K.R.B., 328.**

KIDNAPPING

Indictment—The trial court erred in instructing the jury on first-degree kidnapping where the indictment alleged only second-degree kidnapping. **State v. Dominie, 445.**

Indictment—disjunctive instruction improper—In a kidnapping case where the indictment alleged only that the victims were unlawfully removed, the trial court erred by instructing the jury in the disjunctive. **State v. Dominie, 445.**

Sufficiency of evidence—There was substantial evidence to support the reasonable inference that the victim was kidnapped and murdered by defendant. **State v. Underwood, 533.**

LIBEL AND SLANDER

Employer not vicariously liable for torts of independent contractor—uncertainty as to what was said—The trial court did not err in action arising from defendant working with two multi-level sales companies by granting summary judgment for plaintiff-Market America on defendant's counterclaim for slander relating to independent distributors for Market America. **Market America, Inc. v. Christman-Orth, 234.**

Libel per quod—town board candidate—not resident in town—failure to state a claim—The trial court correctly dismissed a defamation action for failure to state a claim upon which relief could be granted where plaintiff alleged statements by defendant that plaintiff was not a resident of the town in which he was running for office. The damage plaintiff claims to have suffered is the loss of a seat on the town board; in essence, a suit to recover damages for a lost election. It is not the place of the Court of Appeals to engage in a post-election analysis of the decision made by the voters. **Aycock v. Padgett, 164.**

Libel per se—infamous crime—failure to state a claim—The trial court did not err by dismissing a defamation action for failure to state a claim upon which relief could be granted where plaintiff alleged statements by defendant that plaintiff was not a resident of the town in which he was running for office, a felony, but there is a need for explanatory circumstances for the listener or reader to know that plaintiff had committed an infamous crime. Any interpretation of the comments as given does not rise to the level of an actionable defamation claim. **Aycock v. Padgett, 164.**

Qualified privilege—summary judgment—The trial court did not err in an action arising from defendant working with two multi-level sales companies by granting summary judgment for plaintiff-Market America on defendant's counterclaim for libel where the communication was protected by a qualified privilege

PARENT AND CHILD—Continued

sider a child's best interests when refusing his mother's petition to change his name. The General Assembly has not required a "best interests" inquiry in the context of naming a child under N.C.G.S. § 130A-101(f)(4) or in the changing of a child's name under N.C.G.S. § 101-2. Its failure to do so in this context when it has in others is clear evidence of its intent that no such inquiry be required. **In re Crawford, 137.**

Changing child's name—consent of both parents required—Neither the clerk of superior court nor the superior court judge erred by denying a petition to change the name of a minor where the parents were never married, the natural father's surname was given to the child on the birth certificate, and the mother sought to change the surname to her own over the father's objection. N.C.G.S. § 101-2 does not permit one parent to change the name of minor children without the consent of the other living parent and respondent here clearly fits an ordinary definition of "father" and "natural parent." **In re Crawford, 137.**

Name change—unmarried parents—father's consent required—Both the clerk of superior court and the superior court judge correctly denied a name change for a minor child where respondent and petitioner were never married, both had executed an Affidavit of Paternity acknowledging respondent as the father, respondent had submitted to a paternity test which confirmed a 99.92% probability that respondent is the father, both respondent and petitioner are listed on the birth certificate, and petitioner later filed this petition to change the child's surname to match hers. The child was properly given respondent's name under N.C.G.S. § 130A-101(f) and that statute contains no authority for petitioner to unilaterally withdraw her consent as to the child's surname and change it to her own. **In re Crawford, 137.**

PARTITION

Proceeding against State—subsequent eminent domain filing by State—partition moot—A petition to partition land jointly owned with the State was rendered moot where the State subsequently filed an eminent domain proceeding (determined in a companion case to be a proper exercise of the State's condemnation powers). **Coastland Corp. v. N.C. Wildlife Resources Comm'n, 343.**

PLEADINGS

Pro se answer—sufficient—A one sentence pro se response to a complaint, though minimal in the extreme, denied the substance of the claim and sufficed as an answer. **Barnett v. King, 348.**

POLICE OFFICERS

1983 action—official capacity—A municipality may be sued for section 1983 violations only if there are allegations that the unconstitutional action implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers and the municipality may not be held liable on the sole basis of respondeat superior. In this case, there was no valid claim against the City or against the police officer in his official capacity. **Staley v. Lingerfelt, 294.**

PREMISES LIABILITY

Cans falling from store shelf—obvious danger—Summary judgment for defendant was improper in an action arising from an injury suffered by plaintiff-Ms. Lorinovich when salsa cans fell from a shelf and struck her in the face and defendant contended that the display of salsa cans presented an obvious danger. There is no duty to protect a lawful visitor against dangers which are either known or so obvious and apparent that they may reasonably be expected to be discovered, but the occupier of land is not absolved from liability when a reasonable occupier of land should anticipate that a dangerous condition will likely cause harm to the lawful visitor, notwithstanding the known and obvious danger. The obviousness of the danger is some evidence of contributory negligence. **Lorinovich v. K Mart Corp., 158.**

Cans stacked above store shelf—summary judgment—The trial court erred by granting summary judgment for defendant in a negligence action which arose from salsa cans hitting plaintiff-Ms. Lorinovich in the face as she reached for cans stacked on the top shelf. Plaintiff was a lawful visitor and, under *Nelson v. Freeland*, 349 N.C. 615, defendant owed her a duty to exercise reasonable care; there is a genuine issue of fact as to whether a reasonably prudent person would stack unsecured 16-ounce cans of salsa on shelves six feet off the floor, with no ladders or personnel available to assist customers in obtaining the salsa and no warnings of the likely danger involved in reaching for the cans, knowing that other people had been injured when cans had been stacked on shelves higher than eye level and that it was store policy not to stack items that high unless secured. **Lorinovich v. K Mart Corp., 158.**

Contributory negligence—cans falling from store shelf—The trial court erred by granting summary judgment for defendant in action arising from an injury suffered by plaintiff when cans of salsa fell from a store shelf and struck her in the face. Although defendant contended that plaintiff was contributorily negligent in attempting to remove the cans from the top shelf, there is a genuine issue of material fact as to whether a reasonable person under the circumstances would have waited until she obtained assistance. **Lorinovich v. K Mart Corp., 158.**

Contributory negligence—injury on ski slope—Summary judgment should not have been granted for defendant on contributory negligence in an action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp. Whether plaintiff should have recognized the danger of jumping skiers and chosen an alternate path is a question of fact. **Freeman v. Sugar Mountain Resort, Inc., 73.**

Injury on ski slope—foreseeability—Summary judgment should not have been granted for defendant in an action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp where defendant argued that plaintiff's accident was not reasonably foreseeable, but plaintiff presented evidence of a sign on defendant's property forbidding jumping, there was evidence that defendant was understaffed on this night, raising the issue of whether defendant would have noticed the jumping with adequate employees patrolling the slope, and there was testimony that the jumping was in plain view of the lift operator, who did nothing. **Freeman v. Sugar Mountain Resort, Inc., 73.**

PREMISES LIABILITY—Continued

Injury on ski slope—knowledge of hazard—Summary judgment should not have been granted for defendant in a negligence action arising from an injury suffered when another skier jumped into plaintiff from a makeshift snowramp. Although defendant argued that plaintiff failed to present any evidence that defendant either knew or reasonably could have known that skiers were jumping off a makeshift snowramp, plaintiff presented evidence that defendant did not have an adequate number of ski patrols, from which arises a material issue of fact as to whether defendant would have known about the makeshift ramp with an adequate number of patrols. **Freeman v. Sugar Mountain Resort, Inc., 73.**

Summary judgment inappropriate—ambiguity—contract—extrinsic evidence—The trial court erred as a matter of law in granting summary judgment in favor of defendant-security guard and defendant-security company on plaintiff-employee's claim of negligence for failure to protect her, as a hotel employee, from criminal attacks because defendant-employer's contract for guard service was ambiguous. **Holshouser v. Shaner Hotel Grp. Props. One, 391.**

PROCESS AND SERVICE

Notice—actual—summary judgment—no presumption because did not strictly adhere to rules—statute of limitations barred claim—The trial court did not err in granting summary judgment for unnamed defendant Integon General Insurance Corporation in a case arising out of an automobile accident because although Integon had actual notice of the proceedings, plaintiff is not entitled to any presumption that the claims examiner acted as an agent of Integon for purposes of receiving process since her method of service did not meet the requirements of Rule 4 and plaintiff filed her second complaint after it was already time-barred by the statute of limitations. **Fulton v. Mickle, 620.**

Notice—hearing—not mailed to last known address—Where a defendant, especially one acting pro se, provides a mailing address in a document filed in response to a complaint and serves a copy on opposing counsel, he or she should be able to rely on receiving later service at the same address; by the some token, opposing counsel (or a pro se party) may also rely on that address for service of all subsequent process and other communications until a new address is furnished. **Barnett v. King, 348.**

Notice—summary judgment—failure to strictly adhere to statutory requirements—The trial court did not err in granting summary judgment for unnamed defendant Integon General Insurance Corporation in a case arising out of an automobile accident when plaintiff served a copy of the summons and complaint on Integon by regular mail to its claims examiner because: (1) the process was not sent certified or registered mail, return receipt requested, and (2) process was not addressed to an officer, director, or agent authorized to receive service of process. **Fulton v. Mickle, 620.**

PUBLIC ASSISTANCE

Medicaid—denial for failure to apply for Medicare—DMA policy—violation of federal law—A policy of the Division of Medical Assistance which denies Medicaid payments for hospital services to Medicaid recipients who are

SENTENCING

Child abuse—aggravating factor—"very young"—not a necessary element—The trial court did not err in a felony child abuse and second-degree murder case when it found as an aggravating factor, on the felony child abuse conviction, that the three-week old infant victim was "very young" because this finding was not a necessary element to prove felonious child abuse. **State v. Burgess, 632.**

Fair Sentencing Act—Structured Sentencing Act—combined sentences not permitted—The trial court did not err in a breaking and entering and larceny case by resentencing defendant because defendant's offenses committed on 19 September 1994 were controlled by the Fair Sentencing Act and his offenses committed on 4 October 1994 were subject to the Structured Sentencing Act. **State v. Branch, 637.**

Plea bargain—consolidated offenses not required—The trial court did not violate defendant's plea bargain in a breaking and entering and larceny case by failing to consolidate the two offenses under Structured Sentencing even though the offenses occurred under different sentencing schemes because the guilty plea was made before the discrepancy in sentencing schemes was brought to the trial court's attention, and the State kept its end of the bargain by dismissing two other breaking and entering charges. **State v. Branch, 637.**

Resentencing hearing—trial court as a matter of law can vacate an invalid sentence—The trial court did not unlawfully hold a resentencing hearing in a breaking and entering and larceny case since the Department of Correction's letter alerting the trial court of its erroneous sentence was not a motion for appropriate relief, and the trial court as a matter of law has authority to vacate the invalid sentence and resentence defendant accordingly even if the term of court has expired. **State v. Branch, 637.**

STATUTE OF LIMITATIONS

Emotional distress—summary judgment—Emotional distress is not specifically denominated under any limitation statute and falls under the general three-year provision of N.C.G.S. § 1-52(5). **Jones v. Asheville Radiological Grp., 520.**

Medical malpractice—amendment to original complaint denied—action dismissed and refiled—The trial court erred by entering judgment on the pleadings for defendant in a medical malpractice action based upon the statute of limitations where plaintiffs' initial complaint did not comply with N.C.G.S. § 1A-1, Rule 9(j), defendants filed a motion to dismiss, plaintiffs filed a motion to amend and attached a proposed amended complaint, the trial court denied the motion to amend but allowed plaintiffs' to take a voluntary dismissal without prejudice prior to ruling on the motion to dismiss, plaintiffs refiled their complaint, and defendant's new motion for judgment on the pleadings based upon the statute of limitations was granted. N.C.G.S. § 1A-1, Rule 15(a) provides that a party may amend his pleading once as a matter of course before a responsive pleading is served and defendant had not filed any responsive pleading when plaintiffs filed their motion to amend and proposed amended complaint. Plaintiffs were not required to seek the court's permission to amend their complaint and the ruling prohibiting the amendment was error. The original complaint unquestionably

STATUTE OF LIMITATIONS—Continued

gave notice of the transactions and occurrences plaintiffs sought to establish pursuant to the amended complaint, so that the amended complaint related back to the filing of the original and fell within the statute of limitations. This case can be distinguished from *Estrada v. Burnahm*, 316 N.C. 318, and *Robinson v. Entwistle*, 132 N.C. App. 519. **Brisson v. Kathy A. Santoriello, M.D., P.A., 65.**

Medical malpractice—unauthorized disclosure of records—In the context of a health care provider's unauthorized disclosure of a patient's confidences, claims of medical malpractice, invasion of privacy, breach of implied contract, and breach of fiduciary duty or confidentiality should all be treated as claims for medical malpractice. **Jones v. Asheville Radiological Grp., 520.**

Voluntary dismissal—action against wrong party—new summons but complaint not amended—statute of limitations not tolled—The trial court properly dismissed a claim arising from an automobile accident as barred by the statute of limitations where plaintiff filed the claim against Mr. Davidson prior to the expiration of the statute of limitations, being unaware of Davidson's demise; plaintiff issued a summons against the personal representative of his estate when she was advised of his death, but never amended her complaint to allege a cause of action against the personal representative; plaintiff voluntarily dismissed her claim after the statute of limitations had run; and she refiled it within a year. A properly directed summons does not allow a cause of action to survive if the complaint was defective, no amendment of the complaint was ever requested, and the defect was never cured. **Sweet v. Boggs, 173.**

Voluntary dismissal—new claims—The trial court did not err by granting summary judgment for defendants based upon the statute of limitations in an action arising from a confrontation at the scene of an automobile accident where plaintiffs' first complaint was filed within the statute of limitations but alleged only a section 1983 claim and a claim for loss of consortium and plaintiffs did not assert their additional claims until more than four years after the incident, following a voluntary dismissal and a new filing. Although the claims arose from the same events, defendants were not placed on notice that they would be asked to defend these claims within the time required by the statute of limitations. **Staley v. Lingerfelt, 294.**

TAXATION

Bankruptcy—actual sale price not true value—The Tax Commission did not err in failing to adopt the actual sale price of the property as its true value in money because the circumstances of this transaction, a bankruptcy sale, reveal the sale was not an arm's length transaction between a willing buyer and a willing seller. **In re Appeal of Phoenix Ltd. Part. of Raleigh, 474.**

Bankruptcy—stigma not on property—The mismanagement of property by a business owner is not a proper reason to lower the property's value and any stigma resulting from the previous property owner's business failure and subsequent bankruptcy taints the prior owner, not the property. **In re Appeal of Phoenix Ltd. Part. of Raleigh, 474.**

TORTS, OTHER

Negligent supervision—sufficiency of evidence—There was sufficient evidence of negligent supervision of a Chief Building Official (Gaines) by a town where plaintiff presented evidence that Gaines had previously been involved in buying property that he had discovered in the course of his employment, that the Mayor had reported complaints about earlier activities to the Town Manager and other authorities, that the Town Manager had asked Gaines to stop purchasing property in the town limits, and that this request was inadequate to cause Gaines to change his ways. **Leftwich v. Gaines, 502.**

TRIALS

Motion for new trial denied—no abuse of discretion—The trial court did not abuse its discretion by denying a motion for a new trial which was based upon whether the jury disregarded the instructions of the trial court, whether damages were excessive and the result of passion or prejudice, whether there was sufficient evidence to justify the verdict, and whether there were errors in law at trial. **Leftwich v. Gaines, 502.**

UNFAIR TRADE PRACTICES

Libel—qualified privilege—no damages—The trial court did not err by granting summary judgment for plaintiff on defendant's counterclaim for an unfair and deceptive trade practice based upon libel where defendant's reliance on *Ellis v. Northern Star Co.*, 326 N.C. 219, was unfounded because the communication here was protected by a qualified privilege and there was no evidence that defendant suffered actual injury. **Market America, Inc. v. Christman-Orth, 234.**

Non-competition clause—valid—The trial court did not err by granting summary judgment for plaintiff-Market America on defendant's counterclaim that a non-competition clause violated N.C.G.S.§ 75-1. **Market America, Inc. v. Christman-Orth, 234.**

Refusal to resolve—attorney fees—findings—The issue of attorney fees was remanded in an unfair trade practices action where the findings were inadequate to support the trial court's conclusion that defendant made an unwarranted refusal to resolve the matter fully. **Leftiwch v. Gaines, 502.**

Statute of limitations—four years—Summary judgment was properly granted on an unfair trade practices claim arising from the unauthorized release of mammography records where the claim was not filed within the four-year statute of limitations prescribed for Chapter 75 claims. **Jones v. Asheville Radiological Grp., 520.**

Town employee—acting outside scope of duties—*Sperry Corp v. Patterson*, 73 N.C. App. 123, and *Golden Rule Insurance Co. v. Long*, 113 N.C. App. 187 protect government officials from actions under N.C.G.S. § 75-1.1 as long as they act as representatives of the State or a political subdivision of the State, but this protection is independent of, and different from, sovereign immunity. **Leftwich v. Gaines, 502.**

WORKERS' COMPENSATION—Continued

Average weekly wage—fluctuating schedule—exceptional reasons method—The Industrial Commission erred in determining plaintiff-employee's average weekly wage because plaintiff's fluctuating work schedule qualified her job as "seasonal" rather than continuous employment. **Barber v. Going West Transp., Inc., 428.**

Collateral estoppel—determination of earning capacity—In plaintiff-employee's motion to set aside the Form 26 agreement based on changed condition requiring additional compensation, the Industrial Commission was collaterally estopped from determining that plaintiff was incapable of work because the Court of Appeals already affirmed an earlier decision of the Commission finding plaintiff had earning capacity on the date of the Form 26 approval. **Lewis v. Craven Reg'l Med. Ctr., 438.**

Competent evidence—Despite the abundance of evidence to the contrary indicating plaintiff-employee had previously been treated for psychological concerns, there was competent evidence provided by the testimony of a psychologist to support the Industrial Commission's determination that plaintiff is also entitled to compensation for psychiatric problems exacerbated by her compensable work-related neck injury. **Toler v. Black and Decker, 695.**

Competent evidence—principal place of employment—There was competent evidence in the record supporting the Commission's finding that plaintiff's principal place of employment was in North Carolina because: (1) plaintiff's residence was in North Carolina; (2) he conducted all aspects of his business in North Carolina; and (3) each of his assignments started and ended in North Carolina. **Perkins v. Arkansas Trucking Services, Inc., 490.**

Credibility—determination by Full Commission—The Court of Appeals was bound by the Industrial Commission's decision reversing the deputy commissioner's determination that plaintiff-employee lacked credibility based on her uncorroborated version of the events. **Toler v. Black and Decker, 695.**

Death benefits—natural parent—general guardian—appointed person—The Industrial Commission erred by holding that death benefits payable to a minor child in the custody of a natural parent can be made through a general guardian, but the Commission properly determined that such payments can be made through some other person as appointed by a court of competent jurisdiction. **De Portillo v. D.H. Griffin Wrecking Co., 714.**

Disability—aggravation of preexisting back injury—The Industrial Commission did not err by awarding plaintiff disability benefits for aggravation of a preexisting back injury. While there may have been conflicting evidence, it was for the Commission to weigh the credibility of the witnesses and decide the issues. **Smith v. Champion Int'l, 180.**

Employment relationship—jurisdiction—independent determination by appellate courts—The Industrial Commission did not err in determining plaintiff truck driver was a regular employee of defendant rather than an independent contractor based on the factors of: (1) method of payment; (2) furnishing of equipment; and (3) direct evidence of exercise of control by defendant. Whether an employer-employee relationship exists is a jurisdictional issue requiring an independent determination by the appellate courts. **Barber v. Going West Transp., Inc., 428.**

WORKERS' COMPENSATION—Continued

Expenses incurred on appeal—Plaintiff-employee is entitled to receive from defendant-employer the expenses incurred as a result of this appeal because defendant was ordered to continue paying benefits. N.C.G.S. § 97-88. **Flores v. Stacy Penny Masonry Co., 452.**

Failure to properly complete Form 28U not reversible error—not the authorized treating physician—Plaintiff-employee's failure to submit a "properly completed" Form 28U did not require reversal because the Industrial Commission ultimately found that plaintiff's return to work was a "failed return to work" based on his work-related compensable injury. **Jenkins v. Public Service Co. of N.C., 405.**

Improper attempt to limit rights—Although employer had plaintiff sign a form purporting to limit plaintiff's right to compensation in any state other than Arkansas, N.C.G.S. § 97-6 specifically invalidates an attempt by an employer to relieve itself of responsibility under the North Carolina Workers' Compensation Act. **Perkins v. Arkansas Trucking Services, Inc., 490.**

Judgment proceeds—premature distribution by attorney—personal liability of attorney—The trial court did not err in holding the attorney who represented a workers' compensation claimant in an action against the third-party tortfeasor personally liable for the repayment of judgment proceeds the attorney prematurely disbursed from his trust account to his clients and himself. **Hieb v. Lowery, 1.**

Judgment proceeds—UIM payment—distribution—jurisdiction in Industrial Commission—The Industrial Commission, rather than the superior court, had exclusive jurisdiction over the distribution of proceeds recovered by an injured employee from a third-party tortfeasor and paid pursuant to a UIM policy where the judgment exceeded the amount of the workers' compensation carrier's judgment lien and the parties did not reach a settlement. **Hieb v. Lowery, 1.**

Jurisdiction—out-of-state accident—The North Carolina Industrial Commission is vested with jurisdiction for accidents taking place outside of the state only if: (1) the contract of employment was made in this State; (2) the employer's principal place of business is in this State; or (3) the employee's principal place of employment is within this State. **Perkins v. Arkansas Trucking Services, Inc., 490.**

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but it was clear that the Commission considered the testimony. **Jarvis v. Food Lion, Inc., 363.**

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Private communication—treating physician and rehabilitation professional—exclusion of testimony not required—not an agent of defendant—The Industrial Commission erred in excluding or assigning no weight to the authorized treating physician's testimony pursuant to *Salaam v. N.C. Dept. of Transp.*, 122 N.C. App. 83 (1996), because there is no evidence that the rehabilitation professional is an agent of defendant barring the rehabilitation professional's communication with plaintiff's treating physician. **Jenkins v. Public Service Co. of N.C., 405.**

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